

AUSTRIA RELAXES LEGAL HURDLES

*UK firms are in a better position to register in Austria,
says Dr Jürgen Brandstätter*



■ In the past, the registration of a branch of an English company in Austria encountered significant legal resistance and was often rejected by the courts. The cause of this resistance was more often than not a lack of understanding of the Austrian courts of the legal structure of English companies and the inability of the applicants explaining the characteristics of English companies to the Austrian courts. With the recent decision of the Commercial Court of Vienna the registration of an English limited company was accepted and the resistance was finally broken. BMA Brandstätter Rechtsanwälte GmbH represented the English limited company in this case and successfully registered the branch in Austria. By following the steps which led to this positive decision, the registration of English branches in Austria should be trouble-free in the future.

The origins of these problems are the differing legal systems. As well known that in England the common law system is in legal force whereas Austria is a civil law country. These differing legal systems led to essential differences in the company laws of both countries.

In England the ultra vires doctrine has been in legal force since the landmark decision of 1875 of the House of Lords in the case *Ashbury Carriage Company v. Richie*. According to the ultra vires doctrine a company's legal capacity is defined by its memorandum of association. Therefore the memoranda of association of English companies were drafted in particularly extensive and detailed ways, especially with regard to the scope of business. That was done to ensure the companies were given the necessary legal capacity and their directors the necessary capacity to act for the company. In accordance with the ultra vires doctrine, acts of the directors of the company exceeding the scope of business of the company are considered void. This often

led to conflicts with contractual partners and creditors of such companies.

The Companies Act 1985 abolished the ultra vires doctrine and explicitly allowed general clauses fixed in the memorandum of association. Now, the Companies Act 2006, in contrast to the ultra vires doctrine, regulates in section 31 that in case of doubt the scope of business of a company is unrestricted, as long as there were no restrictions explicitly made. Furthermore, the limitation of directors' capacity to act was basically abolished by sections 39 and 40 of the 2006 act.

Despite these changes in the legal system in practice, very often the old memoranda of association are still in use in which one can find such provisions as:

» "To invest and deal with the monies of the Company in such shares or upon such securities and in such manner as from time to time may be determined."

» "To lend and advance money or give credit on any terms and with or without security to any company, firm or person ..., to enter into guarantees, contracts of indemnity and to secure or guarantee in any manner and upon any terms the payment of any sum of money or the performance of any obligation by any company, firm or person ..."

» "To borrow or raise money in any manner and to secure the repayment of any money borrowed raised, or owing by mortgage, charge, standard security, lien or other security upon the whole or any part of the Company's property or assets ..."

Usually there are no such provisions in Austrian memoranda of association. The ultra vires doctrine does not apply in Austrian company law, the legal capacity of legal entities is basically unlimited. In particular, the legal capacity is independent of content and range of the company's scope of business.

THE ORIGINS OF THESE PROBLEMS ARE THE DIFFERING LEGAL SYSTEMS

If an English company wants to register a branch in Austria with a memorandum of association containing such provisions as quoted above, such provisions are interpreted by the Austrian courts in the sense that the company wishes to do banking business. As a prerequisite the courts demand a licence according to the Austrian banking regulations. Since the English company actually is not involved in any banking business, does not intend to become so, and is thus not prepared for obtaining a banking licence, the registration of a branch often fails because of such misunderstanding.

During the registration procedure of the decision quoted above the English company successfully explained to the court the differences between the two legal systems and clarified the misunderstanding about the content of the English memorandum of association and the actual activities of the company.

It was outlined to the Commercial Court of Vienna that content and range of the memorandum of association is still influenced by the *ultra vires* doctrine. Furthermore it was explained to the court that the legal term of banking business is harmonised by the directive 2006/48/EU. Therefore, banking businesses that require a licence in England require a licence in Austria too and vice versa. Requiring a licence from an English company that does not need a licence in England would be a violation of Austrian banking regulations. This would constitute a violation of the harmonised legal term of banking business and at the same time a violation of the principle of freedom of establishment according to articles 49 and 54 of the EU-treaty in the Lisbon version.

Crucial for the understanding and the correct interpretation of such provisions of English memoranda of association as quoted above is the fact that the company only deals with its own money and not with

money from others. This is the essential difference to the banking business, where it is all about money from customers. Taking out credits or issuing bills of exchange is usual commerce and no banking activity. Finally it was explained to the court in this case that according to the Austrian banking regulations a banking business is only given if its activities exceed a certain quantitative threshold. Sporadic credit and loan accommodation – as it is usual in commerce – is not meant to be banking business.

Considering the legal characteristics during the registration process of a branch of an English company in Austria and explaining these characteristics to the court should make the registration of English branches trouble-free in the future. ◇

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