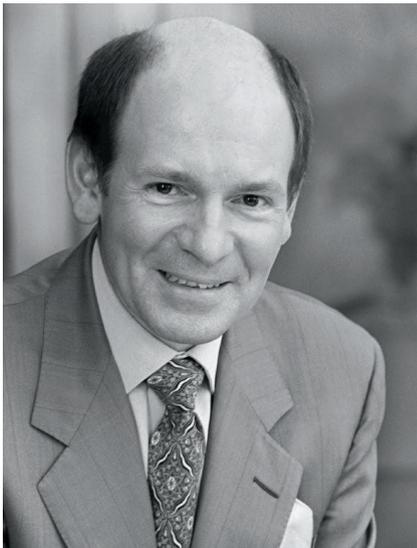


AUSTRIA RELAXES LEGAL HURDLES

*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.