Welcome to the 4th issue of the DRInsider, the quarterly Newsletter of the Wolf Theiss Dispute Resolution Practice Group.

Given the ongoing lively public discussions regarding the free-trade agreements CETA and TTIP, this issue addresses the topic with an arbitration focus at the very beginning.

We would like to draw your attention to recent developments in Austrian law with regard to the private enforcement of capital markets regulation. Although discussions continue in some EU states as to whether investors may raise liability claims based on a violation of the capital markets regulation, Austrian courts have already confirmed such claims.

Once again, we have some very interesting contributions from our regional offices in Warsaw and Ljubljana. In addition, our colleagues from Sofia share their views on limitation periods regarding the international sale of goods and some latest developments in the fight against corruption in Bulgaria.

As you may have already noticed in our recent issues, white collar crime topics are becoming increasingly important across the CEE/SEE region and we will continue to keep you informed on recent developments in this area.

Last but not least, we would like to inform you about our whistle blowing software SecuReveal which we introduced to you in our last issue.

We hope that you enjoy it.

Best regards,

VALERIE HOHENBERG
Counsel, WOLF THEISS

FLORIAN PECHHACKER
Associate, WOLF THEISS

ARBITRATION

CETA, TTIP AND THE NEW APPROACH TO INVESTOR-STATE-DISPUTE RESOLUTION

July 2016 was a path-breaking month in the ongoing discussion of investment protection by arbitral tribunals because there were two incidents which were not related to each other that occurred within only a few days of each other.

First, on July 5, 2016, the European Commission provided a draft text and formally proposed to the Council of the EU the signature and conclusion of the Comprehensive Economic and Trade Agreement between the EU and Canada (CETA). Upon the positive decision by the Council, CETA may be applied on a provisional basis. Its entering into full force is, amongst others, subject to the approval of all member
states through their respective national ratification process.

The negotiations preceding the draft CETA were, in some Member States, accompanied by debates on various levels: in the political arena, by the media, and also among NGO’s. It is in response to this broad and extensive debate in some of the Member States (in particular Austria and Germany), that the European Commission has revised previous drafts of CETA in fundamental aspects. Two of these aspects deserve particular attention.

On the institutional and procedural level, CETA constitutes a significant departure from the traditional approach provided for in most of the existing BITs, as it establishes a permanent investment tribunal and an appeal tribunal. Members of both bodies will be nominated by the EU and Canada. On the substantive level, the EU and national governments, and Canada respectively, explicitly preserve their right to regulate and pursue legitimate public interests relating to health protection, safety or the environment. In order to avoid any wide or abusive interpretation, the investment protection rules have been clearly defined. For instance, the rule of Fair and Equitable Treatment includes a list of elements that could potentially give rise to a violation, as well as situations constituting an indirect expropriation which are defined in a special Annex.

Second, on July 8, 2016, an investment tribunal in the matter Philip Morris v. Uruguay dismissed all claims brought by the tobacco company. The claim was filed under the Switzerland-Uruguay BIT and challenged a series of restrictive tobacco control measures. However, the tribunal found that Uruguay had acted in a bona fide desire to protect public health when enacting the regulations and that those measures were non-discriminatory and proportionate.

Also in July 2016, the EU and the USA concluded their 14th round of negotiations for the Transatlantic Trade and Investment Partnership (TTIP). Even though this Agreement should include similar issues as in CETA, the public is even more concerned. This is because the United States is perceived as a country with particular liberal market standards which could be incompatible with the standards Europeans are used to. It remains to be seen whether the revised draft of CETA and the award against Philip Morris can calm the current discussions, convince the public and enable a conclusion prior to the end of the Obama Administration.

NON-ENFORCEMENT OF ARBITRAL AWARDS IN LIGHT OF EXPROPRIATION OF INVESTMENTS AND THE PRINCIPLE OF DENIAL OF JUSTICE: A REVIEW OF THE STATUS QUO

State liability for the unlawful failure of enforcement of arbitral awards has been subject to a number of claims over the past few years. Despite the Saipem v. Bangladesh award in 2009 declaring the de facto deprivation of the benefits of an ICC award an unlawful expropriation of an investment, tribunals subsequently dealing with this issue in similar cases, including GEA Group Aktiengesellschaft v. Ukraine in 2011, appear to be more reluctant towards holding a state liable for the failure of its courts to enforce an arbitral award.

The first case where investment treaty tribunals dealt with the issue of state liability for the unlawful failure of enforcement of arbitral awards is the case Saipem v. Bangladesh. The decision rendered in Saipem v. Bangladesh is somewhat unique in that the Italy-Bangladesh BIT applicable to that case did not explicitly entitle investors to claim a breach of the fair and equitable treatment obligation, which is the most important standard in the protection of foreign investments. Consequently, the Italian company Saipem alleged a breach of the expropriation clause. While the ICSID tribunal specifically held that not any deprivation of the ability to enjoy the benefits of an arbitral award would be tantamount to an expropriation, it decided that the non-enforcement of the ICC award was in fact expropriatory due to the particularly egregious nature of the acts of the Bangladeshi courts.

Significantly deviating from this highly controversial view, the tribunal in GEA Group Aktiengesellschaft v. Ukraine found that there was no breach of the applicable Germany-Ukraine BIT in respect of the non-recognition and enforcement of an ICC award by Ukrainian domestic courts. It held that the award “in and of itself” could not constitute an investment according to the criteria set forth in the BIT or in

ALBANIA AUSTRIA BOSNIA & HERZEGOVINA BULGARIA CROATIA CZECH REPUBLIC HUNGARY POLAND ROMANIA SERBIA SLOVAK REPUBLIC SLOVENIA UKRAINE
that private enforcement of capital market regulations is possible based on the concept of protective laws.

On March 30, 2011, the Austrian Supreme Court (7 Ob 77/10d) decided that the corporate law rules on the prohibition of repayment of capital, the purchase of own shares and the obligation of equal treatment of all shareholders do not prevent prospectus liability claims of shareholders against the issuer. The core rationale of this decision was that the claims of shareholders under prospectus liability laws are to be treated rather like claims of any creditor and not as claims based on the corporate law relationship between the issuer and its shareholders. A year later, on March 15, 2012, the Austrian Supreme Court (6 Ob 28/12d) in another case not only confirmed the decision of March 30, 2011. In addition, the Court held that the capital market regulations on the issuer's ad-hoc publicity obligation and the prohibition of market manipulation qualify as protective laws for the benefit of investors and claims based on a violation of such protective laws against the issuer are not excluded by corporate law capital maintenance and equal treatment of shareholder rules. On December 19, 2013, the ECJ (C-174/12) held that member states may allow liability claims under the laws implementing the Prospectus Directive, the Transparency Directive, and the Market Abuse Directive against the issuer.

Today, it is standing case law in Austria that investors may raise liability claims against the issuer for (negligent) violation of prospectus law, violations of the ad-hoc publicity obligation of the issuer, and for a violation of the prohibition of market manipulation. Claims may be raised not only against the issuer but against any person in negligent breach of such regulations. Liability claims for violations of the obligation to disclose major shareholdings and for directors' dealings disclosure have so far not been brought before the Supreme Court, but once they are, it is likely that the Supreme Court will qualify these regulations also as protective laws and allow for damage claims in the case of violations. Taken together with the dramatically increased administrative penalties for a violation of capital market regulations, the possibility of investors to claim damages for the violation of capital market regulations underlines the importance of capital markets compliance for Austrian issuers.

HIGHLIGHTS FROM THE AUSTRIAN SUPREME COURT

BROKEN SCISSORS DURING HEART SURGERY – A CASE OF PRODUCT LIABILITY

In a decision dated 30 March 2016, the Austrian Supreme Court ruled in favor of a cardiac patient who demanded damages for pain and suffering, because a part of the scissors used within the surgery process got stuck in his pulmonary vein (4 Ob 48/16m).

A 36-year old man underwent heart surgery in 2008. During the surgery, a part of the surgeon’s scissors (1 cm) snapped off, slipped into the man’s pulmonary vein and got stuck. All efforts to retrieve the broken part of the scissors failed. However, it turned out that the foreign object had no influence on the patient’s overall health. It was very unlikely that the foreign object would move in any direction causing devastating consequences. Nevertheless, the patient felt unsure about further movements of the part of the broken scissors and worried about adverse health effects.

Because of these concerns, the man decided to sue the company producing the scissors used for his heart surgery demanding compensation for pain and suffering. The plaintiff based his claim in the amount of EUR 9,500 on the Austrian Product Liability Law (PHG).

(find out on the next page how the court decided...*)
BEWARE OF SHORT LIMITATION PERIODS REGARDING THE INTERNATIONAL SALE OF GOODS

Limitation periods are of paramount importance for the success of any potential claim arising from non-conforming goods in the international sale of goods. If the applicable limitation periods have expired, claims could be rejected by the courts even if fully proven on the merits. Short limitation periods could require early submission of claims before all evidence is collected to preserve the chances for success.

What limitation periods apply to a CISG dispute?

Limitation periods limit the period during which a claim may be initiated - any claim filed afterwards could be rejected regardless of whether the claim can be proved on the merits unless asserted as a defense or as a set-off. Thus, the identification of all limitation periods which may apply to a potential claim is of paramount importance for its success.

In cases regarding an international sale of goods transaction governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG), the identification of all applicable limitation periods is not always straightforward. The CISG does not contain limitation periods as this issue was intended to be addressed by the 1974 Convention on the Limitation Period in the International Sale of Goods (Limitation Convention). However, the Limitation Convention has not been ratified by a number of states, among them Bulgaria and Austria.

In the absence of ratification of the Limitation Convention, the national law rules for limitation periods apply. The national laws typically provide for different limitation periods such as limitation periods for (i) claims to remedy non-conforming goods, (ii) claims for damages for contractual non-performance, and (iii) claims for performance of payment obligations. All such limitation periods could be applicable to a CISG dispute unless generally incompatible with the application of the CISG.

The application of the CISG precludes only the domestic sale of goods provisions of the applicable national law, but not its general provisions. Thus, the general limitation periods
provided under national law, such as limitation periods for claims for damages based on contractual non-performance or limitation periods for claims for performance of payment obligations, should be applicable to a CISG dispute. Although questionable whether special limitation periods under the domestic sale of goods regimes are compatible with the CISG, it may be argued that given the lack of limitation periods under the CISG, the domestic law limitation periods would apply to fill the gap.

**Short limitation periods can influence the litigation strategy in a CISG dispute**

The litigation strategy in a CISG dispute would require an assessment of which limitation periods will apply, their length and starting date. Some limitation periods are very short under domestic legislation. For example, under Bulgarian law, there is a 6-month limitation period for claims for non-conforming goods, a 3-year limitation period for claims for damages caused by contractual non-performance and regular payments.

The starting date of limitation periods plays significant importance as well. For instance, in Bulgaria the short limitation period for non-conforming goods starts from the date of delivery, the limitation period for damages -- from the date the damages occur, and the limitation period for receivables - from the date when the receivables become due.

In cases where a short limitation period such as the 6-month limitation period under Bulgarian law applies, there could be insufficient time to prepare thoroughly all the necessary evidence to substantiate a claim. However, while the lack of sufficient evidence could be remedied with a follow-up submission, the omission to file within the limitation period could do irreparable harm to the claim.

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**POLAND: NEW LEGAL INSTRUMENTS: CONCLUDING AGREEMENTS PER E-MAIL OR SHORT TEXT MESSAGE AND FILING PLEADINGS VIA THE INTERNET**

Amendments coming into force on 8th September 2016 introduce revolutionary changes aimed at the modernization and simplification of Polish law civil procedure.

A major change is a new form of legal communication covering documents where a personal signature is not essential. To comply with the new form it has to be possible to determine the person who has made the statement, e.g. on the basis of e-mails or short text messages. The prototype of the document form is a text form known in German law.

The amendment also provides the possibility to choose to file and deliver pleadings in so-called ordinary civil proceedings via an electronic data filing. So far, this was only possible in electronic proceedings for writ of payment. The choice of the method of filing pleadings shall be made by submitting an appropriate statement through the electronic data filing system. For the first three years following the amendment coming into force, the possibility of using electronic data filing will depend on the technical capabilities of the respective court. After that time this possibility has to be ensured by all courts.

Other interesting amendments to the civil procedure are, among others, the ability to hold court sessions simultaneously in several courts and to communicate with the participants by means of teleconferencing, as well as the ability to summon the parties, the witnesses and the experts or other involved persons not only using the traditional methods of delivery but also by phone or a text message, if in such a case it is deemed necessary to accelerate the examination of the case.

Computerization will also influence enforcement proceedings, among others by extending the use of electronic filing of pleadings and of electronic delivery methods (the above rules will be applied accordingly), as well as by the introduction of the so-called electronic auction of movables as well as the electronic seizure of receivables from bank accounts.

Since these changes are revolutionary, it is hoped that they will significantly improve the efficiency of the Polish courts and shorten the duration of
civil proceedings. In particular the new regulations concerning the format of documents should streamline the performance of legal actions noticeably.

**SLOVENIA: COLLECTIVE REDRESS**

In July 2016, a proposal of a new Act on collective redress (the “bill”) was released for public discussion. With its adoption, collective redress would be regulated for the first time by Slovenian legislation.

The bill provides for collective actions in disputes arising out of consumer contracts, manufacturers’ liability, antitrust infringements, disputes between issuers and investors on the market in financial instruments and employment disputes. The second and third readings are planned for the end of 2016 or beginning of 2017. The bill also provides for collective settlements and injunctive collective redress.

In the case of compensatory collective redress, four phases are provided:

1. **Approval:** The court decides whether the claimant is able to represent the interest of a group of injured parties. The court dismisses the action or adopts a decision approving the action.

2. **Opt-in or opt-out:** The injured parties enter (opt-in) or exit (opt-out) of the group. An attempt at Mediation in accordance with the Act on Alternative Dispute Resolution in Judicial Matters is also possible. This phase is not required in cases of injunctive collective redress.

3. **Decision-making:** The court plays an active role in the proceedings and ends the proceedings by issuing a judgement. As a result, in the event of failure, a new action on the same subject matter in a civil litigation would not be admissible.

4. **Enforcement:** According to the principle of collective enforcement of claims, the harmed individuals are not parties to the proceedings. Instead, the action is brought for their benefit by a beneficiary organization or legal entity (such as consumer organisations, public prosecutor, trade union etc.) which do not have a profitable purpose.

The bill provides for the preservation of the fundamental rule of reimbursement of expenses, i.e. the rule that the losing party pays the costs incurred to the other party. The cost risk is therefore only borne by the parties to the proceedings. The claimant will have to disclose in its statement of claim whether there are any agreements on financing of the litigation or acceptance of cost risk by a third party, which the court will consider when deciding whether to approve the action. The bill provides for the principle of complete compensation for material and the principle of fair compensation for non-pecuniary damage.

**CRIMINAL LAW**

**AUSTRIA: CRIMINAL PROCEEDINGS PROVIDE OPTIONS FOR VICTIMS**

**Introduction**

When thinking about crime victims, most people usually think of natural persons who suffered from physical violence. However, when it comes to white collar crime cases, a high number of victims are not natural persons but companies. When thinking about crime victims, most people usually think of natural persons who suffered from physical violence. However, when it comes to white collar crime cases, a high number of victims are not natural persons but companies. In these cases, the main goal for the companies is to retrieve lost or damaged assets. Because this goal cannot always be achieved using civil proceedings, Austrian criminal law provides further options for victims in such cases.

**Victims and Private Parties**

Pursuant to Art 66 StPO, an alleged victim of a criminal act is entitled to file a submission to the Public Prosecutor’s Office either requesting the initiation of criminal proceedings or to join pending criminal proceedings as a victim. In such proceedings, the victim has the right to obtain access to the file and to be present at the main criminal court hearing (Hauptverhandlung).

**HIGHLIGHTS FROM THE AUSTRIAN SUPREME COURT**

Compensation for immaterial damages and knowledge of reduced life span

When calculating compensation for immaterial damages, the aggrieved party being aware of their reduced life expectancy is to be taken into account.”

The plaintiff has been treated for severe pain in his left shoulder. The diagnosis was inaccurate and three days later the relatively young claimant suffered a heart attack, leading to irreversible damage of his cardiovascular system. Subsequently, the plaintiff suffered from moderate pains in his chest, breathlessness and anxiety.

Due to the knowledge of a statistically reduced average life expectancy, the psychological impairment (existential fear and depression) of the claimant was evident. Even if the plaintiff’s productive efficiency is severely reduced due to his daily pains, he can actively pursue his family and work life.

The Austrian Supreme Court ruled that a compensation of EUR 90.000- was appropriate. The judges expressly pointed to the psychological impairment of the aggrieved party. This needs to be taken into account when calculating compensation for immaterial damages, due to the party being aware of a reduced life expectancy.

In past court decisions in Austria, a sum such as the above has only been granted to persons with severe disabilities or reduced consciousness.

*Christina Barzal*
Further, according to section 67 StPO, victims are entitled to claim damages which they suffered within the criminal proceedings and are then considered as private parties (Privatbeteiligte). The law also grants several other procedural rights to private parties. These shall ensure that the private party is able to prove the damages suffered.

Participating in criminal proceedings as a victim or a private party are both possible for individuals as well as legal entities. The formal and substantive requirements of such private party joiners are relatively limited making them a very inexpensive and efficient tool for private parties claiming to have incurred damages because of a crime. In addition, this is a very efficient way to get access to all the evidence produced by the Public Prosecutor’s Office which otherwise would be nearly impossible to achieve (house searches, confiscations, telephone surveillance, etc.). However, the status of a private party will only be granted to a person or legal entity who can plausibly argue to have suffered direct damages from the criminal actions.

In cases where the court finds the accused guilty of committing a crime, it is also obliged to rule on the civil claim of the private parties. The court has two options regarding its decision about the claim of the private party:

1. It can grant the claim if the court is of the opinion that the claim is sufficiently proven.
2. It can refer the claim to the competence of a civil court if it is of the opinion that the claim is not sufficiently proven.

Another advantage of pending criminal proceedings is that the limitation of civil claims raised by private parties is suspended.

Therefore, initiating or joining pending criminal proceedings can bring several possibilities for victims when it comes to reclaiming damages that occurred as a result of a crime.

In brief, the Draft Bill provides:

- a definition of “corrupt behaviour” (extending the definition of “bribery” set out in the Criminal Code by including acts that could not be considered criminal offences);
- an extension of persons submitting declarations (by including: municipal counsellors, presidents of state universities, etc.);
- an extension of assets and interests to be declared (by including those of the declarant’s spouse or non-marital partner and minors);
- an increase of the minimum threshold for declaration from BGN 5 000 to 10 000;
- a legal presumption that an asset is illegal unless proved to the contrary, i.e. the burden of proof is shifted - the person under scrutiny should prove the ground of acquisition;
- the establishment of a single anti-corruption body which takes over the functions of four currently operating institutions.

The Draft Bill is subject to criticism by members of the Parliament and the Supreme Court of Cassation. It is questionable whether an analysis of the actual benefits and/or disadvantages of codifying some of the current legal provisions governing those fields of law has been conducted.

After the first reading, the Draft Bill will be further discussed by Parliamentarian committees and voted on text-by-text in a full plenary session.

HIGHLIGHTS FROM THE AUSTRIAN SUPREME COURT

Summer, fun and... ruptured eardrum?

A man raised damage claims in Austria due to a ruptured eardrum after being catapulted into the water.

Every year, the summer time brings new trends reaching from dubious fashion to questionable summer music hits. In addition, our lakes have also been continuously conquered by huge colorful “airbags” in recent years. This fun sport goes by the name “Blobbing” and the procedure is quite simple: One person is sitting on the previously mentioned giant airbag, while others jump down on it in order to catapult the “Blobber” into the air and then into the water. Sounds exciting right? Well, in fact it is – at least as long as everything goes according to plan. But unfortunately that’s not always the case as our person of interest painfully experienced. In his case, he was catapulted sideways instead of forward and therefore he hit the water surface head first and – despite having worn a helmet – ended up with a ruptured eardrum.

Following the events, the injured customer brought damage claims against the operator in the amount of EUR 6 500. However, the Austrian Supreme Court dismissed the claims stating that the plaintiff was instructed sufficiently by the defendant beforehand about the risks of possible injuries and that participants of sporting activities act at their own risk, especially when the risk lies in the nature of the practiced activity itself.
COMPLIANCE

COMPLIANCE PROGRAMS: "TONE AT THE TOP" AND "COMMUNICATION AND TRAINING" - DO’S AND DON'TS

When a compliance incident occurs within a company in today's business world, a company's business may be at risk. A compliance incident may lead to a civil and/or criminal violation, financial loss, or damaged reputation.

In order to minimise these risks, it is recommended for companies to have a robust compliance program in place which prevents and detects any compliance incidents. In the cases where a compliance incident occurs and a company or its senior management or employees face investigations by a prosecutorial authority, a compliance program can be a valuable tool to show that the company has taken appropriate steps to prevent compliance incidents. Thus, a robust compliance program may help to avoid or mitigate potential liabilities.

Companies should consider the following key points when designing and implementing an effective compliance program:

- Conduct a thorough risk assessment about the risks the company faces.
- Establish appropriate policies and procedures that reflect these risks.
- "Tone at the Top" and support for senior management.
- Third party due diligence
- Communication and training
- Monitoring and review

Sometimes the key points "Tone at the Top" and "Communication and training of the employees" do not have such a high priority as the others. Thus, below is a list of Do's and Don'ts in these crucial areas.

1. TONE AT THE TOP

DO: Senior management and 'tone at the top' are of utmost importance for a well working compliance program. The senior management's statement of support of the compliance program should be made accessible to all employees and should be published on the company's website. A member of the senior management team should be responsible to oversee the compliance program and ensure that the company's compliance program is robust.

DON'T: Create and support a culture within the company that ignores compliance.

2. COMMUNICATION AND TRAINING

DO: Set up written policies which are easily understandable for all employees.

DON'T: Create policies consisting of hundreds of pages with legal texts in a very sophisticated language that will not serve any purpose.

DO: Communicate to the staff that every employee is responsible for compliance within the company and that compliance is a joint effort within the organisation.

DON'T: Create the impression that compliance is a minor program which is only taken care of in the compliance department by people who don’t matter at all.

DO: Set up tailored training sessions for the senior management, all employees and (if necessary) external parties which address real life scenarios.

DON'T: Set up a training session according to the "one size fits all principle" to save time and money.

DO: The training interval should be repeated regularly.

DON'T: Perform a training interval once every five years.

ANGELIKA HELLWEGER
Counsel
angelika.hellweger@wolftheiss.com
LIFE SCIENCES

INSUFFICIENT INSURANCE COVERAGE FOR WRONGFUL BIRTH

In its decision dated 22 March 2016, the Austrian Supreme Court (OGH) held that insurance brokers are obliged to inform their clients about the latest case law that may lead to insufficient insurance coverage for their clients. In the case at hand, the liable broker omitted to refer to a major decision in the field of medical liability (5 Ob 232/15t).

In 2001, a gynecologist specialized in the field of prenatal diagnosis consulted an insurance company regarding a professional liability insurance policy that should also cover damages resulting from inadequate information related to a child’s disability (“wrongful birth”). The gynecologist took out an insurance policy that covered damages in the total amount of EUR 400,000.

At that time, the Austrian Supreme Court held that doctors are liable for increased expenses for a child in a case of wrongful birth. However, the highest Austrian court changed its jurisdiction in a major decision dated 7 March 2006 in so far, as parents were now entitled to claim compensation for the entire child support (Unterhalt), not only for increased expenses (5 Ob 232/15t).

In 2007, a patient treated by the gynecologist gave birth to a child with a severe long-term disability. The parents of the disabled child filed a claim for damages in the amount of the entire child support, as the doctor omitted to inform his patient about the method of amniocentesis which violated his information obligations. The patient’s claim was upheld by the courts of all instances. Although the gynecologist had liability insurance, more than half of the insurance sum was already consumed a few years earlier.

Following the decision, the gynecologist brought a claim against his insurance company due to his insufficient insurance coverage. The Supreme Court ruled that the insurance broker was obliged to act in compliance with best-risk-management strategies. Therefore, the broker should have informed his client about the new wrongful birth decision, as a major decision in the field of medical liability, as well as about the consequences of being underinsured.

However, the question of whether the gynecologist was aware of the change in case law and whether this needs to be considered as contributory negligence (Mittverschulden) was left open by the Supreme Court and now needs to be decided again by the first-instance court.

MARKUS TAUFNER
Associate
markus.taufner@wolftheiss.com

FOCUS:
THE AUSTRIAN FEDERAL DISABILITY EQUALITY ACT

Introduction to the Austrian Federal Disability Equality Act (Bundes-Behindertengleichstellungsgesetz - BGFg).

The BGfG came into force on 1 January 2006 with the goal of removing or preventing discrimination and thus guaranteeing the equal participation in social life for persons with disabilities and enabling them to lead a self-determined life. The ban on discrimination also covers people with a close relationship to a disabled person such as parents, friends, teachers or personal assistants. The act applies to access to all publicly available goods and services (e.g. supermarkets, public transport and doctor’s practices) as well as to buildings within the sphere of responsibility of the federal administration (e.g. federal buildings which are open to the public).

A person who feels discriminated against because of a disability or because of the close relationship to a disabled person may not claim the removal of a barrier, but is entitled to claim compensation. Before such an action can be brought, the claimant is obliged to first apply for the opening of conciliation proceedings. The conciliation procedure is conducted by the Federal Social Welfare Office, which also bears the costs of the procedure. All deadlines regarding the legal assertion of the compensation claim are delayed by the opening of the conciliation procedure. The goal of the conciliation procedure is to reach an amicable agreement within three months. If required, the parties can be supported by an external mediator. If no agreement can be reached, the Federal Social Welfare Office has to confirm the failure of the conciliation procedure and the claimant can bring an action before the court within three months.

HIGHLIGHTS FROM THE AUSTRIAN SUPREME COURT

Water slide: pool operator not liable for damages related to prohibited sliding positions

Two warning signs, one at the staircase to the slide and one at the slide’s entrance area allowed only one way of sliding: lying on the back with hands close to the body or crossed behind the back of the head. They indicated that other positions might result in injuries. After sliding several times with his 6-year-old son in the allowed position, the man and his son ignored the warning signs and slid down with their backs first in an upright position. In the last bend, the plaintiff slipped off to the edge, grabbed the outside of the slide with his right hand and cut himself at the sharp edge at the end of the splash screen. By adhering to the only allowed sliding position, it is not possible to reach the outside edge of the slide. It would be necessary to stretch one’s arms out, which does not comply with the required sliding position. The Austrian Supreme Court held that the previous instances were correct in their decisions that the injury was not caused by missing safety measures by the operator or by a defective product, but that the case depended on what extent the user of the facilities is able to detect and avoid dangers: the 38-year-old plaintiff was definitely able to do so and nevertheless ignored the warning signs (9 Ob 77/15m).

Anna Füreder
In some areas, such as traffic and construction, the realisation of accessibility, for example by installing an elevator, is usually very complex and causes very high costs. Therefore, during a 10 year transitional period, the BGStG contained a number of exceptions regarding buildings and traffic facilities, which were built based on a building permit issued before 1 January 2006, and means of public transport, which were authorized before 1 January 2006.

In the past ten years, there have only been a few trials dealing with accessibility for people with disabilities. The end of the transitional period on 31 December 2015 has certainly enhanced the practical relevance of the Federal Disability Equality Act.

SUSANNE SULZBACHER
Associate
susanne.sulzbacher@wolftheiss.com
### The Wolf Theiss Region CEE/SEE

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<td><a href="mailto:e.tirana@wolftheiss.com">e.tirana@wolftheiss.com</a></td>
<td>+355 4 2274 521</td>
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<td>+48 22 378 8900</td>
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<td>+40 21 308 810</td>
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<tr>
<td>Serbia</td>
<td><a href="mailto:e.budapest@wolftheiss.com">e.budapest@wolftheiss.com</a></td>
<td>+381 11 330 2900</td>
</tr>
<tr>
<td>Slovak Republic</td>
<td><a href="mailto:e.bratislava@wolftheiss.com">e.bratislava@wolftheiss.com</a></td>
<td>+421 2 591 012 40</td>
</tr>
<tr>
<td>Slovenia</td>
<td><a href="mailto:e.ljubljana@wolftheiss.com">e.ljubljana@wolftheiss.com</a></td>
<td>+386 1 438 00 00</td>
</tr>
<tr>
<td>Ukraine</td>
<td><a href="mailto:e.kiev@wolftheiss.com">e.kiev@wolftheiss.com</a></td>
<td>+38 044 377 75 00</td>
</tr>
</tbody>
</table>

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DRInsider@wolftheiss.com