20.07.2016

Austria: Shareholder Agreements – Back to Normal?

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On 1 January 2015 the act to amend regulations for partnerships, as defined under the Austrian Civil Code (GesbR-Reformgesetz – GesbR-RG, BGBl I 83/2014), entered into force.

Major amendments included a new simplified definition of partnerships as defined under the Austrian Civil Code (Gesellschaft bürgerlichen Rechts – GesbR); the adoption of detailed rules regarding general partnerships (Offene Gesellschaft – OG) relating to management, representation, capital injections and termination for GesbR; as well as the codification of case law-based developments, eg the distinction of partnerships, acting as such in day-to-day business (Außengesellschaften), and undisclosed partnerships (Innengesellschaften). Art 1175 seq of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch – ABGB) as amended by BGBl 83/2014, apply to all GesbR founded after 31 December 2014 ("new GesbR"). For all GesbR established before this date ("old GesbR") the GesbR-RG provided a transition period until 1 July 2016 or until 1 January 2022 (in the event that a member of the GesbR would declare that he or she prefers to continue working under the terms of the old legal regime before the GesbR-RG).

Shortly before 1 July 2016, thus, just before Art 1175 seq as amended by the GesbR-RG would have been applicable also in case of an old GesbR – unless one member would have declared the intention to remain with the old GesbR regime before 30 June 2016, Art 1209 ABGB as amended by the GesbR-RG on the termination of GesbR, was altered again. Section 11 of the Abschlussprüfungsrechts – Änderungsgesetz 2016 BGBl I 43/2016 amended Art 1209 para 2 ABGB insofar as the regulation regarding the admissibility of the restriction of the termination rights in partnership agreements does not apply to undisclosed partnerships. After being passed by the National Assemby (Nationalrat) and the Federal Council (Bundesrat) on 20 May and 2 June 2016 respectively, the amendment became effective on 1 July 2016 and will be in place both for old and new GesbR.

However, to understand the motivation for this renewed alteration to Art 1209 para 2 ABGB as amended by the GesbR-RG, so soon before the entering into force for old GesbR, one has to look at the events from the very beginning:

Pursuant to Art 1212 ABGB, in its pre- amendment version before the GesbR-RG ("Art 1212 ABGB old version"), a GesbR could be terminated at discretion at any time without observing a period of notice or a specific termination date, as long as the termination was not declared at an inopportune time or with fraudulent intent. This rule was optional and could be amended in the partnership agreement.

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In Art 1209 para 1 ABGB as amended by the GesbR-RG, a provision is made for GesbR established for an indeterminate period regarding a termination date by the end of the financial year and a period of notice of six months. In addition, Art 1209 para 2 ABGB as amended by the GesbR-RG, declares any waiver of the right to terminate the partnership and arrangements other than the extension of the period of notice, complicating the termination of the partnership, null and void. A temporary waiver of the right of ordinary termination is equivalent to an extension of the period of notice and, hence, is deemed to be admissible.

In contrast to Art 1212 ABGB, the old version (Art 1209 ABGB as amended by the GesbR-RG) contains mandatory provisions, thus, obstructing modifications of termination rights in the partnership agreement. In so doing, Art 1209 para 2 ABGB, as amended by the GesbR-RG, has created a precarious situation for shareholder

agreements concluded after 31 December 2014 and would have led to an equally difficult situation for the old GesbR by 1 July 2016 (or by 1 January 2022 at the latest).

Generally speaking, as long as they do not refer to a single vote, shareholder agreements do constitute continuing obligations. Furthermore, the Austrian Supreme Court has confirmed in several rulings (eg 6 Ob 35/14 m) that shareholder agreements containing rules on the pooling of votes usually do qualify as a GesbR. Shareholder agreements may constitute a temporary GesbR determining the duration of the partnership either by defining a definite termination date in the shareholder agreement itself, or the termination date may derive from the purpose of the partnership, eg for the duration of the shareholders' participation in the main company. In this case the ordinary termination is excluded for the duration of the partnership, thus, the shareholder agreement may only be terminated with cause. On the other hand, shareholder agreements concluded for an indefinite period of time may be terminated ordinarily under the applicable legal or contractual provisions. In general, the ordinary termination could not be excluded for continuing obligations. From a corporate law perspective, for the preference for, and promotion of long-term relationships and commitments, a waiver of the right of ordinary termination leading to a timely unlimited commitment, was considered admissible before the GesbR-RG entered into force, unless it would result in an indecent gagging of one partner.

Art 1209 para 2 ABGB, as amended by the GesbR-RG, would have set an end to clauses in partnership agreements restricting the termination of shareholder agreements. Ever since the GesbR-RG entered into force, the effects on shareholder agreements and various approaches to prevent the new mandatory regulation in Art 1209 ABGB from having an impact on shareholder agreements, have been discussed, eg the adoption of all provisions of the shareholder agreement in the articles of association of the main company, or the choice of a foreign law to govern the shareholder agreement. The legislator reacted to the ongoing discussion by exempting undisclosed partnerships from the scope of application of Art 1209 para 2 ABGB as amended by the GesbR-RG. GesbR in the form of an undisclosed partnership, may be assumed when the GesbR itself does not act in the day-to-day business, but the shareholders act on their own behalf. In case of undisclosed partnerships, provisions on the representation of the GesbR or the liabilities of the partners, do not exist. Eventually, the intention of the partners determines if a partnership represents an undisclosed partnership or partnership acting as such in day-to-day business. In their general drafting, shareholder agreements will mostly qualify as undisclosed partnerships, however, it has to be assessed if in the individual case it has to be defined rather as a partnership acting as such in day-to-day business. Thus, for GesbR in the form of an undisclosed partnership, the restrictions of the termination rights in partnership agreements in Art 1209 para 2 ABGB as amended by the GesbR-RG, are not applicable and could be waived in the partnership agreement to a certain extent.

Does the amendment in APRÄG 2016 mean that the right of ordinary termination now can (again) be waived for an indefinite period of time? The waiver of the right of ordinary termination for an indeterminate period of time is and always was a double-edged sword. Although corporate law favors long-term commitments, the shareholder agreement still represents a continuing obligation. Consequently, a waiver of the right of ordinary termination is valid only for a certain period of time. Taking the corporate law interest to promote long-term relationships into consideration, a waiver for a considerable period of time may be justifiable and admissible.

The Austrian Supreme Court has ruled on the admissibility of a previous termination of a shareholder agreement in decisions 1 Ob 629/85 and 7 Ob 59/03 g. As the underlying shareholder agreements were concluded only nine (1 Ob 629/85) or six (7 Ob 59/03 g) years before, the Austrian Supreme Court never dealt with the admissible maximum duration of an (implicit) exclusion of ordinary termination in a

shareholder agreement. Frequently, a period of 30 years is mentioned with regard to the absolute maximum duration of a valid waiver or limitation in time. A limitation in time of a general partnership of 40 years approved by the Supreme Court in ruling 7 Ob 637/85 does not represent a reliable benchmark in light of more recent decisions. The magic limit of 30 years may indicate the longest admissible time period for a waiver of ordinary termination or a limitation of a shareholder agreement. In an attempt to determine the acceptable duration of a waiver or limitation in time, decisions regarding participation rights or timesharing may give auxiliary indications. In case of a participation right, with or without a yearly minimum distribution of profits, the Austrian Supreme Court declared admissible a commitment of 20 and even 27,5 years, as long as the participation right is fungible. On the other hand a commitment in the form of a non-fungible participation right without fixed yearly profit distributions and co-determination rights for 20 years is impermissible. Recently, a waiver of the ordinary termination for 15 years in a timesharing agreement was deemed to be valid although exit options, such as a transfer or selling back the timesharing rights, were not available. The right of ordinary termination may permissibly be waived for 10 years, but not for 18 years, in the case of sub-participation in a limited partnership with current payment obligations, no profit distributions and co-determination rights.

As there is no general rule guiding the assessment of the admissible duration of a waiver, the ordinary termination or the limitation in time always has to take all circumstances in the given case into consideration. In case of the supremacy of one of the partners and/or special encumbrances for the denouncing partner (eg regarding the distribution of profit and loss), and/or an unequal distribution of co-determination rights between the partners of the shareholder agreement, the admissible duration of the limitation in time or a waiver of the ordinary termination of a shareholder agreement, may deviate significantly from a maximum duration of 30 years. In such close-meshed shareholder agreements, a waiver of the ordinary termination may only be valid for 10 to 15 years maximum, depending on the concrete circumstances.

Consequently, long-term or even timely unlimited commitments in shareholder agreements may be deemed admissible only as long as the shareholder has other options to exit the shareholder agreement, eg by selling the shares of the main company. The actual exit option of a shareholder has to be evaluated taking into consideration (i) all preemption and acquisition rights, rights of consent of a core shareholder, as well as the rules on compensation for the leaving shareholder in the exercise of such rights; and (ii) the legal and economical possibility and reasonableness of the exit option.