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Austria

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Introduction

Austria is a well-known arbitration-friendly jurisdiction, offering parties a modern, sophisticated procedural framework for arbitrations seated in Austria. Vienna has gained a great reputation as a neutral and conveniently located venue for arbitrations, particularly for disputes between parties from Central and Eastern Europe.

The Austrian arbitration law is based on the UNCITRAL Model Law and is contained in the Austrian Code of Civil Procedure ("**ACCP**", Sections 577–618). Unlike the United Nations Commission on International Trade Law ("**UNCITRAL**") Model Law, however, Austrian procedural law neither differentiates between commercial and non-commercial arbitrations nor between national and international arbitrations. There are, however, specific rules regarding arbitration agreements with consumers and employees.

Austria, like most jurisdictions, has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("**New York Convention**"). Austria no longer maintains any reservations to the New York Convention. Austria is also a member of the European Convention on International Commercial Arbitration 1961 ("**European Convention**") and has ratified the International Centre for Settlement of Investment Disputes ("**ICSID**") Convention and the Energy Charter Treaty.

The Vienna International Arbitral Centre ("**VIAC**") is one of Europe's leading arbitral institutions. Its procedural rules were recently updated (the Vienna Rules and the Vienna Rules on Mediation 2018, second edition) and now also allow the administration of purely domestic arbitrations. The Vienna Rules emphasise that arbitrators and parties are to conduct arbitral proceedings in a cost-efficient manner. VIAC is dedicated to increasing diversity in arbitration and has signed the ERA – Equal Representation in Arbitration – Pledge. VIAC also promotes transparency of arbitrator appointments by publishing a list of arbitrators acting in VIAC proceedings on their website ("**VIAC Arbitral Tribunals**").

As of 11 July 2019, VIAC is officially included in the list of foreign arbitral institutions recognised as permanent arbitration institutions ("**PAIs**") under Russia's Federal Law on Arbitration dated 29 December 2015. VIAC is the first European arbitral institution to hold such government permit. This registration should facilitate ensuring enforcement of VIAC awards in the Russian Federation in the future.

According to the 2020 VIAC statistics, 41 proceedings with an aggregated amount in dispute of EUR 428 million were pending as of 31 December 2020. Disputes arising from commercial contracts, business ownership, construction, wholesale, retail and trade and manufacturing generate the largest number of VIAC cases and account for approximately 85% of the 2020 caseload.

The International Chamber of Commerce ("**ICC**") maintains a direct presence in Vienna through the Austrian national committee.

In addition to arbitral proceedings based on institutional rules, we also observe that parties commence *ad hoc* arbitral proceedings seated in Austria.

Arbitration agreement

Arbitrability

Arbitration agreements can be concluded for any pecuniary claim falling within the jurisdiction of the courts of law. Non-pecuniary claims are arbitrable if the law allows such disputes to be settled by the parties. Claims arising from family law and tenancy law are not arbitrable (Section 582 ACCP).

Form requirements for arbitration agreements

Under Austrian law, arbitration agreements must sufficiently specify the parties, the subject matter of the dispute in relation to a defined legal relationship, and the parties' intent to finally settle disputes by arbitration (at the exclusion of the state courts' competence). Arbitration agreements can be contained in the main contract or be concluded as a separate agreement. An arbitration clause can also be included in general terms and conditions. In any case, however, the arbitration agreement must be in writing. This requirement may be fulfilled by a written document signed by both parties, or written correspondence proving the existence of the agreement (such as letters, emails, or telefax).

The doctrine of separability is not expressly stipulated in Austrian law but widely recognised in practice.

Law applicable to the arbitration clause

It was highly disputed which law governs the arbitration agreement in the absence of an explicit agreement thereon. Some scholars advocate that an arbitration clause should be governed by the law at the seat of the arbitration, while others consider the application of a choice of law of the main contract to the arbitration clause to better satisfy parties' expectations. In 2019, the Austrian Supreme Court established that the validity of an arbitration clause is generally determined by the law at the seat of the arbitration unless the parties have agreed otherwise. The Supreme Court recently confirmed again that this ruling is in line with Article V para. 1 subsection a of the New York Convention (Austrian Supreme Court ruling of 6 March 2020, docket no. 18 OCg 7/19g). From an Austrian law perspective, the parties' choice of law regarding the arbitration agreement can be expressly or implicitly agreed. Whether the parties agreed on the law applicable to the arbitration clause and, if so, which law is to be applied, is determined in accordance with the general rules of contract interpretation. According to the Supreme Court, a choice of law in the main contract is an indication that the parties intended for this law to also govern the arbitration clause (Austrian Supreme Court ruling of 15 May 2019, docket no. 18 OCg 6/18h).

Competence-competence

Under Austrian law, the arbitral tribunal has the capacity to rule on its own jurisdiction (competence-competence, Section 592 ACCP). The decision on jurisdiction can be rendered together with the decision on the merits, or as a separate arbitral award.

Expiration or termination of an arbitration agreement

Recently, the Austrian Supreme Court clarified that the validity of arbitration agreements can be limited in time and can be terminated for good cause. The arbitration agreement can be terminated if an important reason arises which makes it unreasonable for the party

to conduct or continue arbitral proceedings; for example, because effective legal protection or fair proceedings no longer appear to be guaranteed. A termination declared purely as a procedural act *vis-à-vis* an arbitral tribunal shall have no effect, even if the other party to the arbitration proceedings becomes aware thereof. Only if the declaration *vis-à-vis* the arbitral tribunal also contains a substantive declaration of intent towards the other arbitral party (double functionality) can it lead to the termination of the arbitration agreement.

In a recent case, the Supreme Court declared that it is "questionable" whether the expiration of an arbitration agreement after the commencement of the arbitral proceedings but prior to their termination can lead to the arbitration agreement lapsing, but did not determine this issue as it was not decisive for the case at hand (Austrian Supreme Court ruling of 17 January 2019, docket no. 5 Ob 63/18b). In our view, if the arbitration agreement was valid at the time the proceedings were initiated, the expiration of the time limit does not lead to a lack of jurisdiction of the tribunal to decide the already pending claims.

The expiration or termination of an arbitration agreement constitutes a ground for setting aside (lack of valid arbitration agreement, Section 611 ACCP). The question of whether a valid arbitration agreement exists concerns the jurisdiction of the arbitral tribunal. The plea of lack of jurisdiction must thus be raised at the latest with the first submission on the merits of the case. Failure to do so leads to the exclusion of the plea of lack of jurisdiction not only in arbitration proceedings but also in set-aside and enforcement proceedings.

Joinder of a third party

Austrian law does not set out rules for the joinder of third parties or the consolidation of arbitral proceedings. Legal successors and third-party beneficiaries are, however, bound by arbitration agreements pursuant to the jurisprudence of the Austrian Supreme Court (recently confirmed by the Austrian Supreme Court ruling of 20 December 2019, docket no. 18 ONc 3/19i).

Under the Vienna Rules, the arbitral tribunal shall decide upon the request of a party or a third party after hearing all parties and the third party to be joined and after considering all relevant circumstances. It is also up to the discretion of the arbitral tribunal to decide the manner of the joinder of the third party (Article 14 Vienna Rules). The relevant circumstances to be considered include the applicable national arbitration law and applicable substantive law. Under Austrian law, it is necessary that the third party submits to the jurisdiction of the arbitral tribunal already constituted.

The consolidation of arbitral proceedings is allowed under Article 15 Vienna Rules, upon a party's request, if (a) the parties agree on the consolidation, or (b) the same arbitrator(s) was/were nominated or appointed; and in either case the place of the arbitration is the same.

Arbitration procedure

Procedural rules

Party autonomy is valued greatly under Austrian arbitration law and is decisive for the conduct of the arbitration procedure (Section 594 ACCP). In principle, the parties are free to choose applicable procedural rules at their own discretion, e.g., by establishing their own rules or by agreeing on procedural rules of an arbitral institution.

Party autonomy is only limited by a few mandatory provisions of the ACCP. For arbitral proceedings seated in Austria, the following order of sources of law applies: (1) mandatory provisions; (2) agreements between the parties; and (3) non-mandatory provisions. Only if a procedural issue is not governed by one of these three sources of law can it be determined by the arbitral tribunal at their own discretion.

This hierarchy of norms largely corresponds to the New York Convention. If arbitral proceedings have not been conducted in accordance with the agreements between the parties, the declaration of enforceability of the arbitral award may be refused pursuant to Article V para. 1 subsection d of the New York Convention.

The mandatory provisions include the arbitrator's authority to decide on the admissibility of evidence, the conduct of the taking of evidence and to freely assess its outcome. The arbitrator must be impartial and independent and safeguard the parties' right to be heard and the right to fair and equal treatment.

Soft law

Since the Austrian procedural rules and institutional arbitration only provide a framework for the proceedings but often do not address the conduct of the proceedings and the taking of evidence in detail, so-called soft laws have been developed and published by various institutions, such as the International Bar Association ("**IBA**") Rules for the Taking of Evidence in International Arbitration 2010 ("**IBA Rules**") and the Rules on the Efficient Conduct of Proceedings in International Arbitration 2018 ("**Prague Rules**"). While parties may agree on the binding application of these soft laws, it is more common that arbitral tribunals at their own initiative declare to use such soft law instruments as guidelines.

In Austria, the IBA Rules are currently one of the most recognised soft laws. The IBA Rules aim to create rules of evidence acceptable to members of civil and common law jurisdictions and to provide an internationally unified approach to procedural issues. The Prague Rules, published in December 2018, were established in response to criticism that the IBA Rules too closely followed common law and that these common law features (such as US-style discovery) were a major factor in increasing the duration and costs of arbitral proceedings. The Prague Rules aim to provide an alternative set of rules more in line with the civil law traditions and intend to give arbitrators a more proactive role, closer to the investigative principles of state courts. It remains to be seen which rules will become more prevalent in Austria.

The IBA Guidelines on Conflicts of Interest in International Arbitration ("**IBA Guidelines on Conflicts of Interest**") play an important role in practice in determining the independence and impartiality of arbitrators. The Austrian Supreme Court in several recent cases confirmed that even though the IBA Guidelines on Conflicts of Interest have no normative character and the parties' agreement on their application is necessary for these guidelines to be directly applicable, they serve as a guide when assessing potential grounds for bias of an arbitrator (Supreme Court ruling of 23 July 2020, docket no. 18 ONc 1/20x; Supreme Court ruling of 15 May 2019, docket no. 18 ONc 1/19w).

Confidentiality

Austrian arbitration law does not contain provisions declaring the arbitral proceedings, documents submitted therein or the hearing to be confidential. Therefore, if parties wish to safeguard confidentiality, they should include a confidentiality agreement in their arbitration clause or agree on institutional rules declaring the proceedings confidential.

If parties agree to arbitration under the Vienna Rules, Article 16 para. 2 provides that arbitrators have a duty to keep all information acquired in the course of their duties as arbitrator confidential.

Effect of insolvency proceedings

Pursuant to Section 7 para. 1 of the Austrian Insolvency Act, all pending legal disputes in which the debtor is a plaintiff or defendant are interrupted by the opening of insolvency

proceedings. Prevailing Austrian doctrine and case law hold the view that this also applies to pending arbitral proceedings. It was, however, highly disputed whether proceedings regarding a contested insolvency claim could be carried out during arbitral proceedings, if the insolvency claim is subject to an arbitration agreement.

The Austrian Supreme Court now determines that arbitral proceedings already pending at the time the insolvency proceedings are commenced shall in any case be continued (as "*Prüfungsprozess*") if the validity of the filed insolvency claim was only contested by the insolvency administrator. The insolvency administrator is deemed bound by an existing arbitration agreement between the debtor and an insolvency creditor. The final arbitral award is considered a ruling on the validity of the insolvency claim pursuant to Sections 112 *et seqq.* of the Austrian Insolvency Act. The arbitral award thus also takes effect *vis-à-vis* all other insolvency creditors (Austrian Supreme Court ruling of 30 November 2018, docket no. 18 ONc 2/18s).

Online hearings

The Austrian Supreme Court recently rendered the first national Supreme Court ruling addressing arbitral hearings via videoconference, which to the knowledge of the authors is also the first supreme court ruling on this matter worldwide. The Supreme Court held that the use of videoconferencing technologies does not constitute a violation of Article 6 European Convention on Human Rights, even if one of the parties does not agree with holding the hearing via videoconference (Supreme Court ruling of 23 July 2020, docket no. 18 ONc 3/20s). This led to a consensus among Austrian arbitration practitioners that arbitral tribunals may in principle hold online hearings even if one party objects.

Arbitrators

Appointment of arbitrators

Parties are in principle free to appoint arbitrators they deem best suited to decide their respective case, as long as the arbitrator is impartial, independent and has full legal capacity. Apart from the requirement of being a natural person, there are no legal requirements for the appointment as arbitrator, such as nationality or legal qualification.

Active Austrian state court judges are prohibited from sitting as arbitrators by their rules of professional conduct. A violation of this provision, however, only has disciplinary consequences for the respective judge and is not considered a violation of the rules of arbitral proceedings.

Parties can agree on the number of arbitrators. If the parties have agreed on an even number, the arbitrators shall appoint one additional person as a chairperson. Austrian statutory law provides that, absent a party agreement, the dispute shall be decided by three arbitrators (Section 586 ACCP).

Challenge of arbitrators

Arbitrators intending to accept their appointment must disclose any circumstances which likely give rise to doubts regarding their impartiality or independence or which are in conflict with an agreement of the parties (Section 588 ACCP). The requirement for arbitrators to be impartial is mandatory.

Grounds for challenges

Arbitrators can only be challenged if circumstances exist which give rise to justifiable doubts as to their impartiality or independence or if they do not possess qualifications which the parties had agreed on. A party can only challenge an arbitrator in whose appointment it was

involved, for reasons of which it became aware only after the appointment. Section 588 ACCP no longer contains a reference to the provisions on the disqualification and partiality of state judges (Sections 19 *et seqq*. Austrian Court Jurisdiction Act). The Supreme Court recently confirmed that these provisions may nevertheless serve as a guideline for the challenge of arbitrators. However, the specific standard of review for arbitrators must be taken into account.

The Austrian Supreme Court recently held that it is sufficient for the challenge of an arbitrator that, from an objective point of view, there is an appearance of bias. In each individual case it will therefore have to be examined whether, from the perspective of a reasonable and informed third party, there could be justified doubts as to the independence and impartiality of the arbitrator. On the face of it, a third party must not have the impression that the arbitrator is guided in his decision-making by considerations which are not of a purely factual nature (Supreme Court ruling of 23 July 2020, docket no. 18 ONc 1/20x).

The fact that the arbitrator and a party representative jointly represent a party in other proceedings during ongoing arbitral proceedings pursuant to the Austrian Supreme Court constitutes an appearance of partiality (Austrian Supreme Court ruling of 15 May 2019, docket no. 18 ONc 1/19w).

In the case cited above, the challenged arbitrator was a partner in a limited liability company ("*Rechtsanwälte-GmbH*"). After the constitution of the arbitral tribunal, this limited liability company was appointed by one party to represent it in other arbitral proceedings which were unrelated to the arbitral proceedings in question. Due to the importance of the matter, this party issued a parallel mandate to another law firm. This law firm also represented two defendants in the arbitral proceedings in question. The mandates were awarded to the two law firms independently of each other and without prior consultation. The rejected arbitrator was personally involved in the other case (not only his partners). The Austrian Supreme Court concluded that the intense cooperation which can be expected between the arbitrator and the representative of the defendant in the other case, throughout the arbitral proceedings in question, creates the appearance of bias and thus granted the claimant's request for the challenge.

Ultimately, the Supreme Court focuses on whether there is an appearance of such a degree of familiarity ("*solches Maß an Vertrautheit*") between the arbitrator and a party representative which usually prevents an unbiased assessment of the case. The Supreme Court assumes this, for example, in cases where the arbitrator goes for lunch with a party representative, although the opposing side had already rejected the arbitrator twice. In one recent case, the Supreme Court, however, dismissed a challenge of an arbitrator which was argued on the basis of the arbitrator's close professional relationship with the party representative of the opposing party due to the lack of a *prima facie* case of such a degree of familiarity (Supreme Court ruling of 23 July 2020, docket no. 18 ONc 1/20x).

In another recent case, the Supreme Court rendered a ruling on challenges of one arbitrator and the whole arbitral tribunal, respectively. The applicants alleging bias complained that the arbitral tribunal decided to hold the evidentiary hearing via videoconference due to the COVID-19 pandemic even though it had opposed an online hearing before. Furthermore, the applicants complained that the hearing started at 6am for the applicants' representative, who is based in Los Angeles. Also, the applicants argued that one of the arbitrators made a facial expression when a representative of the applicants made her presentation, which the applicant alleged was a sign of bias. In this case, the Supreme Court – from an objective point of view – did not find any appearance of bias (Supreme Court ruling of 23 July 2020, docket no. 18 ONc 3/20s).

Procedure for challenges

The ACCP provides for a default procedure for the challenge of an arbitrator; however, the parties are free to determine a different procedure. Often, the institutional rules agreed on by the parties contain provisions on the challenge of arbitrators.

If the parties have not agreed on certain rules, the party who seeks to challenge an arbitrator shall submit a written statement of the grounds for the challenge to the arbitral tribunal within four weeks of becoming aware of the composition of the arbitral tribunal, or after becoming aware of any circumstances giving rise to justifiable doubts as to the arbitrator's impartiality. Unless the challenged arbitrator resigns, the arbitral tribunal (including the challenged arbitrator) decides on the challenge.

If a challenge under the agreed or default procedure is not successful, the party has a mandatory right to recourse to the state court. Arbitral proceedings may be continued while challenge proceedings are pending.

Liability of arbitrators

Arbitrators who do not fulfil the obligations assumed by acceptance of their appointment, or who do not fulfil their obligations in a timely manner, are liable to the parties for all losses caused by their wrongful refusal or delay in fulfilling their obligations (Section 594 ACCP).

Pursuant to jurisprudence of the Austrian Supreme Court, liability of the arbitrator for violation of contract (other than refusal or delay in fulfilling their obligation) can only arise if the award was set aside.

Interim relief

In line with the UNCITRAL Model Law, Austrian statutory law provides that the existence of an arbitration agreement does not prevent the parties from seeking interim relief from the competent state courts, irrespective of whether an arbitral tribunal is already constituted or not (Section 585 ACCP).

While parties may exclude the arbitrators' competence to render interim relief, the state court's competence to do so is mandatory. Consequently, Article 28 para. 2 of the ICC Rules of Arbitration and Article 25 para. 3 of the London Court of International Arbitration ("**LCIA**") Arbitration Rules, which limit the parties' right to request interim relief from state courts after the constitution of the arbitral tribunal, are void under Austrian law.

The mere fact that an arbitration is seated in Austria, however, does not provide for the jurisdiction of Austrian courts to render interim relief. Austrian courts are competent to render interim measures when either the place of residence or seat of the defendant is in Austria, or any assets to be seized are located in Austria, or a third-party debtor which is the addressee of a measure resides in Austria (Section 387 para. 2 Austrian Enforcement Act, "**EA**").

Pursuant to Section 593 para. 1 ACCP, the arbitral tribunal may only order interim relief upon request. Arbitrators may order any interim relief they deem appropriate. However, since arbitrators have no coercive powers, interim measures may only be enforced by the competent courts. If the interim relief is unknown to Austrian law, the court enforcing it will interpret the relief to grant the closest equivalent remedy known to Austrian law.

Emergency arbitrators

Emergency arbitration is a relatively new phenomenon in international arbitration. The so-called emergency arbitrators may order interim measures when the arbitration has not

yet been commenced and/or the arbitral tribunal is not yet constituted. Neither the ACCP nor the Vienna Rules contain any provision on emergency arbitral proceedings. The reason for this lies in, *inter alia*, the issues regarding the international enforceability of orders of an emergency arbitrator. Pursuant to prevailing legal doctrine, arbitral orders are not enforceable under the New York Convention. It is disputed whether interim measures rendered as arbitral awards are enforceable.

There are, however, several arbitration rules which contain provisions on emergency arbitral proceedings, such as the ICC Rules of Arbitration or the Swiss Rules. An emergency arbitrator is generally appointed by the arbitral institution.

Pursuant to Article 29 of the ICC Rules of Arbitration, an application for interim or conservatory relief by an emergency arbitrator will only be accepted by the ICC Secretariat if it is received prior to the transmission of the file to the arbitral tribunal and irrespective of whether the party making the application has already submitted its Request for Arbitration. Also, recourse to emergency arbitral proceedings is not possible where the arbitration agreement has not yet been signed. Under the ICC Rules of Arbitration, the emergency arbitrator's decision shall take the form of an order. Importantly, where the emergency arbitrator ordered interim measures, such an order will not bind the arbitral tribunal with respect to any question, issue or dispute determined therein. Pursuant to Article 29 para. 3 of the ICC Rules of Arbitration, the arbitral tribunal may modify, terminate or annul the order or any modification thereto. However, the emergency arbitration foreseen under the ICC Rules of Arbitration does not prevent the parties from requesting interim relief from the competent state court.

Arbitration award

Rendering the award

Arbitral awards shall be made in writing and be signed by the arbitrator or arbitrators. Unless the parties have agreed otherwise, in arbitral proceedings with more than one arbitrator, the signature of the majority of all members of the arbitral tribunal shall suffice, provided that the chairman or another arbitrator notes the obstacle which prevented the missing signature on the award (Section 606 ACCP).

Austrian law does not contain express provisions as to how the award is to be served on the parties. Since the date of service is relevant for the legal effects of the award, service should be made by registered mail, courier service or other means, ensuring that the date of service is recorded.

There is no statutory time limit under Austrian law for the award to be rendered.

Reimbursement of costs

The arbitral tribunal shall decide on the obligation of the parties to reimburse the costs of the proceedings (unless agreed otherwise by the parties). At its discretion, the tribunal can take into account the circumstances of the case, especially but not exclusively its outcome. The obligation to reimburse costs may include all reasonable costs, appropriate for bringing the action or defence. The arbitral tribunal's broad discretion in awarding costs was recently confirmed by the Austrian Supreme Court (Supreme Court ruling of 15 January 2020, docket no. 18 OCg 12/19t).

The decision on the obligation for reimbursement of costs and the determination of the respective amount shall be made in the form of an arbitral award (Section 609 ACCP).

Challenge of the arbitration award

The only recourse to a court against an arbitral award is the application to set aside the award. Consequently, courts may not review an arbitral award on its merits and there are no appeals against an arbitral award. Challenges of arbitral awards of tribunals seated in Austria are decided by the Austrian Supreme Court as first and final instance, except for disputes with consumers and in labour disputes (Section 615 *et seq.* ACCP). In general, the deadline to file a request to set aside is three months from the day on which the arbitral award was received.

Both awards on jurisdiction and on merits may be challenged under very narrow grounds (Section 611 ACCP). The grounds for challenging an arbitral award under Austrian law correspond to the UNCITRAL Model Law and Article V of the New York Convention and include, *inter alia*:

- lack of a valid arbitration agreement;
- violation of the right to be heard;
- a decision was rendered beyond the scope of the arbitration agreement;
- an arbitral tribunal constituted in violation of Austrian law or the agreement of the parties;
- the conduct of the proceedings violates the procedural *ordre public* (public policy);
- the matter of the dispute is not arbitrable; and
- the arbitral award violates Austrian substantive *ordre public*.

In 2013, the Austrian Supreme Court stated that, in principle, grounds for challenges of arbitrators which come to light after the award has been rendered may in general not be asserted in setting aside proceedings. Exceptions of this rule may only be made in severe and unambiguous cases. In 2019, the Austrian Supreme Court overruled its previous decision and determined that the limitation to blatant cases of bias is no longer justified, and that grounds for challenges of an arbitrator which become known only after an award has been rendered can be asserted with an action for annulment if it was not possible to assert the grounds to challenge the arbitrator during the arbitral proceedings. Recently, the Austrian Supreme Court also decided allegations of bias in three setting aside proceedings. The request to set aside the awards was based on, *inter alia*, the violation of the procedural *ordre public* (Austrian Supreme Court rulings of 23 July 2020, docket nos 18 OCg 3/20w, 18 OCg 2/20y and 18 OCg 1/20a). In all three cases, the Supreme Court dismissed the claims for annulment of the arbitral awards, since the claimants did not challenge the arbitrators in the arbitral proceedings even though the alleged bias was already discussed during the arbitral hearings.

If an award is set aside due to the lack of jurisdiction of the tribunal, the statute of limitations remains interrupted only if the claim is immediately brought before the competent forum (Section 584 para. 4 ACCP).

Enforcement of the arbitration award

Enforcement proceedings in Austria provide different rules on the enforcement of "domestic" awards – awards rendered by tribunals seated within Austria – and the enforcement of "foreign" awards – by tribunals seated abroad.

If an award is domestic, it can be enforced like a judgment by an Austrian state court. Enforcement can be requested at the district court where the obliged is domiciled or at the district court where the enforcement will be undertaken.

Foreign awards are subject to recognition and enforcement proceedings governed by the EA unless otherwise provided by international law or legal acts of the European Union.

The district courts are competent to issue a declaration of enforceability and enforce the recognised awards. The district court as the court of first instance renders an *ex parte* decision – i.e., a decision without hearing the opposing party. This court order can be appealed by both parties within four weeks.

A party seeking recognition and a declaration of enforceability of a foreign arbitral award must submit the arbitral award (original or a certified copy) as well as a translation into German, if the award is in another language (either by a certified translator or certified by a diplomatic or consular representative, Article IV of the New York Convention). The arbitration agreement itself only needs to be submitted to the court upon its request.

The enforceability of a foreign award is to be confirmed if it is enforceable in the state where the award was rendered and reciprocity regarding the enforcement is established by international treaties. As international treaties – such as the New York Convention – take precedence over the EA in this context, the grounds for refusing enforcement and recognition contained in the EA are obsolete in practice.

Generally, Austrian courts in enforcement proceedings take a pro-arbitration approach. Even foreign awards that have been set aside at the seat of the arbitration are not automatically refused enforcement. The Austrian court would independently examine the grounds to refuse enforcement.

The initiation of setting aside proceedings does not inhibit the enforcement of the award. The defendant in the enforcement proceedings may, however, request that the enforcement proceedings are deferred due to pending setting aside proceedings (Section 42 para. 1 item 2 EA). The claimant may request that the deferral of the enforcement proceedings be made dependent on the defendant paying a security deposit, if otherwise a subsequent enforcement of the award may fail.

Recently, the Austrian Supreme Court confirmed its previously held approach to the question of whether an arbitral award that has not yet become binding may be declared enforceable. In cases where a party-established higher arbitral tribunal (here in an arbitration under Czech Arbitration Law) does not reject a petition filed for review of the award or does not uphold the award after review, the arbitral proceedings are not finalised and thus the award is not binding. In such cases, the ground to refuse enforcement under Article V para. 1 subsection e of the New York Convention is established (Austrian Supreme Court ruling of 29 April 2020, docket no. 3 Ob 182/19i).

In another recent decision, the Austrian Supreme Court denied the enforcement of an award where one of the three arbitrators was factually excluded from the decision-rendering process. The tribunal could not agree on a ruling after closing of the evidentiary proceedings. It was then anticipated that the tribunal would reconvene to further discuss a ruling. In violation of this agreement among the arbitrators, the chairperson subsequently circulated a draft award, signed by the chairperson and the second arbitrator, and demanded that the third arbitrator sign the award. This draft award denied requests by the parties made after the closing of the evidentiary proceedings. The Austrian Supreme Court did not take issue with the fact that the award itself was not unanimous, but with the fact that one arbitrator was not involved in the process of determining the ruling. The Austrian Supreme Court concluded that such conduct was a violation of the procedural *ordre public* as it did not allow for a fair establishment of an award and thus violated the fundamental principles of Austrian procedural law (Austrian Supreme Court ruling of 19 November 2019, docket no. 3 Ob 13/19m).

Investment arbitration

By the end of 2020, ICSID counted 155 contracting and eight signatory states. For Austria, the ICSID Convention has been in force since 24 June 1971. While only one arbitral investment proceeding against the Republic of Austria has been conducted and concluded under the ICSID rules, plaintiffs with Austrian nationality increasingly assert claims out of investment treaties. Since early 2021, nine arbitral investment proceedings in which Austrian companies acted as plaintiffs have been successfully concluded under the ICSID rules, whereas 11 proceedings are still pending.

The fate of bilateral investment treaties ("**BITs**") between EU Member States was and still is hotly debated. According to the statement of the European Commission of 24 October 2019, EU Member States have agreed on a plurilateral treaty to terminate intra-EU BITs considering the recent judgment of the European Court of Justice ("**ECJ**") of 6 March 2018 ("***Achmea* Judgment**"), in which it was confirmed that intra-EU BITs are in breach of EU law. This also affects Austria, as it is party to 12 intra-EU BITs.

At the beginning of 2019, EU Member States had already issued a political declaration intending to terminate all intra-EU BITs by 6 December 2019. If EU Member States do not comply and subsequently do not terminate their intra-EU BITs, the European Commission has announced it will consider resuming or initiating infringement procedures against concerned Member States, as a few have not yet endorsed the text of the Termination Agreement.

On 5 May 2020, 23 EU Member States signed the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union ("**Termination Agreement**"). Following ratification by Denmark and Hungary, the Termination Agreement entered into force on 29 August 2020. However, Austria is one of those Member States that have not yet signed the agreement.

The Termination Agreement provides for the termination of around 130 intra-EU BITs as well as their sunset clauses. In addition, the Termination Agreement stipulates termination of the sunset clauses of already terminated intra-EU BITs and deprives them of legal effect. Article 5 stipulates explicitly that arbitration clauses cannot serve as the legal bases for new arbitral proceedings.

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Corporate Tax
Employment & Labour Law
Energy
Fintech
Fund Finance
Initial Public Offerings
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Pricing & Reimbursement

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