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Austria: Law and Practice & Trends and Developments

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KNOETZL

AUSTRIA

Law and Practice

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KNOETZL is Austria's premier dispute resolution powerhouse, which has successfully developed into Austria's largest dispute resolution team. The arbitration practice encompasses international commercial arbitration, investment protection, and arbitration-related court proceedings. Key industries include construction and engineering, energy, banking, automotive, aviation, IT and telecommunications, life sciences, healthcare and pharmaceuticals. Members of the arbitration team have successfully acted as counsel in some of the largest and most complex disputes in the CEE region in recent decades, under all the major arbitration rules. KNOETZL lawyers act as arbitrators in a wide array of industries. Members of the firm are recognised as leading arbitration specialists and hold roles in major arbitral institutions and associations.

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1. General

1.1 Prevalence of Arbitration

Austria has long been established as a European hub for international arbitration and Vienna – in particular, as the capital city – is a preferred venue for arbitrations related to the SEE and CEE regions. The legal community boasts a number of arbitration specialists providing high-end counsel and arbitration services. The Vienna International Arbitral Centre of the Federal Economic Chamber (VIAC) provides excellent administration of international arbitrations. The relevance of Austria as a seat for arbitrations is reflected by the opening of a regional office of the Permanent Court of Arbitration (PCA) in Vienna. This development is set to further boost the importance of Vienna as a significant arbitration hub.

1.2 Key Industries

There has been a notable increase in arbitration activity in domestic disputes, particularly concerning energy-related disputes, as well as in construction and engineering. In the international context, energy-related disputes are on the rise in Austria, owing to the changing dynamics in the European energy market affected by the Russia–Ukraine war. The financial services and banking sector is also increasingly turning to arbitration for dispute resolution. This increase is primarily due to the higher perception of arbitration as a suitable form of dispute resolution for complex disputes but also disputes in the finance market.

1.3 Arbitration Institutions

The majority of international arbitrations in Austria are administered either by the VIAC under the Vienna Rules or by the International Court of Arbitration of the International Chamber of Commerce (ICC) under the ICC Rules of Arbitration.

A particular point of note is that VIAC issued as the first European arbitral institution a specific set of Investment Arbitration and Mediation Rules, in force since 1 July 2021, and thus expanded its institutional competence to investment arbitration cases.

A number of arbitrations with seat in Austria are also conducted under the rules of other renowned arbitral institutions, such as the German Arbitration Institute (*Deutsche Institution für Schiedsgerichtsbarkeit*, or DIS), the LCIA, and the Swiss Arbitration Centre. Austria is often also the chosen place of arbitration in ad hoc proceedings conducted under, for example, the UNCITRAL Arbitration Rules.

1.4 National Courts

Austrian law provides for direct recourse to a specialised chamber of the Austrian Supreme Court (*Oberster Gerichtshof*, or OGH) as the first and final instance in proceedings to nominate or challenge arbitrators and to set aside an arbitral award. Practice in setting-aside proceedings has shown that well-reasoned decisions are generally rendered expeditiously (six to eight months, on average).

As regards enforcement proceedings, the competence for the recognition and enforcement of foreign arbitral awards remains with the district courts, generally at the place where the debtor or the assets are located.

2. Governing Legislation

2.1 Governing Law

If the seat of the arbitration is in Austria, the arbitration proceedings will be governed by Austrian arbitration law. This is contained in the Fourth

Chapter of the Austrian Code of Civil Procedure (CCP) (Sections 577-618 of the CCP).

Since 2006, the legislation governing arbitration in Austria has been largely based on the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law"), with only a few minor deviations. Significantly, Austrian arbitration law does not differentiate between domestic and international arbitration.

2.2 Changes to National Law

There have been no changes to Austrian arbitration law in the past year, nor are there any changes planned in the immediate future. Any discussions regarding possible legislative changes are limited to clarifications (eg, regarding the delimitation of consumer and corporate disputes) and reinforcing Austria as an arbitration-friendly jurisdiction.

3. The Arbitration Agreement

3.1 Enforceability

Austrian law requires that the arbitration agreement must identify the parties and the dispute or a defined legal relationship that are subject to the arbitration clause. Furthermore, the arbitration agreement must be in writing, either as part of a document signed by the parties or as an exchange of letters, telefax, emails or any other means of communication that provides a record of the arbitration agreement. As regards the exchange of documents, the Austrian Supreme Court has clarified that "exchanged documents" do not need to be signed, regardless of the means of communication used. Additional form requirements must be met if consumers or employees are parties to the arbitration agreements.

3.2 Arbitrability

The definition of arbitrability is broad. The general rule is that pecuniary claims are usually arbitrable, whereas non-pecuniary claims are arbitrable if the parties have the capacity to enter into a settlement agreement with regard to the specific claim at issue. Disputes that fall under the competence of the administrative authorities are not arbitrable.

Family law matters and all claims based on contracts that are – even only partly – subject to the Tenancy Act (*Mietrechtsgesetz*) or the Non-Profit Housing Act (*Wohnungsgemeinnützigkeitsgesetz*) cannot be made subject to an arbitration agreement, nor can claims concerning condominium property. In addition, certain (collective) labour and social security matters are not arbitrable.

Disputes involving consumers or employees may only be submitted to arbitration (with additional form requirements) after the dispute has arisen. The additional form requirements are extensive and lead to a very high threshold for validly concluding an arbitration agreement with consumers or employees, rendering arbitration agreements in these areas impracticable. In 2021, the Austrian Supreme Court clarified that beneficiaries of a private foundation (*Privatstiftung*) are not subject to these restrictions in the event of a dispute between the beneficiaries and the foundation (OGH 18 OCg 1/21b).

In 2024, the Austrian Supreme Court addressed the objective arbitrability of disputes concerning shareholder resolutions in private limited partnerships if only some but not all shareholders are parties to the arbitration. The Austrian Supreme Court ruled that the arbitration must ensure the inclusion of all shareholders. In the absence of a mechanism that includes all shareholders and

ensures legal effect on all shareholders, such shareholder disputes are objectively not arbitrable (OGH 18 OCg 3/22y).

3.3 National Courts' Approach

Austrian arbitration law does not provide rules to determine the law applicable to the arbitration agreement. The Austrian Supreme Court applies the conflict-of-laws rule contained in Article V (1) lit a of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention") in order to determine the law applicable to the arbitration agreement outside the context of enforcement proceedings. Accordingly, the Austrian Supreme Court applies the law selected by party agreement. Such choice of law may also be agreed implicitly. A choice-of-law clause in the main contract may also extend to the arbitration agreement.

At the same time, the Austrian Supreme Court has recognised the separate legal nature of an arbitration agreement and has emphasised that it is appropriate to determine the law applicable to an arbitration agreement on a case-by-case basis (see, for example, OGH 18 OCg 1/15v). In the absence of a choice of law, the law of the seat of the arbitration governs the arbitration agreement (see, for example, OGH 3 Ob 153/18y).

Austrian legislation and the courts are arbitration-friendly in terms of enforcing arbitration agreements. In practice, courts apply the principle of "in favorem validitatis" – ie, when in doubt, the courts will interpret the intended scope of an agreement to favour arbitration (see, for example, OGH 18 OCg 6/20m).

3.4 Validity

Although legislation governing arbitration in Austria is based on the UNCITRAL Model Law, the specific wording of Article 16 (1) of the UNCITRAL Model Law concerning separability was not adopted. However, the doctrine of separability is recognised by the courts, which evaluate the question of the validity of an arbitration clause contained in an invalid contract on a case-by-case basis by interpreting the intention of the parties (see, for example, OGH 18 OCg 1/15v). In practice, this will usually lead to the determination that the parties' intent was that the arbitration agreement remains valid if the contract is null and void or terminated. Where the main contract is terminated by consent, the courts have held that the arbitration clause contained in the contract may also be considered terminated if the parties' intention was to terminate the entire contractual relationship.

4. The Arbitral Tribunal

4.1 Limits on Selection

The parties are free to agree on a procedure to select the arbitrators. The only limitation under Austrian arbitration law is that an arbitral tribunal must not consist of an even number of arbitrators and that sitting Austrian judges are prohibited by law from accepting arbitrator mandates.

4.2 Default Procedures

Austrian law provides for a default procedure if the parties have failed to designate a method for selecting arbitrators or if the chosen selection procedure fails. However, in most cases, the parties will have chosen a set of institutional arbitration rules that deal with this issue.

As a default, Austrian law provides that there shall be three arbitrators. In principle, each party

shall nominate the same number of arbitrators. However, Austrian law does allow for the joint appointment of one arbitrator by several parties – for example, in the case of multiparty arbitrations.

If the parties have not determined a procedure for the appointment of the arbitrators, a sole arbitrator will be jointly appointed by agreement of the parties. A panel of arbitrators will be appointed by each party appointing one arbitrator and then these two party-appointed arbitrators will appoint the president of the arbitral tribunal. If a party fails to appoint an arbitrator or if no agreement can be found regarding the appointment of a sole arbitrator or the president of the arbitral tribunal or in multiparty arbitrations, a party may apply to the Austrian Supreme Court to make the default appointment.

4.3 Court Intervention

Courts are only involved in the appointment of arbitrators upon the application of (one of) the parties to support the arbitral process. If there is no default procedure agreed upon by the parties, a party can request the court to appoint an arbitrator if the other party fails to do so, or if no agreement can be reached regarding the appointment of an arbitrator, or in multiparty arbitrations. The Austrian Supreme Court will give due regard to the requirements provided for in the parties' agreement if such agreement exists (see, for example, OGH 18 ONc 1/22z). Unless the parties have provided otherwise, the courts may also be called upon to decide on the application to remove an arbitrator (eg, owing to lack of independence or impartiality).

4.4 Challenge and Removal of Arbitrators

Austrian law provides for a default procedure if the parties have failed to agree on a challenge procedure (eg, by reference to institutional rules). The challenging party must submit a written statement of the reasons for the challenge to the arbitral tribunal, which gives the challenged arbitrator the opportunity to resign from office, or the other party may agree that the challenged arbitrator will be removed. If the challenged arbitrator does not resign or is not removed upon mutual agreement of the parties, the arbitral tribunal (including the challenged arbitrator) must decide on the challenge. If the challenge is unsuccessful before the arbitral tribunal, the challenging party may within four weeks apply to the Austrian Supreme Court as the court of first and last instance to decide on the challenge.

If a challenge pursuant to an agreed challenge procedure (eg, contained in institutional rules) is not successful, the challenging party may then apply to the Austrian Supreme Court for a review of the challenge decision within four weeks of receiving the decision. The option to appeal to the Austrian Supreme Court in these cases is mandatory and may not be waived.

The legal standard for the challenge of an arbitrator is:

- justifiable doubts concerning their impartiality or independence; or
- the failure of an arbitrator to meet specific requirements set out in the parties' agreement.

The Austrian Supreme Court routinely applies the International Bar Association Guidelines on Conflicts of Interest in International Arbitration as non-binding guidelines. The mere fact that an arbitrator has not disclosed circumstances that may give rise to doubts concerning their impartiality or independence alone is not per se a ground for a challenge.

4.5 Arbitrator Requirements

Arbitrators are required to be independent and impartial. Prior to accepting an appointment, the prospective arbitrator must disclose any circumstances that are likely to give rise to doubts concerning their impartiality or independence. The obligation to disclose such circumstances is ongoing throughout the arbitral proceedings.

According to decisions of the Austrian Supreme Court, the test is whether the circumstances of the case objectively lead to justifiable doubts regarding the arbitrator's independence and impartiality (see most recently, for example, OGH 18 OCg5/20i).

5. Jurisdiction

5.1 Matters Excluded From Arbitration

Disputes that fall into the competence of the administrative authorities are not arbitrable; the same applies to certain (collective) labour and social security matters, and to family law matters and claims based on contracts that are – even only partly – subject to the Tenancy Act or the Non-Profit Housing Act, as well as claims concerning condominium property. Please see **3.2 Arbitrability** for further details.

5.2 Challenges to Jurisdiction

Austrian arbitration law recognises the principle of "competence-competence". The arbitral tribunal may rule on a party's challenge to its own jurisdiction.

Lack of jurisdiction of the arbitral tribunal may also be raised as a ground to set aside an arbitral award, including a partial award on jurisdiction. If the place of arbitration is Austria and such proceedings are initiated, the question of jurisdiction will be reviewed and ultimately decided by the Austrian Supreme Court.

5.3 Circumstances for Court Intervention

Under Austrian law, the courts may only address matters concerning arbitration in limited cases and upon the request of a party.

The rules on jurisdiction generally favour arbitration over court proceedings. Therefore, if a court action involving a matter that is subject to an arbitration agreement is initiated, the court must dismiss the claim – unless either:

- the other party enters into the merits of the dispute without raising a jurisdictional objection; or
- after an objection has been raised, the court finds that the arbitration agreement does not exist or is incapable of being performed.

If an action is brought before a court while arbitral proceedings are already pending, the court must dismiss the action, unless a party has already challenged the jurisdiction of the arbitral tribunal in the arbitration proceedings and – exceptionally – if the arbitral tribunal is not expected to reach a decision within a reasonable period of time. The initiation of court proceedings does not prevent an arbitration from being initiated or continued, nor an award from being rendered.

Ultimately, the issue of whether (or not) an arbitral tribunal has jurisdiction may also be raised as a ground for setting aside an arbitral award, including an award on jurisdiction.

5.4 Timing of Challenge

The plea that the arbitral tribunal does not have jurisdiction must be raised no later than the first pleading on the substance of the dispute. A party is not precluded from raising such plea by the

fact that it has appointed an arbitrator. The plea that the arbitral tribunal is exceeding the scope of its jurisdiction must be raised as soon as the claim beyond the arbitral tribunal's jurisdiction is made. A belated objection to the tribunal's jurisdiction may be considered by the arbitral tribunal if it considers the delay sufficiently excused.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

In setting-aside proceedings, the Austrian Supreme Court may assess questions of jurisdiction without being bound to the findings of the arbitral tribunal. In practice, there is a discernible bias in favour of upholding arbitral jurisdiction in review proceedings.

5.6 Breach of Arbitration Agreement

As mentioned in **5.3 Circumstances for Court Intervention**, the approach of Austrian courts towards a party who commences court proceedings in breach of an arbitration agreement will be to dismiss the action, unless the other party pleads on the merits of the dispute without raising a jurisdictional objection or if – after an objection has been raised – the court finds that the arbitration agreement does not exist or is incapable of being performed. The courts are generally arbitration-friendly and will observe an arbitration agreement.

5.7 Jurisdiction Over Third Parties

Austrian law does not contain provisions allowing an arbitral tribunal to assume jurisdiction over individuals or entities that are neither party to an arbitration agreement nor signatories to the contract containing the arbitration agreement. However, case law has established that both single and universal legal successors, assignees of a claim or contract, and third-party beneficiaries of contracts are bound by an arbitration agreement even if they are not signatories to the contract (see, for example, OGH 4 Ob 43/21h).

6. Preliminary and Interim Relief

6.1 Types of Relief

Unless otherwise agreed by the parties, arbitral tribunals may award preliminary or interim relief. Such relief may only be awarded by the arbitral tribunal after the other party has been given an opportunity to be heard. A further requirement is that the enforcement of a claim would otherwise be frustrated or that there is a danger that one of the parties may suffer irreparable harm. The relief granted is binding and is enforceable in Austria if it is ordered in writing, signed and served on the parties. Enforcement of interim relief will only be refused if the order suffers from a defect that would allow it to be set aside (if the seat of arbitration is in Austria) or to be refused recognition or enforcement (if the seat of the arbitration is outside Austria).

If an arbitral tribunal grants preliminary or interim relief that contains a remedy unknown to Austrian law, Austrian arbitration law provides that the enforcing court will look at the purpose to be achieved by the remedy and – by means of interpretation, reformulation or even modification of the remedy granted by the arbitral tribunal – grant an equivalent remedy available under Austrian law.

6.2 Role of Courts

Under Austrian arbitration law, parties may turn to the courts or the arbitral tribunal to grant interim relief while arbitration proceedings are pending. There are no provisions on emergency arbitrations.

Although the parties may by agreement exclude the arbitral tribunal's power to grant interim relief, the courts can always be called upon to grant interim relief upon the application of a party both before and after the constitution of the arbitral tribunal. Interim relief granted by a court can only be lifted by the courts and cannot be reversed by an arbitral tribunal. Only the courts have the power to enforce preliminary or interim relief awarded by an arbitral tribunal.

Courts may refuse to enforce measures that would be incompatible with:

- an Austrian court measure that was either requested or issued previously; or
- a foreign court measure that was issued previously and must be recognised.

6.3 Security for Costs

Austrian arbitration law does not contain a provision explicitly granting arbitral tribunals the power to order security for costs. However, this power is understood to be implied in the competence of an arbitral tribunal to award preliminary or interim relief and in the fact that Austrian courts may order security for costs if the enforcement of the cost decision is seriously impaired (ie, due to the lack of enforceability of a judgment abroad).

The Vienna Rules contain a provision granting an arbitral tribunal the power to order security for costs.

7. Procedure

7.1 Governing Rules

Austrian arbitration law grants the parties extensive autonomy in determining the conduct of the arbitration, with only a few mandatory legal provisions that cannot be waived by agreement of the parties. It also provides a framework of default rules that govern the arbitral procedure if the parties have failed to provide for (institutional or other) rules to govern their arbitration proceedings.

7.2 Procedural Steps

The parties are largely free to agree on the manner in which arbitration proceedings are to be conducted. In the absence of an agreement (which may also be a reference to institutional rules), Austrian arbitration law applies as a default rule, and it is otherwise at the discretion of the arbitral tribunal to determine the procedure. Under the Vienna Rules, the arbitrators are free to conduct the proceedings at their discretion (without being required to apply the Austrian non-mandatory arbitration rules), subject to mandatory law and if the parties have not agreed otherwise.

As a mandatory requirement, the arbitrators must observe the parties' right to fair treatment and each party's right to be heard.

7.3 Powers and Duties of Arbitrators

The arbitral tribunal has, inter alia, powers to decide on:

- its own jurisdiction as well as the merits of the case;
- the conduct of the proceedings, where there is no agreement of the parties on the procedure; and
- the admissibility of evidence, and to determine its relevance, materiality and weight.

The arbitral tribunal may also grant preliminary or interim relief. It has the duty to treat the parties fairly and must ensure that each party's right to be heard is observed. Every arbitrator has

the duty to remain independent and impartial throughout the arbitration and has an ongoing obligation to disclose any circumstances that may call their independence or impartiality into question.

7.4 Legal Representatives

There are no particular qualifications or other requirements for legal representatives in arbitration proceedings. Notably, there are no restrictions as to the nationality and/or qualification of counsel.

In proceedings to set aside an arbitral award, there is an obligation to be represented by a lawyer who is admitted to the Bar in Austria.

8. Evidence

8.1 Collection and Submission of Evidence

Austrian arbitration law does not contain any explicit provisions regarding the collection and submission of evidence. In practice, most arbitrators adopt a hybrid approach and will take both civil- and common-law rules on evidence into consideration. By way of example, extensive discovery is rare in international arbitrations conducted in Austria, whereas document production, the use of written witness statements, and extensive cross-examination are standard features of arbitral proceedings in Austria.

Although the client-attorney relationship is privileged under Austrian law, the scope and rules regarding legal privilege are regulated according to the civil law tradition and thus differ from the common-law concept of privilege.

8.2 Rules of Evidence

Austrian law does not contain rules of evidence that apply specifically to arbitral proceedings. The general principle is the free evaluation of evidence. The International Bar Association Rules on the Taking of Evidence in International Arbitration are frequently referred to as guidelines.

8.3 Powers of Compulsion

In general, arbitral tribunals do not have any powers of compulsion but may instead request court assistance regarding the collection of evidence or the interrogation of a witness who does not appear voluntarily. Arbitral tribunals have no power to force a witness to testify or to enjoin a refusing party to produce a document.

An arbitral tribunal that has its seat in Austria may turn to Austrian and foreign courts for legal assistance and may by these means obtain the testimony of a reluctant witness or the production of a document. There is no difference between the witness testimony of parties and unrelated witnesses.

9. Confidentiality

9.1 Extent of Confidentiality

Austrian arbitration law does not contain any explicit provisions on the confidentiality of arbitral proceedings. While arbitral proceedings are private, there is no provision in Austrian law obliging the parties to keep the arbitral proceedings confidential (including pleadings, documents, and the award). If confidentiality is desired, the parties are advised to agree on confidentiality in the arbitration agreement or elsewhere, such as in the terms of reference or a similar document.

The Vienna Rules 2021 contain provisions binding the arbitral institution and arbitrators to con-

fidentiality, but not the parties. Austrian arbitration law does provide that the public may be excluded from setting-aside proceedings if this is requested by one of the parties.

10. The Award

10.1 Legal Requirements

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of the arbitrators, including any arbitral award. The parties may, however, agree otherwise and require a unanimous decision to be rendered. The further requirements for an arbitral award are that it must be made in writing, state the date on which it was rendered and the seat of the arbitration, and be signed by the arbitrator(s). Unless the parties have agreed otherwise, the award must also state the reasons on which it is based.

The making of an award is not subject to any time limits, unless a time limit is agreed by the parties. The revised Vienna Rules 2021 set a time limit for the issuance of an award – ie, an award shall be rendered no later than three months after the last hearing concerning matters to be decided in the award or the filing of the last authorised submission, whichever is later. This time period may be extended by the VIAC's Secretary General upon reasoned request or on their own initiative.

10.2 Types of Remedies

Austrian arbitration law does not contain any express provisions on the types of remedies that an arbitral tribunal may award. Generally, the available remedies – as well as any limits thereto or prescription periods – must be determined by reference to the law applicable to the merits.

The remedy of punitive damages is not known under Austrian law. In principle, the concept of punitive damages is considered contrary to Austrian public policy.

10.3 Recovering Interest and Legal Costs

Austrian arbitration law does not contain any express provisions on whether the parties are entitled to recover interest. In most cases, this will depend on the law applicable to the merits.

Unless the parties have agreed otherwise, they are entitled to recover legal costs (encompassing the reasonable costs of legal representation, the fees of the arbitrators, and – where applicable – the administrative costs charged by the institution). Both Austrian law and the Vienna Rules provide that the arbitral tribunal must render a decision on costs upon termination of the proceedings, including in cases where the arbitral tribunal ultimately finds it has no jurisdiction.

The general practice with regard to allocating costs between the parties is to take into account all circumstances of the case, with a particular focus on the outcome of the proceedings. The Austrian Supreme Court has held (in OGH 18 OCg 5/21s) that it is not a violation of the right to be heard if a party is not granted the opportunity to comment on the other party's cost submission.

Under the Vienna Rules 2021, the arbitral tribunal may – at any stage of the arbitral proceedings and at the request of a party – make a decision on legal costs (ie, excluding the administrative and arbitrator's fees) and order payment. This is primarily intended to apply in cases with separate phases (eg, in the case of bifurcation between jurisdiction and merits).

11. Review of an Award

11.1 Grounds for Appeal

Within three months of the notification of the arbitral award, a party is entitled to initiate a setting-aside action based on one or more of the following grounds:

- a valid arbitration agreement does not exist, or the arbitral tribunal has denied its jurisdiction despite the existence of a valid arbitration agreement, or a party was lacked the capacity to conclude a valid arbitration agreement under the law governing its personal status;
- a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was unable to present its case for other reasons;
- the award deals with a dispute not covered by the arbitration agreement, or contains decisions on matters beyond the scope of the arbitration agreement or the pleas of the parties – if the default concerns only a part of the award that can be separated, only that part of the award shall be set aside;
- the composition or constitution of the arbitral tribunal was not in accordance with a provision of the arbitration law or with a permissible agreement of the parties;
- the arbitral proceedings were conducted in a manner that conflicts with the fundamental values of the Austrian legal system (ordre public);
- the requirements according to which a court judgment can be appealed by an action for revision under Section 530, paragraph 1, numbers 1–5 of the CCP have been met (note that these grounds for revision relate to the scenario in which the decision was based on a fraudulent action or a forged document – or a criminal verdict that has since been reversed – and that the three-month time period to file the action for setting aside does not apply in this circumstance);
- the subject matter of the dispute is not arbitrable under Austrian law; or
- the arbitral award conflicts with the fundamental values of the Austrian legal system (ordre public).

There are additional grounds to set aside an arbitral award rendered in arbitral proceedings in which either a consumer or an employee was involved.

The action to set aside an award is to be filed with the Austrian Supreme Court, which will decide as first and last instance – ie, without the possibility of a further appeal. Practice has shown that a well-reasoned decision will usually be rendered within six to eight months.

11.2 Excluding/Expanding the Scope of Appeal

Under Austrian law, parties cannot agree to exclude or expand the scope of an appeal or challenge.

11.3 Standard of Judicial Review

It is firmly established in the case law of the Austrian Supreme Court that there is no *révision au fond* of the merits of the case (OGH 5 Ob 272/07x). This principle is strictly applied and the Austrian Supreme Court has consistently refused to entertain a review of the merits of the arbitral decision when claimants in setting-aside proceedings have requested this in the guise of annulment grounds.

12. Enforcement of an Award

12.1 New York Convention

Austria has ratified the New York Convention without reservation. Austria is also a contracting state to several other multilateral conventions on the recognition and enforcement of arbitral awards, including the 1961 European Convention on International Commercial Arbitration and the Geneva Convention on the Execution of Foreign Arbitral Awards (1927), as well as a number of bilateral agreements governing the reciprocal recognition and enforcement of arbitral awards. Moreover, Austria has ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, as well as numerous bilateral investment treaties.

12.2 Enforcement Procedure

Arbitral awards are deemed to be equivalent to judgments of state courts and thus will be enforced in the same way – ie, by means of an application to the district court (*bezirksgericht*) of the district where the respondent has its seat or where the object, asset or third-party debtor that will serve to satisfy the claimant's request for enforcement is registered or located.

An authenticated original or a duly certified copy of the arbitral award must be submitted together with the application for enforcement. The original or a certified copy of the arbitration agreement need only be presented upon a request from the court.

If the arbitration was seated outside Austria, the award must first be formally recognised and declared enforceable (pursuant to the New York Convention or other multilateral or bilateral treaties) by the district court that is competent for enforcement. The application for recognition can be made together with the request for enforcement and the courts will decide simultaneously on both requests. After being declared enforceable, the foreign award is treated as a domestic arbitral award – ie, equivalent to the judgment of an Austrian court.

There is no automatic suspension of the enforcement of an arbitral award if setting-aside proceedings have been initiated. However, upon the application of a party (usually the award debtor), the court may – but is not obliged to – stay enforcement proceedings until a final decision is rendered in the setting-aside proceedings. A pragmatic solution employed by Austrian courts in this situation is to make continuation of the enforcement subject to the posting of security by the award creditor.

If the arbitral award is set aside, the effects thereof depend on the applicable law and the international treaty governing its recognition and enforcement. An arbitral award that has been set aside by the Austrian courts will not be enforced in Austria. As regards foreign awards, the Austrian courts do not normally enforce arbitral awards that have been set aside under the regime of the New York Convention. However, the Austrian Supreme Court has held (in OGH 3 Ob 2/21x) that it is a precondition that the (foreign) setting-aside proceedings do not violate Austrian public policy. Under the regime of the European Convention, the Austrian courts have also previously recognised and enforced a foreign arbitral award that had been set aside.

At the enforcement stage, a state or state entity may attempt to raise the defence of sovereign immunity. However, Austrian courts will only consider sovereign immunity in connection with sovereign acts, but not if the state or state entity acted in a private capacity. The burden of proof

for these circumstances lies with the state or state entity invoking immunity.

12.3 Approach of the Courts

The general approach of the courts towards the recognition and enforcement of arbitral awards is pragmatic and the grounds listed in the applicable conventions are interpreted restrictively. Although the opposing party will be granted the opportunity to raise grounds based on which it believes the recognition and enforcement of the award will be refused, these grounds are interpreted narrowly. This applies to public policy, in particular – where a high threshold must be reached in order to be considered a sufficient reason to refuse recognition and enforcement.

13. Miscellaneous

13.1 Class Action or Group Arbitration

In 2020, the EU Directive on Representative Actions for the Protection of the Collective Interests of Consumers (EU 2020/1828) came into force. Austria is currently in the process of implementing this directive, which provides for collective redress for consumers before state courts. In addition, various rules that apply to multiparty proceedings before state courts are used as the basis for group actions.

The Austrian Arbitration Act does not contain provisions regarding class action or group arbitration. Provided there is a valid arbitration agreement in place, there is no reason to assume that the same cannot apply to group arbitrations, given the fact that Austrian arbitration law contains rules regarding the appointment of arbitrators in multiparty arbitrations. However, specifically with regard to class-action arbitrations that involve consumers, the limitations of Section 617 of the CCP would pose a hurdle. Please see **3.2 Arbitrability** for further details on consumers.

13.2 Ethical Codes

The conduct of the legal profession in Austria is subject to the Code of Professional Conduct for Lawyers (*Rechtsanwaltsordnung*), as well as to numerous EU regulations. Although none of these expressly refer to international arbitration, it is common practice to apply them also in arbitral proceedings. Lawyers must not make allegations they know to be false. However, there is no obligation to verify the truthfulness of the information given by a client or a witness. Foreign lawyers acting in arbitrations seated in Austria are not bound by Austrian professional ethics rules but are generally understood to be bound by the ethics rules of their respective home jurisdiction.

13.3 Third-Party Funding

The Austrian market shows that third-party funding is a well-established practice in litigation and arbitration. This is also evident from the increasing number of third-party funders active in the Austrian market.

The Vienna Rules 2021 have sought to bring more transparency to the process by requiring parties to disclose the existence of any third-party funding and the identity of the third-party funder (as defined in Article 6 of the Vienna Rules 2021). This shall ensure the independence and impartiality of the arbitrators through appropriate disclosure.

Otherwise, there are no express provisions on third-party funding under Austrian law – although there are two rules that could be understood to limit it, as follows.

- First, Austrian law requires the claim to be made (litigated) by the person who owns it – ie, it is not permissible for a claim to be made in one person's name but on behalf of another person.
- Second, it is forbidden for attorneys to enter into contingency fee arrangements (quota litis).

13.4 Consolidation

While Austrian arbitration law does not provide for rules regarding the consolidation of separate arbitral proceedings, it is considered permissible.

The Vienna Rules 2021 allow for the consolidation of separate arbitral proceedings – for example, if the seat of arbitration in all of the arbitration agreements is the same and the parties agree to the consolidation or if the same arbitrators were nominated for all proceedings concerned.

13.5 Binding of Third Parties

As a general rule in Austria, only the signatories to an arbitration agreement are bound by it – although there are exceptions. Notably, it has been established by case law of the Austrian Supreme Court that legal successors and third-party beneficiaries are bound by the arbitration agreement. Please see **5.7 Jurisdiction Over Third Parties** for further details.

Trends and Developments

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KNOETZL

KNOETZL is Austria's premier dispute resolution powerhouse, which has successfully developed into Austria's largest dispute resolution team. The arbitration practice encompasses international commercial arbitration, investment protection, and arbitration-related court proceedings. Key industries include construction and engineering, energy, banking, automotive, aviation, IT and telecommunications, life sciences, healthcare and pharmaceuticals. Members of the arbitration team have successfully acted as counsel in some of the largest and most complex disputes in the CEE region in recent decades, under all the major arbitration rules. KNOETZL lawyers act as arbitrators in a wide array of industries. Members of the firm are recognised as leading arbitration specialists and hold roles in major arbitral institutions and associations.

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Introduction

Austria, with its capital city of Vienna, has a long-standing history as a hub for settling international disputes and is known to be a reliable and hospitable seat for arbitrations. Austria offers a modern and arbitration-friendly legal environment and Vienna's excellent infrastructure in which to hold large arbitration hearings. Often said to be the gateway to Eastern Europe, Vienna is frequently selected as the seat of arbitration by parties from the CEE and SEE regions. However, its ever-growing arbitration landscape and professionalism attract parties from around the world, who choose Austria as the seat of arbitration.

This development is also reflected by the number of international organisations seated in Vienna. The newest prominent addition is the Permanent Court of Arbitration (PCA). The PCA, which has its main seat in The Hague, opened its regional office in Vienna in April 2022 – making Vienna its fourth regional office, after Singapore, Mauritius and Buenos Aires. The PCA's opening of a regional office was triggered by a growth in demand for its services in Europe, including the administration of arbitration hearings.

In addition to an internationally recognised professional arbitration community, it is also the high quality of the courts that make Austria recommendable as a seat for arbitrations. The Austrian Supreme Court – with its exclusive jurisdiction at first and last instance to decide applications to set aside awards rendered within its jurisdiction – has shown efficiency and consistency in its judgments, which reflect a deep understanding of the subject matter and a clear pro-arbitration stance.

Energy Sector

During the past two years, the energy crisis has become a pressing European and global issue, prompting companies and also countries to reassess their energy sources and develop sustainable solutions. Austria, with its strategic location in Central Europe, plays a vital role in the European energy market. Vienna is the seat for important international organisations in the energy sector, such as the Energy Community and the Organization of the Petroleum Exporting Countries, and the location for conferences concerning energy (eg, the European Gas Conference).

The energy crisis has also resulted in a surge in energy-related disputes as a consequence of the limited supply and rising energy prices. The disputes mainly arise from non-deliveries and necessary changes in the supply chains. International arbitration, often with the seat in Austria, serves as a key instrument in resolving these conflicts in the upstream markets or between major customers and energy providers over reduced or suspended deliveries or the adjustment of prices. Austria is frequently chosen as place of arbitration in such disputes, as it offers a stable environment for international arbitration with efficient, foreseeable and pro-arbitration decisions by the Austrian Supreme Court. Additionally, it boasts numerous practitioners with extensive experience in the energy sector.

Impact of Environmental, Social and Corporate Governance

ESG considerations have gained significant importance in recent years, with stakeholders and even the general public demanding sustainable and socially responsible practices. This has increased the pressure on states – in many cases, creating a tension between existing con-

tracts, the law, and politically or policy-driven decisions. This has also led to an international increase in investment disputes – with Vattenfall AB and others v Federal Republic of Germany (ICSID Case No ARB/12/12) being one of the most prominent in the DACH region (ie, Germany, Austria and Switzerland). Further investment arbitration cases are to be expected as a result of this development.

Commercial disputes regarding ESG are also projected to increase in the wake of the Corporate Sustainability Due Diligence Directive formally adopted by the Council of the European Union in May 2024. The implementation of this directive will have an impact on existing and future contracts, as the new responsibilities and obligations that companies will have to comply with will lead to reassessment of international supply chains. It seems likely that the adjustment process will give rise to disputes. Arbitration, offering a bespoke and confidential procedural framework with great flexibility to accommodate the needs of businesses acting in a globalised environment, is ideally suited for resolving often sensitive ESG-related disputes. Consequently, the expectation is that ESG-related arbitrations will soon emerge as a dominant trend.

Outer Space Disputes Increasingly Submitted to Arbitration

The commercial use of outer space has grown exponentially. The heavy traffic both in terms of satellites as well as use of bandwidths have turned orbits and frequencies into scarce resources. Austria not only has a strong industry in this sector but is also home to the European Space Agency (ESA) Policy Institute. Perhaps due to this sector specific knowledge, there appears to be a rise in arbitrations in this field. Further, the choice of Austria as a seat of arbitration for outer space disputes may also be driven by the fact that Austria is a neutral country – a factor that is relevant to the increasing PPPs and related disputes in the sector.

Impact of Sanctions Against Russia on Arbitration Proceedings

Arbitration proceedings involving sanctioned parties have been confirmed to constitute an exception to the prohibition on directly or indirectly engaging in any transaction with Russian organisations listed in Annex XIX to Article 5aa of Council Regulation (EU) No 833/2014, concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.

To uphold the fundamental principle of access to justice, including via arbitral proceedings with sanctioned parties, Article 5aa, paragraph 3 (g) of Council Regulation (EU) No 833/2014 contains an exception for "transactions which are strictly necessary to ensure access to judicial, administrative or arbitral proceedings in a Member State, as well as for the recognition or enforcement of a judgment or an arbitration award rendered in a Member State and if such transactions are consistent with the objectives of this Regulation and Regulation (EU) No 269/2014".

Arbitration proceedings have also been confirmed to constitute an exception to the prohibition on providing legal advisory services to legal persons, entities or bodies established in Russia as set out Article 5n, paragraph 2 of Council Regulation (EU) No 833/2014. According to Article 5n, paragraph 6, these prohibitions "shall not apply to the provision of services which are strictly necessary to ensure access to judicial, administrative or arbitral proceedings in a Member State, as well as for the recognition or enforcement of a judgment or an arbitration award rendered in a Member State, provided

that such provision of services is consistent with the objectives of this Regulation and Regulation (EU) No 269/2014".

On 20 June 2024, the exemption expired that previously applied to legal persons, entities or bodies established in Russia that are owned by, or solely or jointly controlled by, a legal person, entity or body that is incorporated or constituted under the law of an EU member state, a country member of the European Economic Area, Switzerland, or a partner country as listed in Annex VIII of Council Regulation (EU) No 833/2014. It has been replaced by a new authorisation requirement pursuant to Article 5n, paragraph 10 (h) of Council Regulation (EU) No 833/2014. In Austria, the Ministry of Justice's Public Procurement Law Unit is responsible for granting such authorisations, which include authorisation for the provision of legal advisory services by lawyers. A separate mailbox has been set up for the submission of applications for the granting of an authorisation. However, there remains a certain grey area as to the definition of "legal services" in this context. It has not yet been clarified at EU level which services related to an arbitration qualify as legal services. This is particularly relevant when it comes to legal advice rendered before a dispute has arisen or becomes pending.

Overall, these exceptions and the authorisation procedure will allow arbitral proceedings and the enforcement of awards to continue in disputes involving parties from Russia.

Also, the introduction of several amendments to the Russian Arbitrazh Procedural Code (commonly referred to as the "Lugovoy Law") in 2020 has affected the conduct of arbitration proceedings involving Russian parties. The Lugovoy Law grants Russian commercial courts exclusive jurisdiction over disputes involving sanctioned entities. This exclusive jurisdiction is protected by the competence of the Russian courts to, upon request of a party, issue anti-suit injunctions directed against arbitration proceedings. These anti-arbitration injunctions have already been frequently requested by Russian parties and have been granted by Russian courts. As a response thereto, arbitral proceedings with Russian parties are now increasingly involving interim measures and counter-measures. The location of assets and the interim securing of assets has also become more prevalent.

Increase of Insolvency-Related Arbitrations

As in many countries, Austria is currently experiencing a spike in insolvency cases. The increase is driven by companies that were supported by public subsidies or the suspension of tax and accounting obligations in the context of the COVID-19 pandemic but are now unable to cope with exploding global energy and resource costs, high inflation and rising interest rates.

The development of the field of insolvency-related arbitrations builds upon a 2018 decision of the Austrian Supreme Court, which confirmed that claim verification proceedings do not fall within the exclusive competence of the (insolvency) courts but can be conducted before arbitral tribunals – provided the arbitration proceedings were already pending at the time of the opening of the insolvency proceedings.

These two factors combined have recently led to a cascade of arbitration proceedings that deal with the effects of insolvency. A significant case is the insolvency of Signa Holding and affiliated companies – the largest insolvency in Austrian history – with debts of more than EUR14 billion affecting not only Austria, but also large-scale projects in Germany and Switzerland.

Bespoke VIAC Investment Arbitration Rules

The Vienna International Arbitral Centre (VIAC), one of the leading European arbitral institutions, has issued the first European arbitral institution-specific investment arbitration rules. The VIAC Rules of Investment Arbitration and Mediation 2021 (the "VIAC Investment Arbitration Rules") are particularly suited for states and state-related entities, as well as investors coming from the CEE/Commonwealth of Independent States (CIS) region. They also generally provide an affordable alternative for smaller investments, as the new rules aim at providing significant cost and time advantages – the two major concerns for conducting investment disputes effectively.

The VIAC Investment Arbitration Rules are a standalone set of rules based on the VIAC Rules of Arbitration and Mediation (the "Vienna Rules"), the VIAC's commercial arbitration rules. However, they feature a number of innovations and modifications that recognise the fundamental differences between commercial and investment arbitration and respond to specific needs that have arisen in practice. By way of example, the VIAC Investment Arbitration Rules do not restrict their implementation by means of any objective jurisdictional requirements regarding the parties and the nature of the dispute. Notably, there is intentionally no definition of an investment. Pursuant to Article 1(1), the agreement can be contained in a contract, treaty, statute or other instrument involving a state, state-controlled entity or intergovernmental organisation. With the aim of reducing jurisdictional disputes, the VIAC Investment Arbitration Rules thus leave it up to the parties to decide whether the rules are suitable for the resolution of their dispute and avoid any particular requirements for the submission of the dispute to VIAC investment arbitration.

The VIAC has placed special emphasis on promoting efficiency and enabling a swift resolution of investment disputes. This can be seen from the incorporation of an early dismissal mechanism for claims and defences that are manifestly outside the jurisdiction of the tribunal, inadmissible, or without legal merit (Article 24a). Frivolous claims can be dismissed at an early stage, thereby avoiding unnecessary costs being incurred by the other party. Moreover, the arbitral tribunal shall render the award within six months after the oral hearing or the last authorised submission (Article 32).

The VIAC's costs are a competitive option compared to other arbitral institutions. Importantly, the VIAC Investment Arbitration Rules explicitly provide the tribunal with the power to order security for costs. They also encompass provisions for the mediation of investment disputes, allowing parties to employ mediation independently from – or in conjunction with – arbitration. If the arbitration is followed by mediation or vice versa, the VIAC's administration fees are charged only once.

To prevent conflicts of interest, the Vienna Investment Arbitration Rules (as well as the Vienna Rules) require the parties to disclose third-party funding at an early stage in the statement of claim or the answer thereto. Third-party funding is defined in a broad manner, covering any kind of direct or indirect financial support that is dependent upon the outcome of the proceedings.

Pragmatic and Pro-arbitration Jurisprudence of the Austrian Courts

The Austrian Supreme Court, in deciding on applications to set aside awards, has maintained a consistent arbitration-friendly approach in its judgments. This may also inform why only four

applications have been filed since June 2023 – the following of which are noteworthy.

- Formal requirements – while the Austrian Supreme Court takes a pro-arbitration stance, it remains strict on the fulfilment of formal requirements. One such formal requirement is that an application for setting aside an award must be submitted by a lawyer who is entitled to appear before the Austrian Supreme Court (ie, is admitted to the Austrian Bar) (Cf OGH 18 OCg 1/23f dated 14 September 2023).
- Shareholder disputes – in 2024, the Austrian Supreme Court also dealt in detail with the objective arbitrability of disputes over shareholder resolutions in private limited partnerships. In that case, some (but not all) shareholders had relied on an arbitration clause between the partnership and the shareholders to file a challenge against a shareholder resolution before an arbitral tribunal. The request for arbitration (and, consequently, the arbitral award) was directed against the company but not against the other shareholders. The company filed an application to set aside the arbitral award by which the shareholder resolution had been nullified. The application was based on the argument that the arbitration proceedings had not included the other shareholders. The Austrian Supreme Court ruled that, even though private limited partnerships – like corporations – may include arbitration clauses in their articles of association, it is not possible to conduct the arbitration proceedings only between some shareholders and the company; rather, the arbitration must ensure the inclusion of all shareholders. Failing a mechanism that includes all shareholders and ensures legal effect on all shareholders, such shareholder disputes are objectively not arbitrable. Therefore, to ensure that such disputes are in fact objectively arbitrable, the participation and intervention rights of all shareholders must be set out ex ante in the arbitration agreement (Cf OGH 18 OCg 3/22y dated 3 April 2024).
- Impartiality – when deciding on challenges to arbitrators, the Austrian Supreme Court will frequently also consider the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, which were updated in 2024. However, in two recent decisions, the question of impartiality was raised in a different context: the question of the impartiality of judges in connection with arbitration proceedings.

In the first case, the Austrian Supreme Court had appointed one of the three arbitrators at the request of one of the parties. After the arbitral tribunal had issued the arbitration award, the claimant sought to set aside the award. In the annulment proceedings before the Austrian Supreme Court, the claimant challenged three of the five Supreme Court judges based on the argument that they had previously been called upon to appoint one of the arbitrators whose award is now being challenged. A separate Senate of the Austrian Supreme Court decided the challenge and held that the appointment of an arbitrator by the court (following default of one party to do so) does not impact the impartiality of a judge in a later action for annulment regarding the arbitral award rendered by the court-appointed arbitrator (Cf OGH 2 Nc 60/23f dated 16 August 2023).

In the second case, the question was whether the impartiality of judges of the specialised Senate of the Austrian Supreme Court dealing with arbitration might be impaired when they are also members of the VIAC board. The Austrian Supreme Court carefully examined:

(a) the duties of the members of the VIAC board; and
(b) the actual dispute before the courts, which related to the claim of invalidity of an arbitration agreement.

The Austrian Supreme Court found that there was not sufficient overlap between the duties of a VIAC board member and the actual subject matter to give rise to even the appearance of bias (Cf OGH 2 Nc 13/24w dated 26 March 2024).

It is rare that the Austrian Constitutional Court deals with matters related to arbitration. It recently had the opportunity when an action was filed requesting that Section 607 of the Austrian Civil Procedure Code, which grants an arbitral award the same effect as a court judgment, be declared unconstitutional and void. The Austrian Constitutional Court declined to accept the action and specifically held that there are no constitutional objections to the fundamental admissibility of private arbitration established on a private autonomous basis (in conjunction with the relevant statutory provisions). Firstly, the relevant provisions provide (sufficient) options for the parties to bring an action to set aside the award. Secondly, the grounds to set aside awards also provide sufficient guarantees that:

- an award that contradicts the fundamental values of the Austrian legal system (ordre public) can be challenged; and
- courts and administrative authorities may ex officio not take an award that contradicts the fundamental values of the Austrian legal system into account.

In view of the legal framework and the safeguards it provides, the application has no reasonable prospect of success (Cf VfGH G 49/2024-7 dated 10 June 2024).

Final Note

Austria continues to be a stable, modern and welcoming place for arbitral proceedings. Staying on top of developments and even leading the latest trends, Austria has maintained its position as an attractive place for commercial and investment arbitration.

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