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Austria

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Introduction

Austria is one of the world's leading seats of arbitration. It offers a transparent, predictable legal framework with a modern, arbitration-friendly law which is largely based on the UNCITRAL Model Law of 1985. Vienna is a popular neutral jurisdiction and a convenient location for hearings, offering user-friendly infrastructure and arbitration facilities. The Vienna International Arbitral Centre ("**VIAC**"), one of Europe's leading arbitral institutions, has its headquarters in Vienna. The UNCITRAL Secretariat was transferred from New York to Vienna in 1979. The Permanent Court of Arbitration seated in The Hague opened an office in Vienna in 2022.

The Austrian court system is arbitration-friendly and experienced in arbitration matters. The Austrian Supreme Court has exclusive jurisdiction in most arbitration-related matters, providing for a specialised forum and fast decisions in a single instance.

The arbitration law currently in force in Austria is contained in Sections 577 to 618 of the Austrian Code of Civil Procedure ("**ACCP**"; in force as of 1 July 2006; amended with the Austrian Arbitration Reform Act of 2013, in force as of 1 January 2014). It applies to all domestic and international proceedings seated in Austria. With the Arbitration Law Reform Acts of 2006 and 2013, Austria tailored the arbitration provisions of the ACCP to the requirements of a modern arbitration law, underscoring the importance of party autonomy by giving parties wide-ranging flexibility for designing the arbitral process according to their preferences and needs. This flexibility is limited by only a few mandatory provisions.

Austria has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") and the European Convention on International Commercial Arbitration ("**European Convention**"). Although it initially made a reservation regarding reciprocity, it withdrew this reservation in 1988. The European Convention entered into force in Austria on 31 July 1961.

For 2023, Austria has a score of 0.80 and a global ranking of 11 out of 142 on the World Justice Project Rule of Law Index. For 2020 – the most recent analysis – Austria has a score of 75.5 and a global ranking of 10 on the World Bank's Enforcing Contracts: Doing Business Index.

Arbitration agreement

Section 583 (2) ACCP stipulates that an arbitration agreement must be either contained in a written document signed by the parties or in an exchange of communications between the parties, provided that the means of communication allows for a record of the agreement, such as E-mail. In contrast to Article 7 (2) of the UNCITRAL Model Law (Option I), the

Austrian arbitration law demands a record of the exchange of communications rather than the recording of an orally concluded arbitration agreement. If the arbitration agreement is concluded by proxies, the power of attorney must comply with the form requirements of the law applicable to it.

Austrian arbitration law defines objective arbitrability broadly and contains few exceptions. Pursuant to Section 582 (1) ACCP, any claim involving an economic interest ("*vermögensrechtlicher Anspruch*") that is subject to the jurisdiction of the courts of law may be referred to arbitration. The Austrian legislator understands the notion of economic interest very broadly. In addition, claims not involving an economic interest are arbitrable if a settlement may be validly concluded on the subject-matter of the dispute.

Criminal, public insolvency law and public law disputes are not arbitrable. In addition, Section 582(2) ACCP lists areas that are reserved for the jurisdiction of state courts for policy reasons, such as family law, certain contracts subject to the Tenancy Act ("*Mietrechtsgesetz*") or the Non-Profit Housing Act ("*Wohnungsgemeinnützigkeitsgesetz*"). The competence-competence principle is set forth in the arbitration law and recognised by the Austrian courts. Arbitral tribunals have the obligation to decide on their own jurisdiction. Courts may only review the arbitrators' decision on jurisdiction in subsequent annulment proceedings.

Austrian law contains no restrictions regarding subjective arbitrability. Any natural or juridical persons having the capacity to be a party to legal proceedings may validly enter into arbitration agreements and be parties to arbitral proceedings. This also applies to juridical persons constituted under public law. Consumers may validly enter into arbitration agreements in relation to consumer disputes, but subject to considerable restrictions: pursuant to Section 617 ACCP, among other conditions, an arbitration agreement involving a consumer is only valid if it is concluded in a separate document after the dispute has arisen. Foundations ("*Privatstiftungen*") and minority shareholders of corporations are, in certain circumstances, considered consumers. The same restrictions apply to employment-related matters.

In principle, only signatories are bound to the arbitration agreement. In certain circumstances, the arbitration agreement also applies to third parties. Legal successors of a party, both in cases of universal succession (including the death of a party or corporate succession through, e.g. mergers or corporate divisions) and singular succession (e.g. the assignment of a contract or a receivable) are bound by the arbitration agreement. In addition, it is established jurisprudence that arbitration agreements extend to disputes relating to the rights of third-party beneficiaries. Under certain circumstances, arbitration agreements may also bind insolvency administrators. As regards corporate relationships, arbitration agreements extend to the partners in a partnership ("*Personengesellschaft*") only exceptionally if this can be derived from the interpretation of the intention of the parties. Shareholders of corporations ("*Kapitalgesellschaften*") are generally not bound by arbitration agreements entered into by the corporation, except in very rare cases of direct liability of shareholders. This may, very exceptionally, occur in case of the abuse of the corporate structure.

Though not explicitly stipulated in the ACCP, the doctrine of the separability of arbitration agreements is widely recognised in Austria. Austrian courts have generally treated the arbitration agreement to be separate from the main contract, but have held that the interpretation of the intention of the parties may lead to a different result. In case of a mutually agreed termination of a contract containing an arbitration agreement, the Austrian Supreme Court has considered the arbitration agreement equally terminated.

Arbitration procedure

Contrary to Article 21a ML, the ACCP does not explicitly set out a rule for the commencement of arbitral proceedings. According to Austrian jurisprudence, *ad hoc* arbitration proceedings are pending once a statement of claim or other document initiating proceedings is delivered to the respondent and the respondent therefore is informed about the proceedings.

Pursuant to Section 595 (2) ACCP, unless otherwise agreed by the parties, the arbitral tribunal may determine the venue of hearings and other acts of procedure at any place it considers appropriate. Hearings or meetings may be held at a different location than the seat even without prior authorisation from the parties. The ACCP is silent on the conditions for holding hearings remotely. In July 2020, the Austrian Supreme Court rendered a landmark decision clarifying that remote hearings are generally possible even against the objection of a party.

Similar to many other arbitration laws, the ACCP does not contain detailed rules on the taking of evidence. Section 599 (1) ACCP stipulates that the arbitrators are free as regards the admissibility of evidence, as well as in taking and evaluating the evidence brought before it. Arbitrators may admit, but also reject evidence a party wishes to introduce into the proceedings. The arbitrators' freedom regarding the admissibility of evidence is restricted by the mandatory requirements to treat the parties fairly and to observe equal treatment and the right to be heard. According to the Austrian Supreme Court, a refusal to take evidence requested by a party does not *per se* constitute a ground for setting aside the arbitral award.

There are no restrictions as regards the presentation of testimony by a party employee, nor are there any other rules restricting the admissibility or the weight of certain types of evidence. In line with international practice, the Austrian arbitration law does not distinguish between the testimony of a witness and a party representative.

The Austrian civil procedure applicable to court proceedings recognises both an internationally comparably narrow form of document production as well as various forms of privilege which can be invoked to defeat document production requests. According to Section 305 (4) ACCP, parties can refuse to produce documents if doing so would violate either a publicly recognised confidentiality obligation, a commercial secret or an artistic secret. The jurisprudence recognises that the attorney–client privilege falls within the first category of "publicly recognised confidentiality obligation"; however, the practical implications especially for international arbitration are still very much disputed. The majority of scholars and practitioners hold that the rules on document production under the ACCP do not apply to arbitral proceedings at all. The ACCP allows the arbitrators to refer to the IBA Rules on the Taking of Evidence in International Arbitration or any other guidelines they deem appropriate in the context of document production and privilege.

The ACCP does not contain a hard-and-fast rule that arbitration is confidential where this is not explicitly provided in the arbitration agreement or the agreed rules of procedure. However, it is uncontested that arbitration hearings are private. The confidentiality of arbitral proceedings may result from a separate party agreement on confidentiality that may, for example, be contained in the arbitration agreement, the main contract or the applicable arbitration rules. In the absence of a confidentiality agreement, legal scholars have supported the view that arbitral proceedings as a contractual and private means of dispute resolution are by their nature confidential. However, the Austrian Supreme Court has not yet decided this issue. The arbitrators' deliberations and their content are under all circumstances to be kept confidential even from the parties.

Austrian arbitration law allows for the adduction of party-appointed expert witnesses as well as the appointment of experts by the arbitral tribunal. The rules under Austrian law regarding the challenge of arbitrators also apply with respect to the independence and impartiality of tribunal-appointed experts. Consequently, persons who are appointed to be expert witnesses have the same disclosure obligations as arbitrators.

Arbitrators

Where the parties did not agree on the procedure for appointing an arbitral tribunal consisting of three arbitrators, the constitution of the arbitral tribunal is triggered by a written request from one party to the other party to appoint an arbitrator. The deadline for complying with such a request is four weeks. The two party-appointed arbitrators appoint the presiding arbitrator. When a party fails to appoint an arbitrator within four weeks, or when the party-appointed arbitrators fail to appoint the presiding arbitrator within four weeks, the Austrian Supreme Court makes default appointments upon the application of a party (Section 587 (2) No. 4 ACCP). If the parties have agreed on a sole arbitrator and the parties fail to agree on the arbitrator within four weeks after a written request from a party, the sole arbitrator may be appointed by the Austrian Supreme Court upon request from one of the parties (Section 587(2) No. 1 ACCP).

Section 588 (2) ACCP provides that "[a]*n arbitrator may only be challenged if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not fulfil the conditions agreed to by the parties*". The standard is objective. It is decisive whether circumstances exist that, from the point of view of a reasonable third party with knowledge of the relevant facts, could give rise to doubts as to the arbitrator's independence or impartiality. The appearance of bias is sufficient. In assessing the arbitrators' independence and impartiality, the Austrian Supreme Court routinely makes reference to the IBA Guidelines on Conflicts of Interest in International Arbitration. When assessing an arbitrator's independence and impartiality, the Austrian Supreme Court applies a strict standard that is comparable to the standard applied by leading arbitral institutions such as the International Court of Arbitration of the ICC.

In the absence of a party agreement on the challenge procedure, the challenging party must bring a written challenge before the arbitral tribunal within four weeks after being notified about the composition of the arbitral tribunal or after becoming aware of the ground on which the challenge is based. If a challenge brought to the arbitral tribunal or made in accordance with the agreed procedure is unsuccessful, the challenge may, within four weeks from the decision rejecting the challenge, be brought to the Austrian Supreme Court (Section 589 (3) ACCP). The right of a party to appeal to the Austrian Supreme Court cannot be excluded by a party agreement.

Arbitrators do not benefit from immunity from civil liability. However, the arbitrators' liability is privileged compared to the general liability regime in Austria and cases dealing with the liability of arbitrators are rare.

Austrian arbitration law does not recognise any rules or codes of conduct with respect to arbitral secretaries, even though their use is common.

Interim relief

The arbitrators' powers to issue interim measures does not exclude the competence of the courts to issue interim measures. Pursuant to Section 585 ACCP, a court may, at the request of a party, grant interim or protective measures before and even during pending arbitration

proceedings. Contrary to arbitral tribunals, the courts may also issue *ex parte* measures. The competence of the courts to issue interim measures may not be excluded by a party agreement.

Section 593 (1) ACCP empowers the arbitral tribunal to issue interim measures "*it deems necessary in respect of the subject-matter in dispute if the enforcement of the claim were otherwise frustrated or significantly impeded, or if there were a risk of irreparable harm*". The arbitral tribunal's power to issue interim measures may be excluded by a party agreement. Interim measures may only be granted upon the request of a party and after hearing the other party. An arbitral tribunal may thus not issue *ex parte* measures.

The ACCP does not contain further conditions for the grant of interim measures. In particular, the standard of proof to be applied by the arbitral tribunal is not defined in the arbitration law. Arbitrators are free to adopt the standard of proof they deem appropriate. Arbitrators may request a party to provide appropriate security as a condition for the grant of an interim measure (Section 593 (1) ACCP).

The ACCP does not define or restrict the types of interim measures an arbitral tribunal may issue. Interim measures issued by arbitral tribunals having their seat in or outside of Austria are enforceable by the Austrian courts (Section 593 (3) ACCP). The courts may refuse to enforce an interim measure if the measure is tainted by a ground allowing to set aside an arbitral award (for interim measures issued by an arbitral tribunal seated in Austria) or a ground for refusing recognition and enforcement of an arbitral award (for interim measures issued by an arbitral tribunal seated outside of Austria).

Austrian courts may enforce interim measures issued by arbitral tribunals that are unknown to Austrian state court proceedings. When enforcing interim measures unavailable in the Austrian state court system, the court may issue an order that comes closest to the measure ordered by the arbitral tribunal (Section 593 (3) ACCP). The court may re-word the measure ordered by the arbitral tribunal to safeguard that the purpose of the arbitral tribunal's order is maintained.

It is broadly acknowledged that arbitral tribunals seated in Austria have the power to issue anti-suit injunctions. The authors are familiar with one case in which an arbitral tribunal with the seat in Austria has issued an anti-suit injunction concerning court proceedings outside the EU based on the Section 593 ACCP. There is no published Austrian court decision dealing with an injunction by arbitrators enjoining parties to refrain from initiating, halting or withdrawing litigation proceedings.

In comparison, the competence of Austrian courts to issue interim measures is limited to those types of measures explicitly enumerated in the Austrian Enforcement Act ("*Exekutionsordnung*", "**Enforcement Act**") and does not include anti-suit injunctions or anti-arbitration injunctions. Austrian courts therefore have no competence to issue anti-suit injunctions or anti-arbitration injunctions in the context or arbitral proceedings, regardless of whether the arbitral proceedings are seated in or outside of Austria.

Arbitration award

Any decision on jurisdiction and on any part of the merits of the dispute must be made in the form of an arbitral award, which also entails a duty of the arbitrators to provide reasons unless otherwise agreed by the parties. The parties may waive the duty to provide reasons.

Pursuant to Section 606 (1) ACCP, an arbitral award must be rendered in writing and must be signed by all arbitrators to be valid under Austrian law. Unless otherwise agreed, the signatures by the majority of the arbitrators are sufficient, provided that one of the signing arbitrator's records on the award the reason for the omitted signature (Section 606 (1)

ACCP). The ACCP does not stipulate a time limit for the making of an arbitral award. There are no atypical requirements regarding the validity of arbitral awards.

Arbitrators have wide discretion with respect to the allocation of costs. All reasonable costs for the pursuit or defence of a claim may be reimbursed. Generally, interest on the costs may be claimed.

Challenge of the arbitration award

Section 611(1) ACCP provides that annulment proceedings are the only remedy against an arbitral award. An appeal against an award is thus not possible under the ACCP. The Austrian Supreme Court repeatedly held that annulment proceedings shall not serve as a means for revising the correctness of the factual and legal findings of the arbitral tribunal (prohibition of a *révision au fond*).

The grounds for set-aside are exhaustively listed in Section 611 (2) of the ACCP:

- A valid arbitration agreement does not exist, the arbitral tribunal has denied its jurisdiction despite the existence of a valid arbitration agreement, or a party was incapable of concluding 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 plea of the parties for legal protection.
- The composition or constitution of the arbitral tribunal was not in accordance with Austrian law or the agreement of the parties.
- The arbitral proceedings were conducted in a manner that conflicts with the fundamental values of the Austrian legal system.
- The requirements according to which a court judgment can be subject to an action for revision (i.e., if the award was based on a fraudulent action or forged document) are met.
- The subject-matter of the dispute is not arbitrable under Austrian law.
- The arbitral award conflicts with the fundamental values of the Austrian legal system.

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

Within four weeks of the receipt of the award, the parties can request a correction, interpretation and supplementation of the award (ACCP, Section 610). The parties may agree on a different period (e.g. by reference to institutional rules).

An award cannot be retracted or revised; however, it may be set aside if it was based on certain criminal offences, such as procedural fraud. In those cases, the time limit is four weeks after the respective criminal conviction has become final and binding, and the plaintiff has become aware thereof.

If an award in proceedings seated in Austria is set aside, the decision will no longer have *res judicata* effect under Austrian law and may be retried.

The Austrian Supreme Court routinely holds that a refusal to take evidence requested by a party does not *per se* constitute a ground for setting aside an arbitral award. However, the court also held that non-compliance with a party's request to hold an oral hearing "*regularly*" constitutes a reason to set aside an arbitral award based on Section 611 (2) No. 2 ACCP for that party's inability to present its case.

Enforcement of the arbitration award

Austrian arbitration law differentiates between the enforcement of domestic and foreign awards. Pursuant to Section 607 ACCP, domestic awards are deemed to have the same effect as final and binding court judgments, thus constituting a readily enforceable enforcement title.

In order to be enforceable, a domestic award must be confirmed as final, binding and enforceable pursuant to Section 606 ACCP. The confirmation of enforceability is a special feature of Austrian law that the presiding arbitrator of an arbitral tribunal or the sole arbitrator are contractually obliged to issue upon the request of a party if the arbitration agreement or the arbitral proceedings are governed by Austrian law. However, it is not a prerequisite for the validity of the award. There is no need to "confirm" the award by a state court, a bailiff or the like.

Foreign awards must be formally recognised and declared enforceable by the competent Austrian court pursuant to Section 614 ACCP ("*Exequatur*"), which refers to the provisions of the Enforcement Act. International law and legal instruments of the European Union take precedence over Austrian statutory law according to Section 614 (1) ACCP and Section 416 of the Enforcement Act. The requirements for the recognition of awards are therefore set out in the New York Convention and other relevant international treaties such as the European Convention, to which Austria is a party.

Pursuant to Section 614 ACCP and Article IV New York Convention, an application for obtaining a declaration of recognition and enforceability must comply with the formal requirements of the New York Convention. It must therefore be accompanied by the "duly authenticated original award" or a "duly certified copy" thereof. According to the Austrian Supreme Court, this requirement is fulfilled if the authenticity has been confirmed by an Austrian authority, by an authority of the country whose law governs the arbitration or by a representative of the administering arbitral institution if provided for in the institutional rules. In addition, if the award is not rendered in German, it must be translated. Such translation must be certified by a court-sworn translator or by a diplomatic or consular agent. A partial translation of an award is not sufficient. Finally, in deviation from Article IV (1) lit b New York Convention, the original or a certified copy of the arbitration agreement has to be submitted only if requested by the court.

Austrian law does not foresee any time limitations for the recognition and enforcement of arbitral awards. However, it provides for a statute of limitation of 30 years to enforce a final court decision (Section 1479 ACC). In this regard, according to the Austrian Supreme Court, the statute of limitation for judgments and arbitral awards is governed by the law applicable to the obligation that was decided upon. Thus, Austrian courts may apply statutes of limitation contained in foreign laws in proceedings on the enforcement of foreign awards.

The annulment of an arbitral award at its seat may have different effects depending on the applicable international treaty governing its recognition and enforcement. Within the scope of application of the New York Convention, the prevailing view of legal scholars is that the New York Convention does not leave room for the courts' discretion to recognise and enforce an award annulled at the seat of arbitration. However, the Austrian Supreme Court recently affirmed the enforcement of an arbitral award which had been set aside at the seat (Belarus) because the court decision setting aside the award violated Austrian *ordre public*.

Pursuant to Article IX of the European Convention, the setting aside of an arbitral award in one contracting state shall only constitute a ground for the refusal of recognition or enforcement in another contracting state if it is based on one of the reasons listed in Article

IX. In particular, the annulment of an award at the seat because of a violation of the public policy of the seat is not a ground for refusing recognition and enforcement in another Member State. The Austrian courts have recognised and enforced an award annulled at the seat for a violation of public policy in accordance with Article IX of the European Convention.

The enforcement of a foreign arbitral awards in Austria is fast and efficient. Enforcement proceedings are conducted *ex parte*. In practice, in line with Section 412 (1) Enforcement Act, the award creditor submits an application for the actual enforcement together with the application for a declaration of recognition and enforcement of the arbitral award. The actual enforcement procedure is equivalent to the procedure applicable for the enforcement of domestic judgments. The enforcement application must be made to the competent district court ("*Bezirksgericht*"). The declaration of recognition and enforcement may usually be obtained within several weeks. Pursuant to Section 411 Enforcement Act, a decision on the enforcement of an arbitral award may be appealed by the award debtor within four weeks or, if the debtor has its seat abroad, within eight weeks after the decision has been served ("*Rekurs*"). Under certain circumstances, an appeal to the Austrian Supreme Court is possible ("*Revisionsrekurs*").

Investment arbitration

Austria is a party to 60 Bilateral Investment Treaties ("**BITs**"). Twelve of these treaties are intra-EU BITs. Austria is a party to the International Centre for Settlement of Investment Disputes ("**ICSID**") Convention and the Energy Charter Treaty.

Austria is very rarely a defendant in investment arbitration cases. The most recent case involving Austria as a defendant was based on the Austria–Malta BIT and the request for arbitration was filed on 30 July 2015 (*B.V. Belegging-Maatschappij "Far East" v. Republic of Austria* (ICSID Case No. ARB/15/32)). It involved a Maltese claimant who held a majority interest in Meinl-Bank, a private investment bank based in Vienna. The claimant was ultimately owned with the Meinl family, the head of which is Julius Meinl V. Austria had conducted an investigation into Julius Meinl V and the Meinl Bank for approximately eight years, yielding no concrete evidence of any wrongdoing. The claimant alleged that the investigation rose to the level of expropriation and a violation of the Austria–Malta BIT's fair-and-equitable-treatment clause and sought EUR 200 million. The award was issued on 30 October 2017 and is confidential. However, reports suggest that the claim failed as manifestly without legal merit on either jurisdictional or admissibility grounds.

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