

Arbitration procedures and practice in Austria: overview

Florian Neumayr and Sarah Baumgartner
bvp Hügel Rechtsanwälte

global.practicallaw.com/0-502-1525

USE OF ARBITRATION AND RECENT TRENDS

1. How is commercial arbitration used and what are the recent trends?

Use of commercial arbitration

Austria is an established venue for commercial arbitration. Among other things, it played an important role as a neutral location for East-West commercial dispute resolution.

Since its establishment in the 1970s, the Vienna International Arbitral Centre (VIAC) has administered more than 1,500 cases. Parties have come from all over the world to arbitrate under the VIAC rules.

As at 31 December 2014 (the date of the last publicised data), the VIAC had 71 pending cases with an aggregated amount in dispute of about EUR1.22 billion. The disputes concerned the following sectors:

- General trade: 27%.
- Machinery: 15%.
- Finance: 12%.
- Construction and engineering: 2%.
- Distribution: 12%.
- Business services: 8%.
- Energy: 2%.
- Share purchase agreements: 17%.
- Other: 5%.

Recent trends

Besides the VIAC, arbitration following the International Chamber of Commerce (ICC) rules plays an increasingly important role in resolving disputes with an Austrian connection.

In 2013 (more recent data is not yet available), 35 parties to ICC arbitration were Austrian (20 claimants and 15 respondents) (*2013 ICC statistics*). In 12 cases Austria served as place of arbitration (11 times in Vienna and once in Innsbruck) and 45 Austrians served as arbitrators (13 sole arbitrators, 17 presidents and 15 co-arbitrators).

Further, Austria has recently revised the legal framework for arbitration contained in the Austrian Code of Civil Procedure (ACCP). Among other things, if arbitration issues are challenged in the Austrian court system, the Austrian Supreme Court (ASC) now functions as the court of first and last instance (*section 615, ACCP*).

Advantages/disadvantages

The general advantages/disadvantages of arbitration compared to court litigation are:

- For many parties, one of the most important advantages is that arbitration proceedings are confidential.
- Arbitral awards can be better enforceable than national judgments, particularly in the international context due to the New York Convention, which has currently 155 contracting states (May 2015).
- For parties from different jurisdictions, rules of arbitration provide a more level playing field than national codes of civil procedure do, to which usually one party is closer than the other. Parties have a say on who is to hear their dispute and also have an influence on the rules of taking evidence, and so on, against the background of a specific set of facts or the particular dispute (and are not bound by national provisions of civil procedure that may not be best to resolve the dispute at hand).
- Arbitration may be faster than resolving a dispute in national courts.
- The higher the amount at stake, the more economic arbitral proceedings usually are, compared to national civil proceedings. Smaller disputes are often resolved more cheaply before national courts.
- There are not many instances to go through before a decision becomes final. Some see this as an advantage, but it can also be seen as a disadvantage. If a party believes that the arbitral award is wrong, there are typically very limited possibilities to have it set aside. The court of first and last instance for arbitration issues is the ASC (*section 615, ACCP*).

LEGISLATIVE FRAMEWORK

Applicable legislation

2. What legislation applies to arbitration? To what extent has your jurisdiction adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Law)?

The statutory rules on arbitration are enshrined in sections 577 to 618 of the Austrian Code of Civil Procedure (ACCP).

In 2006, the rules were largely aligned with the provisions of the UNCITRAL Model Law on International Commercial Arbitration 1985 (UNCITRAL Model Arbitration Law).

Mandatory legislative provisions

3. Are there any mandatory legislative provisions? What is their effect?

Most provisions in the Austrian Code of Civil Procedure (ACCP) are not mandatory. Therefore, the parties are free to agree on different rules or can revert to other jurisdictions' legal systems.

However, in accordance with the official legislative materials (*travaux préparatoires*) (that is, explanations of legal provisions drafted alongside the legislation) and legal commentary, the following provisions are mandatory:

- The provisions on interim legal protection (*section 585, ACCP*).
- There must be an uneven number of arbitrators (most commonly one or three) (*paragraph 2, section 586, ACCP*).
- Arbitrators must be impartial and independent (*section 588, ACCP*).
- Recourse to the ASC is allowed in the case of an unsuccessful challenge of an arbitrator (*paragraph 3, section 589, ACCP*).
- The provisions on the early termination of a mandate as arbitrator (*section 590, ACCP*).
- The principle of fair and equal treatment of all parties and the right to be heard (*paragraph 2, section 594, ACCP*).
- The right to be represented (*paragraph 3, section 594, ACCP*).
- That arbitral tribunals can take or decide not to take evidence, and are free in the consideration of any evidence heard (*paragraph 1, section 599, ACCP*).
- All parties must be duly informed of hearings, briefs and pieces of evidence (*paragraphs 2 and 3, section 599, ACCP*).
- Courts are not bound by awards that violate public order or concern matters that are not arbitrable (*section 613, ACCP*) (see *Question 8*).
- Provisions on the competency and procedure of the ASC (*sections 615 and 616, ACCP*).
- Some special provisions regarding consumers (*section 617, ACCP*).
- Some special provisions regarding labour law matters (*section 618, ACCP*).

In addition, the official legislative materials (see *above*) state that only violations of mandatory provisions that extend into the field of public order entitle a challenge (for the grounds for having an arbitral award set aside, see *Question 28*).

4. Does the law prohibit any types of disputes from being resolved via arbitration?

The Austrian Code of Civil Procedure (ACCP) foresees that basically any pecuniary claim that would fall within the jurisdiction of the (ordinary) courts of law can be subjected to arbitral proceedings. If the parties want to make non-pecuniary claims subject of an arbitration agreement, the legal effectiveness is depended on the parties' capability to conclude a settlement on the matter in dispute (*paragraph 1, section 582, ACCP*).

Some legal provisions excluding types of disputes from arbitration can be found in the ACCP; others in specific legal acts. The following types of disputes are excluded from arbitration:

- Claims regarding family law matters (even if they involve an economic interest) such as: child support claims, claims for the division of marriage assets and savings.
- Claims based on contracts subject (even if only in part) to the Tenant Act (*Mietrechtsgesetz*) or to the Non-Profit Housing Act (*Wohnungsgemeinnützigkeitsgesetz*), including all disputes

regarding the conclusion, the existence, the termination or the legal characterisation of such contracts.

- Claims resulting from or in connection with the Condominium Act (*Wohnungseigentumsgesetz*).
- Certain labour and social security matters.

Limitation

5. Does the law of limitation apply to arbitration proceedings?

In principle, the law of limitation applies in the same way as in relation to proceedings before ordinary Austrian courts.

The Austrian Code of Civil Procedure (ACCP) provides that a claim (that is, a request for arbitration) suspends any limitation period, even if the claim was brought before a non-competent institution or the arbitral award is later set aside due to the arbitral tribunal's lack of jurisdiction. This is provided that the claim is then immediately brought before the competent court or arbitral tribunal (*paragraph 4, section 584, ACCP*).

Which limitation period is relevant depends on the applicable national law (that may be altered by party agreement). Under general Austrian civil law, the limitation period in most cases (for example, common damage claims, and so on) is three years. The 30 year period is only applicable in rare cases.

ARBITRATION ORGANISATIONS

6. Which arbitration organisations are commonly used to resolve large commercial disputes?

Most arbitration proceedings in Austria are either governed by the Vienna International Arbitral Centre (VIAC) or International Chamber of Commerce (ICC) rules (see *Question 1*).

In addition, provincial chambers of commerce and bar associations host arbitral courts dedicated to domestic disputes.

Organisations such as the Austrian Arbitration Association (ArbAut) promote domestic and international arbitration. ArbAut's focus is promoting Austria as a place of arbitration.

See box, *Main arbitration organisations*.

JURISDICTIONAL ISSUES

7. What remedies are available where one party denies that the tribunal has jurisdiction to determine the dispute(s)? Does your jurisdiction recognise the concept of kompetenz-kompetenz? Does the tribunal or the local court determine issues of jurisdiction?

Austrian law recognises the concept of kompetenz-kompetenz. An arbitral tribunal has the competence to rule on its own jurisdiction (*paragraph 1, section 592, ACCP*). Any plea that the arbitral tribunal is not competent must be raised no later than the first pleading on the substance of the dispute. This plea is permissible even if the party has appointed, or participated in the appointment of, the arbitrator concerned. The arbitral tribunal can continue the arbitral proceedings and make an award, even if an action concerning the award on its jurisdiction is still pending.

ARBITRATION AGREEMENTS

Validity requirements

8. What are the requirements for an arbitration agreement to be enforceable?

Substantive/formal requirements

For an arbitration agreement to be valid under the Austrian Code of Civil Procedure (ACCP), the following conditions must be met:

- **Parties.** The arbitration agreement must specify the parties that will be bound to resolve certain of their disputes by arbitration. All natural and legal persons can in principle freely choose arbitration (over dispute resolution in national courts), but there are some restrictions for consumers and employees.
- **Form.** The arbitration agreement must be in writing. It can feature in a document signed by the parties or in letters, telefaxes, e-mails or other forms of communication exchanged between the parties, which provide the evidence of an agreement (*section 583, ACCP*).
- **Content.** The parties must state in the arbitration agreement which arbitrable disputes that have arisen or that will arise between them in respect of a defined legal relationship (contractual or not), will be submitted to arbitration (*section 581, ACCP*).

Separate arbitration agreement

In principle, the arbitration agreement can be contained in an arbitration clause or take the form of a separate agreement (*section 581, ACCP*).

Generally, if the following two conditions are met, the incorporation of an arbitration clause in a contract only by reference to another document is sufficient (*paragraph 2, section 583, ACCP*):

- The contract must fulfil the requirements of paragraph 1, section 58,3 ACCP, which states that either a written document signed by the parties or a letter, an e-mail, a facsimile or another form of transmission of messages between the parties is needed, so that there is proof of the agreement.
- The reference must be in such a way that it is clear that the arbitration agreement becomes part of the contract.

However, arbitration agreements to which a consumer is a party must be contained in a document signed personally by the customer and must not contain any agreements other than those relating to the arbitral proceedings (*paragraph 2, section 617, ACCP*). This provision also applies to arbitration agreements that cover labour law matters (to the extent arbitrable at all).

Unilateral or optional clauses

9. Are unilateral or optional clauses, where one party has the right to choose arbitration, enforceable?

In general, a party can unilaterally choose arbitration. For example, an arbitral tribunal can be constituted not only by arbitration agreement between the parties, but also by a testamentary disposition, a legal transaction not based on agreement or by articles of association (among other things) (*paragraph 2, section 581, ACCP*).

10. In what circumstances can a third party that did not sign the contract incorporating the arbitral clause in question be compelled to arbitrate disputes relating to the contract in question?

In general, arbitration agreements only have an effect inter-partes (that is, the parties that have entered into the arbitration agreement) but do not directly affect third parties. However, in few cases such as legal succession third parties can be bound as well. See further under *Question 15*.

11. In what circumstances is a third party that did not sign the contract incorporating the arbitral clause in question entitled to compel a party that did sign the contract to arbitrate disputes relating to the contract?

The legal sphere of third parties is normally not affected by an arbitration agreement that was concluded by two (different) parties (neither for better nor worse). See further under *Question 15*.

Separability

12. Does the applicable law recognise the separability of arbitration agreements?

While the principle of separability in the UNCITRAL Model Law is not enshrined in Austrian statutory law on arbitration, the ASC applies it on a case by case basis. For example, an arbitration clause referring to "all disputes arising out of or in connection with the agreement" has been held not only to cover disputes concerning damages for breach of contract but also questions concerning the validity and termination of the agreement. Therefore, the arbitration clause can be said to have a separate legal existence and may "survive" the termination or nullity of the main agreement.

However, if there was no agreement in the first place to conclude a contract (that is, where no contract is validly concluded), that lack of consent may also extend to an arbitration clause contained in that contract. However, if there is doubt as to the lack of consent, the lack of consent generally only invalidates the contract and not the arbitration clause.

There may also be an absence of an arbitration agreement where a contract including an arbitration clause is subsequently dissolved.

Breach of an arbitration agreement

13. What remedies are available where a party starts court proceedings in breach of an arbitration agreement or initiates arbitration in breach of a valid jurisdiction clause?

Court proceedings in breach of an arbitration agreement

If an action is brought before an ordinary court on a matter subject to an arbitration agreement, the respondent can raise this issue. Provided the arbitration agreement validly reserves the matter at issue to arbitration, the court must reject the action.

Further, under the Austrian Code of Civil Procedure (ACCP) court proceedings do not prevent parallel arbitral proceedings from being commenced or continued (*paragraph 1, section 584, ACCP*). However, in practice, arbitral tribunals usually suspend their proceedings until the court has rendered a final and binding decision on the matter. Otherwise, an award made would be exposed to challenge if the court decided that it was competent (rather than the tribunal).

If arbitral proceedings are already under way, ordinary courts must reject any further action on the same matter (*paragraph 3, section 584, ACCP*). However, the ordinary court approached can accept the action if (*paragraph 3, section 584, ACCP*):

- An objection to the jurisdiction of the arbitral tribunal is raised at the latest when entering into argument on the substance of the dispute.
- A decision by the arbitral tribunal cannot be obtained within a reasonable period of time.

Further, the breach of an arbitration agreement by bringing an action before an ordinary civil court can make the breaching party liable under general Austrian civil law. In the case of an arbitration agreement of broad scope, the arbitral tribunal can be competent to decide on these damages.

Arbitration in breach of a valid jurisdiction clause

In general, arbitral tribunals decide on their own jurisdiction. If a valid jurisdiction clause exists (or, indeed, no valid arbitration agreement), the tribunal must declare itself not competent.

The decision of the arbitral tribunal on its jurisdiction takes the form of an arbitral award, which can be set aside by a court (*section 671, ACCP*).

14. Will the local courts grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement?

Local courts do not grant anti-suit injunctions that interfere with the jurisdiction of another country.

Joinder of third parties

15. In what circumstances can a third party be joined to an arbitration or otherwise be bound by an arbitration award?

Generally, only the parties to the arbitration agreement are bound by an arbitration award.

In the case of legal succession, arbitration agreements can be extended to third parties; as a result third parties are both compelled and entitled. Succession can take the form of:

- Statutory assignments.
- Assignment (by agreement) of a claim or a debt.
- Judicial conferment of a debt.
- Redemption of a debt.

In addition, the ASC has ruled that third party beneficiaries are bound by an arbitration agreement because the third party is free as to whether or not it wishes to exercise the rights under the contract.

Beyond succession, a third party can join arbitral proceedings if it both:

- Has an interest in the arbitration.
- Signs up to the arbitration agreement or submits to the jurisdiction of the arbitral tribunal.

Further, the parties to the original arbitration agreement must consent to the third party joining, expressly or conclusively at the time of the request for joining or later. This may be the case if a party continues to plead and submit briefs on the joinder of the third party without that joinder being expressly rejected.

Once a third party has joined, it enjoys all procedural rights, in particular the right to be heard.

ARBITRATORS

Number and qualifications/characteristics

16. Are there any legal requirements relating to the number and qualifications/characteristics of arbitrators? Must an arbitrator be a national of, or licensed to practice in, your jurisdiction in order to serve as an arbitrator there?

Depending on the agreement between the parties, the tribunal can consist of one or more arbitrators. If there is more than one arbitrator, the number of arbitrators must be uneven (*paragraph 2, section 586, Austrian Code of Civil Procedure (ACCP)*).

The parties are free to agree on a procedure for appointing an arbitrator (*paragraph 1, section 587, ACCP*). In general, any person over the age of 18 years with legal capacity can become an arbitrator.

Legal education or knowledge is not considered necessary.

There is no limitation regarding the nationality. Only the parties are authorised to agree otherwise.

If there is no agreement, the court appoints the arbitrator(s) on the parties' request (*see Question 18*). In this case, the court must have due regard to any qualifications required of the arbitrator(s) and appoint independent and impartial arbitrator(s) (*see Question 17*).

Generally, arbitrators must not unduly delay the proceedings and must treat the parties equally.

Independence/impartiality

17. Are there any requirements relating to arbitrators' independence and/or impartiality?

Under the Austrian Code of Civil Procedure (ACCP), arbitrators must perform their duties with complete independence and impartiality (*section 588, ACCP*). The parties can challenge arbitrators if there are justifiable doubts about their impartiality or independence, or if they may be biased.

Appointment/removal

18. Does the law contain default provisions relating to the appointment and/or removal of arbitrators?

Appointment of arbitrators

The parties are free to agree on the procedure for appointing the arbitrator(s).

If the parties fail to nominate arbitrators within four weeks of receipt of the written request by the other party, the court must appoint the arbitrator(s) or chairman on request of one party (*paragraph 2, section 587, Austrian Code of Civil Procedure (ACCP)*). This may occur where:

- One party was not able to appoint an arbitrator.
- The parties could not agree to the appointment of a sole arbitrator.
- The co-arbitrators could not appoint the chairman of the tribunal.

The competent court in these proceedings is the ASC in first and last instance (*section 615, ACCP*).

See also *Question 16*.

Removal of arbitrators

Arbitrators can be removed in the following situations:

- Where there is a successful challenge by a party (*sections 588 and 589, ACCP*).
- When the parties agree to the termination of an arbitrator's mandate (*section 590, ACCP*).
- When the arbitrator resigns on his own initiative (*section 590, ACCP*).
- Where one party asks the court to decide on the termination of the mandate when an arbitrator either becomes unable to fulfil his tasks or fails to act (*section 590, ACCP*).

The parties are free to agree on a procedure for challenging an arbitrator (*paragraph 1, section 589, ACCP*). However, if the parties failed to agree on a procedure for challenging, the arbitral tribunal decides on the challenge (*paragraph 2, section 589, ACCP*). In this case, the party must submit a written statement of the reasons for the challenge. The grounds must be submitted within four weeks after the party has become aware of both the:

- Constitution of the arbitral tribunal.
- Facts that give rise to justifiable doubts with regard to the impartiality or independence of the arbitrator or the absence of required qualifications.

If such a challenge is not successful, the challenging party can ask the court to decide on the challenge, which is not subject to appeal.

While the court proceedings are pending, the arbitral tribunal and the challenged arbitrator can continue the arbitral proceedings and render an award.

PROCEDURE

Commencement of arbitral proceedings

19. Does the law provide default rules governing the commencement of arbitral proceedings?

The Austrian Code of Civil Procedure does not provide default provisions with regard to the commencement of arbitral proceedings.

Applicable rules

20. What procedural rules are arbitrators likely to follow? Can the parties determine the procedural rules that apply? Does the law provide any default rules governing procedure?

Applicable procedural rules

The parties are free to determine the procedural rules as long as they do not derogate from the mandatory provisions provided in the Austrian Code of Civil Procedure (ACCP) (*see Question 3*).

The parties can refer to rules of procedure, such as the rules of the VIAC, ICC or UNCITRAL. If there is no agreement, the arbitrators must follow the (mandatory and non-mandatory) provisions of the ACCP and, where no provisions exist, conduct the proceedings at their discretion (*paragraph 1, section 594, ACCP*).

Default rules

Section 600 of the ACCP comprises two notable default rules governing procedure:

- The arbitral tribunal must terminate the proceedings if the claimant fails to communicate his statement (that is, the relief and remedy sought, and the facts supporting his claim) (*paragraph 1, section 600, ACCP*).

- In the case of a respondent's failure to respond within the agreed time period, the arbitral tribunal can continue the proceedings and render a decision based on what is before it by then, if not otherwise agreed by the parties (*paragraph 2, section 600, ACCP*). The same applies if a party is in default in relation to any other procedural act. However, this default is not to be treated as an admission of the claimant's allegations. The arbitral tribunal is also competent to excuse the default if there are reasonable grounds for default.

As the default provisions are not mandatory, the parties can, among other things, also agree that the arbitral tribunal is to render a default decision (that is, an arbitral award by default) if the respondent fails to respond in time.

Arbitrator's powers

21. What procedural powers does the arbitrator have under the applicable law? If there is no express agreement, can the arbitrator order disclosure of documents and attendance of witnesses (factual or expert)?

Under the Austrian Code of Civil Procedure (ACCP), the arbitral tribunal can issue interim or protective measures if the measure was requested by a party and, usually, the other party has already been heard (*section 593, ACCP*). In addition, the arbitral tribunal can take measures indispensable to avoid frustration or impediment of the enforcement of the claim or to avoid the risk of irreparable harm.

The arbitral tribunal can also appoint experts unless otherwise agreed by the parties (*section 601, ACCP*). It can also require the parties to assist an appointed expert by providing relevant information, documents or objects. The parties can challenge an expert in the same manner as arbitrators.

An arbitral tribunal does not have coercive power and therefore cannot enforce interim or protective measures, summon witnesses or order the disclosure of documents. Therefore, if a party or a non-party to the arbitration refuses to disclose documents or a witness (factual or expert) refuses to appear at the hearing to render testimony, the arbitral tribunal can only evaluate this within the scope of its consideration of evidence. Coercive powers are reserved to the (ordinary) law courts.

To compensate this, the arbitral tribunal can ask the court to conduct judicial acts that the arbitral tribunal is not authorised to conduct (*section 602, ACCP*).

EVIDENCE

22. What documents must the parties disclose to the other parties and/or the arbitrator? How, in practice, does the scope of disclosure in arbitrations compare with disclosure in domestic court litigation? Can the parties set the rules on disclosure by agreement?

Scope of disclosure

The production of documentary evidence plays a central role in many arbitral proceedings. There is an emphasis on written submissions. However, the taking of documentary evidence is often very controversial with regard to document discovery and the obligation to forward to the other side documents that are potentially harmful to one's own position.

Under general Austrian civil procedural law, the courts are not entitled to inquire *ex officio* into the circumstances that are the basis of the parties' dispute. The courts are bound by the limits set by the parties' submissions. Further, the courts do not entertain fishing expeditions by one party. There is no pre-trial discovery or large scale disclosure of documents.

However, section 178 of the Austrian Code of Civil Procedure (ACCP) foresees some elements of discovery, the scope of which is the subject of controversy among legal commentators. Further, section 303 of the ACCP allows for a limited request for disclosure. The requesting party must describe the topic of the document and the facts that must be evidenced through this document in as much detail as possible. The other party must produce the document if either:

- It referred to that document in its submissions.
- There is a disclosure obligation under material civil law.
- The document is a joint document (that is, correspondence during the parties' negotiations).

The principle of free consideration of evidence applies. Therefore, the judge (or arbitrators) can also take into account the fact that a document is withheld even where the above criteria are not met.

Parties' choice

In general, parties are free to determine disclosure proceedings. They can include appropriate measures for the production of documents or exclude the production of documents. The arbitral framework does not limit the permissible scope of disclosure.

The parties often set disclosure agreements based on Article 3 of the IBA Rules on the Taking of Evidence in International Arbitration 1999. The scope of disclosure is wider than in Austrian national litigation. If the party refuses to produce the evidence, the arbitral tribunal can order (although not enforce) the disclosure, if the request was specific enough. If the party still fails to produce the documents, the tribunal can draw negative inferences in respect of that document.

CONFIDENTIALITY

23. Is arbitration confidential? If so, what is the scope of that confidentiality and who is subject to the obligation (parties, arbitrators, institutions and so on)?

Although the Austrian Code of Civil Procedure (ACCP) does not contain provisions on the confidentiality of arbitration, the legislative materials state that the character of arbitral proceedings is confidential.

In addition, the public can be excluded to a greater extent than in ordinary court proceedings (where, as a general rule, proceedings are public). The public can be excluded in the proceedings regarding the action for setting aside an arbitral award and the action for declaration of the existence or non-existence of an arbitral award (*paragraph 2, section 616, ACCP*).

COURTS AND ARBITRATION

24. Will the local courts intervene to assist arbitration proceedings seated in its jurisdiction?

Under the Austrian Code of Civil Procedure (ACCP), court intervention in arbitration proceedings is restricted. A court must not intervene except where expressly requested and provided for in the law (*section 578, ACCP*).

In addition, the court must not intervene if the seat of the arbitral tribunal is not within Austria.

The courts can provide assistance in:

- Conducting judicial acts that the arbitral tribunal has no authority to conduct (*section 602, ACCP*). This includes a request to a foreign court or administrative authority to conduct these acts.

- Appointment of arbitrators (*section 587, ACCP*).
- The challenge procedure (*section 589, ACCP*).
- Ordering of interim or protective measures (*section 593, ACCP*).

The arbitral tribunal can grant interim or protective measures without request if a party before or during the arbitral proceeding requests it (*section 585, ACCP*).

25. What is the risk of a local court intervening to frustrate an arbitration seated in its jurisdiction? Can a party delay proceedings by frequent court applications?

Risk of court intervention

The court can only intervene if the party or the arbitral court has requested intervention and only in relation to certain defined matters. Therefore, the risk of court intervention is low.

Delaying proceedings

If an arbitral proceeding is pending, the court must in principle reject court applications in the same matter (*see Question 13*). Contrary to that, if proceedings are pending before the court, an arbitral proceeding can be commenced or continued, and an award can be made. In addition, under the Austrian Code of Civil Procedure (ACCP), the challenge of an arbitrator pending before the court does not hinder the continuation of the arbitral proceeding or an award being made (*paragraph 3, section 589, ACCP*).

REMEDIES

26. What interim remedies are available from the tribunal?

Interim measures

Generally, interim remedies can be taken to prevent the enforcement of the claim being frustrated or considerably hampered, or if there is a danger of irreparable harm.

Ex parte

Ex parte measures are not allowed under the Austrian Code of Civil Procedure (ACCP) (*paragraph 1, section 593, ACCP*). The other party must be heard in court before granting interim relief. An arbitration clause can also not waive such right.

Security

Unless the parties have agreed otherwise, arbitral tribunals have, in principle, the right to issue interim measures.

As with any final remedy (*see Question 27*), interim measures can only be directed against a party that has submitted to the jurisdiction of the tribunal (typically through accepting an arbitration agreement).

Whether these interim measures include orders to provide security for costs is the subject of controversy. The ACCP does not explicitly address the issue. However, there are good arguments that the tribunal has discretion to give orders to provide security for costs where a party to the arbitration is domiciled in a country that would not enforce Austrian awards (provided the parties have not stipulated otherwise).

An arbitral tribunal can require any party applying for interim or protective measures to provide security (*paragraph 1, section 593, ACCP*). This prevents parties from making abusive requests for interim measures and secures funds for damage caused by the measures.

27. What final remedies are available from the tribunal?

An arbitral tribunal can include in its award:

- An obligation to compensate damages.
- Declarations (equivalent to judgments for finding or establishment).
- An order for the payment of interest.
- A costs award.

APPEALS

28. Can arbitration proceedings and awards be appealed or challenged in the local courts? What are the grounds and procedure? Can parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitral clause itself)?

Rights of appeal/challenge

The parties can challenge arbitral awards in the Austrian court system.

Further, under the Austrian Code of Civil Procedure (ACCP), a declaration on the existence or non-existence of an arbitral award can be requested if the party seeking the declaration has a special legal interest in the declaration (*section 612, ACCP*).

The ASC is the court of first and last instance deciding on claims challenging an arbitral award or dealing with requests for declaration (*section 615, ACCP*).

Grounds and procedure

Paragraph 2, section 611 of the ACCP contains an exhaustive list of grounds on which the setting aside of an arbitral award can be sought:

- Although a valid arbitration agreement does not exist, the tribunal has affirmed its jurisdiction or vice versa (jurisdiction of the tribunal).
- A party was unable to present its case or has not been informed about the appointment of an arbitrator or of the arbitral proceedings (right to be heard).
- The award deals with matters that are not part of the arbitration agreement (subjective arbitrability).
- The composition or constitution of the tribunal was not in accordance with the mandatory provisions of the ACCP or with the agreement of the parties (composition of the tribunal).
- The arbitral proceedings contravene fundamental principles of arbitration (procedural *ordre public*).
- The arbitral award has a deficiency that would allow a court judgment suffering from that deficiency to be challenged by an action for revision (revision grounds). These deficiencies are (*paragraph 1, section 530, ACCP*):
 - the award is based on a tampered document, a false testimony, or a criminal judgment which was revised;
 - the award is obtained by means of criminal behaviour;
 - members of the tribunal pursue their duties to the detriment of a party and in violation of criminal provisions.
- The subject matter of the dispute is not arbitrable (objective arbitrability).

- The arbitral award is not in line with the fundamental values of the Austrian legal system (general *ordre public*).

All but the last two grounds (objective arbitrability and general *ordre public*) must actively be claimed by the party seeking to have an award set aside. The last two grounds can be taken up *ex officio* if any challenge of the award is brought; if one of these grounds is given, the award is deemed non-existent.

Excluding rights of appeal

A general waiver of the rights to appeal is impermissible. Further, objective arbitrability and general *ordre public* cannot be excluded.

The other grounds for appeal can be waived once the award has been issued.

29. What is the limitations period applicable to actions to vacate or challenge an international arbitration award rendered?

Under the Austrian Code of Civil Procedure (ACCP), a challenge must be filed within three months of receipt of the award (*paragraph 4, section 611, ACCP*). The three-month period can be reduced or extended by agreement of the parties. A challenge on the revision grounds (*section 530, ACCP*) can be brought within four weeks of discovering the grounds.

COSTS

30. What legal fee structures can be used? Are fees fixed by law?

Legal fees are not fixed by law. Fees can be based on hourly rates or, for example, on a lump sum. If there is no agreement on fees, the Austrian lawyers' tariff may apply.

31. Does the unsuccessful party have to pay the successful party's costs? How does the tribunal usually calculate any costs award and what factors does it consider?

Cost allocation

Generally, under the Austrian Code of Civil Procedure (ACCP), the loser pays principle applies (*paragraph 1, section 609, ACCP*). However, the tribunal has discretion to take factors other than the outcome into account. All reasonable costs for appropriate law enforcement or defence are reimbursable. The decision with regard to the reimbursement of costs is also to be taken in the form of an arbitral award.

As this is not a mandatory provision, the parties are free to stipulate other principles for reimbursement (or non-payment) of costs.

Cost calculation

The tribunal also determines the amount of the costs to be reimbursed (*paragraph 3, section 609, ACCP*). The costs of arbitration generally comprise all the expenses for adequate legal representation as well as administrative fees. In institutional arbitration, the institution typically determines the costs and the parties are asked to pay a deposit beforehand. The arbitrators conclude an arbitrator's agreement with the parties, which includes provisions concerning their fees.

However, the ACCP does not contain any specific provisions regulating the calculation of costs.

Factors considered

When deciding on the costs, the arbitral tribunal takes into account the outcome of the arbitration, but can also take other circumstances into consideration (such as delay of proceedings by one party).

ENFORCEMENT OF AN AWARD

Domestic awards

32. To what extent is an arbitration award made in your jurisdiction enforceable in the local courts?

In Austria, arbitral awards are as binding as any ruling rendered by national courts. They are enforced by local courts the same way as general court decisions.

Foreign awards

33. Is your jurisdiction party to international treaties relating to recognition and enforcement of foreign arbitration awards, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)?

Austria is a party to several international instruments on the enforcement of arbitral awards. These include:

- The New York Convention.
- The (international) Protocol on Arbitration Clauses.
- The Geneva Convention on the Execution of Foreign Arbitral Awards.
- The European Convention on International Commercial Arbitration.
- The Convention on the Settlement of Investment Disputes between States and Nationals of other states (ICSID Convention).
- Bilateral treaties with, among others, Belgium, Germany, Liechtenstein and Russia.

34. To what extent is a foreign arbitration award enforceable?

Foreign awards are enforceable to the extent that they come within the scope of one of the international instruments on the enforceability of arbitral awards (*see Question 33*). For example, Austria is a member of the New York Convention without reservations. Therefore, foreign arbitral awards are generally enforceable in Austria if they are enforceable in their jurisdiction of origin (that is a party to the New York Convention) (*see Question 36*).

However, foreign arbitral awards are not directly enforceable (even if covered by an international instrument). Rather, foreign awards

must be first declared enforceable in *exequatur* proceedings (which are straightforward).

35. What is the limitations period applicable to actions to enforce international arbitration awards rendered outside your jurisdiction?

The Austrian Enforcement Act (*Exekutionsordnung*) governs the recognition and declaration of enforceability of foreign arbitration awards, more precisely its Second Title (*section 79 and following*). However, under the Austrian Code of Civil Procedure (ACCP), provisions of international law such as the New York Convention or provisions of legal instruments of the European Union have priority (*paragraph 1, section 614, ACCP*).

Generally, final titles are subject to a 30-year limitation period in Austria. However, some legal systems require for enforceability that an award must be confirmed by law courts within a certain period of time. If there are such requirements in the jurisdiction in question, particular care needs to be taken to ensure that enforceability is maintained.

Length of enforcement proceedings

36. How long do enforcement proceedings in the local court take, from the date of filing the application to the date when the first instance court makes its final order? Is there an expedited procedure?

Enforcement is usually straightforward and does not take longer than two to three months. Further, enforcement proceedings are rarely refused where there is an international instrument covering the award.

Together with the request to have the award declared enforceable, a copy of the award and a confirmation that the award is not subject to further appeal must be provided. The proceedings do not involve a hearing but the applicant must establish all of the following:

- That the other party was duly informed about the proceedings.
- That the award is enforceable in the country of origin.
- That the country of origin would also enforce Austrian awards.

REFORM

37. Are any changes to the law currently under consideration or being proposed?

The Austrian statutory framework on arbitration has only recently been amended by the Austrian Arbitration Law Reform Act 2013 (*Schiedsrechtsänderungsgesetz*), which came into force on 1 January 2014.

Currently, to the authors' knowledge, no further amendments are under consideration.

MAIN ARBITRATION ORGANISATIONS

Vienna International Arbitral Centre (VIAC)

Main activities. The VIAC is a permanent arbitral institution of the Austrian Federal Economic Chamber and serves as a focal point for the settlement of commercial disputes. The arbitral proceedings are individually designed according to the parties' requirements and meet the highest quality criteria.

W www.viac.eu/en

International Chamber of Commerce (ICC)

Main activities. The ICC is the International Chamber of Commerce's standing arbitral institution headquartered in Paris. It is present in Austria through ICC Austria, a service point.

W www.icc-austria.org/en/Home.htm

ONLINE RESOURCES

Legal Information System of the Republic of Austria (*Rechtsinformationssystem des Bundes*) (RIS)

W www.ris.bka.gv.at/Bundesrecht

Description. Official website hosting the Austrian statutory law, including the ACCP. It is up-to-date and in the German language.

Vienna International Arbitral Centre

W www.viac.eu/en/materials/83-recht/gesetze/200-zpo-as-amended-2013

Description. This website is maintained by the VIAC with up-to-date English translations of rules applicable to arbitration.

Practical Law Contributor profiles



Florian Neumayr, Partner

Bpv Hügel Rechtsanwälte

T +43 1 260 50 206

F +43 1 260 50 133

E florian.neumayr@bpv-huegel.com

W www.bpv-huegel.com



Sarah Baumgartner, Associate

bpv Hügel Rechtsanwälte OG

T +43 1 260 50 0

F +43 1 260 50 133

E sarah.baumgartner@bpv-huegel.com

W www.bpv-huegel.com

Professional qualifications. Attorney-at-law, Austria

Areas of practice. Dispute resolution; EU and Austrian competition law.

Recent transactions

- Heads the litigation department and is vice-head of the firm's competition law practice group.
- Special focus on dispute resolution and, in particular, private enforcement. Advises on all aspects of Austrian and EU competition law.
- Considerable track record in representing national and international clients before authorities, courts, and arbitral tribunals (in particular, the ICC and VIAC). Clients include top undertakings, among others, in the telecoms, building and construction, sports and medical equipment, automotive and waste disposal industries.

Non-professional qualifications. Law School, Vienna University and Aristotle University of Thessalonica; LLM in international commercial law, University of Nottingham; PhD in procurement law

Languages. German, English, Spanish, Dutch, Modern Greek

Professional associations/memberships. Honorary fellow of the Centre for International Legal Studies; active member of the Austrian bar, the Association of German Speaking Competition Lawyers (*Studienvereinigung Kartellrecht*), the Spanish Austrian Lawyers' Association, UIA and LIDC; regular speaker at seminars and conferences; highly regarded in numerous national and international rankings.

Publications. Authored numerous publications on competition law and dispute resolution.

Areas of practice. Representation before courts and authorities; competition law.

Recent transactions

- Associate in the firm's litigation department and the competition law practice group.
- Before joining bpv Hügel, Sarah was an intern in another well-established Austrian law firm and in the legal department of a company.
- In 2014, Sarah completed an internship at the Austrian foreign trade office in Kuala Lumpur, Malaysia.

Non-professional qualifications. Law School, University of Vienna

Languages. German, English, French, Spanish