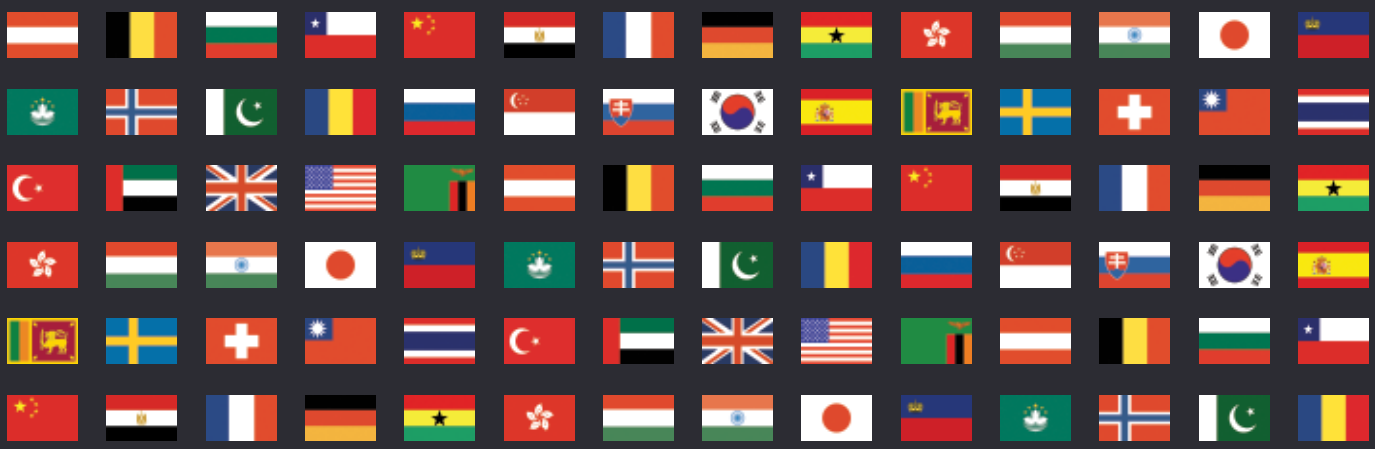
Arbitration 2021

Contributing editors
Stephan Wilske and Gerhard Wegen



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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the sixteenth edition of *Arbitration*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Hong Kong, Macau, Spain, Sri Lanka and Zambia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Gerhard Wegen and Stephan Wilske of Gleiss Lutz, for their continued assistance with this volume.

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Austria

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LAWS AND INSTITUTIONS

Multilateral conventions relating to arbitration

1 | Is your jurisdiction a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Austria has ratified the following multilateral conventions relating to arbitration:

- the New York Convention, 31 July 1961 (Austria has made a notification under article I(3), stating that it would only recognise and enforce awards rendered in other contracting states of this convention);
- the Protocol on Arbitration Clauses, Geneva, 13 March 1928;
- the Convention on the Execution of Foreign Arbitral Awards, Geneva, 18 October 1930;
- the European Convention on International Commercial Arbitration (and the agreement relating to its application), 4 June 1964; and
- the Convention on the Settlement of Investment Disputes, 24 June 1971.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

Austria has signed 69 bilateral investment treaties, of which 62 have been ratified, namely with Albania, Algeria, Argentina, Armenia, Azerbaijan, Bangladesh, Belarus, Belize, Bolivia, Bosnia, Bulgaria, Cape Verde, Chile, China, Croatia, Cuba, the Czech Republic, Egypt, Estonia, Ethiopia, Georgia, Guatemala, Hong Kong, Hungary, India, Iran, Jordan, Kazakhstan, Kuwait, Latvia, Lebanon, Libya, Lithuania, Macedonia, Malaysia, Malta, Mexico, Moldova, Mongolia, Montenegro, Morocco, Namibia, Oman, Paraguay, Philippines, Poland, Romania, Russia, Saudi Arabia, Serbia, Slovakia, Slovenia, South Africa, South Korea, Tajikistan, Tunisia, Turkey, Ukraine, the United Arab Emirates, Uzbekistan, Vietnam and Yemen.

Austria is also a party to a number of further bilateral treaties that are not investment treaties, mainly with neighbouring countries.

Domestic arbitration law

3 | What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

Arbitration law is contained in articles 577 to 618 of the Austrian Code of Civil Procedure (CCP). These provisions regulate both domestic and international arbitration proceedings.

Recognition of foreign awards is regulated in the aforementioned multilateral and bilateral treaties. Enforcement proceedings are regulated by the Austrian Enforcement Act.

Domestic arbitration and UNCITRAL

4 | Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

As in most countries, the law does not mirror every single aspect of the UNCITRAL Model Law. However, the main features have been introduced.

Unlike the UNCITRAL Model Law, Austrian law does not distinguish between domestic and international arbitrations, or between commercial and non-commercial arbitrations. Therefore, specific rules apply to employment and consumer-related matters.

Mandatory provisions

5 | What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The parties are free to agree on the rules of procedure (eg, by reference to specific arbitration rules) within the limits of the mandatory provisions of the CCP. Where the parties have not agreed on any set of rules, or set out rules of their own, the arbitral tribunal must, subject to the mandatory provisions of the CCP, conduct the arbitration in such a manner as it considers appropriate. Mandatory rules of arbitration procedure include that the arbitrators must be, and remain, impartial and independent. They must disclose any circumstances likely to give rise to doubts about their impartiality or independence. The parties have the right to be treated in a fair and equal manner, and to present their case. Further mandatory rules concern the arbitral award, which must be in writing, and the grounds on which an award can be challenged.

Substantive law

6 | Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

An arbitral tribunal must apply the substantive law chosen by the parties, failing which it must apply the law that it considers appropriate. A decision on grounds of equity is only permitted if the parties have expressly agreed to a decision in equity (article 603 CCP).

Arbitral institutions

7 | What are the most prominent arbitral institutions situated in your jurisdiction?

The Vienna International Arbitral Centre (VIAC) (www.viac.eu) administers international arbitration proceedings under its Rules of Arbitration and Conciliation (2013) (the Vienna Rules). Fees for the arbitrators are calculated on the basis of the amount in dispute. There are no restrictions as to the place and language of the arbitration.

The Vienna Commodity Exchange at the Vienna Stock Exchange has its own court of arbitration and its own recommended arbitration clause.

Certain professional bodies and chambers provide for their own rules or administer arbitration proceedings, or both.

The International Chamber of Commerce maintains a direct presence through its Austrian National Committee.

ARBITRATION AGREEMENT

Arbitrability

8 | Are there any types of disputes that are not arbitrable?

In principle, any proprietary claim is arbitrable. Non-proprietary claims are still arbitrable if the law allows the dispute to be settled by the parties.

There are some exceptions in family law or cooperative apartment ownership.

Consumer and employment-related matters are only arbitrable if the parties enter into an arbitration agreement once the dispute has arisen.

Requirements

9 | What formal and other requirements exist for an arbitration agreement?

An arbitration agreement must:

- sufficiently specify the parties (they must at least be determinable);
- sufficiently specify the subject matter of the dispute in relation to a defined legal relationship (this must at least be determinable and it can be limited to certain disputes, or include all disputes);
- sufficiently specify the parties' intent to have the dispute decided by arbitration, thereby excluding the state courts' competence; and
- be contained in either a written document signed by the parties or in telefaxes, emails or other communication exchanged between the parties, which preserve evidence of a contract.

A clear reference to general terms and conditions containing an arbitration clause is sufficient.

Enforceability

10 | In what circumstances is an arbitration agreement no longer enforceable?

Arbitration agreements and clauses can be challenged under the general principles of contract law, in particular, on the grounds of error, deceit or duress, or legal incapacity. There is controversy over whether such a challenge should be brought before the arbitral tribunal or before a court of law. If the parties to a contract containing an arbitration clause rescind their contract, the arbitration clause is deemed to be no longer enforceable, unless the parties have expressly agreed on the continuation of the arbitration clause. In the event of insolvency or death, the receiver or legal successor is, in general, bound by the arbitration agreement. An arbitration agreement is no longer enforceable if an arbitral tribunal has rendered an award on the merits of the case or if a court of law has rendered a final judgment on the merits and the decision covers all matters for which arbitration has been agreed on.

Separability

11 | Are there any provisions on the separability of arbitration agreements from the main agreement?

According to the UNCITRAL Model Law, the separability of the arbitration agreement from the main agreement is valid as a rule of law. Under Austrian law, such separability is derived from the parties' intentions.

Third parties – bound by arbitration agreement

12 | In which instances can third parties or non-signatories be bound by an arbitration agreement?

As a general principle, only the parties to the arbitration agreement are bound by it. Courts are reluctant to bind third parties to the arbitration agreement. Thus, concepts such as piercing the corporate veil and groups of company typically do not apply.

However, a legal successor is bound by the arbitration agreement in which his or her predecessor has entered into. This also applies to the insolvency administrator and to the heir of a deceased person.

Third parties – participation

13 | Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

Normally, joinder of a third party to an arbitration requires the corresponding consent of the parties, which can be either express or implied (eg, by reference to arbitration rules that provide for joinder). Consent can be given either at the time the request for joinder is made or at an earlier stage in the contract itself. Under the law, the issue is largely discussed in the context of an intervention by a third party that has an interest in the arbitration. Here, it is argued that such a third-party intervener must be a party to the arbitration agreement or otherwise submit to the jurisdiction of the tribunal, and that all parties, including the intervener, must agree to the intervention.

The Supreme Court has held that the joining of a third party in arbitral proceedings against its will, or the extension of the binding effect of an arbitration award on a third party, would infringe article 6 of the European Convention on Human Rights if the third party was not granted the same rights as the parties (eg, the right to be heard).

Groups of companies

14 Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

The group of companies doctrine is not recognised in Austrian law.

Multiparty arbitration agreements

15 What are the requirements for a valid multiparty arbitration agreement?

Multiparty arbitration agreements can be entered into under the same formal requirements as arbitration agreements.

Consolidation

16 Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

Consolidation of arbitral proceedings is not expressly governed by Austrian law. In doctrine, however, it is argued that it is permissible, provided that the parties and the arbitrators consent.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

17 Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

Only physical persons can be appointed as arbitrators. The statute does not provide for any specific qualifications, but the parties may agree on such requirements. Active judges are not allowed to act as arbitrators under the statute regulating their profession.

Background of arbitrators

18 Who regularly sit as arbitrators in your jurisdiction?

Whether designated by an appointing authority or nominated by the parties, arbitrators may be required to have a certain experience and background regarding the specific dispute at hand. Such requirements may include professional qualifications in a certain field, legal proficiency, technical expertise, language skills or being of a particular nationality.

Many arbitrators are attorneys in private practice; others are academics. In a few disputes, concerning mainly technical issues, technicians and lawyers are members of the panel.

Qualification requirements can be included in an arbitration agreement, which requires great care as it may create obstacles in the appointment process (ie, an argument about whether the agreed requirements are fulfilled).

Default appointment of arbitrators

19 Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

Courts are competent to make the necessary default appointments if the parties do not agree on another procedure, and if one party fails to appoint an arbitrator; the parties cannot agree on a sole arbitrator; or the arbitrators fail to appoint their chairman.

Challenge and replacement of arbitrators

20 On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement, and the procedure, including challenge in court. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Challenge of arbitrators

An arbitrator can only be challenged if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence, or if he or she does not possess qualifications agreed to by the parties. The party that appointed an arbitrator cannot rely, in its challenge, on circumstances it knew at the time of the appointment (article 588 CCP).

Removal of arbitrators

An arbitrator can be removed if he or she is incapable of discharging his or her tasks, or if he or she does not discharge them within an appropriate time (article 590 CCP).

Arbitrators can be removed, either by way of challenge or with the termination of their mandate. In both cases, it is ultimately the court that decides upon the request of one party. If early termination of the arbitrator's mandate occurs, the substitute arbitrator must be appointed in the same manner in which the replaced arbitrator was appointed.

In a recent case, the Supreme Court dealt with grounds for challenges, analysing the conflicting views of scholars as to whether, and to what extent, challenges should be permitted after a final award. In its analysis the court also cited and relied on the IBA Guidelines.

Relationship between parties and arbitrators

21 What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration and expenses of arbitrators.

In ad hoc arbitration, an arbitrators' agreement should be concluded, regulating their rights and duties. This contract should include a fee arrangement (eg, by reference to an official tariff of legal fees, hourly rates or in some other way) and the arbitrators' right to have their out-of-pocket expenses reimbursed. Their duties include the conduct of the proceeding, as well as the drafting and signing of the award.

Duties of arbitrators

22 What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

Pursuant to article 588 CCP, an arbitrator must disclose any circumstances that could raise doubts as to his or her impartiality or independence, or that are in conflict with the parties' agreement at any stage of the proceedings. Independence is defined by absence of close financial or other ties between the arbitrator and either of the parties. Impartiality is closely related to independence, but rather refers to the arbitrator's attitude. An arbitrator may be successfully challenged if objectively justified doubt as to his or her impartiality or independence can be established.

Immunity of arbitrators from liability

23 | To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

If an arbitrator has accepted his or her appointment, but then refuses to discharge his or her tasks in due time, or at all, he or she can be held liable for the damage because of the delay (article 594 CCP). If an award has been set aside in subsequent court proceedings and an arbitrator has caused, in an unlawful and negligent manner, any damage to the parties, he or she can be held liable. Arbitrators' agreements and rules of arbitration of arbitral institutions often contain exclusions of liability.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

24 | What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

The law does not contain any express rules on the remedies available if court proceedings are commenced in breach of an arbitration agreement, or if arbitration is commenced in breach of a jurisdiction clause (other than an adverse cost decision in proceedings that should not have been commenced in the first place).

If a party brings a legal action before a court of law, despite the matter being subject to an arbitration agreement, the defendant must raise an objection to the court's jurisdiction before commenting on the subject matter itself, namely, at the first hearing or in its statement of defence. The court must generally reject such claims if the defendant objected to the court's jurisdiction in time. The court must not reject the claim if it establishes that the arbitration agreement is non-existent, invalid or impracticable.

Jurisdiction of arbitral tribunal

25 | What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated, and what time limits exist for jurisdictional objections?

An arbitral tribunal can rule on its own jurisdiction in either a separate award or in the final award on the merits. A party who wishes to challenge the jurisdiction of the arbitral tribunal must raise that objection no later than in the first pleading in the matter. The appointment of an arbitrator, or the party's participation in the appointment procedure, does not preclude a party from raising the jurisdictional objection. A late plea must not be considered, unless the tribunal considers the delay justified and admits the plea. Both courts and arbitral tribunals can determine jurisdictional issues.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 | Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

If the parties have not agreed on a place of arbitration and on the language of the arbitral proceedings, it is at the arbitral tribunal's discretion to determine an appropriate place and language. Pursuant to article 604 CCP, the parties are free to choose the substantive law. In the absence of such agreement, it is within the discretion of the arbitral tribunal to choose the law it deems appropriate. The tribunal may not decide ex aequo et bono unless the parties have given the respective authorisation.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

Under statutory law, the claimant must submit a statement of claim that sets forth the facts on which the claimant intends to rely, and his or her requests for relief. The statement of claim must be filed within the period agreed between the parties or set by the arbitral tribunal. The claimant may submit relevant evidence at that point. The respondent shall then submit his or her statement of defence.

Under the Vienna Rules, the claimant must submit a statement of claim to the secretariat of the VIAC. The statement must contain the following information:

- the full names, addresses and other contact details of the parties;
- a statement of the facts and a specific request for relief;
- if the relief requested is not exclusively for a specific sum of money, the monetary value of each individual claim at the time of submission of the statement of claim;
- particulars regarding the number of arbitrators;
- the nomination of an arbitrator if a panel of three arbitrators was agreed or requested, or a request that the arbitrator be appointed; and
- particulars regarding the arbitration agreement and its content.

Hearing

28 | Is a hearing required and what rules apply?

Oral hearings shall take place at the request of one party, or if the arbitral tribunal considers it necessary (article 598 CCP and article 30 of the Vienna Rules).

Evidence

29 | By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

Statutory law does not contain specific rules on the taking of evidence in arbitral proceedings. Arbitral tribunals are bound by rules on evidence, which the parties may have agreed on. In the absence of such rules, the arbitral tribunal is free to take and evaluate evidence as it deems appropriate (article 599 CCP). Arbitral tribunals have the power to appoint experts (and to require the parties to give the experts any relevant information, or to produce or provide access to any relevant documents, goods or other property for inspection), hear witnesses, parties or party officers. However, arbitral tribunals have no power to compel the attendance of parties or witnesses.

As a matter of practice, parties often authorise arbitral tribunals to refer to the IBA Rules on the Taking of Evidence (IBA Rules) for guidance. If rules such as the IBA Rules are referred to, or agreed, the scope of disclosure is often broader than disclosure in litigation (which is quite limited under Austrian law). The arbitral tribunal must give the parties the opportunity to take note of, and comment on, the evidence submitted and the result of the evidentiary proceedings (article 599 CCP).

Court involvement

30 | In what instances can the arbitral tribunal request assistance from a court, and in what instances may courts intervene?

An arbitral tribunal may request assistance from a court to:

- enforce an interim or protective measure issued by the arbitral tribunal (article 593 CCP); or

- conduct judicial acts where the arbitral tribunal is not authorised to do so (compelling witnesses to attend, hearing witnesses under oath and ordering the disclosure of documents), including requesting foreign courts and authorities to conduct such acts (article 602 CCP).

A court can only intervene in arbitrations if this is expressly provided for in the CCP. In particular, the court can (or must):
grant interim or protective measures (article 585 CCP);
appoint arbitrators (article 587 CCP); and
decide on the challenge of an arbitrator if:

- the challenge procedure agreed upon, or the challenge before the arbitral tribunal, is unsuccessful;
- the challenged arbitrator does not withdraw from his or her office; or
- the other party does not agree to the challenge.

Confidentiality

31 | Is confidentiality ensured?

The CCP does not explicitly provide for the confidentiality of arbitration, but confidentiality can be agreed upon between the parties. Further, in court proceedings for setting aside an arbitral award and in actions for a declaration of the existence, or non-existence, of an arbitral award, or on matters governed by articles 586 to 591 CCP (eg, challenge to arbitrators), a party can ask the court to exclude the public from the hearing, if the party can show a justifiable interest for the exclusion of the public.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

32 | What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

Both the competent court and an arbitral tribunal have jurisdiction to grant interim measures in support of arbitration proceedings. The parties can exclude the arbitral tribunal's competence for interim measures, but they cannot exclude the court's jurisdiction on interim measures. The enforcement of interim measures is in the exclusive jurisdiction of the courts.

In support of money claims, the court can grant interim remedies if there is reason to believe that the debtor would prevent or impede the enforcement of a subsequent award by damaging, destroying, hiding or carrying away his or her assets (including prejudicial contractual stipulations).

The following remedies are available:

- the placement of money or movable property into the court's custody;
- a prohibition to alienate or pledge movable property;
- a garnishment order in respect of the debtor's claims (including bank accounts);
- the administration of immovable property; and
- a restraint on the alienation or pledge of immovable property, which is to be registered in the land register.

In support of non-pecuniary claims, the court can grant interim remedies similar to those mentioned above in relation to money claims. Search orders are unavailable in civil cases.

Injunctions given by a foreign arbitral tribunal (article 593 CCP) or by a foreign court can be enforced in Austria under certain circumstances. Enforcement measures, however, must be compatible with Austrian law.

Interim measures by an emergency arbitrator

33 | Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

State law does not provide for an emergency arbitrator.

Interim measures by the arbitral tribunal

34 | What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

An arbitral tribunal has wide powers to order interim measures on the application of one party if it deems it necessary to secure the enforcement of a claim or to prevent irretrievable harm. Differing from interim remedies available in court proceedings, an arbitral tribunal is not limited to a set of enumerated remedies. However, the remedies should be compatible with enforcement law, to avoid difficulties at the stage of enforcement. Statutory law does not provide for a security for costs in arbitration proceedings.

Sanctioning powers of the arbitral tribunal

35 | Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Arbitral tribunals have wide discretion to order interim measures as a way of dealing with guerrilla tactics. They may suspend the proceedings in extreme cases, or even dismiss an arbitration with prejudice as a sanction for the wilful misconduct of a party or of its counsel.

Arbitral tribunals may also order security for costs.

Further, it is a widely accepted possibility that arbitrators may draw negative inferences from a party's failure to comply with the tribunal's requests. For example, if a party refuses to produce documents, the tribunal can assume that the documents contain information that would compromise the party's position.

Another quite effective measure for regulating a party's misconduct is the award of costs in the final award.

Austrian lawyers are bound by professional ethical rules when acting as counsel in arbitrations (independent of whether they are held in Austria or abroad). Foreign lawyers in arbitrations held in Austria are not bound by Austrian professional ethical rules.

AWARDS

Decisions by the arbitral tribunal

36 | Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Unless otherwise agreed by the parties, it is sufficient for the arbitral award to be valid if it has been rendered and signed by a majority of arbitrators. The majority must be calculated on the basis of all appointed arbitrators and not just those present. If the arbitral tribunal intends to decide on the arbitral award without all of its members being present, it must inform the parties in advance of its intention (article 604 CCP).

An arbitral award signed by a majority of arbitrators has the same legal value as a unanimous award.

Dissenting opinions

37 | How does your domestic arbitration law deal with dissenting opinions?

Statutory law is silent on dissenting opinions. There is a controversy on whether they are admissible in arbitral proceedings.

In a recent case concerning the enforcement of a foreign arbitral award, the Supreme Court stated that the requirement to attach the dissenting opinion to the arbitral tribunal's award (such requirement was contained in the applicable rules of arbitration), is not a stringent requirement under enforcement law.

Form and content requirements

38 | What form and content requirements exist for an award?

An arbitral award is to be delivered in writing and must be signed by the arbitrator or arbitrators. Unless otherwise agreed by the parties, the signatures of a majority of arbitrators are sufficient. In that event, the reason for the absence of some of the arbitrators' signatures should be explained.

Unless otherwise agreed by the parties, the award should also state the legal reasoning on which it is based, and indicate the day on, and place in, which it is made.

Upon request of any party of the arbitration, the award must contain the confirmation of its enforceability.

Time limit for award

39 | Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

State law does not provide for a specific period within which an arbitral award must be delivered.

Date of award

40 | For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Under state law, the date of delivery of the award is relevant for both an application to the arbitral tribunal for correction or interpretation of the award, or both, or to make an additional award (see question 45) and any challenge to the award before the courts of law (see question 46). If the arbitral tribunal corrects the award on its own, the time limit of four weeks for such a correction starts from the date of the award (article 610(4) CCP).

Types of awards

41 | What types of awards are possible and what types of relief may the arbitral tribunal grant?

The following types of awards are usual under arbitration law:

- award on jurisdiction;
- interim award;
- partial award;
- final award;
- award on costs; and
- amendment award.

Termination of proceedings

42 | By what other means than an award can proceedings be terminated?

Arbitral proceedings can be terminated:

- if the claimant withdraws its claim;
- if the claimant fails to submit its statement of claim within the period determined by the tribunal (articles 597 and 600 CCP);
- by mutual consent of the parties, by settlement (article 605 CCP); and
- if the continuation of the proceedings has become impracticable (article (608(2)(4) CCP).

There are no formal requirements for such a termination.

Cost allocation and recovery

43 | How are the costs of the arbitral proceedings allocated in awards? What costs are recoverable?

With respect to costs, arbitral tribunals have broader discretion and are, in general, more liberal than courts. The arbitral tribunal is granted discretion in the allocation of costs, but must take into account the circumstances of the case, in particular, the outcome of the proceedings. As a rule of thumb, costs follow the event and are borne by the unsuccessful party, but the tribunal can also arrive at different conclusions if this is appropriate to the circumstances of the case.

Where costs are not set off against each other, as far as possible the arbitral tribunal must, at the same time as it decides on the liability for costs, also determine the amount of costs to be reimbursed.

In general, attorneys' fees calculated on the basis of hourly rates are also recoverable.

Interest

44 | May interest be awarded for principal claims and for costs, and at what rate?

An arbitral tribunal would, in most cases, award interest for the principal claimed if permitted under the substantive law applicable. Under the law, the statutory interest of civil law claims is 4 per cent. If both parties are entrepreneurs and the default is reproachable, a variable interest rate, published every six months by the Austrian National Bank, would apply. At present, it is 8.58 per cent. Bills of exchange are subject to an interest rate of 6 per cent.

The allocation and recovery of costs in arbitration proceedings are regulated in article 609 of the CCP. However, there is no provision as to whether interest may be awarded for costs, and it is, therefore, at the arbitral tribunal's discretion.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

45 | Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

The parties can apply to the arbitral tribunal requesting a correction (of calculation, typing or clerical errors), clarification or to make an additional award (if the arbitral tribunal has not dealt with all claims presented to it in the arbitral proceedings). The time limit for this application is four weeks from service of the award, unless otherwise agreed by the parties. The arbitral tribunal is also entitled to correct the award on its own within four weeks (an additional award within eight weeks) of the date the award has been rendered.

Challenge of awards

46 | How and on what grounds can awards be challenged and set aside?

Courts are not entitled to review an arbitral award on its merits. There is no appeal against an arbitral award. However, it is possible to bring a legal action to set aside an arbitral award (both awards on jurisdictions and awards on merits) on very specific, narrow grounds, namely:
the arbitral tribunal accepted or denied jurisdiction although no arbitration agreement or a valid arbitration agreement exists;
a party was incapable of concluding an arbitration agreement under the law applicable to that party;
a party was unable to present its case (eg, it was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings);
the award concerns matters not contemplated by, or not falling within the terms of the arbitration agreement, or concerns matters beyond the relief sought in the arbitration – if such defects concern a separable part of the award, such part must be set aside;
the composition of the arbitral tribunal was not in accordance with articles 577 to 618 of the CCP or the parties' agreement;
the arbitral procedure did not, or the award does not, comply with the fundamental principles of the Austrian legal system (public policy); and
if the requirements to reopen a case of a domestic court in accordance with article 530(1), Nos. 1 to 5 of the CCP are fulfilled, for example:

- the judgment is based on a document that was initially, or subsequently, forged;
- the judgment is based on false testimony (of a witness, an expert or a party under oath);
- the judgment is obtained by the representative of either party, or by the other party, by way of criminal acts (for example, deceit, embezzlement, fraud, forgery of a document or of specially protected documents, or of signs of official attestations, indirect false certification or authentication or the suppression of documents);
- the judgment is based on a criminal verdict that was subsequently lifted by another legally binding judgment; or
- the award concerns matters that are not arbitrable in Austria.

Further, a party can also apply for a declaration of the existence or non-existence of an arbitral award.

Levels of appeal

47 | How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

Instead of three procedural levels (the court of first instance, the court of appeal and the Supreme Court), article 615 of the CCP has been changed so that the decision about a claim challenging an arbitration award is made by just one judicial instance (ie, the decision is made by only one judicial entity and cannot be appealed against).

Article 616(1) of the CCP stipulates that the procedure that follows a claim challenging an arbitration award – or a claim regarding the declaration on the existence or non-existence of an arbitration award – is the same one as performed in front of a court of first instance. This means, in fact, that the Supreme Court must apply the same procedural rules as a court of first instance (eg, in the context of taking evidence).

Recognition and enforcement

48 | What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

Domestic arbitral awards are enforceable in the same way as domestic judgments.

Foreign awards are enforceable on the basis of bilateral or multilateral treaties that Austria has ratified – the New York Convention being by far the most important legal instrument. Thus, the general principle that mutuality of enforcement must be guaranteed by treaty or decree remains applicable (as opposed to the respective provisions under the UNCITRAL Model Law).

Enforcement proceedings are essentially the same as for foreign judgments.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

There is no limitation period applicable to the commencement of enforcement proceedings. However, it is advisable to apply the 30-year statutory limitation period applicable to proceedings for enforcement of judgments under the law by analogy.

Enforcement of foreign awards

50 | What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Under article 5 of the New York Convention, the recognition and enforcement of a foreign arbitral award may be refused if the award has been set aside or suspended by the competent authority of the country in which, or under the laws of which, that award was made.

Austria is a contracting state to the New York Convention and Austrian courts would therefore, in general, refuse enforcement of such an award. However, if an award has been set aside on the grounds that it is in conflict with public policy at the place of arbitration, Austrian courts must assess whether the award would also violate public policy in Austria. If the award is not in conflict with Austrian public policy, Austrian courts would probably enforce such an award.

Enforcement of orders by emergency arbitrators

51 | Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

Article 45 of the Vienna Rules provides for an expedited procedure. However, there are no specific rules on the enforcement of orders issued in such proceedings by emergency arbitrators. The same goes for domestic arbitration legislation (including case law).

Cost of enforcement

52 | What costs are incurred in enforcing awards?

The prevailing party is entitled to recover the lawyers' fees from the opponent in accordance with the Austrian Act on Lawyers' Fees (a schedule of fees based on the amount in dispute).

Court fees are also based on the amount in dispute. If the principal amount of the enforced claim is, for example, for €1 million, the court fee for the enforcement against movable property would amount to approximately €2,500; if the enforcement is against immovable property, the court fee would be approximately €23,000.

OTHER

Influence of legal traditions on arbitrators

53 What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

In civil and commercial proceedings, there is no court-ordered discovery, and the possibilities to obtain a court order providing for the production of documents by the other party are rather limited. In arbitral proceedings, there is no tendency towards US-style discovery, but arbitrators may order a certain amount of document production, depending on the applicable rules of arbitration and the agreement between the parties. Written witness statements are common in arbitral proceedings. The IBA Rules are becoming popular in arbitral proceedings.

Professional or ethical rules

54 Are specific professional or ethical rules applicable to counsel and arbitrators in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

There are no specific ethical rules governing the conduct of arbitration practitioners. The Austrian Professional Code of Conduct for Lawyers applies to all members of the Austrian Bar, including when acting as counsel or arbitrators.

Third-party funding

55 Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Third-party funding has become common in Austria. The funder will cover the procedural costs and receive a share of the recouped amount. The validity of such arrangements has not yet been decided on by the Supreme Court. It is not entirely clear whether and to what extent the prohibition for lawyers to accept fees on a percentage basis could also apply to such funding.

Regulation of activities

56 What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Under tax law (implementing Regulations (EC) No. 1798/2003 and No. 143/2008), arbitrators who are based in Austria need not charge VAT if the refunding party is a 'taxable person' under said regulation and has its place of business outside Austria but in the European Union.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

A new version of the VIAC Rules of Arbitration and Mediation entered into force on 1 January 2018 and introduced – inter alia – the following new features:

- VIAC now also administers purely domestic cases;
- all new proceedings are administered through an electronic case management system; and
- the Vienna Rules now explicitly specify that arbitrators and parties as well as their representatives shall conduct the proceedings in an efficient and cost-effective manner; this may also be taken into consideration in determining the arbitrators' fees and costs.

Coronavirus

58 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The incremental rise of covid-19 infections has, at the time of writing, claimed a total of 655,112 deaths (source: WHO) worldwide. Its global reach has indisputably and irrevocably transformed life as we know it, leaving no industry, economy or personal interaction untouched. International supply chains have been interrupted, global commerce destabilized and stock markets have plummeted.

While some governments have chosen to resume business by implementing measures, inter alia, to reopen nurseries, primary schools as well as lifting travel restrictions, others have voiced concerns over the loosening or indeed abandoning of containment measures in light of the real risk of unleashing a new wave of mass infections. Yet, irrespective of the policy considerations underlying these diverging courses of action, the uncertainty over when a full and safe resumption of economic activities can be expected remains.

As numerous business relationships are unable to uphold their service obligations, the pandemic has given rise to an array of legal questions on whether and to what extent contractual claims are enforceable and who should bear the economic consequences absent clearly assignable blame. While anticipating how the coronavirus crisis will affect international arbitration would be misguided, its impact thus far cannot be negated. Arbitration hearings have been postponed and international conferences cancelled. With conflicting directives applying to different locations of parties, arbitrators and witnesses, concerns persist over how to safely conduct hearings in the foreseeable future. Yet, with many fearing that the virus may become endemic and non-medical interventions, like social distancing, expected to remain in place for the foreseeable future, new avenues are needed to navigate novel legal challenges. It is here that arbitration, by virtue of its recourse to online tools, can provide the necessary flexibility required during these unprecedented times.

The following will address the impact and challenges posed by covid-19 to those engaging in arbitration. It will touch upon the provisions adopted by the Austrian judicial system as well as outline the methods and possible solutions for conducting arbitration hearings in the context of covid-19.

The Austrian response

In trying to avoid perpetual delays, leading arbitral institutions have offered a number of alternative measures on how to conduct arbitral proceedings.

Seeking to minimise the number of potential disruptions, exacerbated by those seeking to evade arbitral responsibility, institutional guidelines have and continue to be updated on a regular basis. The responses have been wide-ranging, with many resorting to virtual meetings, telephone conferences and new channels for the submission of documents and filing requests.

Conducting arbitral proceedings in the absence of in-person hearings constitutes a fundamental diversion from what arguably has long been perceived an indispensable element of due process.

The Austrian Judicial System has recognised the necessity of such a revised approach by adopting new strategies that depart from well-established traditions and trusted techniques previously considered instrumental to arbitral proceedings.

On 25 March 2020, the Austrian government established the Austrian Federal Act on Covid-19-Measures for the Judicial System, which is to remain in effect until 31 December 2020. Its first part outlines rules regarding civil matters, focusing on interruptions of procedural deadlines as well as the suspension of deadlines to initiate proceedings including the statute of limitation. Yet it is the introduction of restrictions for oral proceedings and service of process that deserves singling out. Apart from the limits on the freedom of movement already put in place, oral hearings are to be held only if utmost necessity can be demonstrated. Any form of communication is to be conducted through technological means whether telephone or video conferencing, while the physical transfer of documents is to occur via post and should only be utilized in case of urgency. The Electronic Court Filing System remains fully operational. The Act also offers information on the effects of a potential cessation of judicial services rendered by Austrian courts (section 4), the impact of payment default under section 156(a), paragraph 1 of the Austrian Insolvency Code (section 5), extensions of merger control deadlines (section 6), advances on maintenance payments (section 7) and powers of authority of the Minister of Justice (section 8).

While arbitration proceedings are exempt from the provisions set out in the Act, arbitrators and tribunals are entrusted with significant liberties in determining how to effectively balance the interests of stakeholders in pending arbitrations. The Vienna International Arbitral Centre (VIAC) had initially announced that all submissions to and communication with its offices are to be exclusively dealt with electronically until further notice. Its newly released Practical Checklist for Remote Hearings offers a useful reference point on the preparatory measures to consider when planning to hold such hearings. Legal matters such as the risk of potential challenges to awards as well as the right to be heard and treated equally are also dealt with in a recently published article made available on its website; seeking to encourage greater collaboration among legal, process and technology professionals, the PlatformsProtocol has been launched for public consultation until 31 August; and since 30 May, in-person hearings were allowed to resume at the VIAC premises, yet the availability of rooms remains limited.

Further, the International Chamber of Commerce (ICC) continues to progress pending arbitrations, with its Secretariat and ADR Centre remaining fully operational. Like LCIA and HKIAC, it is however advised that all communication is conducted electronically. Recommended measures to ensure disputes are settled in a cost-effective, fair and expeditious manner, have been made available via its Guidance Note.

Given the recent surge of coronavirus cases, a decline in litigation and arbitral proceedings is not to be expected. Rather, new claims are likely to arise, not least in relation to international transit, data privacy, biotech, insurance, employment as well as commercial and investment disputes. Moreover, the effects of nationally implemented emergency measures will precipitate new legal issues concerning breach, performance and exemption from liability as well as foreseeability, reasonableness, loss, damage and the duty to mitigate.

Options to consider

As many parties find themselves having to rebuild business relationships through methods other than the strict enforcement of contractual terms, dispute resolution processes like arbitration are an attractive option. In light of the covid-19 pandemic, new innovative options are needed to ensure parties are offered the opportunity to fully present their case. The following methods are worth considering:

- Adjourning in-person hearings until such proceedings are cleared as safe again. While this option allows parties to prevent having to put in place the necessary arrangement for a remote hearing, it remains unclear how long the current restrictions will last. With many businesses, already being put under severe strain due to uncertain or stagnant cash flows, this may not be a viable option.
- Allowing the dispute to be resolved on paper. This method may prove to be useful in relation to issues that are less dependent on factual evidence and cross-examination. Yet even then, using this method would only in part reduce delays to final and interim awards and may induce parties to settle more rapidly.
- Divide claims only leaving some to be resolved by arbitration. This approach lends itself to cases with distinct heads of claim.
- Conducting a remote hearing. Given the logistical coordination required in planning for remote hearings, parties need to ensure the availability of a secure internet connection as well as accessibility to necessary documents and requisite software or hardware. Additionally, they should take account of sitting hours, time zones and the duration of proceedings as well as the potential to create distinct virtual spaces to allow for easy communication of arbitrators and legal teams. Parties should consider drawing on the recommendations set out in the Seoul Protocol on Video Conferencing In International Arbitration, covering a wide range of practical aspects to ensure procedural fairness. This option has also been acknowledged as a viable alternative by the Chamber of Commerce and Industry of the Russian Federation and is in line with article 25(2) of the ICC Rules of Arbitration 2017.

With videoconferencing technology already being frequently used, party deliberations are not likely to be affected. Hearing bundles can be made available electronically and will facilitate the work of practitioners due to hyperlinked cross-references and the fact that new documents can be made immediately available. Similarly, arbitral awards can be delivered via email, although the transmission of original and certified copies to the parties may occur at a later stage. Nevertheless, electronic signatures have become a daily occurrence in business transactions and thus do not demonstrate a cause of concern. What remains unclear is whether the forum in which the respective arbitration is meant to take place will allow for a departure from the formalities of in-person hearings and traditional document issuance processes. It is here that parties are advised to confirm with counsel on how to best proceed before engaging in remote arbitration. Given the increased reliance on online communication tools it is essential that, among other things, a secure videoconferencing program is used with end-to-end encryption and that virtual hearing rooms are strictly limited to allocated participants

Parties should consider recommended methods on how to adhere to a high level of online security as well as data protection privacy obligations when conducting international arbitration proceedings. To this end, they may wish to refer to the precautionary guidelines set out in the 2020 Cybersecurity Protocol for International Arbitration, the ICC-IBA Roadmap to Data Protection in International Arbitration, the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration as well as the African Academy Protocol on Virtual Hearing in Africa.

Where to go from here

Considering the inevitable influx of cases expected to arise from events since the outbreak, it remains paramount for claims to be initiated as soon as the necessary facts can be established. Since arbitral institutions have signalled that they are intending to continue their operation, it is prudent for stakeholders to weigh their arbitration options carefully and expeditiously. Private parties are also given the opportunity to review existing contractual terms and consider incorporating the use of technological tools in the procedural rules of their arbitration agreements. Since there is great uncertainty regarding the duration and measures implemented to contain the spread of the virus, it is crucial for parties to establish a contingency plan in case physical hearings will not be a feasible option in the upcoming weeks or months. While case progression may be slower, taking advantage of electronic tool for the submission of documents, communication and correspondence have proven to be successful options in the past and should now be expanded upon.

Ultimately, the success of any arbitration requires adequate preparation which in turn will depend on the specific circumstances of the case and for which there can be no all-encompassing framework. Refusing to adapt to these changed conditions due to sheer convenience of customary hearing practices, cannot provide a justifiable basis in light of the current challenges and health risks that the epidemic brings with it. Since justice delayed is justice denied, 'public institutions such as the Court must do all they can to facilitate the continuation of the economy and essential services of government, including the administration of justice.' (*Capic v Ford Motor Company of Australia Limited* (Adjournment) [2020] FCA 486; para 5).

The threat posed by covid-19 is one that requires diligence and commitment by leadership and the healthcare sector, yet it is also dependent on the support of civic society. As such, parties, arbitrators and legal representatives alike have a shared duty to minimise the effects of the epidemic and to halt its spread. The outbreak of the virus has and undoubtedly will continue to alter existing arbitration practices and will force participants and stakeholders to adapt, reflect and improve upon the current system. It will also prove to be the driving force in advancing well-established yet outdated processes in a way that is less dependent on the stringent rituals of conventional court practices but instead can transcend adversities of times such as these.

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