Dispute Resolution 2021

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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the nineteenth edition of *Dispute Resolution*, 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 Israel, New York, Slovenia and Ukraine.

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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, Martin Davies and Alanna Andrew of Latham & Watkins LLP, for their continued assistance with this volume.

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Austria

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LITIGATION

Court system

1 | What is the structure of the civil court system?

On the first level, civil proceedings are initiated before either the district court or the regional courts.

District courts have jurisdiction in most disputes relating to tenancy and family law (subject matter jurisdiction) and in matters with an amount in dispute of up to €15,000 (monetary jurisdiction). Appeals on points of fact and law are to be made to the regional courts. If a legal question of fundamental importance is concerned, another final appeal can be submitted to the Supreme Court.

Regional courts have monetary jurisdiction in matters involving an amount in dispute exceeding €15,000 and subject matter jurisdiction in intellectual property and competition matters, as well as various specific statutes (Public Liability Act, Data Protection Act, Austrian Nuclear Liability Act). Appeals are to be directed to the Higher Regional Courts. The third and final appeal goes to the Supreme Court.

With respect to commercial matters, special commercial courts exist only in Vienna. Apart from that, the above-mentioned ordinary courts decide as commercial courts. Commercial matters are, for example, actions against business people or companies in connection with commercial transactions, unfair competition matters and such like. Other special courts are the labour courts, which have jurisdiction over all civil law disputes between employers and employees resulting from (former) employment as well as over social security and pension cases. In both commercial (insofar as Commercial Courts decide in panels) and labour matters, respectively, lay judges and professional judges decide together. The Court of Appeal in Vienna decides as the Cartel Court on the trial level. This is the only Cartel Court in Austria. Appeals are decided by the Supreme Court as the Appellate Cartel Court. In cartel matters, lay judges also sit on the bench with professional judges.

Judges and juries

2 | What is the role of the judge and the jury in civil proceedings?

Compared to common law countries, the role of Austrian judges is rather inquisitorial: to establish the relevant facts, judges can order witnesses to appear at a hearing, unless this is opposed by both parties, or otherwise appoint experts at their own discretion. In some proceedings, the tribunal will consist of a panel involving 'expert' lay judges, especially in antitrust cases, and 'informed' lay judges in labour and public interest matters.

Limitation issues

3 | What are the time limits for bringing civil claims?

Limitation periods are determined by substantive law.

Claims are not enforceable once they become statute-barred. The statute of limitations generally commences when a right could have been first exercised. Austrian law distinguishes between long and short limitation periods. The long limitation period is 30 years and applies whenever special provisions do not provide otherwise. The short limitation period is three years (which can be extended or waived) and applies, for example, to accounts receivable or damage claims.

The statute of limitations must be argued explicitly by one party, yet must not be taken into consideration by the initiative of the court (ex officio).

Pre-action behaviour

4 | Are there any pre-action considerations the parties should take into account?

No, there is not. However, as a matter of general practice, a claimant will give notice to his or her opponent before commencing proceedings.

Starting proceedings

5 | How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement? Do the courts have the capacity to handle their caseload?

The proceedings are initiated by submitting a statement of claim with the court. The statement of claim is considered officially submitted upon receipt.

Service is usually effected by registered mail (or, once represented by a lawyer, via electronic court traffic, namely an electronic communication system connecting courts and law offices). The document is deemed served at the date on which the document is physically delivered to the recipient (or available for viewing).

Within the European Union, the Service Regulation (Council Regulation (EC) No. 1348/2000 on the service in the member states of judicial and extrajudicial documents in civil or commercial matters applies. Service to international organisations or foreigners enjoying immunities under public international law is effected with the assistance of the Austrian Ministry for Foreign Affairs. In all other cases, service abroad is effected in accordance with the respective treaties (particularly the Hague Convention on Civil Procedure).

Timetable

6 | What is the typical procedure and timetable for a civil claim?

The statement of claim is filed with the court and passed on to the defendant, along with an order to file a statement of defence. If the defendant replies in time (four weeks from receipt), a preparatory hearing will be held, which mainly serves the purpose of shaping the further proceedings by discussing the main legal and factual questions at hand as well as questions of evidence (documents, witnesses,

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experts). In addition, settlement options may be discussed. After an exchange of briefs, the main hearings follow.

The average duration of first instance litigation is one year. However, complex litigations may take significantly longer. At the appellate stage, a decision is handed down after approximately six months. In this regard, there are no expedited trial procedures available in Austrian civil litigation.

Case management

7 | Can the parties control the procedure and the timetable?

The courts allocate the cases in accordance with criteria defined on a regular basis by a particular senate.

Proceedings are primarily controlled by the judge in charge of the schedule. The judge orders the parties to submit briefs and produce evidence within a certain period of time. If necessary, the experts are also nominated by the judge. However, the parties may file procedural motions (eg, for a time extension), yet may also agree on a stay of the proceedings.

Evidence – documents

8 | Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

If a party manages to show that the opposing party is in possession of a specific document, the court may issue a submission order if:

- the party in possession has expressly referred to the document in question as evidence for its own allegations;
- the party in possession is under a legal obligation to hand it over to the other party; or
- the document in question was made in the legal interest of both parties, certifies a mutual legal relationship between them, or contains written statements that were made between them during negotiations of a legal act.

A party is not bound to present documents that concern family life if the opposing party violates obligations of honour by the delivery of documents, if the disclosure of documents leads to the disgrace of the party or of any other person or involves the risk of criminal prosecution, or if the disclosure violates any state-approved obligation of secrecy of the party from which it is not released or infringes a business secret (or for any other reason similar to the above).

There are no special rules concerning the disclosure of electronic documents or acceptable practices for conducting e-disclosure. Lastly, rules on pre-action disclosure do not exist.

Evidence – privilege

9 | Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Following the attorneys' professional confidentiality rules, there is no obligation to produce documents unless the attorney advised both parties in connection with the disputed legal act. Attorneys have the right of refusal to give oral evidence if information was made available to them in their professional capacity.

Evidence – pretrial

10 | Do parties exchange written evidence from witnesses and experts prior to trial?

No – evidence is taken during the course of the litigation, not before. The parties are required to produce the evidence supporting their respective allegations or where the burden of proof is on them, respectively.

Evidence – trial

11 | How is evidence presented at trial? Do witnesses and experts give oral evidence?

The main types of evidence are documents, party and witness testimony, expert testimony and judicial inspection. Written witness statements are not admissible.

There are no depositions and no written witness statements. Therefore, witnesses are obliged to appear at the hearing and testify. Witnesses are examined by the judge followed by (additional) questions by the legal representatives of the parties.

Restrictions to this obligation exist (eg, privileges for lawyers, doctors, priests or in connection with the possible incrimination of close relatives).

While the (ordinary) witness gives testimony concerning facts, the expert witness provides the court with knowledge that the judge cannot have. Expert evidence is taken before the trial court. An expert witness may be requested by the parties yet also called on the judge's own motion. An expert witness is required to submit his or her findings in a report. Oral comments and explanations must be given during the hearing (if requested by the parties). Private reports are not considered to be expert reports within the meaning of the Austrian Code of Civil Procedure; they have the status of a private document.

As there is no room for concurrent evidence, no such rules exist.

Interim remedies

12 | What interim remedies are available?

The granting of interim measures is regulated by the Austrian Enforcement Act. In general, Austrian law provides for three main types of interim measures:

- to secure a monetary claim;
- to secure a claim for specific performance; and
- to secure a right or legal relationship.

The parties may turn to the court for assistance with safeguarding evidence both before and after a statement of claim has been filed. The required legal interest is considered established if the future availability of the evidence is uncertain or if it is necessary to examine the current status of an object.

Remedies

13 | What substantive remedies are available?

The statutory interest rate payable on monetary judgments is set at four per cent per year. However, monetary claims deriving from commercial transactions are subject to a higher interest rate in addition to the statutory base interest rate. The higher interest rate for such cases is determined by the Austrian National Bank. Punitive damages are not available.

Enforcement

14 | What means of enforcement are available?

The enforcement of judgments is regulated by the Austrian Enforcement Act.

Austrian enforcement law provides for various types of enforcement. A distinction is made between a title to be enforced directed at a monetary claim or at a claim for specific performance, and against which asset enforcement is to be levied.

Generally, the usual methods for enforcement are:

- seizure of property;
- attachment and transfer or receivables;

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- compulsory leasing; and
- judicial action.

Enforcement will be executed by a bailiff, who is an executive of the court and must comply with the court's orders. With respect to immovable property, three types of enforcement measures are available:

- compulsory mortgage;
- compulsory administration, with the goal of generating revenue to satisfy the claim; and
- compulsory sale of an immovable asset.

With respect to movable property, Austrian law distinguishes between:

- attachment of receivables;
- attachment of tangible and movable objects;
- attachment of claims for delivery against third-party debtors; and
- attachment of other property rights.

Austrian law does not allow for the attachment of certain specific receivables, such as nursing allowance, rent aid, family allowance and scholarships.

Public access

15 | Are court hearings held in public? Are court documents available to the public?

In most cases, court hearings are open to the public, although a party may ask the court to exclude the public from the hearing, provided that the party can show a justifiable interest for the exclusion of the public.

In principle, file inspection is only permitted to parties involved in the proceedings. Third parties may inspect files or even join the proceedings if they can demonstrate sufficient legal interest (in the potential outcome of the proceedings).

Costs

16 | Does the court have power to order costs?

In its final judgment, the court will order who will have to bear the procedural costs (including court fees, legal fees and certain other costs of the parties (eg, costs for the safeguarding of evidence, travel expenses). In principle, however, the prevailing party is entitled to reimbursement by the losing party of all costs of the proceedings. The court's decision on costs is subject to redress, along with or without an appeal on the court's decision on the merits.

According to the Austrian Court Fees Act, the claimant (appellant) must advance the costs. The amount is determined on the basis of the amount in dispute. The decision states who should bear the costs or the proportion in which the costs of the proceedings are to be shared.

Lawyers' fees are reimbursed pursuant to the Austrian Lawyers' Fees Act irrespective of the agreement between the prevailing party and its attorney. Thus, the reimbursable amount may be lower than the actual payable legal fee, as any claim for reimbursement is limited to necessary costs. There are no rules on costs budgets; therefore, there are no requirements to provide a detailed breakdown for each stage of the litigation.

Upon request, a claimant residing outside the European Union may be ordered to arrange for a security deposit covering the defendant's potential procedural costs unless bilateral or multilateral treaties provide otherwise. This also does not apply if the claimant has its residence in Austria, the court's (cost) decision is enforceable in the claimant's residence state or the claimant disposes of sufficient immovable assets in Austria.

Funding arrangements

17 | Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

Unless agreed otherwise, lawyers' fees are subject to the Austrian Lawyers' Fees Act. Agreements on hourly fees are permissible and common. Lump sum fees are not prohibited but are less commonly used in litigious matters. Contingency fees are only permissible if they are not calculated as a percentage of the amount awarded by the court (*pactum de quota litis*).

Legal aid is granted to parties who cannot afford to pay costs and fees. If the respective party can prove that the financial means are insufficient, court fees are reprieved or even waived, and an attorney is provided free of charge.

Third-party financing is permitted and usually available for higher amounts in dispute (minimum approximately €50,000), yet it is more flexible regarding fee agreements. Fee agreements that give a part of the proceeds to the lawyer are prohibited.

Insurance

18 | Is insurance available to cover all or part of a party's legal costs?

Insurance for legal costs is commonly available in Austria and may – depending on the individual insurance policy – cover a wide range of costs arising out of legal proceedings, including the party's costs and potential liability for the counterparty's costs.

Class action

19 | May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Although the Austrian Code of Civil Procedure does not contain any provision on class actions, the Austrian Supreme Court held that a 'class action with a specific Austrian character' is legally permissible. The Austrian Code of Civil Procedure allows a consolidation of claims of the same plaintiff against the same defendant.

A joinder may be filed if the court has jurisdiction for all claims, the same type of procedure applies or the subject matter is of the same nature regarding facts and law. Another possibility is to organise mass claims and assign them to an institution that then proceeds as a single claimant.

Appeal

20 | On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

There are ordinary appeals against the judgment of a trial court and appeals against the judgment of an appellate court. Procedural court orders can be challenged as well; the procedure in principle follows the same rules as appeals (yet is a little less informal).

An appeal against a judgment suspends its legal validity and – with few exceptions – its enforceability. As a general rule, new allegations, claims, defences and evidence must not be introduced (they will be disregarded). Other remedies are actions for annulment or for the reopening of proceedings.

An appeal may be filed for four main reasons, including:

- procedural errors;
- unjustified exclusion of evidence;

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- incorrect statement of facts; and
- incorrect application of the law.

Following an appeal, the appellate court may set aside the judgment and refer the case back to the court of first instance, or it may either alter or confirm the judgment.

Finally, a matter may only be appealed to the Supreme Court if the subject matter involves the resolution of a legal issue of general interest, namely if its clarification is important for purposes of legal consistency, predictability or development, or in the absence of coherent and previous decisions of the Supreme Court.

Foreign judgments

21 | What procedures exist for recognition and enforcement of foreign judgments?

In addition to the numerous bilateral and multilateral instruments that Austria has concluded, the Austrian Enforcement Act, the Austrian Code of Civil Procedure and the Austrian Jurisdiction Act govern the recognition and enforcement of foreign judgments. In the case of a conflict between statutory law provisions and applicable treaty provisions, the latter will prevail. Although Austrian case law is not binding, it is given careful consideration.

Austria is a signatory to many bilateral and multilateral instruments. The most important in this regard is the Brussels Ia Regulation (Regulation (EU) No. 1215/2012 of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)). The Brussels Ia Regulation lays down uniform rules to facilitate the free circulation of judgments in the European Union and applies to legal proceedings instituted on or after 10 January 2015.

The Brussels Ia Regulation replaces Regulation (EU) 1215/2012 of 22 December 2000 (the Brussels I Regulation, together with the Brussels Ia Regulation, 'the Brussels regime'), which remains applicable to all legal proceedings instituted prior to 10 January 2015.

The basic requirements for enforceability include the following:

- the award is enforceable in the state of issuance of the judgment;
- an international treaty or domestic regulation expressly provides for reciprocity between Austria and the state of issuance in the recognition and enforcement of judgments;
- the document instituting the proceedings was properly served on the defendant;
- the judgment to be enforced is produced with a certified translation; and
- there are no grounds on which to refuse recognition of enforceability.

A party seeking enforcement must request leave for enforcement from the respective court. The application for a declaration of enforceability must be submitted to the court of the place where the debtor is domiciled. The party may combine this request with a request for an enforcement authorisation. In such a case, the court will decide on both simultaneously.

Once a foreign judgment has been declared enforceable in Austria, its execution follows the same rules as those for a domestic judgment, meaning that the enforcement of judgments is regulated by the Austrian Enforcement Act.

Foreign proceedings

22 | Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

In the European Union, the procedure for obtaining oral or documentary evidence from other jurisdictions is regulated by the Evidence Regulation (Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the member states in the taking of evidence in civil or commercial matters). In this regard, the regulation applies to both oral and documentary evidence and stipulates that judicial assistance requests may be communicated directly between the courts.

Bilateral treaties may apply for judicial assistance requests outside of the European Union.

ARBITRATION

UNCITRAL Model Law

23 | Is the arbitration law based on the UNCITRAL Model Law?

Yes – the Austrian arbitration law (contained in the Austrian Code of Civil Procedure (ACCP)) substantially reflects the UNCITRAL Model Law on International Commercial Arbitration, while granting a great degree of independence and autonomy to the arbitral tribunal.

Unlike the UNCITRAL Model law, Austrian law does not distinguish between domestic and international arbitrations, or between commercial and non-commercial arbitrations. Therefore, special provisions apply to employment and consumer-related matters (these are found under sections 618 and 617 ACCP, respectively).

More generally, the Austrian Arbitration Law is regulated in sections 577 to 618 ACCP. They provide the general framework for arbitration proceedings for both domestic and international arbitrations.

Arbitration agreements

24 | What are the formal requirements for an enforceable arbitration agreement?

Arbitration agreements must be in writing (section 581 ACCP). The formal requirements for an enforceable arbitration agreement are found under sections 581 to 585 ACCP.

An arbitration agreement must:

- sufficiently specify the parties (they must be at least determinable);
- sufficiently specify the subject matter of the dispute in relation to a defined legal relationship (this must be 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.

Special provisions apply to consumers and employees (these are found under sections 617 and 618 ACCP respectively).

Choice of arbitrator

25 | If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

The ACCP provides for default provisions for the appointment of arbitrators. If the arbitration agreement is silent on the matter and absent an agreement by the parties, the Austrian arbitration law provides for a tribunal consisting of three arbitrators (section 586(2) ACCP).

The parties are free to agree on the procedure for challenging the appointment of an arbitrator (section 589 ACCP). In this regard, an arbitrator may 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 the qualifications agreed upon by the parties. A party may challenge an arbitrator appointed by it, or in whose

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appointment it has participated, only for reasons of which it becomes aware after the appointment has been made, or after its participation in the appointment.

Arbitrator options

26 | What are the options when choosing an arbitrator or arbitrators?

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).

Arbitral procedure

27 | Does the domestic law contain substantive requirements for the procedure to be followed?

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 ACCP. Where the parties have not agreed on any set of rules, or set out rules of their own, the arbitral tribunal will, subject to the mandatory provisions of the ACCP, 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.

Further, an arbitral tribunal must apply the substantive law chosen by the parties, failing which it will apply the law that it considers appropriate.

Court intervention

28 | On what grounds can the court intervene during an arbitration?

Austrian courts may only intervene in arbitration matters when they are expressly permitted to do so under sections 577 to 618 ACCP. 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.

The intervention of courts is limited to the issuance of interim measures, assistance with the appointment of arbitrators, review of challenge decisions, decision on the early termination of an arbitrator's mandate, enforcement of interim and protective measures, court assistance with judicial acts that the arbitral tribunal does not have the power to carry out, decision on an application to set aside an arbitral award, determination of the existence or non-existence of an arbitral award and recognition and enforcement of awards.

Interim relief

29 | Do arbitrators have powers to grant interim relief?

Yes – 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. In contrast to the 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. In this regard, the arbitral tribunal may request any party to provide appropriate security in connection with such measures to prevent frivolous requests (section 593(1) ACCP).

The arbitral tribunal – or any party with the approval of the arbitral tribunal – may request a court to perform judicial acts (eg, service of summons, taking of evidence) for which the arbitral tribunal does not have the authority.

Award

30 | When and in what form must the award be delivered?

The form requirements for arbitral awards are found under section 606 ACCP and are in line with default provisions. The form requirements stipulate that the arbitral award must:

- be in writing;
- signed by the arbitrators involved in the proceedings;
- display its date of issuance;
- display the seat of arbitral tribunal; and
- state the reasons upon which it is based. The arbitral award has the effect of a final and binding court judgment (section 607 ACCP).

Appeal

31 | On what grounds can an award be appealed to the court?

The only available recourse to a court against an arbitral award is an application to set aside the award. This also applies to arbitral awards on jurisdiction. Courts may not review an arbitral award on its merits. The application to set aside is to be filed within three months from the date on which the claimant has received the award. There are no appeals against an arbitral award.

An arbitral award shall be set aside if:

- no valid arbitration agreement exists or if the arbitral tribunal denied its jurisdiction even though a valid arbitration agreement existed;
- if a party was incapable of concluding a valid arbitration agreement;
- if a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present the case;
- if the arbitral award deals with a dispute that is not covered by the arbitration agreement or contains decisions on matters beyond the scope of the arbitration agreement or the submission of the parties to arbitration;
- if the constitution or composition of the arbitral tribunal was in violation of the respective rules; and
- if the arbitration proceedings were conducted in violation of Austrian public policy.

Furthermore, an award can be set aside if the preconditions exist under which a court judgment can be appealed by filing a complaint for revision pursuant to section 530(1), Nos. 1–5 ACCP. This provision determines circumstances under which criminal acts led to the issuance of a certain award. An application to set aside an award on these grounds must be filed within four weeks of the date on which the sentence on the respective criminal act became final and binding.

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An award may also be set aside if the matter in dispute is not arbitrable under domestic law.

Enforcement

32 | What procedures exist for enforcement of foreign and domestic awards?

The procedure for the enforcement of arbitral awards is set out in both the ACCP (section 614) and the Austrian Enforcement Act (section 409).

Foreign arbitral awards are enforceable on the basis of bilateral or multilateral treaties that Austria has ratified – the most important of these legal instruments being the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 and the European Convention on International Commercial Arbitration of 1961. In this regard, enforcement proceedings are essentially the same as for foreign judgments.

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

Costs

33 | Can a successful party recover its costs?

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.

The ACCP is silent on the type of costs that might be subject to reimbursement. 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.

An exception to the above rule is found under section 609(2) ACCP, which empowers the arbitral tribunal to decide upon the obligation of the claimant to reimburse the costs of the proceedings if it has found that it lacks jurisdiction on the grounds that there is no arbitration agreement.

ALTERNATIVE DISPUTE RESOLUTION

Types of ADR

34 | What types of ADR process are commonly used? Is a particular ADR process popular?

The main extra-judicial methods provided for by statute are arbitration, mediation (mainly in family law matters) and conciliation boards in housing or telecommunication matters.

In addition, various professional bodies (lawyers, public notaries, doctors, civil engineers) provide for dispute resolution mechanisms concerning disputes between their members or between members and clients.

Mediation is governed by the Civil Law Mediation Act. However, a solution reached with the assistance of the mediator is not enforceable by the court.

Requirements for ADR

35 | Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

No – there are no general requirements under Austrian law providing for obligatory settlements or requiring parties to consider ADR before commencing arbitration or litigation. However, it is not uncommon that judges – at the beginning of trial – informally encourage parties to explore settlement options or turn to mediators first.

MISCELLANEOUS

Interesting features

36 | Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

Not applicable.

UPDATE AND TRENDS

Recent developments

37 | Are there any proposals for dispute resolution reform? When will any reforms take effect?

On 1 January 2019, amendments to the Enforcement Act entered into force. These amendments now grant access to data about pending enforcement proceedings. Attorneys and notaries public may access information about the enforcement court, the case number and the amount of the debt that is subject to the enforcement proceedings. The database is available online and aims to assist potential claimants in evaluating the creditworthiness of their prospective respondents before commencing court or arbitral proceedings.

Another recent development is an Austrian Supreme Court decision confirming that the res judicata effect of a foreign judgment applies at all stages of proceedings conducted in Austria. This is particularly important, as the decision clarifies that the effect of res judicata also applies to pending appellate proceedings. The Austrian Supreme Court emphasised that this is true with respect to both issues regarding res judicata – namely, the exclusiveness (*ne bis in idem*) and the binding effect of foreign judgments. Furthermore, the Austrian Supreme Court clarified that the interdiction of novation in appellate proceedings applies only to new facts and new evidence, and thus does not preclude the appellate court from considering the res judicata effect of a new foreign decision.

Coronavirus

38 | 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?

Arbitration

Filing and submission

Seeking to ensure the continuity of arbitral proceedings throughout the pandemic, the administrative office of the Vienna International Arbitral Centre (VIAC) has worked remotely since early 2020 and its case management services have remained fully operational, due to the introduction of an electronic case management system in 2019. Although

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encouraging the electronic submission of all written material and supporting documentation (pursuant to article 12 para 2 of the Vienna Rules of Arbitration and Mediation 2018 (Vienna Rules)), parties have been expressly requested to transmit hard copies of commencement documents for respondent parties (pursuant to article 12 para 1 of the Vienna Rules). It remains the default rule that parties should rely on hard-copy notification unless the transmission thereof proves impracticable or cannot be provided within a reasonable time.

Remote and in-person hearings

In response to state-level ordinances, the VIAC promulgated a Practical Checklist for Remote Hearings in June 2020, offering arbitrators and parties extensive guidance in determining the reasonableness and suitability of such proceedings. The Protocol provides a comprehensive overview of potential measures to employ with regard to:

- determining the viability of remote hearings: factors to be considered include, for example, time zones, technology access, location and number of parties involved, duration and nature of hearing;
- selecting an appropriate remote hearing platform and adopting suitable pre-hearing preparatory measures: while the Protocol affords the tribunal considerable discretion in conducting the arbitration, it must do so in an efficient and cost-effective manner (pursuant to article 28 of the Vienna Rules), paying due regard to fundamental principles such as the parties' right to be heard. It also recommends the organisation of a pre-hearing conference and outlines administrative and technical factors to be considered in advance (eg, hearing etiquette, data security, recordings, costs and room arrangements); and
- establishing and ensuring compliance with the remote hearing protocol: unlike the Vienna Rules, which are silent on the 'permissibility of conducting hearings remotely' and require an 'oral hearing' only upon explicit party request, the Protocol confirms that these provisions are satisfied provided said hearings allow parties to orally present their case (page 2 of the Practical Checklist for Remote Hearings).

Given that the Protocol is neither exhaustive nor binding in nature, it is universally applicable and can be used for arbitration proceedings administered by any arbitral institution. Notwithstanding these developments, as of 30 May 2020, physical hearings are once again permitted to take place at VIAC facilities under special conditions and with restricted availability.

Litigation

Court proceedings

Since the onset of the covid-19 crisis and in response to the subsequent implementation of strict lockdown measures that came into effect on 16 March 2020, the Austrian Parliament has introduced a number of legislative packages to address its impact on the justice system. The adoption of COVID-19-JuBG caused most procedural deadlines to be suspended and virtually all oral hearings to be cancelled or postponed. Pursuant to the newly promulgated Rules, accessibility of judicial buildings was significantly restricted while enforcement actions were limited to those urgent and necessary for the orderly administration of justice. Following the replacement of these government-mandated orders with less restrictive measures after 30 April 2020, oral hearings resumed in May 2020, while the demand for and use of videoconferencing technology has since continually increased.

Videoconferencing

The application of videoconferencing in Austrian proceedings, albeit not novel, has thus far been limited to cases meeting specific conditions (section 277 of the Austrian Code of Civil Procedure; including the incapacity of parties to travel). In an effort to facilitate the continuation and remote functioning of civil trials, the aforementioned Rules have expanded upon prior digitalisation efforts, allowing for entire hearings to be conducted via videoconferencing technology (applicable until the end of 2020), provided that:

- access to suitable communication technology can be secured (section 3 Abs 1 Z 1 1. COVID-19-JuBG; note that enforcement and insolvency proceedings may still be conducted via videoconference without party consent, except when lacking the necessary technical means to participate);
- parties mutually consent to the use of said technology, which is deemed to have been given unless objected to within a reasonable period set by the court (section 3 Abs 1 Z 1 1. COVID-19-JuBG); and
- parties can certify that an increased health risk exists both for themselves or individuals with whom they are in necessary private and professional contact with (section 3 Abs 2 1. COVID-19-JuBG).

Video hearings are called at the courtroom and remain open to the public subject to safety precautions (interpersonal distance rules, protective masks and shields inside court buildings, restricted elevator use, temperature readings). The online participation of non-parties in these hearings is not envisioned. Determining the appropriateness of using videoconference technology is currently solely at the discretion of the court (the assigned judge must examine which measures may be necessary in light of the health risks posed and the extent to which their implementation can be guaranteed). A landmark decision (Docket 18 ONc 3/20s) by the Austrian Supreme Court, rendered on 23 July 2020, has addressed concerns pertaining to the admissibility of remote videoconference hearings in the context of challenge proceedings. Besides offering practical guidance to ensure that the principles of a fair trial are observed, it has set a precedent by establishing that such hearings neither give rise to a violation of the parties' fundamental rights (the right to be heard and to be treated equally) nor constitute grounds for challenging tribunals or setting aside arbitral awards.

The covid-19 pandemic has and undoubtedly altered existing arbitration and litigation practices, and will continue to do so. Parties are thus encouraged to establish a contingency plan and assess new feasible options to settle cross-border disputes quickly and efficiently. The following methods are worth considering:

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- adjourning in-person hearings;
- allowing for a resolution of the dispute 'on the papers';
- considering all or parts of a claim to be resolved by arbitration;
- conducting remote hearings and evaluating the benefits associated with the use of videoconferencing technology; and
- reviewing existing business agreements to:
    - determine whether contractual obligations can be upheld and damages mitigated;
    - consider the applicability of other remedies under the contract (warranty, error, transferral of risk provisions, etc);
    - assess whether business interruptions and losses resulting from government-mandated covid-19 restrictions give rise to compensation rights under force majeure or extraordinary termination clauses; and
    - ascertain the applicability of international investment treaties.

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