ICLG

The International Comparative Legal Guide to:

Investor-State Arbitration 2019

1st Edition

A practical cross-border insight into investor-state arbitration.

Published by Global Legal Group, in association with CDR, with contributions from:

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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Stephens & George Print Group
November 2018

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ISBN 978-1-912509-41-6
ISSN 2631-6307

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PEFC/16-33-254
www.pefc.org

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Austria

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1 Treaties: Current Status and Future Developments

1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

To date, Austria has signed and ratified 69 Bilateral Investment Treaties ("BITs"), out of which BITs with the following 60 states are presently in force: Albania; Algeria; Argentina; Armenia; Azerbaijan; Bangladesh; Belarus; Belize; Bosnia-Herzegovina; Bulgaria; Chile; China; Croatia; Cuba; Czech Republic; Egypt; Estonia; Ethiopia; Georgia; Guatemala; Hong Kong; Hungary; Iran; Jordan; Kazakhstan; Kosovo; Kuwait; Kyrgyzstan; 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 Korea; Tajikistan; Tunisia; Turkey; Ukraine; United Arab Emirates; Uzbekistan; Vietnam; and Yemen.

The Treaty on the Functioning of the European Union ("TFEU") entered into force on 1 December 2009 establishing the European Union's ("EU") competence over direct investments. Based on the transferred competence, the European Parliament and the EU Council adopted Regulation 1219/2012 according to which existing BITs remain valid subject to authorisation by the European Commission after "*evaluating whether one or more of their provisions constitute a serious obstacle to the negotiation or conclusion by the Union of bilateral investment agreements with third countries*" (Regulation 1219/2012, Article 5). The European Commission further initiated infringement proceedings with respect to 12 Intra-EU BITs (bilateral investment treaties between EU Member States) signed and ratified by Austria.

Austria signed the Energy Charter Treaty in 1994, followed by a formal ratification in 1997.

Various trade agreements and treaties with investment provisions are in force with respect to Austria in its capacity as an EU Member State.

1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

BITs signed with Zimbabwe (2000), Cambodia (2004) and Nigeria (2013) have yet to come into force.

The most important agreement awaiting ratification in EU Member States' national parliaments is the EU-Canada Comprehensive Economic and Trade Agreement ("CETA") which has been in provisional force since 21 September 2017.

Negotiations with China, Japan, Mexico, Myanmar, the Philippines, Tunisia, and the US ("TTIP"), are currently in progress.

Trade agreements negotiated at the EU level are facing strict scrutiny by Member States including Austria. It may be concluded that the scope and dispute resolution mechanisms enshrined in the stated trade agreements are the subject of relentless legal and political debate.

1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

Austria does have a Model BIT adopted in 2008 ("Model BIT"). It is, however, crucial to recall that the prevailing number of BITs signed and ratified by Austria predate the newest version of the Model BIT. An assessment of the impact the latest model BIT may have in the future is likewise challenging to make.

A comparable analysis of BITs signed after the Austrian Model BIT had been introduced shows a lack of uniformity. On the one hand, investment treaties with Tajikistan and Kosovo were strictly drafted along the lines of the Model BIT. Contrariwise, agreements of the same nature with Kyrgyzstan and Kazakhstan introduced amendments to the Model BIT in some important aspects.

Furthermore, investment protection provisions are commonly becoming a part of EU trade agreements with third countries, thus limiting the purpose envisaged for the Model BIT.

As far as the content of the Model BIT is concerned, Austria certainly presented a concise, functional, and advanced platform for successful protection of foreign investments. The key provisions ensure:

a. equal treatment of foreign investors in comparison to (i) national investors and/or (ii) investors from third countries;

b. obligation of a fair treatment according to the standards of international law (closely regulated expropriation; payments made in the context of an investment must be effected without restrictions, *etc.*); and

c. effective dispute resolution in front of (i) national courts, (ii) the International Centre for Settlement of Investment Disputes ("ICSID"), (iii) a sole arbitrator or an *ad hoc* arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"), and (iv) a sole arbitrator or an *ad hoc* tribunal under the Rules of Arbitration of the International Chamber of Commerce ("ICC").

Further peculiarities of the Model BIT include characteristic defining of the terms "investor" and "investment", as well as a rather wide-reaching umbrella clause. A commentary addressing important aspects of the Model BIT in greater detail is conveniently accessible online: https://www.iisd.org/pdf/2012/austrian_model_treaty.pdf.

1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

A rare example of diplomatic notes exchanged for the purpose of establishing the intended meaning of a BIT is related to the BIT concluded with Paraguay and available in electronic form under https://www.bmdw.gv.at/Aussenwirtschaft/investitionspolitik/Documents/Bilaterale Investitionsschutzabkommen/Paraguay2.pdf.

1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

All available supporting materials to any international treaty ratified by the Parliament of the Republic of Austria are officially accessible in an electronic form under https://www.parlament.gv.at/PAKT/. While the Federal Ministry of Digital and Economic Affairs makes German versions of the ratified BITs with accompanying instruments available on its website for review and public scrutiny (https://www.bmdw.gv.at/Aussenwirtschaft/investitionspolitik/Seiten/BilateraleInvestitionsschutzabkommen-Laender.aspx), English versions may be found under http://investmentpolicyhub.unctad.org/IIA/CountryBits/12.

2 Legal Frameworks

2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

Austria became a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") on 2 May 1961. The New York Convention applies to Austria without limitation, since the initial reciprocity reservation was withdrawn in 1988.

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") was ratified on 25 May 1971, entering into power with respect to Austria on 24 June 1971.

Austria is not a party to the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention").

2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

Austria does not have a specific (foreign) investment law.

2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

Formal admission of a foreign investment is generally not required. However, some non-discriminatory national and EU measures may become applicable (e.g. in acquisition of real estate, antitrust, energy sector, *etc*.).

3 Recent Significant Changes and Discussions

3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

Pursuant to the Austrian Supreme Court's ("OGH") landmark case on point (3 Nd 506/97) multinational agreements ought to be seen from the international application angle. A multinational agreement loses its meaning and effectiveness if its rules were to be interpreted exclusively nationally. Therefore, the interpretation of individual text elements must not be based on the sole meaning of the national legal language. It is rather to be examined whether these parts of the text were deliberately adopted by the contracting parties with due regard to specific national traditions.

OGH proceeded to state that the purpose of unified law requires international legal unity to be valued higher than that of a seamless incorporation into a national legal order. Although systemic breaks with autonomous civil law are to be avoided as far as practically possible, they must, if necessary, be accepted under international uniformity. The systematic interpretation is thus confined to the international context.

3.2 Has your country indicated its policy with regard to investor-state arbitration?

The Austrian Government has yet to announce any crystalised policy regarding investor-state arbitration.

As a matter of general attitude unrelated to any particular investment disputes, the Federal Ministry of Digital and Economic Affairs does, however, indicate the Government's openness to binding international arbitration as a proper alternative to national courts in dispute resolution under the applicable BITs.

3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country's treaties?

1. Corruption:

The issue of corruption is not uniformly addressed by the applicable legal instruments. The preamble of the Model BIT emphasises "*the necessity for all governments and civil actors alike to adhere to UN and OECD anti-corruption efforts, most notably the UN Convention against Corruption (2003)*". Preambles of the post-Model-BITs signed with Kazakhstan, Kyrgyzstan, Tajikistan and Nigeria contain similar provisions.

An example of a pre-Model-BIT stipulation that tackles the issue of corruption in a limited form may well be Article 25(1)(c) of the Uzbekistan BIT that introduces corruption as a ground for annulment of an award if shown on "*the part of a member of the tribunal or on the part of a person providing decisive expertise or evidence*".

2. Transparency:

The issue of transparency is addressed in Article 6 of the Model BIT. This provision introduced obligations of prompt: (i) publishing of all instruments that may affect the operation of the BIT; and (ii) response to information requests. Notable limitation to the above

is stipulated insofar as to remove mandatory access to "*information concerning particular investors or investments the disclosure of which would impede law enforcement*".

BITs currently in force follow somewhat opposite approaches to the Model BIT's rules on transparency. While a significant number of the agreements contain wording corresponding to the above (e.g. BITs concluded with Armenia, Azerbaijan, Bangladesh, *etc*.), an equally evident number comes without a distinct transparency clause (e.g. BITs concluded with Belarus, Bulgaria, *etc*.). Finally, the third group of BITs incorporates rules on transparency with significant redactions (*see* e.g. Iran BIT, Article 4; Kuwait BIT, Article 3; and Libya BIT, Article 3, *etc*.).

3. Most-Favoured Nation clause:

Article 3(3) Model BIT stipulates that "[e]*ach Contracting Party shall accord to investors of the other Contracting Party and to their investments or returns treatment no less favorable than that it accords to its own investors and their investments or to investors of any third State*". The protection is provided with respect to "*management, operation, maintenance, use, enjoyment, sale and liquidation as well as dispute settlement of their investments or returns, whichever is more favorable to the investor*". (Some of the pre-Model-BITs (e.g. with Belarus, Hong Kong, India, Malaysia, Montenegro, Serbia, *etc*.) do not contain a specified list of protected investment actions.)

4. Indirect investment:

The Model BIT covers both direct and indirect investments. However, some of the Pre-Model-BITs have more restrictive definitions of "investments" and possibly do not cover indirect investments (*see*, e.g., the BIT concluded with Iran).

5. Environmental protection:

The preamble of the Model BIT addresses the issue of environmental protection insofar as it stipulates that contracting states:

- are committed to the objectives stated in a manner consistent with the protection of the environment; and
- acknowledge the principles of the UN Global Compact and that "*investment agreements and multilateral agreements on the protection of environment* […] *are meant to foster global sustainable development and that any possible inconsistencies there should be resolved without relaxation of standards of protection*".

Pre-Model BITs generally do not have similar provisions incorporated in their preambles. Contrary to this general observation, preambles of Post-Model-BITs signed with Nigeria and Tajikistan are similar to the Model BIT and it is only the preambles of the BITs with Kazakhstan and Kyrgyzstan that are less comprehensive on the point than the Model BIT.

As far as the body of the Model BIT is concerned, Article 4 specifically states that "[t]*he Contracting Parties recognize that it is inappropriate to encourage an investment by weakening domestic environmental laws*". Post-Model BITs have provisions to a similar extent.

Article 7(4) of the Model BIT states that "*non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as...the environment, do not constitute indirect expropriation*". Apart from the BIT concluded with Kazakhstan, other post-Model BITs contain a comparable provision.

An example of a Pre-Model-BIT's stipulation that takes account of environmental protection is Article 3(4) of the BIT concluded with Kuwait which states: "*investments shall not be subjected in the host Contracting State to additional performance requirements which may hinder or restrict their expansion or maintenance in a manner as to adversely affect or be detrimental to their viability, unless such requirements are deemed vital for reasons of* […] *the environment* […]."

3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

Austria has not given notice to unilaterally terminate any BIT, yet.

It must be emphasised, however, that the conclusive effects of the transfer of competences over direct investments to the EU (*see* question 1.1 above) are yet to be determined.

4 Case Trends

4.1 What investor-state cases, if any, has your country been involved in?

As of the day of this publication, Austria has been actively involved in a single publicly known investor-state arbitration: *B.V. Belegging-Maatschappij "Far East" v. Republic of Austria* (ICSID Case No. ARB/15/32).

The proceeding was initiated in July 2015 under the BIT Austria had concluded with Malta in 2002 (in force as of March 2004). The moving investor thereby alleged that Austria: (i) imposed arbitrary, unreasonable and/or discriminatory measures; (ii) denied full protection and security; (iii) violated applicable prohibitions of direct and indirect expropriation; and (iv) denied fair and equitable treatment.

The Arbitral Tribunal dismissed the claims on jurisdictional grounds in October 2017, following a hearing on a point which had arisen in March that same year.

4.2 What attitude has your country taken towards enforcement of awards made against it?

Not applicable (*see* question 4.1 above).

4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

Not applicable (*see* question 4.1 above).

4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

Not applicable (*see* question 4.1 above).

4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

Not applicable (*see* question 4.1 above).

5 Funding

5.1 Does your country allow for the funding of investor-state claims?

Austrian lawmakers have not yet introduced any legislation intended to govern the matter of third-party funding in litigation and/or arbitration, yet. The regulatory framework has thus been embraced by the courts, which seemed to endorse (in general) the legality of third-party funding in dispute resolution proceedings (*see* question 5.2 below).

Openness towards the permissibility of third-party funding in investor-state disputes may moreover be derived from the trade agreements currently negotiated at the EU level. By way of example, Article 8.26 of the closely scrutinised CETA permits third-party funding only subject to a mandatory disclosure of the "*name and address of the third party funder*".

5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

The OGH landmark decision of February 2013 (6 Ob 224/12b) provides thus far the closest insight into the Austrian highest court's perception of third-party funding's legality.

The relevant issue presented to OGH was in essence whether third-party funding agreements violate *pactum de quota litis* prohibition stipulated in Section 879 para. 2 Austrian Civil Code ("ABGB"). While refraining from making a decision on point, OGH concluded that the standing of a party in a proceeding may not be affected by the existence of a third-party funding agreement, even if such agreement were to be found in violation of the *pactum de quota litis* rule.

The holding of OGH has been widely interpreted as upholding legality of third-party funding not only in national litigation proceedings, but also in international arbitration.

5.3 Is there much litigation/arbitration funding within your jurisdiction?

The Austrian market's interest in third-party funding has consistently been increasing in the past few years. In particular in international arbitration proceedings, disputing parties tend to carefully explore advantages and disadvantages of funding in securing their claims. Investor-state disputes are no exception. As a traditionally established arbitration centre embraced by political neutrality, affected investors worldwide strongly consider retaining the services of Austrian leading practices whether or not claims are related in any manner to Austria. Depending on the nature of the claims thereby intended to be raised, third-party funding agreements are time and again negotiated with specialised institutions abroad.

6 The Relationship Between International Tribunals and Domestic Courts

6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

As a well-established rule of Austrian law, the legal force of a *final* criminal conviction must be understood in such a way that the convicted person, as well as any third party, have to accept the verdict. Thus, in a subsequent legal dispute, no person may claim that she had not committed an act for which she was convicted, regardless of whether the opposing party in the subsequent proceedings was involved in the criminal proceedings in any capacity.

Subject to the stated, international tribunals may have a rather limited power to evaluate *effects* of a criminal conviction and/or investigation as a matter of (established) fact against any applicable obligations of the state *vis-à-vis* investors as a matter of law.

6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

National courts may intervene in arbitration proceedings if so expressly provided for in the Austrian Code of Civil Procedure ("ZPO"). Two groups of national courts' permissible dealings with procedural issues arising out of arbitration may be distinguished:

a. Subject to a prior request from an arbitral tribunal:
   - enforce an interim measure issued by the arbitral tribunal (Section 593 ZPO); or
   - conduct judicial acts for which the arbitral tribunal has no authority (e.g. compelling witnesses to attend, ordering the disclosure of documents, *etc*.), including requesting foreign courts and authorities to perform such actions (Section 602 ZPO).

b. Subject to specific procedural authorisations arising out of ZPO:
   - grant interim measures (Section 585 ZPO);
   - appoint arbitrators (Section 587 ZPO; *see* question 6.7 below); or
   - decide on the challenge of an arbitrator (Section 589 ZPO).

6.3 What legislation governs the enforcement of arbitration proceedings?

Austria is a party to both the New York and ICSID Conventions (*see* question 2.1 above). Nonetheless, both international instruments (*see* Article III *et seq*. New York Convention; Article 54 *et seq*. ICSID Convention) look up to the national rules of procedure for a proper implementation.

Austrian lawmakers make a clear distinction between the rules on enforcing domestic (*i.e*. rendered in arbitral proceedings with the agreed seat of arbitration in Austria) and foreign (*i.e*. rendered in arbitral proceedings with the agreed seat of arbitration out of Austria) arbitral awards.

In the case of the former, Section 1 of the Austrian Enforcement Act ("EO") stipulates that domestic awards not subject to appeals (inclusive of settlement agreements) may be enforced directly as inherently conferring executory titles.

Contrary to the above, Title III EO (Section 403 *et seq*.) requires formal recognition of foreign arbitral awards prior to domestic enforcement, unless the awards ought to be enforced without prior separate declaration of enforceability by (i) virtue of an applicable international agreement (e.g. treaties with applicable obligation of reciprocity in recognition and enforcement), or (ii) an act of the European Union.

6.4 To what extent are there laws providing for arbitrator immunity?

Austrian applicable law favours the concept of legal liability over absolute immunity of arbitrators. Section 594(4) ZPO in this respect clearly stipulates that "[a]*n arbitrator who does not fulfil his obligation resulting from the acceptance of his appointment at all*

or in a timely manner, shall be liable to the parties for all damages caused by his wrongful refusal or delay".

6.5 Are there any limits to the parties' autonomy to select arbitrators?

There are no express limitations to the parties' autonomy to select arbitrators. Nonetheless, it should be emphasised that the generally accepted interpretation of Section 587 ZPO only permits appointments of natural persons as arbitrators. Furthermore, active judges are not allowed to act as arbitrators.

6.6 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Yes. In accordance with Section 587(3) ZPO, if the parties' agreed method for selecting arbitrators fails due to one of the enumerated reasons, "*either party may request from the court to make the necessary appointment, unless the agreed appointment procedure provides for other means for securing the appointment*".

For the avoidance of doubt, in case of parties' failure to reach an agreement on the appointment procedure to begin with, the applicable default appointment procedure is expressly stipulated in Section 587(2) ZPO.

6.7 Can a domestic court intervene in the selection of arbitrators?

Domestic courts may be invited to appoint arbitrators in accordance with Section 587(3) ZPO (see question 6.6 above).

7 Recognition and Enforcement

7.1 What are the legal requirements of an award for enforcement purposes?

According to Article IV(1)(a) New York Convention, an applicant seeking recognition of an award has to furnish the original award (or a certified copy) plus the original arbitration agreement (or a certified copy). Section 614(2) ZPO places in this respect the decision on whether to request the applicant to table the relevant arbitral agreement (or a certified copy) within the discretion of the judge. Since the competent district courts only examine whether the formal requirements are satisfied, the Austrian Supreme Court's take on this has been more formalistic – they require an examination of whether the name of the debtor as indicated in the Request for enforcement authorisation is in line with the name indicated in the arbitral award.

In addition to the stated, an award may be subject to Section 606 ZPO requiring the award to be (i) in writing, and (ii) signed by arbitrators. Further formal requirements may be applicable in the absence of parties' agreement.

7.2 On what bases may a party resist recognition and enforcement of an award?

Austrian 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 (e.g. 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 Sections 577 to 618 ZPO or the parties' agreement;
- the arbitral procedure did not, or the award does not, comply with the fundamental principles of the Austrian legal system (*ordre public*); and
- if the requirements to reopen a case of a domestic court in accordance with Section 530(1) ZPO are fulfilled.

7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

Foreign countries are only granted immunity for actions to the extent of their sovereign capacity. Immunity does not apply to conduct of private commercial nature. Foreign assets in Austria are thus exempt from enforcement depending on their purpose: if meant to be used solely for private transactions, they may be seized and become subject to enforcement; but if meant to exercise sovereign powers (e.g. embassy tasks), no enforcement measures may be ordered. In a relevant decision on the issue, OGH concluded (*see* 3 Ob 18/12) that general immunity for state assets is not envisaged, instead it is the duty of the obliged state to prove that it was acting with sovereign power in suspension of enforcement proceedings according to Section 39 EO.

7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

In the absence of instructive case law, it may be rational to conclude that piercing the corporate veil with respect to sovereign assets would be legally permissible so long as the rules on the scope of sovereign immunity (*see* question 7.3 above) are complemented with satisfaction of the applicable legislative requirements on piercing the corporate veil.

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Miloš further advises international business leaders and state entities on strategic issues related to investment protection and means of minimising exposure to legal liability. His expertise is confirmed time and again when representing clients' interests in investor-state arbitration proceedings.

Miloš is highly committed to the *pro bono* support of human rights, especially providing legal support to NGOs combatting human trafficking.

After becoming a part of academia at Washington University School of Law, Miloš has been regularly engaged as a scholar at various Universities. His academic field of expertise is Public International Law and comparative Civil Procedure.

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