# Austria

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## GENERAL

**1. Please give a brief overview of the use of commercial arbitration in your jurisdiction, including any recent trends. What are the general advantages and disadvantages of arbitration compared to court litigation in your jurisdiction?**

### Use of commercial arbitration

Commercial arbitration is an acknowledged mechanism for the resolution of cross-border and domestic commercial and corporate disputes. Arbitration clauses are commonly included in all types of commercial contracts. Less frequently, and particularly in complex multi-party situations, separate arbitration agreements are added to the contractual framework of transactions. The dynamic development of arbitration can be best shown by reference to the Vienna International Arbitral Centre's (VIAC) statistics, according to which the number of statements of claim in 2009 was about two times higher than in 2006.

Various versions of the dispute review boards, as a continuing dispute resolution and avoidance tool, are currently used and tested for practicality. Mostly in large cross-border construction projects, the use of dispute review boards has increased significantly.

### Arbitration vs litigation

The principal advantages of arbitration are the parties' broad discretion to agree on the procedural framework, free choice of the language of the proceedings and of witness testimony, no review on the merits and so on. In addition:

- Litigation focuses on oral fact pleading and the number of preparative written pleadings that can be submitted is restricted by court judges (generally, the complaint and one preparative submission are scheduled at an early stage). In arbitration, parties can agree on a different timeline and explain the interrelation between different factual components more carefully in writing (for example, they can specify the number of preparative pleadings before the tribunal).
- Under the *jura novit curia* principle (according to which the court is not solely dependent on the parties' argument before it with respect to the applicable law), the party's pleading of the applicable statutory and case law may be difficult and more limited in civil law litigation. An arbitral tribunal can leave ample room for the discussion of these issues, if necessary.
- Although some court judges try to schedule oral hearings over several days, this is not common. Therefore, if the parties prefer oral hearings over a certain time period, arbitration is recommended.
- Apart from declarations in lieu of oath that can support requests for preliminary injunctions, written witness statements are unknown to Austrian court litigation. If parties require a forum, which is better prepared for the often complex and technical witness testimony due to written witness statements, arbitration should be selected.
- In Austrian litigation, requests for the production of documents as understood in common law countries (that is, "fishing expeditions") are not available (*see Question 13*). Since arbitrators sitting in Austria frequently use the IBA Rules on the Taking of Evidence (or suggest that the parties agree on these rules), arbitration may be the better choice if a case requires (limited) document production.

**2. Which arbitration organisations are commonly used to resolve large commercial disputes in your jurisdiction? Please give details of both arbitral institutions and professional/industry bodies, including the website address of each organisation.**

### Vienna International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC)

Having initially served as an arbitration centre mostly chosen for dispute resolution between eastern and western European countries, the VIAC has evolved into an established international arbitration centre used by a wide variety of international parties. Although one quarter of the parties in the VIAC arbitration are Austrian, parties from many other European countries also use VIAC. Parties from the US, France and Luxemburg comprise a minority of the parties in VIAC arbitration.

The VIAC's Rules of Arbitration and Conciliation (Vienna Rules) were updated in 2006, at the time of the adoption of the UNCITRAL Model Law by the Austrian legislator. The Vienna Rules provide a comprehensive framework for international arbitration which regulates the applicable procedure in great detail. The framework includes the rules relating to:

- The admissibility of multi-party proceedings (for the appointment of arbitrators in multiparty situations see *Article 15.3 et seq* and for consolidation see *Article 15.9*).
- Disclosure (*Article 7.5*), challenges (*Articles 16 and 21*) and their consequences (*Article 18*).
- Kompetenz-kompetenz (*Articles 19.2 and 20.1*).
- Due process (*Article 20.3*) and equal treatment of the parties (*Article 20.1*).
- The taking of evidence on the arbitrator's own motion (*Article 20.5*).

- The waiver of procedural objections (*Article 20.7*).
- Interim measures of protection (*Article 22*).
- The choice of appropriate law by the arbitrator (*Article 24.2*).
- The decision-making process in the tribunal (*Article 26*).
- The award (*Article 27*).

**International Chamber of Commerce (ICC)**

The ICC Rules of Arbitration are frequently chosen by Austrian companies which participate in the cross-border trade or provide cross-border services. In 2008, Austria held seventh place among 16 most selected venues for ICC arbitration (*ICC statistical report 2008, ICC International Court of Arbitration Bulletin 2009, Vol. 20 No. 1*). This further confirms Austria's profile as an arbitration friendly country.

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

The Austrian Arbitration Law as amended in 2006 (AAL) is available at *www.ris.bka.gv.at* in German under reference to the Official Bulletin (BGBl) I 7/2006. The 2006 amendment, in force since 1 July 2006, brought the Austrian law in line with the UNCITRAL Model Law. (Important differences between the AAL and Model Law are considered below, for example, see *Questions 8* and *10*). The AAL is still embedded in the Austrian Code of Civil Procedure (CCP) (*sections 577 to 618*).)

Unless indicated otherwise, all below references to statutory sections are references to the AAL.

**4. Are there any mandatory legislative provisions (for example, relating to removal of arbitrators, challenge of awards and arbitrability)? If yes, please summarise their effect.**

Subject to the mandatory requirements, the parties can freely agree on the procedure to be followed in arbitration (*section 594.1*). The AAL's mandatory provisions are either specifically referred to as such in the law or seem to be mandatory through their purpose.

The following provisions of the AAL are considered mandatory:

- Arbitrability (*section 582*) (*see Question 7, Arbitrability*).
- Formal requirements of the arbitration agreement (*section 583*) (*see Question 7, Formal requirements*).
- Possibility to request interim measures from courts before or during the arbitration (*section 585*).
- The number of arbitrators must be uneven (*section 586.1*) (*see Question 7*).
- Court appoints substitute arbitrator(s) if the appointment did not take place within the period agreed or within a reasonable time (*section 587.6*).
- A certain standard of impartiality and independence of arbitrators and experts, and the possibility to apply to courts to challenge an arbitrator (*sections 588 and 589.3*) (*see Question 5*).
- The parties' power to apply for the termination of an arbitrator's mandate if the arbitrator is unable or fails to comply with his duties without undue delay (*section 590.2*) (*see Question 9*).
- Fair treatment of the parties, and the parties' right to be (*sections 594.2, 594.3, 599.2 and 599.3*):
  - heard;
  - supplied with all other party's submissions and expert reports;
  - represented by persons of their choice; and
  - informed about every hearing for the purpose of the taking of evidence.
- The tribunal's power to decide on the admissibility of evidence, to take evidence and to freely determine its relevance and weight (*section 599.1*).
- The termination of the arbitration through failure to communicate the statement of claim including a prayer for relief and the underlying facts to the tribunal and the other party (*section 600.1*).
- The possibility to request legal assistance from the courts (*section 602*).
- Requirements as to the form and service of the award (*section 606*).
- Instances in which the tribunal must terminate the arbitration (*section 608.2*).
- The application for the setting aside of an award (*section 611*) (*see Question 22*).
- Special provisions relating to consumer and employment law matters (*sections 617 and 618*).

**5. Are there any requirements relating to independence or impartiality?**

A person intending to accept an appointment as an arbitrator must disclose any circumstances likely to give rise to any doubt as to his impartiality or independence, or which contradict the agreement between the parties (*section 588.1 and Article 12, UNCITRAL Model Law*). From the time of the arbitrator's appointment and throughout the arbitral proceedings, the arbitrator must promptly disclose such circumstances.

An arbitrator can be challenged only if either (*section 588.2*):

- Circumstances exist that give rise to justifiable doubts as to his impartiality or independence.
- He lacks the qualifications agreed by the parties.

If a party challenges a self-appointed arbitrator or an arbitrator in whose appointment it participated, the challenge can only be based on grounds of which the challenging party became aware after the appointment of an arbitrator or its participation in it.

The parties can agree the procedure for the challenge of an arbitrator, for example, by reference to arbitration rules. In the absence of agreement, the tribunal, including the challenged arbitrator, decides on the challenge (*section 589.2*). If the

challenge is unsuccessful, the challenging party can apply to the court to decide on the challenge within four weeks after receiving the notice of the decision rejecting the challenge (*section 589.3*).

**6. Does the law of limitation apply to arbitration proceedings? If yes, briefly state the usual length of limitation period(s) and what triggers or interrupts it in the context of commercial arbitration.**

### Prescription

Under Austrian law, prescription periods are considered a matter of substantive law. Therefore, they generally only apply to the extent Austrian substantive law regulates the arbitration matter. The general prescription period is 30 years, subject to specified exceptions. For example, a three-year limitation period applies to claims for:

- Accounts receivables.
- Rent and leasehold payments.
- Employees' salaries.

A request for arbitration must be received by the agreed arbitration institution within this three-year limitation period.

Damage claims are barred after three years after the injured person discovers the damage and the identity of the offender. If the injured fails to discover either the injury or the offender, or if the injury results from a pre-meditated criminal act punishable by more than one year of imprisonment, the damage claim is barred after 30 years.

### Interruption of prescription

According to Austrian Supreme Court case law, prescription is interrupted at the time the request for arbitration is received by the agreed arbitration institution (*Austrian Supreme Court 23 June 1995, 1 Ob 25/95*). If the parties submitted their dispute to ad hoc arbitration, prescription is interrupted at the time the claimant's notice of arbitration is received by the respondent (*Austrian Supreme Court 27 March 1945, 1 Ob 44/94*). If an incompetent forum was chosen and a claim is dismissed by a court due to the tribunal's jurisdiction or vice versa, or if the award is annulled due to the tribunal's lacking jurisdiction, proceedings are considered duly pursued (that is, the prescription does not resume during the time between, for example, the award annulment and filing of a new action with the competent forum) if an action is brought with the competent forum immediately after that.

## ARBITRATION AGREEMENTS

**7. For an arbitration agreement to be enforceable:**

- **What substantive and/or formal requirements must be satisfied?**
- **Is a separate arbitration agreement required or is a clause in the main contract sufficient?**

### Arbitrability

The AAL refers to proprietary claims and claims on which the parties can settle. Broadly, any proprietary claim that can be decided by the regular courts can be arbitrated (*section 582*). In relation to non-proprietary claims, an arbitration agreement is effective to the extent the parties are allowed to settle on the matter in dispute. The following cannot be subject to an arbitration agreement (*section 582.2*):

- Claims in family law.
- All contractual claims which are wholly or partly subject to the Austrian Landlord and Tenant Act or to the Austrian Act on Assisted Housing, including disputes relating to the:
  - entry into, existence, dissolution and legal classification of such contracts; and
  - all claims relating to the co-operative apartment ownership.

These requirements are not based on the UNCITRAL Model Law.

### Formal requirements

An arbitration agreement must be contained either in (*section 583.1*):

- A document signed by the parties.
- An exchange of letters, facsimiles, e-mails or other means of communication which ensure a record of the agreement (but do not necessarily need to be signed).

Similarly to the UNCITRAL Model Law, a valid arbitration agreement must be in writing under the AAL.

Notably, a party generally waives its right to object to formal defects of an arbitration agreement if it enters the merits of the case without raising this objection.

### Separate arbitration agreement

Arbitration agreements can be concluded as separate agreements or arbitration clauses in the main contract. The reference in a contract that satisfies the formal requirements of section 583.1 (*see above, Formal requirements*) to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make the arbitration agreement part of the contract, simply according to contract law principles (*section 583.2*). (Austrian contract law does not require the separate document to be attached to the contract.)

An arbitration agreement relating to consumer and certain employment law disputes can only be concluded after the dispute has arisen. In addition, these disputes are subject to enhanced pre-conditions relating to (*sections 617 and 618*):

- The form of the agreement.
- The entrepreneur's duty of disclosure.
- The seat of the tribunal.

**8. Do statutory rules apply to the arbitration agreement? For example, are there restrictions on the number, qualifications/characteristics or selection of arbitrators?**

The parties can determine the number of arbitrators, failing which the number is three (*section 586*). If the parties agree on an even number of arbitrators, the arbitrators must appoint an additional individual as the tribunal's Chairman. Therefore, an uneven number of arbitrators is mandatory (which is different from the UNCITRAL Model Law).

Country Q&A

Except the requirement of full capacity and the exception of active Austrian court judges, the parties can:

- Appoint any individual as an arbitrator.
- Agree on any qualifications they consider sensible.

To be appointed, an arbitrator does not have to have studied law or be a qualified lawyer. In practice, only natural persons can sit as arbitrators under Austrian law.

**9. In what circumstances can a third party be joined to an arbitration, or otherwise be bound by an arbitration award? Please give brief details.**

The AAL does not expressly regulate the preconditions for the joinder of a party to the arbitration if the party is not a signatory to the arbitration clause (a third party). Generally, third parties cannot be forced to arbitrate and be bound by an award without having been able to exercise the rights that a party to arbitration generally enjoys (*Austrian Supreme Court judgment 6 Ob 170/08 of 1 October 2008*). Therefore, the third party's consent is required before the joinder. In addition, the court limited the binding effect of the award to signatories of the arbitration clause.

## PROCEDURE

**10. Does the applicable legislation provide default rules governing the appointment and removal of arbitrators, and the start of arbitral proceedings?**

### Appointment of arbitrators

The parties can freely agree the procedure for appointing the arbitrator(s) (*section 587*). Failing any agreement, the appointment process is as follows:

- **Arbitration with a sole arbitrator.** If the parties are unable to agree on the sole arbitrator within four weeks of a party's respective written request, the sole arbitrator must be appointed by the court, on a party's application.
- **Arbitration with three arbitrators.** Each party must appoint one arbitrator. The two arbitrators appointed must appoint the third arbitrator to act as the Chairman.
- **Arbitration with more than three arbitrators.** Each party must appoint an equal number of arbitrators. The arbitrators appointed must appoint another arbitrator to act as the Chairman. If a party fails to appoint an arbitrator within four weeks of receiving a respective written request from the other party or if the parties, within four weeks of the appointment of the arbitrators, do not receive any communication from them naming the Chairman, the arbitrator (Chairman) must be appointed, on a party's application, by the court.

Unless the parties' agreed appointment procedure provides otherwise, any party can apply to a court for the respective appointment of arbitrators if:

- A party fails to act as required under the appointment procedure agreed by the parties.
- The parties or arbitrators cannot reach a compromise under the agreed procedure.
- The appointing authority fails to perform its function within three months of receiving a written communication.

The appointment mechanism corresponds to the UNCITRAL Model Law, subject to three matters:

- The stipulation of a four-week time limit instead of a 30-day time limit prescribed by the UNCITRAL Model Law.
- Default rules for appointment if the tribunal consists of more than three arbitrators.
- Special rules for appointment in multi-party arbitrations.

### Removal of arbitrators/substitute arbitrators

In addition to challenging an arbitrator for impartiality or independence, an arbitrator's mandate can be terminated prematurely (*section 590.2*). Any party can request the court to decide (in a final and binding ruling) on the termination of the arbitrator's mandate if:

- The arbitrator is either unable to comply with his duties or fails to comply with those duties without undue delay, and the arbitrator does not withdraw from his office.
- The parties cannot independently agree on the termination of the arbitrator's mandate.
- The procedure agreed by the parties does not lead to the termination of the arbitrator's mandate.

If an arbitrator's mandate terminates prematurely, a substitute arbitrator must be appointed under the initial appointment procedure (*section 591.1*). Both sections 590 and 591 closely follow the UNCITRAL Model Law (*Articles 14 and 15*).

### The start of arbitral proceedings

The statement of claim must both (*section 597.1*):

- Be filed within the time period agreed by the parties or determined by the AT.
- State the facts on which the claim is based.

Contrary to the UNCITRAL Model Law, the AAL does not set a default period when the arbitration is considered to have started to provide a more flexible approach. However, it is generally considered that the arbitration starts and the proceedings are pending once the statement of claim or the notice of arbitration has been received by the respondent.

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

### Determination of procedural rules by the parties

Subject to mandatory provisions (*see Question 4*), the parties are free to agree the procedure to be followed by the arbitrators (*section 594.1*). This rule corresponds to the UNCITRAL Model Law. In addition, the parties can refer to the rules of procedure such as a set of institutional arbitration rules (*AAL*).

If the parties fail to agree the procedure, the tribunal must conduct the arbitration in accordance with the AAL (*sections 594 to 602 (Part 5)*) and beyond that in such a manner as it considers appropriate (*section 594.1*). It is becoming more and more common that the arbitrators use the IBA Rules on the Taking of Evidence as guidance.

**Default rules governing procedure**

Part 5 contains the following default rules:

- An arbitrator who does not fulfil his duties at all or not in a timely manner is liable to the parties for the damage caused by his culpable refusal or delay (*section 594.4*).
- If the parties fail to agree on the seat of the arbitration, it must be determined by the tribunal, considering the circumstances of the case (*section 595*).
- Failing the parties' agreement, the language of the arbitration must be determined by the tribunal (*section 596*).
- The claimant must submit its claim and state the facts on which it is based, and the respondent must respond within the period agreed by the parties or determined by the tribunal. The parties can present any evidence they consider relevant or indicate further evidence they intend to rely on. Both parties can amend or supplement their claim or the underlying facts, unless the tribunal does not permit this due to the delay (*section 597*).
- If requested by a party and unless the parties agreed that no oral hearing must be held, the tribunal must hold an oral hearing (*section 598*).
- If the claimant fails to duly file its statement of claim, the tribunal must terminate the proceedings. If the respondent fails to respond to the statement of claim, the tribunal must continue the proceedings without treating this failure as an admission of the claimant's allegation, unless the parties agreed otherwise. The same rule applies if a party does not perform any other procedural act in time. If the default is excused, the respective procedural act may be performed later (*section 600*).
- The tribunal can appoint experts and require the parties to give to the expert any relevant information or objects which are relevant for the report, unless otherwise agreed by the parties (*section 601*).
- The tribunal or any party with the tribunal's approval can request from a court the performance of judicial acts for which the tribunal does not have authority (*section 602*).

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

For the tribunal's general procedural powers see *Question 11*.

In addition, the tribunal can (*section 599.1*):

- Decide on the admissibility of evidence.
- Take evidence and determine its relevance, materiality and weight unrestrictedly.
- Summon witnesses to attend oral hearings.

This reflects the UNCITRAL Model Law.

In relation to experts, the tribunal, if it considers necessary, can request the expert to participate in an oral hearing after delivery of the expert's report, unless otherwise agreed by the parties (*section 601.1*).

Considering the arbitrators' broad procedural discretion (*see Question 11*) and the power to take evidence, the tribunal can order, on the parties' request or on its own motion:

- The production of documents.
- The attendance of witnesses.

The tribunal can probably order the production of documents by interim or protective measure, although only at a party's request (*section 593.1*). However, the tribunal cannot enforce compliance with its orders.

## EVIDENCE

**13. What documents must the parties disclose to the other parties and/or the arbitrator(s)? Can the parties determine the rules on disclosure? How, in practice, does the scope of disclosure compare with disclosure in litigation?**

The AAL does not recognise a general pre-trial disclosure (that is, the concept of the production of documents to the other party or arbitrators). The law only deals with the production of documents that can be ordered by the tribunal if they are relevant to the proceedings to make an expert report (*sections 601.1 and 601.2*).

The parties can determine the rules of disclosure or document production. In practice, the IBA Rules on the Taking of Evidence and its regulations are commonly used in this respect.

In Austrian courts, a request for the production of documents can be effectively made if:

- The requested party made reference to the document requested in its own motion to take evidence.
- The requested party is under a civil law duty to deliver the requested documentation.
- The document:
  - was established in the parties' joint interest;
  - sets forth the parties' mutual legal positions; or
  - incorporates the written negotiations of the individuals involved in a legal transaction.

## CONFIDENTIALITY

**14. Is arbitration confidential?**

The law contains no provision in relation to the confidentiality of arbitration proceedings, although arbitration proceedings are generally considered to be a private matter between the parties and the tribunal.

In court, the public can be excluded from the proceedings to set aside an award on a party's request, if that party demonstrates that it has a legitimate interest in the private proceedings (*section 616.2*). This provision was intended to reflect the confidential character of arbitration. However, as there is no express provision, it is still recommended to include a confidentiality provision in the arbitration clause or the arbitration agreement if confidentiality is of paramount importance.

## COURTS AND ARBITRATION

**15. Will the local courts intervene to assist arbitration proceedings? For example, by granting an injunction or compelling witnesses to attend?**

It is not incompatible with an arbitration agreement for a party to request, before or during arbitration proceedings, a preliminary or protective measure from a court, and for a court to grant such a measure (*section 585 and Article 9, UNCITRAL Model Law*). Therefore, parties can request preliminary and protective measures from courts, if it is necessary in the circumstances.

In addition, interim or protective measures (domestic and foreign) rendered by the tribunal must be enforced by the local court at a party's request. If the protective measure is unknown to domestic law, the court must, on request and having heard the respondent, apply such other means of protection under domestic law which most closely reflects the measure ordered by the tribunal (*section 593.3*). (This is different from the UNCITRAL Model Law and its 2006 amendments.)

Considering the tribunal's lack of power to enforce summons of witnesses and other orders, court assistance is available for these matters (*section 602*).

In addition, the courts can assist with the following:

- Dismissal of claims subject to an arbitration agreement *(section 584)*.
- Substitute appointment of arbitrators (*section 587*).
- Substitute decision of challenges of arbitrators (*section 589*).
- Substitute early termination of an arbitrator's mandate (*section 590*).
- Setting aside of an arbitral award (*section 611*).
- Determination of the (non-) existence of an arbitral award if the applicant has a legitimate interest in it (*section 612*).
- Recognition and enforcement of foreign arbitral awards (*section 614*).

**16. What is the risk of a local court intervening to frustrate the arbitration? Can a party delay proceedings by frequent court applications?**

The risk of delay and frustration of arbitration proceedings is low, as the competence is clearly divided between the courts and tribunals under the AAL. In matters to which the AAL applies, no court can intervene except if so provided under section 578. The court will only intervene to support arbitration (*see Question 15*).

Austrian courts refrain from rendering declaratory judgments concerning the validity of an arbitration agreement or the tribunal's jurisdiction, and simply dismiss inadequate court actions. Therefore, a party cannot delay arbitration by frequent court applications.

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

If court proceedings are started in breach of an arbitration agreement, the court must dismiss the claim unless the respondent enters the merits of the dispute without raising a jurisdictional objection. If such court action is pending, arbitration proceedings can nevertheless be commenced or continued (*section 584.1*). This rule does not apply if the court establishes that the arbitration agreement does not exist, or is incapable of being performed.

If arbitration proceedings are started in breach of a valid jurisdiction clause, the tribunal dismisses the claim through an award on jurisdiction. Until the tribunal renders its award on jurisdiction, the general rule against parallel proceedings applies. Therefore, no further legal action relating to the claim can be brought before a court or an arbitral tribunal if arbitration proceedings are pending (*section 584.3*). If such an action is brought, it must be dismissed.

However, this general rule does not apply if both:

- An objection contesting the tribunal's jurisdiction has been raised before a tribunal no later than at the time the merits of the case are entered.
- A tribunal's decision on its jurisdiction cannot be obtained within a reasonable period of time.

In these circumstances, a claim by the party objecting to the tribunal's jurisdiction can be brought before the courts irrespective of the pending arbitration proceedings.

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

Generally, and in line with the AAL, anti-suit injunctions are not available before Austrian courts (*section 578*).

**19. What remedies are available where one party denies that the tribunal has jurisdiction to determine the dispute(s)? Does your jurisdiction recognise the concepts of separability and/or kompetenz-kompetenz? Does the tribunal or the local court determine issues of jurisdiction?**

The principle of kompetenz-kompetenz is recognised (*section 592*). Therefore, a tribunal can rule on its own jurisdiction and can do so in the award on the merits or in a separate arbitral award. A plea that the tribunal does not have jurisdiction must be raised no later than the first submission on the merits. A plea that the tribunal is exceeding the scope of its authority must be raised as soon as the matter alleged to be beyond the scope of its authority is raised during arbitral proceedings. Although a later plea is in principle not admissible, the tribunal may admit it if it considers the delay sufficiently excused. Even if a request to set aside an award by which the tribunal affirmed its jurisdiction is pending before court, the tribunal can both continue the arbitration proceedings and make an award (*section 592*).

The concept of separability is not expressly recognised, although the doctrine is recognised in Austria by virtue of numerous Supreme Court rulings.

## REMEDIES

**20. What interim remedies are available from the tribunal? Can the tribunal award:**

- **Security for costs?**
- **Security or other interim measures?**

Unless otherwise agreed by the parties, the tribunal can, at a party's request, order such interim or protective measures against the other party as the tribunal considers necessary in relation to the subject matter of the dispute. However, there are additional requirements for interim and protective measures ordered by the tribunal. Generally, such measures can only be ordered if either:

- The enforcement of a claim would otherwise be frustrated or materially compromised.
- There is a danger of irreparable damage.

The tribunal can order a party to provide appropriate security in relation to the awarded measure (*section 593.1*). In addition, there is a strong belief that security for costs can be issued, as cost claims form part of the subject matter of the dispute.

Before the issuance of an interim or protective measure, the tribunal must hear the other party. Ex-parte proceedings are not available.

**21. What final remedies are available from the tribunal? For example, can the tribunal award damages, injunctions, declarations, costs and interest?**

There is no limitation as to the relief that may be granted by an AT as long as the subject matter of the dispute is substantively arbitrable. Therefore, an AT has power to award (*section 609*):

- Damages.
- Declaratory relief.
- Cost and interest.

## APPEALS AND CHALLENGES

**22. Can arbitration proceedings and awards be appealed or challenged in the local courts? If yes, please briefly outline the grounds and procedure. Can the parties effectively exclude any rights of appeal?**

### Grounds for setting aside

Arbitral awards are not subject to a revision on the merits (revision *au fond*). However, a party can request the correction and interpretation of the arbitral award and an additional award (*section 610*).

A party can apply to set aside an arbitral award if (*section 611*):

- A valid arbitration agreement does not exist, or if the tribunal denied its jurisdiction even though a valid arbitration agreement existed, or if a party, under the applicable law, was incapable of concluding a valid arbitration agreement.
- A party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case.
- If the arbitral award deals with a dispute not falling within the terms of the arbitration agreement, or contains decisions on matters which are beyond either the scope of the arbitration agreement or the submission of the parties.
- If the constitution or composition of the tribunal is not in accordance with the provisions of the applicable law, or with the parties' valid agreement.
- The arbitration proceedings were conducted in violation of Austrian public policy.
- The pre-conditions exist under which an award can be appealed by an application to re-open the proceedings under section 530.1, subsections 1 to 5 of the CCP.

### MAIN ARBITRATION ORGANISATIONS

**Vienna International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC)**

**Main activities.** The VIAC promotes arbitration through conferences, including in cooperation with UNCITRAL or arbitration institutions of eastern European countries. The VIAC and its board provide full support to the arbitration proceedings conducted under the Vienna Rules (for example, by providing a standard arbitration clause, fixing the deposit of the arbitration costs, appointing substitute arbitrators, deciding on challenges of arbitrators, confirming and serving awards, and providing venue and secretarial services for hearings). The VIAC's Rules (Vienna Rules) are a complete set of institutional arbitration rules.

**W** *www.wko.at/arbitration*

**International Chamber of Commerce (ICC), Paris**

**Main activities.** The services of the ICC International Court of Arbitration as an arbitration institution are well known. ICC Austria, one of the ICC's most active national committees does the following:

- Proposes arbitrators for substitute appointment by the ICC court and its bodies.
- Informs parties on the application of the ICC Rules of Arbitration and on enforcement issues.
- Promotes international arbitration through the organisation of international conferences.
- Provides guidance and seminars in relation to the ICC Incoterms, bank guarantees, letters of credit and many other aspects of export law relating to a variety of European, Asian, Arabic countries and the US.

**W** *www.iccwbo.org*
*www.icc-austria.org*

- The matter in dispute is not arbitrable under Austrian law.
- The arbitral award violates Austrian public policy.

These grounds are somewhat different from the UNCITRAL Model Law. In addition, awards rendered in arbitrations involving consumers or employees are subject to additional grounds for setting aside (*sections 617 and 618*).

The parties cannot waive any of these grounds. However, only the grounds under the two last bullet points (*see above*) are always observed (*ex officio*) by courts. The other grounds must be raised by the claimant.

**Procedure**

An application for setting aside an award must be filed within three months of the day on which the claimant received the arbitral award. In the first instance, jurisdiction for an application lies with the regional (commercial) court having general jurisdiction in civil matters that either:

- Has been selected in the arbitration agreement or in a choice of forum clause.
- Has jurisdiction at the place of arbitration. (If the place of arbitration has not been determined, the Vienna Commercial Court is competent to receive applications (*section 615*).)

The first instance judgment on the setting aside application can be appealed before a competent higher regional court and then the Austrian Supreme Court.

## COSTS

**23. What legal fee structures can be used? For example, hourly rates and task-based billing? Are fees fixed by law?**

Austrian lawyers are free to negotiate their remuneration with the client, subject to the requirement of reasonableness. Generally, legal advice relating to arbitration is mostly provided on the hourly rates basis. Mark-up fees, payable on the lawyer's client's success, are allowed. Contingency fees that form *quota litis* agreements (that is, a lawyer is promised a part of the amount awarded to the party) are prohibited.

Subject to the contrary agreement between the lawyer and client, the Austrian tariff on lawyers' fees fixes the fees that can be charged as a percentage of the amount in dispute and dependent on the task fulfilled.

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

Unless otherwise agreed by the parties, the tribunal must decide on the parties' claims for reimbursement of the costs of the arbitration on termination of the arbitration proceedings. The tribunal has discretion to consider the circumstances of the case, particularly the outcome of the proceedings. The obligation to reimburse costs can include all reasonable costs for the adequate claim enforcement or defence. Usually, and to the extent they are not excessive, the hourly rates billed by lawyers are considered reasonable.

Even if the tribunal decides that it has no jurisdiction (for example, through a non-existent arbitration agreement), it can still decide on the claimant's obligation to reimburse the costs of the proceedings. The decision on this obligation and the determination of the amount must be made in the form of an arbitral award (*section 609*). However, a separate award on costs is not required.

## ENFORCEMENT

**25. To what extent is an arbitration award made in your jurisdiction enforceable in the local courts? Please briefly outline the enforcement procedure.**

Arbitral awards rendered in Austria are considered domestic awards. They do not need to be declared enforceable and are considered to be directly enforceable (to the extent they are final and cannot be appealed before another arbitral instance agreed by the parties in the arbitration agreement) (*section 1(16), Austrian Enforcement Act (AEA)*).

The award, together with the confirmation of enforceability affixed to it by the tribunal, must be attached to the application for leave for enforcement.

**26. To what extent is an arbitration award made in your jurisdiction enforceable in other jurisdictions? Is your jurisdiction party to international treaties relating to this issue such as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)?**

Austria is party to numerous bilateral enforcement treaties and to several multilateral enforcement treaties such as:

- New York Convention (Austria did not make any declaration or reservation).
- European Convention on International Commercial Arbitration 1961.
- Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 (Washington Convention).

Arbitral Awards rendered in Austria are regularly enforced abroad.

**27. To what extent is a foreign arbitration award enforceable in your jurisdiction? Please briefly outline the enforcement procedure.**

The recognition and enforceability of foreign arbitral awards is regulated by the AEA, subject to international law or EU legal acts.

Although foreign arbitral awards are recognised in Austria by operation of law, they need to be declared enforceable, on the creditor's request, which can be filed simultaneously with an application for leave for enforcement.

Depending on the underlying enforcement convention, the creditor must provide the original or a certified copy of the award, together with a certified German translation. Section 614.2 decreases re-

quirements under the New York Convention on the documentation to be supplied in the enforcement proceedings. The presentation of an original or a certified copy of the arbitration agreement is only necessary on the court's request. If the arbitration agreement does not satisfy the formal requirements of the underlying enforcement convention, the formal requirements for the arbitration agreement must also be deemed satisfied if the arbitration agreement complies with the formalities of section 583 and the formalities of the law applicable to the arbitration agreement (*section 614*).

The court renders its decision without any prior oral hearing (*section 83, AEA*). Depending on the applicable enforcement convention, the grounds for opposing the enforcement are either taken into account by the court *ex officio* or must be raised by the debtor. The time limit to appeal the court's decision relating to the declaration of enforceability is two months, to the extent the respective application has been partially allowed or rejected, the counterparty is located abroad and this appeal is the first occasion of the enforcement proceedings (*section 84.2, AEA*).

**28. How long do enforcement proceedings in the local court take? Is there any expedited procedure?**

Considering the court's decision on the declaration of enforceability and leave for enforcement is regularly rendered without an oral hearing, there is no other expedited procedure available for the enforcement of foreign arbitral awards.

Enforcement proceedings with the Austrian district courts can take from a week up to a few months, depending on whether:

- Grounds opposing the enforcement of the arbitral award are introduced.
- A stay of the enforcement proceedings is requested, due to setting aside proceedings abroad.

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