

ARBITRATION IN AUSTRIA

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1. Historical background and overview

1.1 Historical background

1.1.1 Austria has a relatively long tradition of arbitration. The first provisions relating to arbitration were included within the Austrian Code of Civil Procedure from 1895. Austria has benefited and continues to benefit from its reputation as a neutral setting and convenient location in the centre of Europe, which is evidenced by the continued increase in the number of international commercial arbitrations with the seat of the arbitration in Vienna. In many cases, the arbitral proceedings do not involve an Austrian party. The International Arbitral Centre of the Austrian Federal Economic Chamber, better known as the Vienna International Arbitral Centre (**VIAC**), has benefited from Vienna being an attractive, yet less expensive venue (compared to Zurich, Paris or Stockholm) and has recently celebrated its 35th anniversary.

1.1.2 In 2006, a new arbitration law came into effect, bringing the Austrian arbitration law in line with the Model Law (2006).¹

1.2 Overview of arbitration in Austria

1.2.1 The law of arbitration in Austria is contained in the Austrian Code of Civil Procedure (*Zivilprozessordnung*) (**CCP**), originally enacted in 1895, which sets out the provisions relating to arbitration in its fourth section.

1.2.2 After several partial amendments of the old provisions relating to arbitration, with the last major amendment in 1983, the new Austrian Arbitration Act (*Schiedsrechts-Änderungsgesetz 2006*) (**Austrian Arbitration Act**)² came into force on 1 July 2006, comprehensively amending the old law on arbitration. The main purpose of the new Austrian Arbitration Act is to create a modern arbitration law which incorporates the principal features of the Model Law (2006).

1.2.3 The Austrian Arbitration Act was not codified in a separate act, but continues to be part of the CCP. The former provisions of Articles 577–599 of the CCP have been replaced by the new provisions of Articles 577–618 of the CCP. The efficacy of arbitration agreements that were concluded prior to 1 July 2006 is still governed by the former provisions of Articles 577–599 of the CCP.

¹ For the full text of the Model Law (2006), see CMS Guide to Arbitration, vol II, appendix 2.1.

² Federal Law Gazette I 2006/7.

- 1.2.4 Originally, Austrian arbitration law was intended for domestic arbitrations only, but over the years it has proved flexible enough for international arbitral proceedings as well.
- 1.2.5 In 1975, the Austrian Federal Economic Chamber established the VIAC. Undoubtedly the success of the arbitral centre, with its own conciliation and arbitration rules (**VIAC Arbitration Rules**),³ was due to the fact that Vienna provided a convenient middle ground during the thaw in East-West relations in the 1970s and 1980s.
- 1.2.6 The VIAC administers the settlement of disputes by arbitration, provided that the jurisdiction of the centre has been agreed upon by the parties. Furthermore, the dispute needs to have an international character. This will be the case in situations where either of the contracting parties to an arbitration agreement had their place of business or normal residence outside of Austria at the time of the conclusion of that agreement (a cross-border element) or the subject matter of the dispute between the parties, whose place of business or normal residence is in Austria, has an international character.
- 1.2.7 If the parties have agreed to the jurisdiction of the VIAC, the VIAC Arbitration Rules apply in the version valid at the time of commencement of the proceedings. The VIAC Arbitration Rules were recently updated to take into account the amendments that were made to the law by the Austrian Arbitration Act. The present version of the VIAC Arbitration Rules was adopted on 3 May 2006 with effect from 1 July 2006.

2. Scope of application and general provisions of the Austrian Arbitration Act

2.1 Subject matter

- 2.1.1 Unlike the Model Law (2006), the provisions of the Austrian Arbitration Act do not distinguish between domestic and international arbitration or between commercial and non-commercial arbitral proceedings. The provisions of Articles 577 *et seq* of the CCP apply to all arbitrable disputes.

³ For the full text of the VIAC Arbitration Rules, see CMS Guide to Arbitration, vol. II, appendix 3.16.

2.2 Structure of the law

- 2.2.1 The structure of the law closely follows the Model Law (2006):
- (i) the first chapter contains general provisions about the scope of application and service of written proceedings;
 - (ii) the second chapter deals with the arbitration agreement itself;
 - (iii) the third chapter deals with the formation of the arbitral tribunal and the challenge of arbitrators;
 - (iv) the fourth chapter deals with jurisdiction;
 - (v) the fifth and sixth chapters set out provisions relating to the conduct of proceedings and the rendering of awards;
 - (vi) the seventh chapter deals with setting aside an award;
 - (vii) the eighth chapter regulates the recognition and enforcement of foreign awards;
 - (viii) the ninth chapter covers state court proceedings relating to arbitration; and
 - (ix) the tenth chapter contains special provisions concerning consumer-related and employment-related issues.

2.3 General principles

- 2.3.1 The general principles underlying the Austrian Arbitration Act are equality and objectivity, autonomy and due process.

Equality and objectivity

- 2.3.2 All parties must be treated fairly and shall have the right to be heard.⁴

Autonomy

- 2.3.3 The parties enjoy great autonomy. There are only a few mandatory legal provisions that cannot be waived by agreement of the parties.⁵

Due process

- 2.3.4 All parties must have the opportunity to present their case.⁶

⁴ CCP, art 594(2).

⁵ The following provisions cannot be varied: CCP, 585 (interim measures); CCP, art 588 (requirement of impartiality of the arbitrators); CCP, art 589(3) (mandatory right to go to court to obtain a decision on a previously unsuccessful challenge); CCP, art 590 (early termination of an arbitrator's mandate); CCP, art 591 (appointment of an substitute arbitrator); CCP, art 594(2) (fair and equal treatment of all parties and the right to be heard); CCP, art 594(3) (right to be represented); CCP, art 599 (proceedings and taking of evidence); CCP, art 607 (effects of the arbitration award); CCP, art 608 (termination of the arbitration proceedings); CCP, art 610 (adjustment, clarification and amendment of an arbitral award); CCP, art 611 (motion to set aside an award); CCP, art 613 (courts are not bound to awards which violate public policy or concern matters that are not arbitrable under Austrian law); CCP, art 615 (jurisdiction of the courts); CCP, art 616 (rules of procedure); CCP, art 617 (special provisions regarding consumers); and CCP, art 618 (special provisions regarding labour law).

⁶ CCP, art 594(2).

3. The arbitration agreement

3.1 Definitions

3.1.1 The definition of an arbitration agreement is set out in Article 581 of the CCP, which corresponds with the definition in Article 7(1) of the Model Law (2006). An arbitration agreement may be concluded by a separate agreement or may be included as an arbitration clause within a contract. It must be set out in writing and clearly express the intention of both parties to submit the dispute in question to arbitration.

3.1.2 An arbitration agreement must specify which of the disputes that may arise in respect of a defined legal relationship are to be resolved by arbitration. Thus, without a defined legal relationship, general arbitration agreements which refer all future disputes between the parties to arbitration, regardless of the origin or nature of the dispute, are null and void.

3.1.3 It is an accepted principle that the arbitration agreement binds only the parties to the agreement. Austrian courts are very reluctant to bind third parties to arbitration agreements.⁷

3.2 Formal requirements

3.2.1 Article 583 of the CCP governs all arbitration agreements concluded on or after 1 July 2006. The formal requirements of a written arbitration agreement correspond with those set out in Article 7(2) of the Model Law (2006). The document must either be signed by the parties to the agreement or it can be contained in correspondence between the parties which provides a record of the agreement (e.g. letters, facsimiles, e-mails or other means of communication).⁸

3.2.2 Under Austrian law, the arbitration agreement may also be validly concluded by a party representative other than the managing director or the company officer (*Prokurist*), but only if that person holds a special power of attorney stating their empowerment to conclude an arbitration agreement.

3.2.3 A reference in a contract to another document containing the arbitration clause amounts to a valid arbitration agreement if it satisfies the general requirements of a contractual reference to a separate document.⁹ It should be noted that a defect

⁷ OGH 01.10.2008, 6 Ob 170/08f.

⁸ CCP, art 583(1).

⁹ *Ibid*, art 583(2).

in the form of the arbitration agreement is cured if the parties do not contest it before entering into the merits of the case in arbitral proceedings.¹⁰

3.3 Special tests and requirements of the jurisdiction

3.3.1 Generally, a pecuniary claim that lies within the jurisdiction of the courts is capable of being subject to an arbitration agreement.

3.3.2 Disputes relating to non-pecuniary claims can also be arbitrable.¹¹ However, a number of matters are excluded from arbitrability, even though they may include pecuniary claims. Claims in family law, claims relating to the lease of real property and to co-operative apartment ownership cannot be resolved by arbitral proceedings.¹² In regard to consumer-related or employment-related matters, special provisions apply.¹³

3.3.3 Furthermore, it is highly controversial as to whether a number of specific (Austrian) company law issues are arbitrable. For example, a claim for compensation against the managing director of a limited liability company or a claim for payment of the capital invested according to Article 10 of the Austrian Limited Liability Company Law (*GmbH-Gesetz*) are historically not considered arbitrable by the Austrian courts. However, it has been claimed by recent legal doctrine that this view is no longer applicable.¹⁴

3.4 Separability

3.4.1 It is important to note that the CCP omits the second and third sentence of Article 16(1) of the Model Law (2006) concerning the doctrine of separability.¹⁵ This does not mean that arbitration agreements in Austria are invalid just because the main contract in which they are contained is invalid. Numerous court decisions in Austria have stated that in many cases an arbitration clause survives the termination of the contract.¹⁶

¹⁰ *Ibid*, art 583(3).

¹¹ *Ibid*, art 582(1). The definition used in relation to the arbitrability of pecuniary claims is expanded with regard to non-pecuniary claims, allowing for the fallback to "a matter capable of settlement", as had been included in the old law.

¹² CCP, art 582(2).

¹³ *Ibid*, art 617–618. See further section 11 below.

¹⁴ See C Hausmaninger, "Sections 577–618 ZPO" in H W Fasching/A Konecny, *Kommentar zu den Zivilprozessgesetzen* (2nd Edition, 2007), and in particular, CCP art 582 at paras 39–41.

¹⁵ See CMS Guide to Arbitration, vol II, appendix 2.1.

¹⁶ See for example: OGH 29. 4. 2003, 1 Ob 22/03 x, RdW 2003, 507 = GesRZ 2003, 298 = ecolex 2003, 341 = wbl 2003/305; OGH 17. 4. 1996, 7 Ob 2097/96 z, ecolex 1996, 756 = HS 27.825 = RdW 1997, 135 = ZIK 1997, 60; OGH 6. 9. 1990, 6 Ob 572/90, RdW 1991, 327; OGH 18. 4. 1985, 7 Ob 551/85, SZ 58/60 = HS 17.074; SZ 55/89; OGH 10. 10. 1962, 1 Ob 215/62, RIS-Justiz RS0045164. OGH 16. 6. 1982, 1 Ob 628/82.

Therefore, in Austria, the concept of separability between the contract and the arbitration clause seems to be in line with the provisions of the Model Law (2006).

3.5 Legal consequences of a binding arbitration agreement

- 3.5.1 If the arbitration agreement is binding and capable of being performed, a national court must dismiss a claim brought before the court which deals with a matter which is subject to the arbitration agreement between the parties. Once arbitral proceedings are commenced, no claim concerning the same subject matter may be brought before a national court. The general consequence is that a court must dismiss any claim which is subject to an arbitration agreement and/or arbitral proceedings.¹⁷

4. Composition of the arbitral tribunal

4.1 Constitution of the arbitral tribunal

- 4.1.1 Only a natural person who has full contractual capacity may be appointed as an arbitrator. There is no requirement that an arbitrator must be qualified as a lawyer or a registered member of the bar. Active Austrian judges are prohibited from accepting appointments as arbitrators during their tenure of judicial office. An arbitrator may be appointed either as a result of being specifically named in the arbitration agreement (a contractually appointed arbitrator) or by an appointment in compliance with the form of appointment provided for in the arbitration agreement, taking into account the number of arbitrators agreed. The latter method of nomination is in line with general practice in Austria.
- 4.1.2 The parties are free to agree on the number of arbitrators. If the parties agree on an even number, the arbitrators shall appoint an additional arbitrator as chair.¹⁸ If the parties do not agree on the number of arbitrators, the number shall be three.¹⁹ The parties are also free to agree on the procedure for appointing the arbitrator(s).²⁰ If the parties fail to agree on such a procedure, the following default provisions are applicable:²¹
- in arbitral proceedings with a sole arbitrator, the arbitrator is appointed by the national court if the parties fail to agree within four weeks after receipt of a written request by the other party to appoint the arbitrator;²²

¹⁷ CCP, art 584.

¹⁸ *Ibid*, art 586(1).

¹⁹ *Ibid*, art 586(2).

²⁰ *Ibid*, art 587.

²¹ *Ibid*, art 587(2).

²² *Ibid*, art 587(2)(1).

- if there are to be three arbitrators, each party appoints one arbitrator and the party-appointed arbitrators shall choose a third arbitrator to act as chair;²³
- in arbitral proceedings with more than three arbitrators, each party shall appoint an equal number and the party-appointed arbitrators shall appoint another arbitrator to act as chair;²⁴
- if the party or the equal number of party-appointed arbitrators fail to nominate an arbitrator (or chair) within four weeks of receipt of a written request to do so, the missing arbitrator shall be appointed by the national court;²⁵ and
- parties are bound to their appointment as soon as the written communication has been received by the other party.²⁶

4.1.3 In further derogation from the Model Law (2006),²⁷ the Austrian Arbitration Act contains special provisions in case of multi-party arbitrations. If several parties fail to appoint a common arbitrator or multiple arbitrators within four weeks, the appointment shall be made by the court (upon one party's request), unless the arbitration agreement calls for other measures.²⁸

4.2 Procedure for challenging and substituting arbitrators

Challenge of arbitrators

4.2.1 Article 588 of the CCP sets out the grounds for the challenge of arbitrators. Similar to the provision in Article 12 of the Model Law (2006),²⁹ Article 558 of the CCP is a mandatory provision. It provides that arbitrators may be challenged if there are justifiable doubts as to their impartiality or independence. No actual lack of impartiality or lack of independence is required. The challenge of an arbitrator is also possible if an arbitrator does not possess the qualifications agreed by the parties (e.g. professional qualifications, experience or language skills).

Procedure and early termination of mandate

4.2.2 The parties are free to decide on the procedural rules for challenging arbitrators.³⁰ If the parties fail to do so, the statutory provisions of Article 589(2) of the CCP apply. These provisions follow Article 13(2) of the Model Law 2006.³¹ Where a

²³ *Ibid.*, art 587(2)(2).

²⁴ *Ibid.*, art 587(2)(3).

²⁵ *Ibid.*, art 587(2)(4).

²⁶ *Ibid.*, art 587(2)(5).

²⁷ See CMS Guide to Arbitration, vol II, appendix 2.1.

²⁸ CCP, art 587(5).

²⁹ See CMS Guide to Arbitration, vol II, appendix 2.1.

³⁰ CCP, art 589(1).

³¹ See CMS Guide to Arbitration, vol II, appendix 2.1.

challenge to an arbitrator is unsuccessful, the challenging party may, within four weeks of the arbitral tribunal's decision, apply to the court for a final decision. This is a mandatory provision, the parties may not exclude this right in their agreed procedural rules or otherwise waive such right.³²

- 4.2.3 For arbitrations under the VIAC Arbitration Rules, the VIAC Board decides on any challenge of an arbitrator.³³ Nevertheless, an unsuccessful challenge may be subsequently brought to court.
- 4.2.4 Early termination of an arbitrator's mandate is possible if the parties so agree or if the arbitrator withdraws from office.³⁴ Furthermore, the court may (upon one party's request) terminate the arbitrator's mandate in case the arbitrator is unable to or fails to exercise his or her function in due time and one of the following conditions is satisfied:
- (i) the arbitrator does not resign;
 - (ii) the parties cannot agree on the termination of the arbitrator's mandate; or
 - (iii) if the agreed procedure does not lead to the termination of the arbitrator's mandate.³⁵

Appointment of a substitute arbitrator

- 4.2.5 If the mandate of an arbitrator is terminated for any reason whatsoever, a substitute arbitrator must be appointed in accordance with the rules applicable to the former appointment.³⁶ The arbitral tribunal, at its own discretion, may continue with the proceedings without the repetition of any procedural steps that have already been taken.³⁷
- 4.2.6 Court decisions on the substitute appointment of arbitrators are made in accordance with the provisions of Articles 587(8)–(9) of the CCP and are not subject to appeal. The courts must refrain from making a substitute appointment if the party in default of its appointment obligations appoints the missing arbitrator in the interim.³⁸

³² CCP, art 589(3).

³³ VIAC Arbitration Rules, art 16. For the full text of the VIAC Arbitration Rules, see CMS Guide to Arbitration, vol. II, appendix 3.16.

³⁴ CCP, art 590(1).

³⁵ *Ibid*, art 590(2).

³⁶ *Ibid*, art 591(1).

³⁷ *Ibid*, art 591(2).

³⁸ *Ibid*, art 587(7).

4.3 Responsibilities of an arbitrator

- 4.3.1 The Austrian Arbitration Act provides that arbitrators must:
- be neutral and independent from the parties;
 - disclose all circumstances which could raise doubts as to their impartiality and independence;³⁹
 - not unduly delay the proceedings (otherwise they may become liable for the damage resulting from such delay);⁴⁰ and
 - treat the parties equally and fairly which entails providing the parties an opportunity to present their case.⁴¹

4.4 Arbitration fees and expenses

- 4.4.1 The costs of arbitration usually comprise the fees and expenses of the arbitrators, as well as administrative fees, translation costs, etc. In institutional arbitration the institution determines the cost of arbitration and the parties are asked to pay a deposit upfront. In ad hoc arbitration the practice is similar. The arbitrators conclude an arbitrator's agreement with the parties, which contains provisions concerning their fees. Usually arbitrators do not start arbitral proceedings before a deposit of the agreed fees is paid.

4.5 Arbitrator immunity

- 4.5.1 If an arbitrator does not fulfil the duty assumed by the acceptance of his or her appointment or does not fulfil this duty in a timely manner, he or she is liable to the parties for all damages caused by the refusal or delay, if he or she acted, at least, negligently.⁴²
- 4.5.2 The VIAC Arbitration Rules exclude liability of the arbitrators for acts or omissions in relation to arbitral proceedings.⁴³

5. Jurisdiction of the arbitral tribunal

5.1 Competence to rule on jurisdiction

- 5.1.1 The arbitral tribunal shall decide on the issue of its jurisdiction (*competence-competence*). Pursuant to Article 592(1) of the CCP, the decision shall be made in

³⁹ *Ibid*, art 588(1).

⁴⁰ *Ibid*, art 594(4).

⁴¹ *Ibid*, art 594(2).

⁴² *Ibid*, art 594(4).

⁴³ VIAC Arbitration Rules, art 8. For the full text of the VIAC Arbitration Rules, see CMS Guide to Arbitration, vol. II, appendix 3.16.

an award on the merits or in a separate award. This provision follows the wording of Article 16 of the Model Law (2006).

5.2 Power to order interim measures

- 5.2.1 After having heard both parties, an arbitral tribunal is entitled to order interim or protective measures against a party that it considers necessary in respect of the subject matter of the proceedings. *Ex parte* applications for interim or protective measures are not allowed, as the other opposing party must be heard before measures may be ordered against it.⁴⁴
- 5.2.2 Interim or protective measures may be ordered if the enforcement of the subject matter of the claim would otherwise be frustrated or if there is danger of irretrievable damage to one of the parties to the arbitration.
- 5.2.3 The interim or protective measures are enforceable in Austria upon one party's request to the competent court.⁴⁵

6. Conduct of proceedings

6.1 Commencing an arbitration

- 6.1.1 The Austrian Arbitration Act does not define the commencement of arbitration. Under the VIAC Arbitration Rules, an arbitration commences once the statement of claim is filed with the VIAC Secretariat.⁴⁶

6.2 General procedural principles

- 6.2.1 Aside from the limited number of mandatory provisions of the Austrian Arbitration Act,⁴⁷ the parties are free to agree on the procedure to be followed in conducting the proceedings.⁴⁸ Therefore, the parties are free to refer to the rules of an arbitral institution. In the absence of such an agreement, non-mandatory law applies or, in the absence of non-mandatory law, the arbitrators are free to conduct the proceedings at their own discretion.

⁴⁴ CCP, art 593.

⁴⁵ *Ibid*, art 593(3)–(6).

⁴⁶ VIAC Arbitration Rules, art 9(1). For the full text of the VIAC Arbitration Rules, see CMS Guide to Arbitration, vol. II, appendix 3.16.

⁴⁷ See for example CCP, art 594(2)–(3), 597(1), 599(1), 602 and 617.

⁴⁸ CCP, art 594(1).

6.2.2 The parties shall be treated fairly.⁴⁹ This requirement derives from Article 6 of the European Convention on Human Rights and also contains the requirement of equal treatment of the parties. Furthermore, each party has the right to be heard. This does not mean that oral hearings are mandatory, only that the parties must have an opportunity to present their case.

6.2.3 The parties also have the right to be represented by persons of their choice in the proceedings.⁵⁰

6.3 Seat, place of hearings and language of arbitration

6.3.1 The parties are free to agree on the seat of the arbitration.⁵¹ This provision does not refer to the actual place for oral hearings, but to the legal seat of the arbitration. This is important in deciding the question of whether the Austrian Arbitration Act applies,⁵² as the procedural law follows that of the seat of the arbitration. Accordingly, the Austrian Arbitration Act will only be applicable if the seat of the arbitration is within Austria. The actual oral hearings may be conducted at any place that the arbitral tribunal considers to be appropriate.

6.3.2 Corresponding with Article 22 of the Model Law (2006), the parties are free to choose the language of the arbitral proceedings. Failing such agreement, the language is determined by the arbitral tribunal.⁵³

6.4 Multi-party issues

6.4.1 The Austrian Arbitration Act does not contain provisions for multi-party proceedings. Whether third parties can be joined to or intervene in arbitral proceedings will depend on the applicable procedure of the arbitration. However it is an accepted principle that the arbitration agreement binds only the parties to the agreement. Austrian courts are very reluctant to bind third parties to arbitration agreements.⁵⁴

6.4.2 Unlike the Austrian Arbitration Act, the VIAC Arbitration Rules contain detailed provisions in relation to multi-party proceedings.⁵⁵

⁴⁹ *Ibid*, art 594(2).

⁵⁰ *Ibid*, art 594(3).

⁵¹ *Ibid*, art 595(1).

⁵² *Ibid*, art 577.

⁵³ *Ibid*, art 596.

⁵⁴ See paragraph 3.1.3 above.

⁵⁵ VIAC Arbitration Rules, art 15. For the full text of the VIAC Arbitration Rules, see CMS Guide to Arbitration, vol. II, appendix 3.16.

6.5 Oral hearings and written proceedings

- 6.5.1 The parties are free to agree whether the arbitral proceedings shall be conducted only in writing or whether there shall be an oral hearing. In the absence of agreement by the parties, the tribunal may order an oral hearing at an appropriate stage, if a party requests for it to do so.⁵⁶

Statements of claim and defence

- 6.5.2 The claimant has the duty to submit its statement of claim and to state the facts on which the claim is based. Notwithstanding Article 23(1) of the Model Law (2006), the Austrian Arbitration Act does not stipulate that the claimant shall present the points at issue in its statement of claim. It is not a matter for the claimant to anticipate which of its particulars of claim the respondent may take issue with. Instead, throughout the proceedings, both parties may amend or supplement their claims or positions, unless the tribunal rejects this due to delay.⁵⁷ The points at issue between the parties will, therefore, become clear throughout the course of proceedings.

6.6 Default by one of the parties

- 6.6.1 Article 600 of the CCP deals with the issues that may arise if there is a default by a party in the arbitral proceedings. If the claimant fails to submit its statement of claim, the proceedings shall be terminated by the arbitral tribunal. If the respondent fails to respond within the agreed or ordered term, this does not automatically mean that the failure itself shall be treated as an admission by the respondent. The arbitral tribunal may continue with the arbitral proceedings and decide on the basis of the evidence taken by the arbitral tribunal. Furthermore, the default may be cured at a later stage if the party in default participates in the proceedings again, provided that the arbitral tribunal finds the default to be sufficiently excused.

6.7 Taking of evidence

- 6.7.1 The arbitral tribunal has the power to decide on the admissibility of evidence, to take such evidence and to determine its relevance.⁵⁸ The parties are entitled to receive sufficient notice concerning hearings and meetings of the arbitral tribunal for the taking of evidence.⁵⁹ Furthermore, the parties have the right to receive all submissions, documents or communications supplied to the arbitral tribunal by the other party, as well as expert reports or other evidence upon which the arbitral tribunal may rely.⁶⁰

⁵⁶ CCP, art 598.

⁵⁷ *Ibid*, art 597.

⁵⁸ *Ibid*, art 599(1).

⁵⁹ *Ibid*, art 599(2).

⁶⁰ *Ibid*, art 599(3).

6.7.2 Both Articles 598 and 599 of the CCP are in line with the Model Law (2006),⁶¹ even though the Austrian Arbitration Act uses slightly different wording.

6.8 Appointment of experts

6.8.1 Unless otherwise agreed by the parties, the arbitral tribunal has the authority to appoint experts to supply the arbitral tribunal with a report on specific issues. Furthermore, the arbitral tribunal may require the parties to give the tribunal-appointed expert(s) any relevant information or to produce and provide documents relevant to the proceedings.⁶²

6.8.2 Parties have the right to present the expert reports of their own expert witnesses.⁶³

6.9 Confidentiality

6.9.1 Even though the Austrian Arbitration Act does not expressly stipulate that the arbitral proceedings are private, this prevailing principle in arbitration applies in Austria. Therefore, unless agreed otherwise, the public is excluded from the arbitral proceedings.

6.9.2 This principle is stipulated in connection with court proceedings concerning arbitration matters as well (i.e. the public may be excluded at the request of a party if a justified interest in the exclusion of the public is shown).⁶⁴

6.9.3 Since neither the Austrian Arbitration Act nor the VIAC Arbitration Rules expressly impose a duty on the parties to keep documents and materials produced in (or for the purposes of) arbitral proceedings confidential, it is advisable to include such provisions in the arbitration agreement.

7. Making of the award and termination of proceedings

7.1 Choice of law

7.1.1 The arbitral tribunal shall make its decision based on the applicable law as agreed by the parties. The parties are free to decide on the applicable law.⁶⁵ Failing an agreement of the parties, the arbitral tribunal has full discretion to determine

⁶¹ Model Law (2006), art 19(2) and 24(2)–(3). (CMS Guide to Arbitration, vol II, appendix 2.1).

⁶² CCP, art 601(1).

⁶³ *Ibid*, art 601(4).

⁶⁴ *Ibid*, art 616(2).

⁶⁵ *Ibid*, art 603(1).

which law(s) it considers to be applicable.⁶⁶ The parties may also authorise the arbitral tribunal in writing to make the decision based on principles of equity.⁶⁷

7.2 Timing, form, content and notification of an award

- 7.2.1 The arbitral tribunal may render final awards regarding all claims in the case, as well as partial or interim awards. There is no statutory time limit within which an award must be issued. However, arbitrators have the duty not to unduly delay the proceedings. The award shall state the reasons on which it is based,⁶⁸ the date of issue and the seat of arbitration.⁶⁹ Each party has the right to receive a copy signed by the arbitrators⁷⁰ and to request the arbitral tribunal to confirm that the award is final and enforceable.⁷¹
- 7.2.2 The award shall be made in writing and shall be signed by all of the arbitrators. If the arbitral tribunal consists of more than one arbitrator, the decision must be made by a majority of its members, unless the arbitration agreement determines otherwise.⁷²
- 7.2.3 Abstention by one or more arbitrators is possible under the Austrian Arbitration Act.⁷³ If there is more than one arbitrator and one of the arbitrators fails to sign the award, then the majority of arbitrators (including the chair) shall sign the award and note the reason which prevented the missing signature on the award.⁷⁴
- 7.2.4 Even though the parties are free to agree on the decision making provisions, it is not acceptable under Austrian law to decrease the necessary quorum to a minority or to give a certain arbitrator's vote a special weight.⁷⁵
- 7.2.5 A signed copy of the award shall be sent to each party.⁷⁶ There are no further specific provisions for the notification of awards.

⁶⁶ *Ibid*, art 603(2).

⁶⁷ *Ibid*, art 603(3).

⁶⁸ *Ibid*, art 606(2).

⁶⁹ *Ibid*, art 606(3).

⁷⁰ *Ibid*, art 606(4).

⁷¹ *Ibid*, art 606(6).

⁷² *Ibid*, art 604(1).

⁷³ *Ibid*, art 604(2).

⁷⁴ *Ibid*, art 606(1).

⁷⁵ *Ibid*, art 604(2).

⁷⁶ *Ibid*, art 606(4).

7.3 Settlement

7.3.1 The parties may conclude a settlement during the arbitral proceedings and may request that the arbitral tribunal either:

- record the settlement and sign the record afterwards; or
- render an award on agreed terms, which has the same effect as an award on the merits of the case.⁷⁷

7.3.2 With regard to enforcement in Austria, the difference between these two settlement options is not of great importance. However, if enforcement is sought in another signatory state of the New York Convention, the parties will require an award by consent rather than a mere settlement agreement. A settlement agreement or record of this agreement does not have the same status as an award and is not enforceable under the provisions of the New York Convention.⁷⁸

7.4 Power to award interest and costs

7.4.1 The arbitrators may, at their discretion, decide on the obligation to reimburse the costs of the arbitral proceedings, provided that the parties have not agreed otherwise.⁷⁹ However, it is common practice that the losing party pays the total amount of the arbitrators' fees and the costs of the arbitral proceedings, including the other party's reasonable costs of legal representation (i.e. the costs follow the event). The decision on the obligation for reimbursement of costs and the determination of the amount of costs shall be made in the form of an award.⁸⁰ This can also be made in a separate award.⁸¹

7.4.2 The power to award interest will depend on the applicable law, there are no specific provisions in the Austrian Arbitration Act in this respect.

7.5 Termination of the proceedings

7.5.1 Under the Austrian Arbitration Act, arbitral proceedings may be terminated either as a result of settlement, a final award on the merits or by an order of the arbitral tribunal where:

- the claimant fails to file a statement of claim in accordance with the provisions of the Austrian Arbitration Act;

⁷⁷ *Ibid*, art 605.

⁷⁸ See CMS Guide to Arbitration, vol II, appendix 1.1.

⁷⁹ CCP, art 609(1)–(3).

⁸⁰ *Ibid*, art 609(4).

⁸¹ *Ibid*, art 609(5).

- the claimant withdraws its claim, unless the respondent objects thereto and the arbitral tribunal recognises a legitimate interest on the respondent's part in obtaining a final award;
- the parties agree on the termination of arbitral proceedings; or
- the continuation of the arbitral proceedings is impossible (e.g. because the parties fail to pursue the proceedings any further).⁸²

7.5.2 The termination of the arbitral proceedings also terminates the mandate of the arbitral tribunal.⁸³

7.6 Effect of an award⁸⁴

7.6.1 Between the parties, the award has the effect of a legally binding and final judgment.⁸⁵ In general, the finality and enforceability of an award does not differ from that of a binding judgment of an Austrian court.

7.7 Correction, clarification and issuance of a supplemental award

7.7.1 The arbitrators may correct clerical mistakes, typographical errors and mathematical errors at the request of any of the parties.⁸⁶ The arbitrators may do so within four weeks of the receipt of the award by the parties. Furthermore, the arbitrators may correct such errors of their own initiative within four weeks from the date of the award.⁸⁷

7.7.2 The parties can request the interpretation of the award by the arbitrators within four weeks of receipt of the award. The parties can also request that the arbitral tribunal issues an additional award concerning claims that have been asserted but have not been decided by the award.⁸⁸ Any such interpretation or correction is considered to form part of the award itself.⁸⁹

7.7.3 The provisions of the Austrian Arbitration Act generally follow those of the Model Law (2006)⁹⁰ on this issue. However, there are some exceptions. For example, the arbitral tribunal only has four weeks (rather than 30 days) to correct any error,

⁸² *Ibid*, art 608(1)–(2).

⁸³ *Ibid*, art 608(3).

⁸⁴ *Ibid*, art 606–607.

⁸⁵ *Ibid*, art 607.

⁸⁶ *Ibid*, art 610(1).

⁸⁷ *Ibid*, art 610(4).

⁸⁸ *Ibid*, art 610(1).

⁸⁹ *Ibid*, art 610(5).

⁹⁰ See CMS Guide to Arbitration, vol II, appendix 2.1.

either on the request of a party (from the date of receipt) or on its own initiative (from the date of the award) and no provision is made for allowing for an extension of this time period.⁹¹

8. Role of the courts

8.1 Jurisdiction of the courts

8.1.1 Article 615 of the CCP establishes regional courts (*Landesgericht*) as the general competent courts for judicial tasks in relation to arbitration matters. If the seat of arbitration has not been determined or, in instances of claims for a declaration of the existence of an award,⁹² the seat is outside Austria, the competent court is the Vienna Commercial Court (*Handelsgericht Wien*).⁹³

8.1.2 Court proceedings concerning the third chapter of the Austrian Arbitration Act,⁹⁴ relating to the formation of the arbitral tribunal, are governed by the general provisions of the so-called Act on Non-Litigious Matters (*Außerstreitgesetz*). Other court proceedings in connection with arbitration, such as proceedings regarding an application to set aside an award or the application for determination of the existence or non-existence of an award, are governed by the CCP.⁹⁵

8.2 Dismissal of court proceedings

8.2.1 Austrian courts have consistently dismissed court proceedings where an arbitration agreement is deemed to exist. It is generally acknowledged that arbitration enjoys a privileged position within the Austrian legal system, with a prevailing “arbitration-friendly” regime.

8.3 Preliminary rulings on jurisdiction

8.3.1 The Austrian Arbitration Act removes arbitration matters almost completely from the supervision of the national courts and affords the parties and arbitrators wide autonomy to conduct the arbitration as they consider appropriate.

8.3.2 The provisions of the CCP regarding substantive claims brought before national courts in a matter that is the subject of an arbitration agreement correspond with Article 8 of the Model Law (2006). The provisions provide that the dispute is to be

⁹¹ Model Law (2006), art 33. (See CMS Guide to Arbitration, vol II, appendix 2.1).

⁹² CCP, art 612.

⁹³ *Ibid*, art 615(1).

⁹⁴ *Ibid*, art 586–591.

⁹⁵ *Ibid*, art 616(1).

referred to arbitration if an arbitration agreement exists. However, there are additional provisions which state that the national courts may, in specific situations, deal with the merits of a claim, even if an arbitration agreement was originally concluded.⁹⁶

8.3.3 As discussed in section 5.1 above, Articles 584 and 592 of the CCP set out one of the most important principles of arbitration: the power of the arbitral tribunal to rule on its own jurisdiction (*competence-competence*). Unless the arbitration clause is null and void, inoperative or incapable of being performed, a national court must dismiss a claim brought before it if that claim is subject to an arbitration agreement between the parties. Once arbitral proceedings have commenced, no claim concerning the subject matter in dispute may be brought before a national court. The general consequence is that a court must dismiss any claim concerning the same subject matter as the subject matter in the arbitral proceedings. However, if the jurisdiction of the arbitral tribunal has been challenged before going to the merits of the case and the arbitral tribunal cannot be expected to reach a decision within a reasonable time, then the national court may proceed to deal with the issue of the arbitral tribunal's jurisdiction.⁹⁷

8.3.4 The arbitral tribunal decides on its own jurisdiction in the form of an award. However, it should be noted that an award may still be challenged by way of an application to set aside an award on the issue of jurisdiction.⁹⁸

8.4 Interim protective measures

8.4.1 Except where the Austrian Arbitration Act so provides, the courts shall refrain from intervening in arbitration matters altogether.⁹⁹ As a consequence, matters such as anti-suit injunctions against arbitrators or parties to arbitration are not admissible.

8.4.2 Austrian courts are still able to grant interim or protective measures, even if a valid arbitration agreement exists and even while arbitral proceedings are pending.¹⁰⁰

8.4.3 The VIAC Arbitration Rules contain a similar provision, which states that a request for interim measures of protection to a national court does not constitute an

⁹⁶ CCP, art 584.

⁹⁷ *Ibid*, art 584(3).

⁹⁸ *Ibid*, art 611.

⁹⁹ *Ibid*, art 578.

¹⁰⁰ *Ibid*, art 585.

infringement or waiver of the arbitration agreement.¹⁰¹ Arbitral tribunals may order interim or protective measures at the request of a party.¹⁰²

8.5 Obtaining evidence and other court assistance

8.5.1 The arbitral tribunal may request court assistance for the performance of judicial acts for which the arbitral tribunal does not have authority (e.g. legal assistance by a foreign court or by another authority). If the taking of evidence before a court is the subject of the request for court assistance, the arbitrators and the parties are entitled to participate in this taking of evidence before the court and to put questions to witnesses and experts.¹⁰³

9. Challenging and appealing an award through the courts

9.1 Jurisdiction of the courts

9.1.1 The recourse against an award (including recourse against awards concerning the jurisdiction of the tribunal) may only be made in an application to set aside the award. This procedure is set out in the seventh chapter of the Austrian Arbitration Act¹⁰⁴ and follows Article 34 of the Model Law (2006).

9.1.2 An award will be set aside if:

- a valid arbitration agreement does not exist, the agreement has become invalid before the award was rendered or ceased to have effect for the particular case, the arbitral tribunal denied its jurisdiction despite the existence of a valid arbitration agreement or a party was unable to conclude the arbitration agreement because of its status or lack of capacity;¹⁰⁵
- a party was not given proper notice of the appointment of arbitrators or of the proceedings or was otherwise unable to present its case;
- the arbitral tribunal either rendered an award on a dispute not covered by the arbitration agreement or raised by the parties or made decisions on matters which are not subject to the arbitration agreement or were not claimed by the parties;¹⁰⁶

¹⁰¹ VIAC Arbitration Rules, art 22. For the full text of the VIAC Arbitration Rules, see CMS Guide to Arbitration, vol. II, appendix 3.16.

¹⁰² CCP, art 593. See section 5.2 above.

¹⁰³ *Ibid*, art 602.

¹⁰⁴ *Ibid*, art 611–613.

¹⁰⁵ *Ibid*, art 611(2).

¹⁰⁶ The court may, to the extent possible, sever the offending part of the award rather than set aside the entire award.

- the arbitral tribunal was not constituted or composed in accordance with contractual or statutory provisions;
- the arbitral proceedings were conducted in a way that violates Austrian public policy or if the award itself violates public policy;
- the matter in dispute is not arbitrable under Austrian law;
- the conditions are present whereby a request may be made for a court judgment to be set aside and the case re-opened by means of a claim of revision in accordance with Article 530(1) numbers 1–5 of the CCP.¹⁰⁷

9.2 Appeals

9.2.1 In general, awards are not subject to appeal, unless the parties provide for measures of appeal in their arbitration agreement. The parties can agree on an appeal to another arbitral tribunal or to the courts.

9.3 Applications to set aside an award

9.3.1 The application to set aside an award shall be filed within three months of receipt of the arbitral or additional award.¹⁰⁸ However, the setting aside of the award does not automatically invalidate the underlying arbitration agreement. If an award concerning the same subject matter has been set aside twice and is likely to be set aside again, the court may declare the arbitration agreement invalid in relation to this subject matter upon the request of one of the parties.¹⁰⁹

9.3.2 A request to determine the existence or non-existence of an award is possible if the applicant shows that it has a legitimate legal interest in such a declaration.¹¹⁰

9.3.3 An award that violates public policy or concerns matters which are not arbitrable under Austrian law does not have any effect in other proceedings. Therefore, courts or other authorities are not bound by such an award, even if it has not been set aside.¹¹¹

9.3.4 It should be noted that, in general, the Austrian courts are very restrictive in setting aside awards.

¹⁰⁷ CCP, art 611(2).

¹⁰⁸ *Ibid*, art 611(4).

¹⁰⁹ *Ibid*, art 611(5).

¹¹⁰ *Ibid*, art 612.

¹¹¹ *Ibid*, art 613.

10. Recognition and enforcement of awards

10.1 Domestic awards

10.1.1 Domestic awards are those which were issued by an arbitral tribunal seated in Austria. These awards are equivalent to domestic court judgments and, therefore, do not need to be separately declared enforceable. Domestic awards are directly enforceable in accordance with the Austrian Enforcement Act (*Exekutionsordnung*) (**EA**).¹¹²

10.2 Foreign awards

10.2.1 Austria is a signatory state to the New York Convention.¹¹³ The recognition and enforcement of foreign awards is governed by the provisions of the EA to the extent that these issues are not determined by international law or legal acts of the European Union. When determining the formal validity of an arbitration agreement that is subject to a foreign law, that arbitration agreement will also be considered valid if it complies with the formalities of Article 583 of the CCP and with the formalities of the law applicable to the arbitration agreement.

10.2.2 The original arbitration agreement – or a certified copy of the agreement – only has to be submitted if requested by the court.¹¹⁴

10.2.3 The grounds for refusing the enforcement of an award, as laid down in Article 36 of the Model Law (2006), have not been specifically included in the provisions of the Austrian Arbitration Act.

10.2.4 To date, the enforcement of foreign awards in Austria has not presented a problem.

11. Special provisions and considerations

11.1 Consumers

11.1.1 There are special provisions for arbitration matters between a business, usually referred to as an entrepreneur (*Unternehmer*) and a consumer.¹¹⁵ A consumer is a

¹¹² EA, art 1 para 16.

¹¹³ See CMS Guide to Arbitration, vol II, appendix 1.1.

¹¹⁴ CCP, art 614(2). This goes a step further than the Model Law (2006), art 35(2) and the New York Convention, art IV(1)(b), which require the original or certified copy of the arbitration agreement to be submitted in all instances. For the full text of the Model Law (2006) and the New York Convention see CMS Guide to Arbitration, vol II, appendices 2.1 and 1.1, respectively.

¹¹⁵ CCP, art 617.

person for whom the transaction is not part of his business. Unlike the Model Law (2006), Austrian law offers protection for consumers who are involved in arbitration. Therefore, an arbitration agreement between an entrepreneur and a consumer can only be effectively concluded after the dispute has arisen.

- 11.1.2 The agreement must be contained in a document directly signed by the consumer.¹¹⁶ Furthermore, a written legal instruction pointing out the differences between arbitration and state court litigation has to be provided to the consumer before the conclusion of the arbitration agreement.¹¹⁷ Geographical proximity between the place of arbitration and the consumer is another requirement. In addition to the general grounds for setting aside awards, an award, in cases involving consumers, may be set aside if:
- mandatory provisions of the law have been violated;
 - the requirements for the re-opening of proceedings are fulfilled as set out in Article 530 of the CCP;¹¹⁸ and
 - a written legal instruction pointing out the differences between arbitration and state court litigation has not been provided to the consumer.¹¹⁹

11.2 Employment law

- 11.2.1 Article 618 of the CCP is not based on the Model Law (2006). The protection that is granted to consumers under Articles 617(2)–(7) of the CCP is extended to certain employment matters by the Act on the Procedure before the Labour and Social Court (**ASGG**).¹²⁰ Such matters include, amongst others:
- civil claims regarding the rights and duties arising out of an employment contract;
 - civil claims regarding all kinds of social services and company benefits; and
 - demands arising out of holiday entitlements.¹²¹

12. Concluding thoughts

- 12.1.1 By substantially amending and modernising the Austrian Arbitration Act, Austria will be able to remain a significant arbitration centre, benefiting from its privileged location in the very heart of Europe and its long tradition as an arbitration-friendly jurisdiction.

¹¹⁶ *Ibid* art 617(2).

¹¹⁷ *Ibid* art 617(3).

¹¹⁸ See paragraph 9.1.2. above.

¹¹⁹ CCP, art 617(6)–(7).

¹²⁰ *Ibid*, art 618.

¹²¹ ASGG, s 50.

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