



Arbitration Guide
IBA Arbitration Committee

AUSTRIA

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I. Background

- (i) **How prevalent is the use of arbitration in your jurisdiction? What are seen as the principal advantages and disadvantages of arbitration?**

In Austria, arbitration is a frequent method for resolving international commercial disputes. The principal advantages of arbitration are the parties' ability to influence the choice of the person(s) who will decide their dispute, the high speed of the proceedings and the possibility to enforce the arbitral awards practically worldwide. The costs of arbitration proceedings, which might exceed the costs of court proceedings, may be considered as the principal disadvantage.

- (ii) **Is most arbitration institutional or *ad hoc*? Domestic or international? Which institutions and/or rules are most commonly used?**

Given the fact that *ad hoc* arbitrations will not be registered in any 'institution', it is difficult to make an assessment on the frequency of *ad hoc* arbitrations. However, it can be said that institutional and international arbitrations are more frequent in Austria than *ad hoc* arbitration and domestic arbitration.

There are two institutions which seem to be most commonly used for settlement of disputes by arbitration: Vienna International Arbitral Centre (VIAC), which administers international arbitrations conducted under the Vienna Rules; and the International Court of Arbitration of the International Chamber of Commerce (ICC), providing for dispute settlement under the Rules of Arbitration of the ICC.

- (iii) **What types of disputes are typically arbitrated?**

International commercial disputes are typically arbitrated. Such disputes are often based on arbitration agreements included in construction contracts, share and purchase agreements, etc.

- (iv) **How long do arbitral proceedings usually last in your country?**

Generally, the complexity of a case and the number of the parties and/or arbitrators involved will have – apart from other factors – a considerable influence on the length of the arbitral proceedings. A dispute involving average complexity and only two parties (one claimant and one respondent), will usually last eight to 18 months.

- (v) **Are there any restrictions on whether foreign nationals can act as counsel or arbitrators in arbitrations in your jurisdiction?**

Under Austrian arbitration law, there are no restrictions as to the nationality of a counsel or arbitrator. However, Austrian bar rules require that counsel be admitted to the bar.

II. Arbitration Laws

- (i) **What law governs arbitration proceedings with their seat in your jurisdiction? Is the law the same for domestic and international arbitrations? Is the national arbitration law based on the UNCITRAL Model Law?**

If the seat of the arbitration is in Austria, the arbitration proceedings will be governed by sections 577 *et seq* of the Austrian Code of Civil Procedure (ACCP; Austrian arbitration law).

Since Austrian law does not distinguish between domestic and international arbitrations, the same provisions apply in both cases.

Austrian arbitration law is based on the UNCITRAL Model Law although the latter has not been adopted on a one-to-one basis. On balance, Austria can be designated as a Model Law country.

- (ii) **Is there a distinction in your arbitration law between domestic and international arbitration? If so, what are the main differences?**

Austrian arbitration law does not distinguish between domestic and international arbitrations.

- (iii) **What international treaties relating to arbitration have been adopted (eg, New York Convention, Geneva Convention, Washington Convention, Panama Convention)?**

Austria has adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention'), the 1961 European Convention on International Commercial Arbitration and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention').

- (iv) **Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?**

Pursuant to section 603 of the ACCP, the arbitral tribunal shall decide the dispute in accordance with such rules of law as have been chosen by the parties. Thus, the

parties are free to agree on the rules of law to be applied to their dispute and such agreement must be observed by the arbitral tribunal. Failing any designation of the applicable rules of law by the parties, the arbitral tribunal has full discretion to determine the law it considers appropriate. In doing so, the arbitral tribunal is not bound to apply the law determined by the conflict of law rules which it considers applicable. Finally, a decision *ex aequo et bono* is permissible only if the parties have expressly authorised the arbitral tribunal to that end.

III. Arbitration Agreements

- (i) **Are there any legal requirements relating to the form and content of an arbitration agreement? What provisions are required for an arbitration agreement to be binding and enforceable? Are there additional recommended provisions?**

As regards the form, the arbitration agreement must be made in writing, either as part of a document signed by the parties or as an exchange of letters, telefax, e-mails or any other means of communication which represent a record of the arbitration agreement. If a separate document of a contract refers to an arbitration clause, such arbitration clause is valid if this reference incorporates the separate document as part of the contract (section 583.2 of the ACCP). A formal defect of an arbitration agreement is deemed to be cured if a party pleads to the merits of the case without simultaneously raising the issue of the invalidity of the arbitration agreement (section 583.3 of the ACCP). However, much stricter requirements apply to the validity of arbitration agreements involving consumers or employees.

With respect to its content, an arbitration agreement must include a precise designation of the parties and the dispute to be decided or of a defined legal relationship (whether contractual or not) which shall be subject to the arbitration clause and also include an unambiguous agreement of the parties that their dispute be decided by an arbitral tribunal. These *essentialia negotii* of an arbitration agreement must be sufficiently clear. In addition, arbitration agreements may include other provisions, for example, limits on the conduct of the arbitral proceedings. It is advisable to include in the arbitration agreement a specification on the number of arbitrators, the place of arbitration, as well as the language of the arbitral proceedings.

- (ii) **What is the approach of courts towards the enforcement of agreements to arbitrate? Are there particular circumstances when an arbitration agreement will not be enforced?**

The approach of the courts towards the enforcement of agreements to arbitrate may surely be defined as arbitration-friendly. According to pertinent case law of the Austrian Supreme Court (OGH), the interpretation of an arbitration agreement must be made in a way which allows the broadest possible interpretation in

support of the validity of an arbitration agreement. If two equivalent interpretations are possible, primacy must be given to an interpretation which upholds the validity of an arbitration agreement.

A particular circumstance when an arbitration agreement will not be enforced is, for example, the creation of an arbitration agreement with a consumer before a dispute has arisen. Pursuant to section 617.1 of the ACCP, arbitration agreements between an entrepreneur and a consumer may only be effectively enforced when the dispute giving rise to the action preceded the agreement's creation.

- (iii) Are multi-tier clauses (eg, arbitration clauses that require negotiation, mediation and/or adjudication as steps before an arbitration can be commenced) common? Are they enforceable? If so, what are the consequences of commencing an arbitration in disregard of such a provision? Lack of jurisdiction? Non-arbitrability? Other?**

Multi-tier clauses are increasingly common in Austria and are enforceable. Disrespect of the clause may lead to the dismissal of the claim by a court or arbitral tribunal (or, alternatively, to a stay of the proceedings). If an arbitration clause requires certain steps to be taken before arbitration can be initiated, for example, an attempt to resolve the matter by mediation, a claim prematurely submitted to arbitration may not be considered actionable. In this case, the claim will likely be dismissed or the arbitration proceedings will be suspended for the duration of the mediation.

- (iv) What are the requirements for a valid multi-party arbitration agreement?**

For a valid multi-party arbitration agreement, the same requirements as listed in III.(i) above must be fulfilled.

- (v) Is an agreement conferring on one of the parties a unilateral right to arbitrate enforceable?**

An agreement conferring on one of the parties a unilateral right to arbitrate is, in principle, enforceable.

- (vi) May arbitration agreements bind non-signatories? If so, under what circumstances?**

Austrian jurisprudence and scholarly writings are quite restrictive when it comes to an arbitration agreement having binding effects on non-signatories. In essence, it is accepted that both the single and the universal legal successors ('Einzelrechtsnachfolger' and 'Gesamtrechtsnachfolger') and the beneficiaries of contracts created for the benefit of a third party ('Vertrag zu Gunsten Dritter') are bound by an arbitration agreement even if they have not signed the same.

The shareholders of corporate entities are, in principle, not deemed to be bound by arbitration clauses created by the corporate entity. However, under certain conditions, an interpretation based on the intention of the parties may prove the opposite. Therefore, whether a shareholder is bound by an arbitration clause created by the corporate entity must be decided on a case-by-case basis. In any case, the requirement that the arbitration agreement shall be in writing (see III.(i) above) must be fulfilled.

IV. Arbitrability and Jurisdiction

- (i) **Are there types of disputes that may not be arbitrated? Who decides – courts or arbitrators – whether a matter is capable of being submitted to arbitration? Is the lack of arbitrability a matter of jurisdiction or admissibility?**

In principle, all proprietary claims are arbitrable. There are, however, certain types of proprietary claims that may not be arbitrated: claims relating to family law issues; all claims which are subject to the contracts involving the (Austrian) Act on Tenancy Law ('Mietrechtsgesetz') or the (Austrian) Act on Non-Profit Apartment Ownership ('Gemeinnützigkeitsgesetz'); and all claims relating to ownership of apartments ('Wohnungseigentum'). Finally, the arbitrability of several company law issues is controversial.

A non-proprietary claim is arbitrable only if the parties can enter into a settlement agreement with regard to that claim.

While disputes involving consumers or employees (other than those just mentioned), are considered arbitrable in principle, sections 617 *et seq* of the ACCP stipulate numerous preconditions for the validity of arbitration agreements where a consumer or an employee is a party to such agreement. There are also certain employment issues (concerning social security issues or disputes concerning the collective representation of employees in an enterprise (works council)) which are not arbitrable.

In line with the *competence-competence* principle governing Austrian arbitration law, the arbitral tribunal will, in the first place, decide whether a matter is capable of being submitted to arbitration. Under section 611.7 of the ACCP, recourse to the state courts against an arbitral award is possible if the matter in dispute is not arbitrable under Austrian law. Thus, the Austrian Supreme Court has the ultimate say as to the arbitrability of a matter in dispute.

- (ii) **What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an arbitration agreement? Do local laws provide time limits for making jurisdictional objections? Do parties waive their right to arbitrate by participating in court proceedings?**

There are two possible scenarios envisaged by section 584 of the ACCP with regard to court proceedings which are initiated despite an arbitration agreement. Under the first scenario, an action is brought before a court in a matter which is the subject of an arbitration agreement where the arbitral proceedings have not yet been initiated. In such case, a court must dismiss the claim unless the respondent enters the merits of the dispute without raising objections to this effect. This rule is inapplicable if the court establishes that the arbitration agreement does not exist or is incapable of being performed. The jurisdictional objection must be made at the outset of the proceedings. If the parties participate in court proceedings without raising a jurisdictional objection, they are deemed to have waived their right to arbitrate.

Under the second scenario, an action is brought before a court in a matter which is the subject of pending arbitral proceedings. In such case, an action relating to the matter in dispute brought before a state court must be dismissed. This, however, does not apply if a party to the pending arbitration has challenged the jurisdiction of the arbitral tribunal and if the arbitral tribunal cannot be expected to reach a decision within a reasonable period of time.

- (iii) **Can arbitrators decide on their own jurisdiction? Is the principle of *competence-competence* applicable in your jurisdiction? If yes, what is the nature and intrusiveness of the control (if any) exercised by courts on the tribunal's jurisdiction?**

Arbitrators can, in principle, decide on their own jurisdiction. The principle of *competence-competence*, introduced to the Austrian arbitration law by sections 584 and 592 of the ACCP, is thus applicable in Austria. However, a decision of the arbitral tribunal on its jurisdiction does not conclusively resolve the issue of jurisdiction. The award may be challenged by the parties by filing an annulment claim (section 611 of the ACCP). It is then the Austrian Supreme Court which has the ultimate say.

V. Selection of Arbitrators

- (i) **How are arbitrators selected? Do courts play a role?**

The parties may agree on a procedure to select the arbitrators. They may do so for example, by agreeing that the arbitration should be conducted under a certain set of rules such as the Vienna Rules or the ICC Rules of Arbitration. If the parties do not agree on a procedure to select the arbitrators, Austrian arbitration law provides for a fallback procedure.

Under the relevant provisions, the arbitral tribunal may consist of one or more arbitrators (it must not however consist of an even number of arbitrators). If the parties have not agreed on the number of arbitrators, their dispute will be decided by a panel of three.

If the dispute is to be decided by a sole arbitrator and the parties are unable to agree on the person within four weeks from receipt of a party's written request, the arbitrator must be appointed by a state court. In an arbitration which is to be decided by a panel of three, each party must appoint one arbitrator. The two arbitrators appointed by the parties will appoint the chairman of the arbitral tribunal. If a party fails to appoint an arbitrator within four weeks from receipt of other party's written request, or if the parties do not receive, within four weeks of the appointment of the arbitrators, a communication from their appointed arbitrators naming the chairman, the chairman will be appointed, upon application of a party, by the court.

(ii) What are the requirements in your jurisdiction as to disclosure of conflicts? Do courts play a role in challenges and what is the procedure?

Arbitrators can be challenged if they are not independent or if they lack impartiality. Thus, pursuant to section 588.1 of the ACCP, which is a mandatory provision, a person who would like to accept an appointment as an arbitrator must disclose any circumstances likely to give rise to doubt as to his/her impartiality or independence. The obligation to disclose such circumstances lasts throughout the whole arbitral proceedings, until an arbitral award has been made.

The parties can, in principle, agree on a challenge procedure. In the absence of such an agreement, a party intending to challenge an arbitrator must submit a written statement of the reasons for the challenge to the arbitral tribunal. In such case, there are three possible scenarios: either the challenged arbitrator withdraws from his/her office; the other party agrees to the challenge; or (ultimately) the arbitral tribunal decides on the challenge. If a challenge before the arbitral tribunal is unsuccessful, the challenging party may still apply to the Supreme Court to decide on the challenge. The decision of the Supreme Court is final.

(iii) Are there limitations on who may serve as an arbitrator? Do arbitrators have ethical duties? If so, what is their source and generally what are they?

Under Austrian arbitration law, only individuals may be appointed as arbitrators. Further, Austrian active judges are not allowed to act as arbitrators.

The ethical duties of arbitrators emanate, on one hand, from their duty to disclose any circumstances likely to give rise to doubt as to his/her impartiality or independence or which contradict the agreement between the parties. On the other hand, the contract between arbitrator and the parties to the arbitral proceedings

imposes various duties on an arbitrator including those of an ethical nature (eg a duty to conduct the proceedings in good faith).

In addition, if an arbitrator qualifies as an Austrian attorney at law, various ethical duties emanate from the Rules of Professional Conduct which must be observed by all Austrian attorneys.

- (iv) **Are there specific rules or codes of conduct concerning conflicts of interest for arbitrators? Are the IBA Guidelines on Conflicts of Interest in International Arbitration followed?**

There are no specific rules or codes of conduct concerning conflicts of interest for arbitrators. The IBA Guidelines on Conflicts of Interest in International Arbitration have no normative effect. However, they are referred to from time to time.

VI. Interim Measures

- (i) **Can arbitrators issue interim measures or other forms of preliminary relief? What types of interim measures can arbitrators issue? Is there a requirement as to the form of the tribunal's decision (order or award)? Are interim measures issued by arbitrators enforceable in courts?**

The arbitrators can enter interim or protective measures unless otherwise agreed by the parties. Thus, if a party requests, the arbitral tribunal may order such a measure after having heard the other party. Such a measure may however be taken only if enforcement of a claim would be otherwise frustrated or materially hampered or if one of the parties may suffer irreparable damage. The orders rendered by the arbitral tribunal are enforceable by the courts.

Austrian arbitration law does not exactly define an 'interim' or 'protective' measure. For example, measures securing the enforcement of an arbitral award, measures regulating a legal relationship on a provisional basis and even interim payments can, in principle, be considered 'interim and protective' measures. Whether measures of preservation of evidence belong to such measures is controversial.

- (ii) **Will courts grant provisional relief in support of arbitrations? If so, under what circumstances? May such measures be ordered after the constitution of the arbitral tribunal? Will any court-ordered provisional relief remain in force following the constitution of the arbitral tribunal?**

Courts may issue interim and protective measures and enforce them in support of arbitrations if a party requests, even after the constitution of the arbitral tribunal. Interim or protective measures ordered by a court will remain in force after the arbitral tribunal has been constituted.

- (iii) **To what extent may courts grant evidentiary assistance/provisional relief in support of the arbitration? Do such measures require the tribunal's consent if the latter is in place?**

Austrian courts may intervene in arbitration matters only when they are expressly permitted to do so by sections 577 *et seq* of the ACCP. Pursuant to section 602 of the ACCP, the arbitral tribunal, arbitrators authorised for this purpose by the arbitral tribunal or a party with the approval of the arbitral tribunal may request that the state courts assist with the judicial acts that the arbitral tribunal does not have the power to carry out. This provision applies to assistance in the collection of evidence.

VII. Disclosure/Discovery

- (i) **What is the general approach to disclosure or discovery in arbitration? What types of disclosure/discovery are typically permitted?**

Austrian arbitration law does not contain a specific provision on disclosure. Parties often agree on the application of the IBA Rules on the Taking of Evidence in International Arbitration ('IBA Rules'). Even if that is not the case, a request for the production of documents which complies with the IBA Rules will typically be permitted.

- (ii) **What, if any, limits are there on the permissible scope of disclosure or discovery?**

Austrian law does not state any limits on the permissible scope of disclosure or discovery.

- (iii) **Are there special rules for handling electronically stored information?**

There are no special rules for handling electronically stored information.

VIII. Confidentiality

(i) Are arbitrations confidential? What are the rules regarding confidentiality?

Austrian arbitration law does not include any explicit provisions on confidentiality in the arbitral proceedings. However, it is well-accepted that an arbitrator is bound by confidentiality with regard to all circumstances and information which are brought to him in his capacity as an arbitrator.

To ensure that the parties will also be bound to keep the matters related to arbitration confidential, it is advisable to include an explicit confidentiality provision in their arbitration agreement.

With regard to court proceedings relating to an appeal against an arbitral award, section 616.2 of the ACCP determines that the public may be excluded from such proceedings if a respective request is filed.

(ii) Are there any provisions in your arbitration law as to the arbitral tribunal's power to protect trade secrets and confidential information?

There are no specific provisions to that end.

(iii) Are there any provisions in your arbitration law as to rules of privilege?

There are no specific provisions in Austrian arbitration law as to rules of privilege. However, there are rules of privilege which must be observed where a relationship between an attorney and his/her client is concerned. These are incorporated in the Attorney's Rules of Professional Conduct and, generally, protect information received by counsel from its client.

IX. Evidence and Hearings

(i) Is it common that parties and arbitral tribunals adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern arbitration proceedings? Is so, are the Rules generally adopted as such or does the tribunal retain discretion to depart from them?

It is quite common for parties to adopt the IBA Rules on the Taking of Evidence in International Arbitration to govern the arbitration proceedings. Typically, the tribunals retain discretion to depart from them.

(ii) Are there any limits to arbitral tribunals' discretion to govern the hearings?

The arbitral tribunals' discretion to govern the hearings is only limited by the applicable arbitration law and by the procedural rules agreed upon by the parties (if any). In this regard, section 594.2 of the ACCP stipulates that the parties must

be treated fairly and that each party has the right to be heard. This provision is facilitated through some further provisions, for example, that the arbitrators must hold an oral hearing if a party requests (section 598 of the ACCP) and that for the purposes of taking evidence, the parties must be informed in a timely manner of every hearing (and of every meeting) of the arbitral tribunal (section 599.2 of the ACCP).

(iii) How is witness testimony presented? Is the use of witness statements with cross examination common? Are oral direct examinations common? Do arbitrators question witnesses?

The parties are free to agree on how the witness testimony should be presented. In the absence of such agreement, the arbitral tribunal is free to determine respective rules. The use of witness statements with cross examination is quite common. The arbitrators usually question witnesses – in addition to the questioning by the parties' counsels.

(iv) Are there any rules on who can or cannot appear as a witness? Are there any mandatory rules on oath or affirmation?

There are no rules on who can or cannot appear as a witness. The parties may however agree on a set of rules which regulate this issue.

There are no mandatory rules on oath or affirmation in Austrian arbitration law. Arbitral tribunals are not permitted to administer oaths.

(v) Are there any differences between the testimony of a witness specially connected with one of the parties (eg, legal representative) and the testimony of unrelated witnesses?

Austrian arbitration law does not require different treatment of the testimony of a witness specially connected with one of the parties (eg, legal representative) and the testimony of unrelated witnesses. Pursuant to section 599.1 of the ACCP, the arbitral tribunal has the power to decide on the admissibility of evidence, and to determine its relevance, materiality and weight unrestrictedly. It is thus upon the tribunal's discretion to determine the admissibility and weight of the testimony of a witness specially connected with one of the parties and the testimony of unrelated witnesses.

(vi) How is expert testimony presented? Are there any formal requirements regarding independence and/or impartiality of expert witnesses?

Unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to supply it with an expert report on a specific issue to be determined by the arbitral tribunal. Furthermore, each party has the right to present expert reports of its own expert witnesses unless otherwise agreed by the

parties. If a party requests, or if the arbitral tribunal considers it necessary, the expert, after delivery of its report, shall participate in the oral hearing where the parties may place questions to the expert and have their own experts testify on the points at issue.

The provisions governing the challenge of arbitrators also apply when it comes to the independence and/or impartiality of an expert witness appointed by an arbitrator. Consequently, a person who would like to accept an appointment by an arbitral tribunal as an expert must disclose any circumstances likely to give rise to doubt as to his/her impartiality or independence or which contradict the agreement between the parties.

- (vii) Is it common that arbitral tribunals appoint experts beside those that may have been appointed by the parties? How is the evidence provided by the expert appointed by the arbitral tribunal considered in comparison with the evidence provided by party-appointed experts? Are there any requirements in your jurisdiction that experts be selected from a particular list?**

It is not very common that arbitral tribunals appoint experts beside those that may have been appointed by the parties. However, if that happens, the evidence provided by the expert appointed by the arbitral tribunal may be considered to have more weight in comparison with the evidence provided by party-appointed experts. There are no particular requirements in Austria that experts be selected from a particular list. However, the parties may agree otherwise.

- (viii) Is witness conferencing ('hot-tubbing') used? If so, how is it typically handled?**

Witness conferencing ('hot-tubbing') is used from time-to-time and with increasing frequency.

- (ix) Are there any rules or requirements in your jurisdiction as to the use of arbitral secretaries? Is the use of arbitral secretaries common?**

There are no rules as regards the use of arbitral secretaries. However, their use is quite common.

X. Awards

- (i) Are there formal requirements for an award to be valid? Are there any limitations on the types of permissible relief?**

A valid award shall be made in writing and shall be signed by the arbitrator/arbitrators. Unless the parties have agreed otherwise, the award shall state the reasons on which it is based. It shall further state the date on which it has been made and the seat of arbitration.

(ii) Can arbitrators award punitive or exemplary damages? Can they award interest? Compound interest?

In general, the arbitrators can award punitive damages and award interest as well as compounded interest, although this is a matter to be resolved under the law applicable on the merits. Whether and to what extent punitive damages can be awarded has not yet been subject of Austrian jurisprudence. However, Austrian courts may well consider the granting of punitive damages contrary to public policy.

(iii) Are interim or partial awards enforceable?

Both interim and partial awards are enforceable.

(iv) Are arbitrators allowed to issue dissenting opinions to the award? What are the rules, if any, that apply to the form and content of dissenting opinions?

Dissenting opinions are possible. Austrian arbitration law does not provide guidance as to the form or content of dissenting opinions.

(v) Are awards by consent permitted? If so, under what circumstances? By what means other than an award can proceedings be terminated?

Pursuant to section 605.2 of the ACCP, if the parties settled their dispute during the arbitral proceedings, and if the matter in dispute is such that the parties are able to conclude a settlement, they may request the arbitral tribunal to record the settlement as an arbitral award by consent, provided that the content of the settlement does not violate Austrian public policy.

The arbitral proceedings are terminated by an arbitral award on the merits, by settlement or by an order of the arbitral tribunal if:

- the claimant fails to file a statement of claim pursuant to the relevant provision;
- the claimant withdraws his claim unless the respondent objects thereto;
- the parties agree on the termination of the proceedings; and
- the continuation of the proceedings has become impossible for the arbitral tribunal.

(vi) What powers, if any, do arbitrators have to correct or interpret an award?

Any party may, within four weeks of receipt of the award, request the arbitral tribunal correct any errors in computation, address any clerical, typographical or similar errors, give an interpretation of specific parts of the award (if so agreed by

the parties) and make an additional award as to claims asserted in the arbitration proceedings but not decided by the arbitral award. The time limit of four weeks does not apply if the parties agreed on a different time limit. The request must be communicated to the other party. The other party must be heard before the arbitral tribunal has rendered a decision on such a request.

The arbitral tribunal shall decide on the correction or interpretation of the arbitral award within four weeks and on an additional award within eight weeks.

Even in the absence of a request, the arbitral tribunal may correct in the arbitral award any errors in computation and address any clerical typographical or similar errors. The time limit is four weeks from the date of the award.

XI. Costs

(i) Who bears the costs of arbitration? Is it always the unsuccessful party who bears the costs?

The arbitral tribunal shall decide on the parties' obligation to reimburse the costs of arbitration upon termination of the proceeding unless otherwise agreed by the parties. Usually, the tribunal will take into account all circumstances of the case with special regard to the outcome of the proceedings. Hence, it is most often the unsuccessful party who bears the costs.

(ii) What are the elements of costs that are typically awarded?

Typically, the costs of arbitration (including the fees of arbitrators and the administrative costs) and the costs for adequate enforcement or defence, including reasonable attorney's fees, will be awarded upon a respective request by a party.

(iii) Does the arbitral tribunal have jurisdiction to decide on its own costs and expenses? If not, who does?

The arbitral tribunal does not have jurisdiction to decide on its own costs and expenses. In case of a dispute, the issue is for the courts.

(iv) Does the arbitral tribunal have discretion to apportion the costs between the parties? If so, on what basis?

According to section 609.1 of the ACCP, arbitral tribunals have discretion to apportion the costs between the parties thereby taking into account the circumstances of the individual case, in particular its outcome. The principle of 'costs follow the event' is largely applied.

- (v) **Do courts have the power to review the tribunal's decision on costs? If so, under what conditions?**

As the tribunal's decision on costs must be rendered in a form of an arbitral award, the courts in theory have the power to review such decision if it is challenged under any of the grounds set out in section 611 of the ACCP (see XII.(i) below). However, it seems rather unlikely that the cost decision can successfully be challenged on any of these grounds.

XII. Challenges to Awards

- (i) **How may awards be challenged and on what grounds? Are there time limitations for challenging awards? What is the average duration of challenge proceedings? Do challenge proceedings stay any enforcement proceedings? If yes, is it possible nevertheless to obtain leave to enforce? Under what conditions?**

Arbitral awards may be challenged by an appeal on the following grounds:

- a valid arbitration agreement does not exist, or the arbitral tribunal has denied its jurisdiction but a valid arbitration agreement was present, or if one party was incapable to create a valid arbitration agreement under the law governing this person's personal status;
- a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was unable for other reasons to present its claim or defence;
- the arbitral award deals with a dispute which is not covered by the arbitration agreement, or contains decisions that are beyond the scope of either the arbitration agreement or the submission of the parties to the arbitration; if this defect pertains only to a separable part of the arbitral award, then only that part of the award shall be set aside;
- the constitution or composition of the arbitral tribunal is not in accordance with a provision of sections 677 *et seq* of the ACCP or within a permissible agreement of the parties;
- the arbitration proceedings were conducted in a way that violates the fundamental values of Austrian public policy (*ordre public*);
- the preconditions under which a judgment of a court of law can be appealed by filing an action for revision under section 530 para 1 no. 1-5 of the ACCP are satisfied. Revision can be requested if the outcome of the proceedings was influenced by a criminal act, such as by the submission of forged documents or perjury;
- the subject of the dispute is not arbitrable under the domestic law; and
- the arbitral award violates the fundamental values of Austrian public policy (*ordre public*).

An application for setting aside an arbitral award must be filed within three months from the day on which the claimant has received the arbitral award or additional award. This time limit does not apply in the case of an application based on section 530 of the ACCP as set out above. In that instance, the time limit is governed by the respective provisions of an action for revision under section 530 para 1 no. 1-5 of the ACCP.

The application for setting aside an award had to be filed with the Austrian Supreme Court. The Supreme Court will decide on the application after an oral hearing without any possibility of a further appeal.

The challenge proceedings do not automatically stay enforcement proceedings; however, a party may file an application to that effect. The court will grant a stay if: (1) an application for setting aside an arbitral award has been filed; (2) the enforcement threatens to cause an irreparable pecuniary loss to the obligated party (or a third party) or such pecuniary loss would be hard to indemnify; (3) leave to enforce will not endanger the satisfaction of the creditor (this precondition might be substituted by a security deposit); and (4) an application for setting aside an arbitral award is not futile.

- (ii) May the parties waive the right to challenge an arbitration award? If yes, what are the requirements for such an agreement to be valid?**

A general waiver of the right to challenge an arbitral award is not possible.

- (iii) Can awards be appealed in your country? If so, what are the grounds for appeal? How many levels of appeal are there?**

Arbitral awards cannot be appealed in Austria unless the parties have explicitly agreed otherwise and set out the procedure and tribunal before which such appeal would have to be brought.

- (iv) May courts remand an award to the tribunal? Under what conditions? What powers does the tribunal have in relation to an award so remanded?**

Courts will not remand an award to the tribunal.

XIII. Recognition and Enforcement of Awards

- (i) What is the process for the recognition and enforcement of awards? What are the grounds for opposing enforcement? Which is the competent court? Does such opposition stay the enforcement? If yes, is it possible nevertheless to obtain leave to enforce? Under what circumstances?**

Arbitral awards will be enforced by Austrian courts in the same way as judgments of the state courts. The recognition and enforcement of awards is governed by the

Enforcement Act (EO) to the extent that they are not determined by international law or legal acts of the European Union.

Austrian law distinguishes between domestic and foreign awards. The latter are such where the seat of arbitration is not in Austria. Enforcement of foreign awards is subject to the treaties to which Austria is a party: the Geneva Convention, the European Convention, the New York Convention and the Washington Convention.

In enforcement proceedings, the party applying for enforcement must submit either an authenticated original or a duly certified copy of the award. The original or a certified copy of the arbitration agreement must only be presented upon a respective request by the court.

In the enforcement proceedings, the respondent has the opportunity to oppose the recognition and enforcement of the award. In practice, such a request will be based on the grounds listed in Article V of the New York Convention, as the grounds listed in the EO are overridden by the provisions of international treaties. If the recognition is opposed, assets of the respondent may be attached but not realised until there is a final decision on the recognition of the foreign award (section 84a.2 of the EO).

- (ii) If an *exequatur* is obtained, what is the procedure to be followed to enforce the award? Is the recourse to a court possible at that stage?**

See XIII.(i) above.

- (iii) Are conservatory measures available pending enforcement of the award?**

Conservatory measures are available.

- (iv) What is the attitude of courts towards the enforcement of awards? What is the attitude of courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?**

Generally, courts have a good attitude towards the enforcement of awards. The enforcement of foreign awards set aside by the courts at the place of arbitration depends on the case. For example, Art IX of the European Convention on International Commercial Arbitration gives leeway to enforce awards which have been set aside for reasons of public policy.

- (v) How long does enforcement typically take? Are there time limits for seeking the enforcement of an award?**

Generally, enforcement proceedings are conducted swiftly without undue delay. The time limit to enforce an award is 30 years.

XIV. Sovereign Immunity

- (i) **Do state parties enjoy immunities in your jurisdiction? Under what conditions?**

State parties which are parties to an arbitration agreement are deemed to be capable of submitting their dispute to arbitration and thus do not enjoy immunities to that end. They will enjoy immunity against enforcement of an award in assets which serve the purpose of exercising their sovereign powers, such as the bank accounts of embassies or embassy buildings and cars.

- (ii) **Are there any special rules that apply to the enforcement of an award against a state or state entity?**

In general, enforcement of an award against a state or state entity is not possible as far as sovereign assets are concerned.

XV. Investment Treaty Arbitration

- (i) **Is your country a party to the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States? Or other multilateral treaties on the protection of investments?**

Austria signed the ICSID Convention on 17 May 1966. The ICSID Convention entered into force on 24 June 1971. On 17 December 1994, Austria signed the Energy Charter Treaty (entry into force: 16 April 1998).

- (ii) **Has your country entered into bilateral investment treaties with other countries?**

Austria has entered into bilateral investment treaties with a number of countries, including the following: Albania, Algeria, Argentina, Armenia, Azerbaijan, Bangladesh, Belarus, Belize, Bolivia (terminated), Bosnia and Herzegovina, Bulgaria, Cambodia, Cabo Verde (terminated), Chile, China, Croatia, Cuba, Czech Republic, Egypt, Ethiopia, Estonia, Georgia, Hungary, Guatemala, Hong Kong, India, Islamic Republic of Iran, Jordan, Kazakhstan, Republic of Korea, Kosovo, Kuwait, Kyrgyzstan, Latvia, Lebanon, Libya, Lithuania, Malaysia, Malta, Morocco, Macedonia, Mexico, Moldova, Mongolia, Montenegro, Namibia, Nigeria, Oman, Paraguay, Philippines, Poland, Romania, Russian Federation, Saudi Arabia, Serbia, Slovakia, Slovenia, South Africa, Tajikistan, Tunisia, Turkey, Ukraine, Uzbekistan, UAE, Vietnam, Yemen and Zimbabwe.

XVI. Resources

- (i) **What are the main treatises or reference materials that practitioners should consult to learn more about arbitration in your jurisdiction?**

The main treatises that practitioners should consult to learn more about arbitration in Austria are the commentaries on Austrian arbitration law, for example, Zeiler, *Schiedsverfahren* (2014); Hausmaninger in *Fasching/Konecny* IV/2; Stefan Riegler et al, *Arbitration Law of Austria: Practice and Procedure* (2007); Franz T. Schwarz and Christian W. Konrad, *The Vienna Rules* (2009); Klausegger et al (eds.), *Austrian Arbitration Yearbook* (published annually).

- (ii) **Are there major arbitration educational events or conferences held regularly in your jurisdiction? If so, what are they and when do they take place?**

The major arbitration event is the conference called ‘Vienna Arbitration Days’ which is held on an annual basis in the first quarter of each year. It is co-organised by the Austrian Arbitration Association (ArbAut), ICC Austria, the Young Austrian Arbitration Practitioners (YAAP) and the Austrian Yearbook on International Arbitration. ArbAut also organises a number of other domestic and international conferences. Furthermore, the University of Vienna, Faculty of Law hosts the finals of the annual Willem C. Vis International Commercial Arbitration Moot which takes place shortly before Easter.

XVII. Trends and Developments

- (i) **Do you think that arbitration has become a real alternative to court proceedings in your country?**

Arbitration has certainly become a real alternative to court proceedings in commercial disputes.

- (ii) **What are the trends in relation to other ADR procedures, such as mediation?**

Mediation is rare. It cannot be considered a real ‘competitor’ to arbitration.

- (iii) **Are there any noteworthy recent developments in arbitration or ADR?**

In 2003, the Civil law-Mediation Act was passed which determines the rights and duties of mediators. In 2006, Austrian arbitration law was amended, largely along the lines of the UNCITRAL Model Law.

Since January 1, 2014, any application to set aside an award has to be brought directly at the Austrian Supreme Court. The Supreme Court will decide on the application after an oral hearing. Its decision is final without the possibility of any further appeal.