ICLG

The International Comparative Legal Guide to:

International Arbitration 2018

15th Edition

A practical cross-border insight into international arbitration work

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

Ali Budiardjo, Nugroho, Reksodiputro
Andersen Tax & Legal
Anderson Mori & Tomotsune
Attorneys at law Ratiolex Ltd
Baker McKenzie
BDO LLP
BDO USA LLP
Bekina, Škurla, Durmiš and Spajić
BMT LAW
Boss & Young, Attorneys-at-Law
BRISDET
Cases & Lacambra
Costa e Tavares Paes Advogados
DLA Piper France LLP
DLA Piper Studio Legale Tributario Associato
Dr. Colin Ong Legal Services
Eric Silwamba, Jalasi and Linyama Legal Practitioners
Freshfields Bruckhaus Deringer LLP
Georgiev, Todorov & Co.
GrahamThompson
HFW
Homburger
International Advocate Legal Services
JAŠEK LEGAL
Jung & Sohn
Kachwaha and Partners
Kennedys Chudleigh Ltd.
Linklaters
Luke and Associates
Marxer & Partner Attorneys at Law
Matheson
Montezuma Abogados
Moroğlu Arseven
Njeri Kariuki Advocate
Norburg & Scherp
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Pierre Thielen Avocats S.à r.l
Popovici Niţu Stoica & Asociaţii
Portolano Cavallo
PUNUKA Attorneys and Solicitors
Quevedo & Ponce
Salazar & Asociados
SBH Law Office
SyCip Salazar Hernandez & Gatmaitan
Taylor Wessing Partnerschaftsgesellschaft mbB
Von Wobeser y Sierra, S.C.
Weber & Co.
Williams & Connolly LLP
Wilmer Cutler Pickering Hale and Dorr LLP
YKVN

CDR Commercial Dispute Resolution

glg global legal group

global legal group

Contributing Editors
Steven Finizio and Charlie Caher, Wilmer Cutler Pickering Hale and Dorr LLP

Sales Director
Florjan Osmani

Account Director
Oliver Smith

Sales Support Manager
Toni Hayward

Sub Editor
Oliver Chang

Senior Editors
Suzie Levy
Caroline Collingwood

CEO
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
July 2018

Copyright © 2018
Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-912509-24-9
ISSN 1741-4970

Strategic Partners

Preface:

General Chapters:

Asia Pacific:

Central and Eastern Europe and CIS:

Western Europe:

Continued Overleaf →

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer
This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice.
Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication.
This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

Austria

Stefan Weber

Weber & Co.

Katharina Kitzberger

1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

Pursuant to §581(1) Austrian Code of Civil Procedure ("ACCP"), an arbitration agreement requires at least the exact designation of the parties to the arbitration agreement, the specific legal relationship to which the arbitration agreement pertains and the parties' unambiguous consent to have all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, resolved by arbitration. The arbitration agreement may be concluded as a separate agreement or a clause within a contract. The subject matter has to be arbitrable.

The formal requirements are addressed in §583(1) ACCP, according to which an arbitration agreement must be in writing and contained either in a written document signed by the parties or in letters, telefax, e-mails or other forms of communication exchanged between the parties which preserve evidence of the agreement. An arbitration agreement may also be part of general terms and conditions, provided that the contract referring to these terms is validly executed. It is not necessary to attach the general terms and conditions to the main contract.

Special provisions apply to arbitration agreements with consumers. Pursuant to §617(1) and (2) ACCP, arbitration agreements between an entrepreneur and a consumer may only be validly concluded for disputes that have already arisen. Further, the arbitration agreement must be contained in a document which is personally signed by the consumer and does not contain any agreements other than those relating to the arbitral proceedings. The latter also applies to arbitral proceedings in labour law matters.

1.2 What other elements ought to be incorporated in an arbitration agreement?

Elements that are advisable to be incorporated in an arbitration agreement are the determination of the place of arbitration, the language of the proceedings, the number of arbitrators, the manner of their appointment, the applicable arbitration rules and the substantive law applicable to the dispute and the arbitration agreement.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

In general, Austrian courts have a positive approach towards arbitration agreements. Austrian courts apply interpretations that uphold the validity of arbitration agreements, provided that the formal and minimum content requirements have been met.

The pendency of arbitral proceedings bars the commencement of parallel court proceedings. The pendency of an action before an arbitral tribunal results in the inadmissibility of subsequent proceedings concerning the same dispute ("*lis pendens*"). If court proceedings are commenced in a dispute that is subject to an arbitration agreement, the courts must dismiss the claim if it relates to a matter which is subject to an arbitration agreement, unless the respondent enters into the merits of the dispute without raising objections to this effect or the court establishes that the arbitration agreement is invalid or unenforceable.

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

In Austria, arbitration proceedings are governed by §§577 to 618 ACCP. The legislation is based on the UNCITRAL Model Law and was amended in 2013.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

The same provisions apply to domestic and international arbitration proceedings.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

Austrian arbitration law conforms with the UNCITRAL Model Law to a large extent. The most significant difference is that, pursuant to §611(2) 5 ACCP, an award may only be set aside if the arbitral procedure was not in accordance with Austrian public policy

© Published and reproduced with kind permission by Global Legal Group Ltd, London

(procedural *ordre public*). The accordance of the arbitral procedure with the agreement of the parties, as required by Article 34(2)(a)(iv), second case of the UNCITRAL Model Law, is not required under Austrian law.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

The ACCP contains only a few mandatory provisions, e.g. the principle of equal treatment, the parties' rights to representation and to be heard, the rules on objective arbitrability, the option of applying to state courts for interim measures, the possibility of challenging an arbitrator before national courts and the provisions on actions for setting aside an award.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Any claim involving an economic interest may be arbitrable. A dispute relating to a non-proprietary claim is arbitrable if the parties could enter into a settlement on the subject-matter in dispute. Claims in family law, tenancy law and matters concerning social security are not arbitrable.

3.2 Is an arbitral tribunal permitted to rule on the question of its own jurisdiction?

Pursuant to §592(1) ACCP, the arbitral tribunal is permitted to rule on its own jurisdiction in the final award or in a separate award (doctrine of competence-competence).

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

The court has to dismiss a claim if it relates to a matter which is subject to an arbitration agreement, unless the respondent makes submissions on the merits of the dispute or orally pleads before the court without raising objections to this effect or the court establishes that the arbitration agreement is invalid or unenforceable.

3.4 Under what circumstances can a national court address the issue of the jurisdiction and competence of an arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

An arbitral tribunal's decision on jurisdiction may be challenged and, thus, can be subject to national court review. The challenge of an award on jurisdiction does not prevent an arbitral tribunal from continuing arbitral proceedings or from rendering a final award.

Further, a national court may notify the parties before the start of hearings of its view that the case is subject to arbitration and dismiss the action *in limine litis*.

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

The extension of an arbitration agreement's scope to third parties is viewed conservatively by the Austrian courts, as well as legal writers. There are no express provisions on the extension of an arbitration agreement's scope to non-signatories. In general, only the parties to the arbitration agreement are bound by that agreement. As a consequence, concepts such as "groups of company doctrine", "piercing of the corporate veil" or representation and agency generally do not apply. However, the Austrian Supreme Court consistently rules that legal successors, as well as third-party beneficiaries are also bound by an arbitration agreement.

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

Austrian laws or rules do not prescribe any limitation periods for the commencement of arbitration. Pursuant to §584(4) ACCP, when an arbitral tribunal or a court denies its jurisdiction over a dispute, or where an arbitral award is set aside due to the arbitral tribunal's lack of jurisdiction, the proceedings are considered to be properly continued ("*gehörig fortgesetzt*") if the claimant immediately files its claims with the competent court or arbitral tribunal. This ensures continuous suspension of the limitation period under Austrian law.

Limitation periods are governed by the applicable substantive law in Austria. The typical length of such limitation periods is either three or 30 years, depending on the nature of the claim.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

Pursuant to the Austrian Insolvency Act, all pending proceedings in which the debtor is either a claimant or respondent are interrupted by virtue of the commencement of insolvency proceedings. This rule also applies to arbitration proceedings which have their seat in Austria.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

The law applicable to the substance of a dispute shall be determined by the parties. Pursuant to §603 ACCP the arbitral tribunal has to decide the dispute in accordance with the provisions of law as chosen by the parties. Unless the parties have explicitly agreed otherwise, an agreement on the law of a given state shall be construed as directly referring to the substantive law of that state and not to its conflict rules. Only in the absence of any designation by the parties does the arbitral tribunal have full discretion to determine the law which it considers to be appropriate, without having to resort to specific conflict-of-laws rules.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

The parties' autonomy to determine the applicable law is limited by mandatory laws, for example, if so required by the principle of the protection of the weaker party, e.g. in consumer law or employment law. The Austrian public policy (*ordre public*) also prevails over the law chosen by the parties.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

In view of recognition and enforcement, Article V(1)(a) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NYC") applies, providing for the application of the law chosen by the parties or, lacking such agreement, the law of the country where the award was made. Austrian arbitration law does not explicitly regulate this matter. Lacking agreement between the parties, the laws of the place of arbitration shall be applied.

5 Selection of Arbitral Tribunal

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

The parties' autonomy to select arbitrators is limited to the extent that an arbitrator may be challenged if there are circumstances that give rise to justified doubts as to his impartiality or independence or if he or she lacks qualifications agreed upon by the parties. An arbitral tribunal which has its seat in Austria must be composed of an uneven number of arbitrators (§586 ACCP).

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

§587 ACCP provides for a default procedure if the parties' chosen method for selecting arbitrators fails or does not exist at all. If the parties agreed upon arbitration proceedings with a sole arbitrator and if the parties fail to agree on the arbitrator within four weeks of receipt of a request to do so from the other party, the arbitrator shall be appointed by the court upon application by a party. If no nomination procedure was agreed upon for a three-arbitrator tribunal, each party shall appoint one arbitrator, and thereafter the two appointed arbitrators shall appoint a third arbitrator as chairman. If more than three arbitrators have been provided for, each party shall appoint the same number of arbitrators and the arbitrators thus appointed shall appoint a further arbitrator as chairman.

Any party may apply to a court for substituting an appointment of an arbitrator if the party-agreed appointment procedure has failed, i.e. one party does not act in accordance with the agreed procedure, or the parties are unable to reach an agreement as to the joint appointment of an arbitrator, or a third party does not fulfil its role in the appointment of an arbitrator.

Austrian arbitration law provides for a mandatory subsidiary catch-all provision in §587(6) ACCP, which covers all cases not expressly mentioned in the law, in which a party does not appoint an arbitrator within four weeks after receipt of a written request to do so, and in which any agreed substitute procedure does not lead to the appointment of an arbitrator within a reasonable period of time.

5.3 Can a court intervene in the selection of arbitrators? If so, how?

The court may only intervene in the selection of arbitrators upon application by a party to the arbitration agreement. §587(3) ACCP provides for a party's right to request a court to appoint the missing arbitrator(s) if the party-agreed appointment procedure has failed.

Pursuant to §589(3) ACCP, the courts may also be requested by a party to decide on the challenge of arbitrators if a challenge under a party-agreed procedure or under the procedure set forth in §589(2) ACCP is not successful. This competence is mandatory and applies as an additional instance of review even in cases where an arbitral institution decides on challenges raised by the parties.

5.4 What are the requirements (if any) imposed by law or issued by arbitration institutions within your jurisdiction as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators?

Pursuant to §588 ACCP, an arbitrator must disclose any circumstances which could raise doubts as to his or her impartiality and/or independence, or which are in conflict with the agreement of the parties at any stage of the arbitral proceedings. Independence is defined by the absence of close financial or other ties between the arbitrator and the parties. Impartiality is closely related to independence, but refers to the arbitrators' attitude. However, an arbitrator may be successfully challenged if there is objectively justified doubt as to his or her impartiality or independence.

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

The procedure of arbitration in Austria is governed by §§577 *et seq*. ACCP. These provisions apply to all arbitral proceedings that have their seat in Austria. Subject to mandatory requirements, the parties are free to derogate from most of the procedural rules.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

There are no particular procedural steps required by the ACCP. Arbitration proceedings must meet fundamental procedural rights such as fair and equal treatment, proper representation and the right to be heard. The respondent's right to submit a memorandum in reply is considered as such a mandatory procedural step.

Unless otherwise agreed by the parties, the arbitral tribunal shall decide on whether to hold oral hearings or to conduct the proceedings in writing. Upon a party's request, the arbitral tribunal shall hold oral hearings at an appropriate stage of the proceedings, unless the parties have agreed that no oral hearings shall be held. In any case, pursuant to §599(2) ACCP, the arbitral tribunal has to notify the parties in a timely manner of any hearings or any meetings for taking evidence. The latter is mandatory.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no specific rules that govern the conduct of counsels from Austria in arbitral proceedings that have their seat in Austria. However, Austrian counsels admitted to the Austrian Bar are bound by the Austrian Attorney's Act (*Rechtsanwaltsordnung*) that sets forth the core principles for the exercise of the profession as a lawyer, such as the obligation to confidentiality and integrity towards the client, the prohibition of dual representation, etc. Further, Austrian counsels shall refrain from creating the appearance to influence witnesses and are not entitled to agree on fee arrangements containing a *quota litis*, i.e. contingency fees.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The main obligation of the arbitrators is to conduct the arbitral procedure in accordance with the parties' agreement and the principles of a fair trial, including the duty of neutrality. Upon a plea, the arbitrators may decide on their own jurisdiction. During the proceedings, the arbitrators have the power to decide on the admissibility of evidence, to take such evidence and to determine its relevance, materiality and weight unrestrictedly. The arbitrators thus have wide discretion on the conduct of the proceedings. Finally, arbitrators have the right to render interim or protective measures upon either party's request.

The most significant duties of the arbitrators are to conduct the arbitral procedure efficiently and to be cost-effective in accordance with the parties' agreement and ultimately render an award with final and binding effect. Arbitrators must promptly disclose any circumstances likely to raise doubts as to his or her impartiality or independence at any stage of the arbitration proceedings.

The main powers bestowed upon the arbitrators are the rendering of arbitral awards with final and binding effect, including a decision on the tribunal's own jurisdiction, as well as the discretion to conduct the proceedings in all questions not regulated by the law or by virtue of the parties' agreement. Arbitrators have the power to render interim measures although they lack coercive powers. As such, arbitrators cannot compel witnesses or parties to produce particular documents, to give testimony or even to appear at an oral hearing. Further, arbitrators cannot administer oaths, requiring them to request state court assistance in case an examination under oath is required.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

In Austria the appearance of lawyers, including lawyers from other jurisdictions, in legal matters is strictly regulated. The rules of representation applicable to national court proceedings do not apply to arbitration proceedings sited in Austria and representation in arbitration proceedings is, unlike national court proceedings, not reserved to lawyers.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Austrian law does not provide for arbitrator immunity. Pursuant to §594 ACCP, arbitrators are liable for any damage caused by their culpable refusal or delay in fulfilling the duty assumed by acceptance of the appointment, e.g. if they do not render the arbitral award in a timely manner or unjustifiably resign from their function. For any liability going beyond the ambit of §594 ACCP, the Austrian Supreme Court has repeatedly held that any such liability requires a successful challenge of the arbitral award in order to even be considered.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

National courts may only deal with procedural issues arising during arbitration proceedings if so provided for in §§577 *et seq*. ACCP, e.g. the appointment or challenge of arbitrators. Arbitrators or any party with the approval of the arbitrators may request national courts to perform judicial acts for which the arbitrators do not have authority, including the request to a foreign court or other authority to carry out such acts, e.g. assisting in the taking of evidence. In addition to the arbitrators' power to issue interim measures, national courts remain competent to grant interim measures of protection even though the parties have entered into an arbitration agreement.

7 Preliminary Relief and Interim Measures

7.1 Is an arbitral tribunal in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitral tribunal seek the assistance of a court to do so?

Unless otherwise agreed by the parties, an arbitral tribunal may, upon request of a party and after hearing the other party, order interim or protective measures. Such measures may only be ordered if the enforcement of a claim would otherwise be frustrated or materially hampered, or there would be a danger of irreparable damage. Interim or protective measures are only of a preliminary nature and no awards. The issuance of *ex parte* measures is explicitly forbidden. Austrian law does not provide for a *numerous clausus* of such interim or protective measures. Thus, arbitral tribunals are also free to issue measures which are unknown to Austrian law. Arbitral tribunals do not have to seek the assistance of a court for issuance of preliminary measures.

Interim or protective measures are enforceable by Austrian courts upon request of a party.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

Pursuant to §585 ACCP, an arbitration agreement does not deprive a party of its right to request interim relief from the courts. Upon request by a party before or during arbitration proceedings, courts are entitled to grant interim measures of protection even though the parties have entered into an arbitration agreement. This provision brings the side-by-side power of granting interim measures of

© Published and reproduced with kind permission by Global Legal Group Ltd, London

national courts and arbitrators. However, the principle that no legal action can be instituted twice for the same cause of action has to be considered.

Preliminary measures, either granted by arbitrators or courts, shall not prejudice the final outcome of the arbitration proceedings.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Austrian courts have repeatedly granted interim measures related to arbitration.

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

Austrian law does not provide for anti-suit injunctions either by an arbitral tribunal or by a domestic court.

7.5 Does the law of your jurisdiction allow for the national court and/or arbitral tribunal to order security for costs?

Austrian law allows for the national court to order security for costs, whereby in certain cases national courts are obliged to order security for costs. Austrian arbitration law does not explicitly provide for the right or duty of arbitral tribunals to order security for costs. In practice, it is common that the arbitral tribunal may require any party to provide appropriate security in connection with an interim or protective measure, as well as with an award.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Pursuant to §593 ACCP, Austrian courts (i.e. the District Court), upon application of a party, shall enforce interim measures ordered by arbitral tribunals. This applies to interim or protective measures of arbitral tribunals having their seat in Austria, as well as to measures of tribunals not having their seat in Austria or having the seat not yet determined.

Austrian law leaves no discretion to Austrian courts whether to enforce interim or protective measures ordered by an arbitral tribunal. However, Austrian courts shall refuse to enforce a measure ordered by arbitral tribunals having their seat in Austria if the measure suffers from a defect that would constitute grounds for setting aside an arbitral award. They shall also refuse to enforce measures ordered by an arbitral tribunal not having its seat in Austria if the measure suffers from a defect that would constitute grounds for refusal of recognition and enforcement. If the measure provides for means of protection unknown in Austrian law, the court may, upon application of a party and after hearing the opponent, execute the means of protection under Austrian law which comes closest to the means ordered by the arbitral tribunal. The court may also formulate the measure ordered by the arbitral tribunal differently in order to safeguard the realisation of its purpose.

Austrian courts shall revoke interim or protective measures if the term of the measure set by the arbitral tribunal has expired or the arbitral tribunal has limited the scope or set aside the interim or protective measure.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

Unless otherwise agreed by the parties, the arbitral tribunal is free to determine the rules of evidence. Pursuant to §599 ACCP, the arbitral tribunal has the power to decide on the admissibility of evidence, to take such evidence and to determine its relevance, materiality and weight unrestrictedly.

8.2 What powers does an arbitral tribunal have to order disclosure/discovery and to require the attendance of witnesses?

The disclosure of documents and other disclosures are not regulated with regard to arbitration. In general, the parties are free to agree on a certain disclosure policy. Even without such an agreement, arbitral tribunals seated in Austria have repeatedly ordered the production of documents, often relying on what they consider to be best practice in international arbitration.

8.3 Under what circumstances, if any, can a national court assist arbitral proceedings by ordering disclosure/discovery or requiring the attendance of witnesses?

A court may only intervene in matters of disclosure/discovery if the arbitral tribunal or any party with the approval of the arbitral tribunal requests from the court assistance in the gathering of evidence. However, the Austrian courts' authority to order the production of documents is very limited and cannot be enforced. Rather, the consequences of a party's failure to produce the documents ordered are limited to negative inferences during the evaluation of evidence. To the contrary, the attendance of witnesses may be ordered by national courts and can also be enforced.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal and is cross-examination allowed?

Austrian arbitration law does not provide for certain rules determining the production of written and/or oral witness testimony. The parties are free to decide upon the procedure. Written and oral witness testimony, as well as cross-examination of witnesses or experts at a hearing is allowed as evidence. Witnesses or experts cannot be sworn by the arbitral tribunal, but only with the assistance of a national court. The professional rules for lawyers admitted to the Austrian Bar require them to refrain from influencing a witness.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

Lacking any specific rules, an arbitral tribunal seated in Austria may consider any documents submitted to it by the parties, irrespective of whether such submission was made in violation of a confidentiality obligation or legal privilege. However, in line with international practice, wherever an arbitral tribunal orders the production of

© Published and reproduced with kind permission by Global Legal Group Ltd, London

documents, legal privileges acknowledged by the law, such as the attorney-client privilege or the doctor-patient privilege, must be observed. No privilege protection is granted to communications between company representatives and their in-house counsel.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the award contain reasons or that the arbitrators sign every page?

Pursuant to §606 ACCP, an award must be made in writing and signed by the arbitrators. Unless otherwise agreed by the parties, the award must be signed by at least the majority of members of the arbitral tribunal, provided that the obstacle which prevented the missing signature on the award is noted. The award also has to state the date on which it has been rendered and the seat of the arbitral tribunal.

The award has to be reasoned, unless the parties have agreed otherwise. The reference to the parties' respective agreement will suffice only in the case of an award on agreed terms.

9.2 What powers (if any) do arbitral tribunals have to clarify, correct or amend an arbitral award?

Pursuant to §610 ACCP, the arbitral tribunal may, upon request by either party, (i) correct in the award any errors in computation, any clerical, typographical or errors of similar nature, (ii) explain certain parts of the award, or (iii) render an amended award as to claims asserted in the arbitral proceedings but not disposed of in the award. Arithmetic and spelling mistakes in terms of (i) above may also be corrected by the arbitral tribunal on its own initiative.

The arbitral tribunal shall decide upon the correction within four weeks and upon an amendment within eight weeks. The other party shall be served with the request to clarify, correct or amend the arbitral award and shall be heard before the arbitral tribunal decides upon such request. The correction (or clarification or amendment) of the arbitral award constitutes a part of the (original) arbitral award.

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Pursuant to §611 ACCP, the arbitral award may be challenged only based on the following grounds:

1. invalid arbitration agreement;
2. violation of the right to be heard;
3. award is beyond the matter in dispute;
4. violation of Austrian arbitration law by the constitution or composition of the arbitral tribunal;
5. violation of the fundamental values of the Austrian legal system by the arbitral procedure (procedural *ordre public*);
6. fulfilment of requirements for an action for revision;
7. lack of arbitrability of the matter in dispute; and
8. violation of public policy (substantive *ordre public*).

The grounds stipulated in numbers 7 and 8 above also have to be observed *ex officio* at all stages of court proceedings.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

The parties may not waive the right to challenge the arbitral award or any challenge grounds in advance. The grounds stipulated in numbers 7 and 8 in question 10.1 above cannot be excluded by an agreement between the parties at all as they concern the public interest.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

The challenge to set aside an arbitral award is the only recourse against an arbitral award. The list of grounds for the challenge is exhaustive. The parties may not expand the scope of appeal by Austrian national courts.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

The action for setting aside an arbitral award must be filed with the Austrian Supreme Court as first and also last instance. The Supreme Court, however, has to apply the same procedural rules as a court of first instance when deciding upon an action for setting aside an award.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Austria ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) on 2 May 1961 and the convention entered into force on 31 July 1961. No reservations are currently in place since the initial reservation under Article I(3) of the NYC was withdrawn on 25 February 1988. §614 (2) ACCP explicitly refers to the NYC.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Apart from the NYC, Austria has ratified the following multilateral conventions concerning arbitration: (i) the Geneva Protocol on Arbitration Clauses of 1923; (ii) the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927; and (iii) the European Convention on International Commercial Arbitration of 1961. In addition, Austria has entered into several bilateral agreements concerning the recognition and enforcement of arbitral awards.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

In general, Austrian national courts have a positive approach towards the recognition and enforcement of domestic or foreign arbitral awards. In particular, they do not review the merits of the arbitral tribunal decision.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

The recognition and enforcement of arbitral awards is governed by the Austrian Enforcement Act ("*Exekutionsordnung*"). However, where applicable, the NYC overrides most of the domestic provisions. Austrian courts consistently apply the NYC with due consideration of its international character, recognising the need for a unified instrument of recognition and enforcement.

The first step to be taken by a party intending to enforce an award is to apply for declaration of enforcement ("*exequatur*"). The applicant must provide the court with the original or a duly certified copy of the award and the arbitration agreement. After the declaration of the enforcement has been granted, the party may apply for enforcement authorisation which will lead to the execution of enforcement.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

An arbitral award has the effect of a legally binding judgment between the parties. The arbitral award's finality and enforceability do not differ from those of binding judgments of national courts. As a result, any issues finally determined by an arbitral tribunal are to be considered *res judicata*.

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Refusing enforcement of foreign arbitral awards violating public policy (*ordre public*) is primarily governed by the NYC. The standard for refusing enforcement of a foreign arbitral award refers to fundamental principles of the Austrian jurisdiction, e.g. the mandatory fundamental principles of the constitution or criminal law. Pursuant to several court decisions, this public policy standard is defined very narrowly.

In practice, objections to enforcement based on this ground are fairly common, but very rarely successful.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Austrian law does not provide for the confidentiality of arbitral proceedings sited in Austria. In practice, arbitration proceedings are mostly kept confidential. It is generally accepted that arbitrators have to keep the arbitration proceedings confidential. The arbitration rules agreed upon by the parties may contain provisions relating to confidentiality.

It is advisable to expressly agree on confidentiality as a part of the document when concluding an arbitration agreement.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

Unless the parties have agreed otherwise, information disclosed in arbitral proceedings can be referred to and/or relied on in subsequent proceedings. In the context of challenge proceedings to set aside an arbitral award, the public may be excluded from the oral hearings upon request of a party.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

Austrian arbitration law does not determine limits on the types of remedies available. However, *ordre public* has to be considered. Austrian law does not know punitive damages. While there is no applicable case law, in literature it is argued that the concept of punitive damages could violate Austrian public policy.

13.2 What, if any, interest is available, and how is the rate of interest determined?

Under Austrian law, interest is a matter of substantive law. Pursuant to the Austrian Civil Code, the interest rate is determined with a basic percentage of 4% *per annum* and, pursuant to the Austrian Commercial Code, in case of disputes between non-consumers with 9.2% *per annum* above the base interest rate as published by the Austrian National Bank.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Pursuant to §609(1) ACCP the arbitral tribunal is legally requested to decide on the duty to reimburse the costs of the proceedings upon termination of the arbitration proceedings, unless otherwise agreed by the parties. The arbitral tribunal has wide discretion in taking into account all the circumstances of the case, in particular the outcome of the proceedings. The arbitral tribunal shall decide on reimbursement only upon request by either party if the proceedings are terminated by entering into a settlement.

There is no general practice. The reimbursement of fees and/or costs is decided in each case depending on the individual circumstances.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

An arbitral award is not subject to tax. The Austrian Stamp Duty Act provides for stamp duties on out-of-court settlements recorded in writing. If arbitration proceedings are terminated by entering into a settlement, stamp duty may be imposed pursuant to the Austrian Stamp Duty Act. The stamp duty amounts to 1% of the settlement amount.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

Pursuant to Austrian substantive law, contingency fees violate the so-called forbidden *pactum de quota litis* and are considered invalid/void. The rules of professional conduct for lawyers expressly forbid contingency fees.

Professional funders are active in the Austrian market. However, for the time being they are mainly active in court litigation.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Austria signed the Washington Convention on 17 May 1966 and the convention entered into force on 24 June 1971.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

Austria is party to 65 BITs, to several multi-lateral investment treaties and the Energy Charter Treaty. Many of Austria's BITs provide for dispute settlement under the auspices of ICSID.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Austria has a model BIT which aims at providing a high degree of protection to investors, not only incorporating all typical substantive standards, but also providing for a choice of dispute resolution under the auspices of either ICSID or the ICC, or under the UNCITRAL Arbitration Rules. The model BIT addresses, in particular, the issue of transparency in investor–state dispute settlement.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

A state that has entered into an arbitration agreement and, thus, has agreed to arbitration proceedings is recognised under Austrian law to have waived the immunity defence. The state is then also deemed to have agreed to potential court proceedings relating to such arbitration. The state's commercial assets are subject to enforcement of arbitral awards.

15 General

15.1 Are there noteworthy trends or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

On 1 January 2018, the new Arbitration and Mediation Rules of the Vienna International Arbitral Centre ("VIAC", Vienna Rules 2018) entered into force. VIAC has also revised and amended its Model Arbitration Clause and the Model Mediation Clauses. The most noteworthy new features are that VIAC now also administers purely domestic cases in addition to the international cases that have been handled so far. All new proceedings will be administered electronically via an electronic case management system. Further, under certain circumstances respondents now have the possibility to request security for costs. Finally, in terms of gender diversity it has been defined that the terms in the Vienna Rules 2018 shall be used in a gender-specific manner.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

In order to address the current time and costs issue, the new Vienna Rules 2018 explicitly specify that arbitrators and parties as well as their representatives shall conduct the proceedings in an efficient and cost-effective manner. Non-compliance with these rules may be taken into consideration when determining the arbitrators' fees. Further, when determining the arbitrators' fees, the VIAC Secretary General now is more flexible to increase the fees by a maximum total of 40% depending on the circumstances of the case or, conversely, to decrease the fees where appropriate. Finally, the fee schedules have been revised.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Stefan Weber
Weber & Co.
Rathausplatz 4
1010 Wien
Austria

Tel: +43 1 427 2030
Email: s.weber@weber.co.at
URL: www.weber.co.at

Stefan Weber is an attorney-at-law with Weber & Co. in Vienna. He has extensive experience in representing clients as parties' counsel in arbitration proceedings. Further, he has acted as mediator and as arbitrator. Subject matters of the arbitrations include post-M&A-disputes, corporate disputes, finance contracts, bank guarantees, international sales and service contracts.

Stefan is a professor of international business law and finance law at Saarland University, Saarbrücken, Germany, where he teaches International Dispute Resolution. He is a graduate of the University of Vienna (*Dr.iur.*, 1982) and Harvard Law School (LL.M., 1985) where he was staff editor of the *Harvard International Law Journal*. He habilitated on securities regulation at the Vienna School of Economics (*Univ.Doz.*, 1996) and was a visiting professor at The Johns Hopkins University, the Paul H. Nitze School of Advanced International Studies and The American University in Washington, D.C. (1992–1993). Stefan Weber was a member of the Austrian Takeover Panel (*Übernahmekommission*) from 2009–2013.

Stefan has published numerous books and articles on arbitration, business and finance law. Stefan Weber is a member of ICC, DIS, ArbAut and ASA.

Katharina Kitzberger
Weber & Co.
Rathausplatz 4
1010 Wien
Austria

Tel: +43 1 427 2070
Email: k.kitzberger@weber.co.at
URL: www.weber.co.at

Katharina Kitzberger is a partner specialising in commercial litigation, asset recovery and arbitration. She has extensive experience in representing clients in Austrian court proceedings and arbitration proceedings, in both defending and bringing claims.

Katharina regularly advises clients in civil, commercial and competition law/distribution law matters and has particular expertise in the field of civil fraud cases. Katharina has conducted court and arbitral proceedings involving large amounts in dispute and cases of utmost complexity due to e.g. the involvement of foreign clients, the application of international law and other legal issues.

Katharina is a graduate of the University of Vienna (*Mag.iur.* 2005, *Dr.iur.* 2011). Further, she gained a B.A. in political sciences at the University of Vienna (2009). In the course of her doctoral thesis she dealt with the appointment and challenge of arbitrators under Austrian law. Besides this, she has published numerous articles on arbitration, civil procedural, distribution and antitrust law. Katharina is a member of the ICC, YAAP, IBA, AIJA and TI-AC (Working Group on Whistleblowing).

WEBER & CO.
RECHTSANWÄLTE

Weber & Co. is one of the leading Austrian law firms. The firm operates internationally. Its lawyers are highly specialised and are committed to the highest standards of legal service and proficiency. Weber & Co. offers legal services to companies, entrepreneurs, governments and individuals in all areas relevant to businesses, with a focus on arbitration & litigation, corporate, mergers & acquisitions and finance.

The arbitration department is headed by Stefan Weber and Katharina Kitzberger who both have extensive experience in arbitral proceedings. Lawyers of the department advise and represent domestic and foreign clients in international and Austrian arbitration proceedings and serve as arbitrators or chair arbitral tribunals.

The position of Weber & Co. as a leading Austrian law firm has been recognised internationally for years.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Other titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- Investor-State Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com