International Commercial Arbitration

International Conventions, Country Reports and Comparative Analysis

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2016

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PART 3
Country Reports

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ichtsbarkeit gemäß den Wiener Regeln 2013, in: Liber Amicorum Torggler, Verlag Österreich 2013, 1403; *Zeiler*, Schiedsverfahren, 2nd ed., NWV 2014.

National legislation: §§ 577–618 Austrian Code of Civil Procedure (*Zivilprozessordnung*, ZPO).

International conventions: Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958 (BGBl 1961/200; 1988/161); European Convention on International Commercial Arbitration, Geneva, 21 April 1961 (BGBl 1964/107); Convention on the Settlement of Investment Disputes between States and Nationals of Other States (BGBl 1971/357); Energy Charter Treaty (BGBl III 1998/81).

Content

I. Introduction

Historically as well as in modern days, Austria has always had a strong reputation as venue for international arbitration. This is owed to the fact that Vienna – due to Austria's neutrality – in times of the cold war was a popular place to solve disputes between parties from the Eastern and the Western part of Europe. Eventually, the "Vienna International Arbitral Center" (VIAC) was established in 1975 by the Austrian Federal Chamber of Commerce in order to react properly to this development. 1

After the end of the cold war, arbitrations in Austria decreased significantly, but in 2006 the implementation of a new arbitration law reverted this trend and rapidly the number of cases commenced to grow again.[1] The fact that the number of arbitrations in Austria is increasing steadily is also reflected by a recent case-statistic of the ICC, which ranked Vienna sixth among the world's most chosen arbitration venues.[2] Likewise, VIAC is constantly ranked among the world's most popular arbitration institutions.[3] 2

1. The legal framework

Austrian Arbitration Law is regulated in §§ 577–618 ZPO (Austrian Code of Civil Procedure). No official English translation is provided but the law has been translated by commentators.[4] The original version of the law dates back to 1 August 1895 Austria, but in the meanwhile these provisions have been amended several times.[5] The last major amendments took place in 2006 and 2013. With the Arbitration Act 2006 Austrian arbitration law was basically adapted to the UNCITRAL Model Law on International Commercial Arbitration. On 1 January 2014 the Austrian Arbitration Act 2013 came 3

[1] *Infra* mn. 12.
[2] ICC International Court of Arbitration Bulletin, Vol. 21/1-2010, 13; *Nueber*, Choosing your arbitral seat: Austria – the key facts, Lexis® PSL Arbitration, 7/2014.
[3] International Arbitration: Corporate Attitudes and Practices 2008 Queen Mary, University of London/Pricewaterhouse Coopers LLP, 2008, 15.
[4] E.g. an English translation of the Arbitration Act 2006 can be found in *Zeiler/Steindl*, Arbitration in Austria, 2nd ed., 2007.
[5] *Heider/Nueber*, in: Fitz *et al.* (eds), Liber Amicorum Hellwig Torggler, 2013, 451 (452).

into force, according to which the procedure to set aside an arbitral award had been significantly abbreviated.[6]

4 In addition, Austria is a member state of the New York Convention of 1958, the Geneva Convention of 1961, the Convention on the Settlement of Investment Disputes (Washington Convention) of 1965, the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, a number of bilateral investment treaties[7] as well as the Energy Charter Treaty.

5 **a) Domestic and international arbitration.** Unlike article 1(1) ML, the Austrian law does not distinguish between domestic and international arbitrations. Thus, in both cases §§ 577–618 ZPO apply.

6 **b) Commercial and non-commercial arbitration.** Austrian arbitration law further does not distinguish between commercial and non-commercial arbitrations.[8] There exist, however, some specialties in regard to arbitrations with consumers and employees. Although consumer and employment disputes, in principle, are arbitrable, the law protects consumers and employees in various ways.[9]

7 **c) Ad hoc and institutional arbitration.** Similar to most other jurisdictions under Austrian law it is up to the parties to choose between ad hoc and institutional arbitration. There exists one major arbitral institution in Austria, the Vienna International Arbitral Centre (VIAC). As already mentioned above, the VIAC has traditionally a strong reputation in solving disputes with a connection to the CEE (Central and Eastern Europe)-region. Constituted at the Austrian Federal Chamber of Commerce, VIAC's main task is to administer arbitral proceedings according to its arbitration rules ("The Vienna Rules").

8 The current version of the Vienna Rules came in force on 1 July 2013. Some amendments made in 2013 are of significant importance, such like the provisions on the joinder of third parties, consolidation of proceedings, appointment of arbitrators in multi-party arbitrations, confirmation of the nomination of arbitrators, expedited proceedings and the costs of the proceedings.[10]

9 When the member states of the COMECON developed to market economies in the 1990 s, VIAC experienced a constant decrease of new cases. As from 2005, this situation began to change and VIAC recorded a significant increase of new cases.[11] Accordingly, in 2009 60, in 2010 68, in 2011 68 and in 2012 70 new cases were brought before the VIAC.[12]

10 There are some further arbitral institutions existing in Austria, e. g. the arbitral institutions established at the Viennese Stock Exchange, the Austrian National Bank or the Austrian Bar Association. Some of them – like the arbitral tribunal of the Viennese Stock Exchange – have mandatory jurisdiction over disputes with a connection to their members.[13]

11 **d) The territoriality principle, the seat of the arbitration and the *lex arbitri*.** If the seat of the arbitral tribunal is within Austria, § 577(1) ZPO provides for the application of Austrian arbitration law. The seat of the arbitral tribunal can be determined either by

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[6] *Infra* mn. 142.
[7] *Fremuth-Wolf*, in: Riegler *et al.* (eds), Arbitration Law of Austria, 2007, § 577 mns 9 *et seq.*
[8] *Zeiler/Steindl*, Arbitration in Austria, 2nd ed., 2007, 15.
[9] *Infra* mns 49–50.
[10] For a detailed analysis *cf. Fremuth-Wolf/Schuch*, (2013) 16 Int'l Arb. L. Rev. 198.
[11] *Heider/Nueber*, in: Fitz *et al.* (eds), Liber Amicorum Hellwig Torggler, 2013, 451 (461).
[12] See http://viac.eu/de/service/statistiken/89-service/statistiken/124-viac-statistics-2011 (last accessed 28 April 2014); http://viac.eu/de/service/statistiken/89-service/statistiken/122-viac-statistics-2012 (last accessed 28 April 2014).
[13] *Ballon*, in: Fasching/Konecny (eds), JN, 3rd ed., 2013, JN § 1 mns 30 *et seq.*

party agreement or by the arbitral tribunal in case no such agreement exists.[14] In order to validly determine the seat of the arbitral tribunal it is also sufficient that the parties refer to arbitration rules and the respective default provisions of such rule which determines the seat in the absence of an agreement of the parties.[15] The seat of the arbitral tribunal is the decisive criterion in order to assess whether Austrian arbitration law applies.[16] The expression "seat of the arbitral tribunal" in § 577(1) ZPO does not necessarily mean the place where the oral hearing is conducted it refers to the legal seat of the arbitration.[17]

However, § 577(2) ZPO significantly deviates from this territoriality principle. Accordingly, §§ 578, 580, 583, 584 585, 593 subsections (3) to (6), 602, 612 and 614 ZPO apply even, if the seat of the arbitral tribunal is not in Austria or has not yet been determined. These provisions mainly concern the interaction of municipal courts with arbitral tribunals[18] and include important issues like the preconditions for the valid receipt of written statements, the form and conclusion of arbitration agreements, the enforcement of interim measures issued by the arbitral tribunal and the recognition and enforcement of foreign arbitral awards. In regard to the latter § 614 ZPO provides that foreign arbitral awards shall be recognized and enforced according to the Austrian enforcement act unless otherwise provided by international law or by legal instruments of the European Union. The drafters of the new law had the New York Convention in mind, when they referred to international law.[19] 12

If the place of the arbitration has not yet been established and if (at least) one of the parties has its seat, domicile or habitual residence in Austria the Austrian courts have limited jurisdiction to assist with the establishment of the arbitral tribunal as well as in regard to the challenge of arbitrators.[20] 13

e) Arbitration and other ADR mechanisms (mediation, expert determination). Mediation is primarily based on negotiations that are conducted based on certain methods.[21] Therefore, a competent mediator must be able to use a variety of methods in order to guide the parties of the dispute to a (final) solution.[22] To comply with these requirements it is necessary that a mediator passes a solid training. Austrian legislation provides for such special training that leads to the qualification of so called "certified mediator". The ZivilMedG (*Zivilrechtsmediationsgesetz*) establishes a mediation council at the Austrian ministry of justice and stipulates the requirements to be listed as certified mediator.[23] 14

According to § 18 ZivilMedG a mediator is obliged to keep information confidential, which he became aware of in the course of the mediation. Thus, a certified mediator has the right to deny testifying in court proceedings. Another characteristic of a qualified mediator is that procedural time periods are suspended while mediation proceedings are being conducted.[24] The result of mediation proceedings is not enforceable like arbitral awards. However, where parties conclude a settlement agreement, such agreement subsequently can be enforced in state court proceedings.[25] Recently, a trend can be 15

[14] § 595 ZPO.
[15] *Oberhammer*, Entwurf eines neuen Schiedsverfahrensrechts, 2002, 94.
[16] *Fremuth-Wolf*, in: Riegler *et al.* (eds), Arbitration Law of Austria, 2007, § 577 mn. 1.
[17] *Zeiler/Steindl*, Arbitration in Austria, 2nd ed., 2007, 16.
[18] *Fremuth-Wolf*, in: Riegler *et al.* (eds), Arbitration Law of Austria, 2007, § 577 mn. 21.
[19] *Reiner*, The new Austrian Arbitration Law, 2006, § 614 remark 215.
[20] *Power*, The Austrian Arbitration Act, 2006, § 577 mn. 5.
[21] *Schäfer*, in: Torggler (ed.), Praxishandbuch Schiedsgerichtsbarkeit, 2007, 18.
[22] *Schäfer*, in: Torggler (ed.), Praxishandbuch Schiedsgerichtsbarkeit, 2007, 18.
[23] § 2(1) ZivilMedG; § 8 ZivilMedG.
[24] § 22 ZivilmedG.
[25] *Schäfer*, in: Torggler (ed.), Praxishandbuch Schiedsgerichtsbarkeit, 2007, 24.

observed before Austrian commercial courts to offer parties the option of mediation previous to the commencement of court proceedings.

16 Another popular possibility to solve disputes apart from state court or arbitration proceedings is expert determination (*Schiedsgutachten*), which is closely related to arbitration. In the case of expert determination, the parties mandate a third person to determine certain facts of the case or to adopt or adjust a contract, e. g. due to a significant change of circumstances.[26] Contracts for expert determination demand no special form requirement to be duly concluded.[27] In doubt whether an agreement qualifies as an arbitration agreement or an agreement for expert determination, the manifest intention of the parties is decisive.[28] If the legal nature of an agreement is not clear and the party appointed person – be it an arbitrator or an expert – renders an "arbitral award" (to which he is not entitled to), such arbitral award can be nevertheless challenged before state courts.[29] Further, where an applicant has a legitimate interest § 612 ZPO provides for the right to request a state court to determine whether an arbitral award exists.

17 State courts control the result of the expert determination and can annul a decision if its content is manifestly inequitable.[30] Reasons to annul the result of an expert determination are that the expert has exceeded his authority given by the parties' agreement or that the findings of the expert must be considered as manifestly incorrect.[31] Austrian courts are silent in regard to the question whether a determination of an expert who acted in a partial way has still binding effect. Scholarly writing is inconsistent in regard of this topic. An expert determination does not lead to an enforceable title.[32] It has, however, substantial effect, and determines the legal relationship between the parties.[33]

2. The guiding principles of Austrian arbitration law

18 Arbitration in Austria is primarily based on party autonomy. Accordingly, one of the most famous Austrian scholars defined arbitration in its basic form as the pure result of the parties' right to dispose about their private laws.[34] Arbitration as method of dispute resolution is accepted by the Austrian constitution as well. There is, however, no duty stipulated by Austrian (constitutional) law to permit arbitration by the legislator. It has been advocated by Austrian scholars that such duty can possibly be deducted from the rule of law as well as from Art 6 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[35]

19 Another question of importance is whether arbitration must be considered as a part of (municipal) jurisprudence. Since an arbitral award has the same effect as a decision of a state court[36], the Austrian Supreme Court in a line of decisions ruled that arbitrators act with sovereign power.[37] In addition, the Arbitration Act 2006 grants arbitrators the right to issue interim injunctions.[38] Hence, also fostered by further constitutional

[26] *Zeiler*, Schiedsverfahren, 2nd ed., 2014, § 581 mn. 143; *OGH*, 17 August 2001, 1 Ob 300/00 z.
[27] *Hausmaninger*, in: Fasching/Konecny (eds), ZPO, 2nd ed., 2007, § 581 mn. 139.
[28] *OGH*, 13 July 2000, 8 Ob 93/00 k.
[29] *OGH*, RIS-Justiz RS0045073.
[30] *Hausmaninger*, in: Fasching/Konecny (eds), ZPO, 2nd ed., 2007, § 581 mn. 157.
[31] *Koller*, in: Liebscher/Oberhammer/Rechberger (eds), Schiedsverfahrensrecht I, 2012, mn. 3/22.
[32] *OGH*, RIS-Justiz RS0004281.
[33] *Hausmaninger*, in: Fasching/Konecny, ZPO, 2nd ed., 2007, § 581 mn. 152.
[34] *Fasching*, Schiedsgericht und Schiedsverfahren im österreichischen und internationalen Recht, 1973, 2.
[35] *Heller*, Der verfassungsrechtliche Rahmen der privaten internationalen Schiedsgerichtsbarkeit, 1996, 38.
[36] § 607 ZPO.
[37] E. g. *OGH*, 14 December 1994, 7 Ob 604/94.
[38] § 585 ZPO.

arguments, it can be corroborated that arbitration forms part of the municipal judicial system.[39]

A further principle of Austrian arbitration law is the guarantee of fair proceedings. 20
This principle is manifested several times within Austrian arbitration law. E. g. § 594(2) ZPO stipulates that parties have to be treated fairly and that they are fully granted their right to be heard. As can be seen below, Austrian state courts, in the context of annulment proceedings, advocate a very narrow view of the right to be heard.[40] Accordingly, it is discussed whether under Austrian law the guarantees of Art 6 ECHR in regard to the parties' right to be heard apply to their full extent in arbitration proceedings as well.[41] Since even the European Commission of Human Rights accepts several exceptions from the strict requirements of Art 6 ECHR in the course of state court proceedings, (at least) the same must apply in regard to arbitration proceedings.[42]

II. The arbitration agreement

As mentioned above, party autonomy is the basis of any arbitration proceedings 21
under Austrian law. Hence, the parties' must have agreed voluntarily to arbitration as their method of dispute resolution. In fact, the arbitration agreement is the most important pillar that arbitration proceedings are based on. § 581 ZPO defines what constitutes an arbitration agreement under Austrian law. According to this provision, an arbitration agreement is the agreement by the parties to submit certain or all, contractual or non-contractual, current or future disputes to an arbitral tribunal.[43] In any case, such disputes must arise out of a specified legal relationship of the parties.[44] Accordingly, an arbitration agreement that refers all disputes of the parties to arbitration – irrespective of its origin – has been found invalid.[45] *Essentialia negotii* of an arbitration agreement under Austrian law therefore are: the exact description of the parties, the exact description of the legal relationship as well as the unambiguous parties' agreement to resolve their dispute before an arbitral tribunal.[46]

The arbitration agreement may be concluded in the form of a separate agreement or 22
as a clause in a contract. As a rule of thumb, an arbitration agreement, in most cases, is concluded in the course of an arising dispute, whereas an arbitration clause normally refers to future disputes.[47] Since there are no material differences between arbitration agreements and arbitration clauses in the following the use of any of this terms includes the other as well.

It is worth to be mentioned that § 581(2) ZPO stipulates that § 581(1) ZPO – the 23
very definition of an arbitration clause under Austrian law – applies analogously to arbitration clauses established in a testament, other legal transactions that are not based on a party's agreement, or in articles of association. Whereas in Germany a broad discussion in scholarly writing took place whether arbitration clauses in testaments are valid and disputes in connection to testaments are arbitrable, Austrian literature is relatively silent in regard to these topics. One major question in this context is whether

[39] *Heller*, Der verfassungsrechtliche Rahmen der privaten internationalen Schiedsgerichtsbarkeit, 1996, 27.
[40] For an overview on recent Supreme Court decisions see *Nueber*, wbl 2013, 130.
[41] *See* e. g. by *Reiner*, ZfRV 2003, 52.
[42] *Cf. Nueber*, wbl 2013, 130 (132).
[43] § 581(1) ZPO.
[44] *Zeiler/Steindl*, Arbitration in Austria, 2nd ed., 2007, § 581 ZPO mn. 1.
[45] *Zeiler*, Schiedsverfahren, 2nd ed., 2014, § 581 mn. 4.
[46] *OGH*, RIS-Justiz RS0044991.
[47] *Koller*, in: Liebscher/Oberhammer/Rechberger (eds), Schiedsverfahrensrecht I, 2012, mn. 3/1.

an arbitration clause contained in a testament must meet the form requirements of Austrian arbitration law[48] or the form requirements for testaments stipulated by the ABGB.[49] The far dominant opinion advocated by Austrian and German scholarly writing states that the (more liberal) form requirements for testaments as stipulated by the ABGB are sufficient to incorporate a valid arbitration clause in a testament.[50] In fact, such result does not comply with the doctrine of separability[51] according to which an arbitration clause is an independent agreement standing next to the main contract. Therefore, an arbitration clause in a testament must meet the form requirements stipulated by § 583 ZPO like any other arbitration clause.[52] It is commonly accepted by Austrian scholarly writing that inheritance disputes are arbitrable.[53] However, whether or not claims to a compulsory portion of the inheritance are arbitrable is subject to discussions in scholarly writing.[54]

24 § 1008 ABGB stipulates that an agent requires a special power of attorney in order to validly conclude an arbitration agreement on behalf of another person. Austrian scholars currently discuss whether the requirements stipulated by § 1008 ABGB apply to representatives of limited liability companies as well.[55]

1. The doctrine of separability

25 In the vast majority of cases, an arbitration clause is contained in the main contract concluded between the parties. To conclude an arbitration agreement after the dispute has arisen is – although permitted by Austrian law[56] – a rare case, however, with the exception of consumer-related disputes. § 617(1) ZPO stipulates that arbitration agreements with consumers are only valid if the respective dispute has already arisen. This means that a consumer is only able to validly agree to arbitrate after the dispute has arisen.[57]

26 Unlike German[58] arbitration law and Art 16(1) UNCITRAL Model Law, no provision of Austrian law describes the relationship between the main contract and an arbitration clause included in that main contract. The fact that Austrian law is silent on this issue is owed to a line of decisions of the Austrian Supreme Court, which clarified that a defect of the main contract, in principle, does not affect an arbitration clause.[59] In the light of this line of decisions, the legislator found it superfluous to add an explicit statutory explanation for the phenomenon. As an exemption, according to decisions of the Austrian Supreme Court, an arbitration clause ends if the parties agree on the termination of the main contract or if they consensually consider the main contract void from the beginning.[60]

27 Hence, these court decisions are the basis for the application of the *doctrine of separability* in Austria. In addition, the separate nature of the arbitration agreement is further justified by the fact that it is considered as procedural agreement based on

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[48] § 583 ZPO.
[49] §§ 578 *et seq.* ABGB.
[50] E. g. *Werner*, ZEV 2011, 506; *Jud/Kogler*, GesRZ 2012, 79.
[51] *Infra* mn. 35.
[52] *Nueber*, JEV 2013, 118 (123).
[53] *Koller*, in: Liebscher/Oberhammer/Rechberger, Schiedsverfahren I, 2012, mn. 3/87.
[54] *Jud/Kogler*, GesRZ 2012, 79 (84); *Koller*, in: Liebscher/Oberhammer/Rechberger, Schiedsverfahren I, 2012, mn. 3/87.
[55] *Koller*, ecolex 2011, 878; *Trenker*, in: Nueber/Przeszlowska/Zwirchmayr (eds), Privatautonomie und ihre Grenzen im Wandel, 2015, 151 *et seq.*
[56] § 583(1) ZPO.
[57] *Nueber*, Lexis®PSL Arbitration, 7/2014.
[58] *Infra* § 10 mn. 13.
[59] *OGH*, 7 August 2007, 4 Ob 142/07 x; *Oberhammer*, Entwurf, 2002, 75.
[60] *OGH*, 21 April 2004, 9 Ob 39/04 g; *OGH*, 29 April 2003, 10 Ob 22/03 x.

procedural law.[61] Further, even in the case one party terminates the main contract unilaterally, the arbitration clause remains still in force. Thus, this arbitration clause establishes jurisdiction of an arbitral tribunal to decide about disputes arising out of the termination as well.[62]

2. The law applicable to the arbitration agreement

It must be distinguished between the law applicable to the form of the agreement and 28
the law applicable which governs the arbitration clause. In general, the parties can agree on the law governing the arbitration agreement. The Austrian Supreme Court ruled that the validity of the arbitration agreement must be assessed according to law of the country were the arbitral award was made.[63] If the seat of the arbitral tribunal is in Austria, § 583 ZPO is decisive for the formal validity of the arbitration agreement.[64] In the case the parties did not agree an applicable law to merits, the law of the arbitral tribunal's seat is decisive (*lex fori*).[65] The personal capacity to conclude an arbitration agreement must always be assessed based on the personal laws of the parties (*lex domicilii*).[66]

3. The validity of the arbitration agreement (capacity, arbitrability, form)

a) Capacity to conclude arbitration agreements. The capacity to conclude an 29
arbitration agreement is not regulated in Austrian arbitration law. Thus, it corresponds to a person's ability to enter into agreements.[67] Since an arbitration agreement is of procedural nature, for Austrian citizens their capacity to conduct proceedings is relevant (too).[68] In principle, this means that individuals above the age of eighteen are able to conclude arbitration agreements.[69] Further, any legal entity or partnership fully capable of concluding a contract can enter into an arbitration agreement.[70] According to § 611(2) an arbitral award must be set aside if a party was incapable of concluding a valid arbitration agreement.

b) Arbitrability. As a general rule, § 582(1) sets forth that all pecuniary claims 30
(*vermögensrechtliche Ansprüche*) are arbitrable.[71] An arbitration agreement relating to non-pecuniary claims is only valid if the parties of the dispute are capable to conclude a settlement regarding the matter of the dispute. Thus, in the context of international commercial arbitration the arbitrability of disputes is hardly ever an issue.[72]

In any case, § 582(2) ZPO stipulates several exemptions from the general rule set out 31
above. Accordingly, family law matters as well as all contractual claims which are wholly or partly based on the Austrian Landlord and Tenant Act (*Mietrechtsgesetz*) are not arbitrable. Furthermore, claims pursuant to the Austrian Act on Assisted Housing (*Wohnungsgemeinnützigkeitsgesetz*), which also includes disputes relating to the entry into, existence, dissolution and legal classification of such contracts, and all claims in

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[61] *Schwarz/Konrad*, The Vienna Rules, 2009, mn. 19-035.
[62] *Koller*, in: Liebscher/Oberhammer/Rechberger (eds), Schiedsverfahren I, 2012, mn. 3/188.
[63] *OGH*, 19 February 2004, 6 Ob 151/03.
[64] *Fremuth-Wolf*, in: Riegler *et al.* (eds), Arbitration Law of Austria, 2007, § 581 mn. 70.
[65] *OGH*, 26 April 2006, 7 Ob 236/05 i.
[66] *OGH*, RIS-Justiz RS0045375.
[67] *Fremuth-Wolf*, in: Riegler *et al.* (eds), Arbitration Law of Austria, 2007, § 582 mn. 3.
[68] *Zeiler*, Schiedsverfahren, 2nd ed., 2014, § 611 mn. 14.
[69] *Fremuth-Wolf*, in: Riegler *et al.* (eds), Arbitration Law of Austria, 2007, § 581 mn. 12.
[70] *Schwarz/Konrad*, The Vienna Rules, 2009, mn. 1-034.
[71] *Power*, The Austrian Arbitration Act, 2006, § 582 mn. 1.
[72] *Infra* § 10 mn. 17.

connection with cooperative apartment ownership (*wohnungseigentumsrechtliche Ansprüche*), cannot be subject to an arbitration agreement.[73] The last sentence of § 582(2) ZPO further stipulates that legal provisions in legislation other than the Austrian Arbitration Act, which prohibit certain matters to be arbitrated, remain applicable as well. Therefore, according to § 9 ASGG (*Arbeits- und Sozialgerichtsgesetz*) collective labour law and social law disputes are not arbitrable.[74] Criminal law issues, enforcement matters as well as issues of insolvency law are not arbitrable too.[75] Also, claims based on public law are not arbitrable under Austrian law.[76]

32 It is undisputed, that corporate disputes are arbitrable as well.[77] Hence, disputes regarding the (validity of) resolutions of the general assembly of an Austrian limited liability company (*GmbH*) are arbitrable.[78] Also, pursuant to KartG 2005 and Art 101 and 102 TFEU antitrust and competition law matters are arbitrable.[79] Although, in the light of a line of decisions of the European Court of Justice (ECJ) arbitral tribunals are not allowed to ask the ECJ for preliminary rulings in respect of issues of European law[80], the ECJ ruled several times that arbitral tribunals are obliged to apply European antitrust and competition law, otherwise a respective arbitral award can be set aside by municipal courts based on the violation of the (European) *ordre public*.[81] The same applies for European consumer protection law.[82] It is questionable whether arbitral tribunals are allowed to request assistance[83] from state courts in order to submit their questions of European law to the ECJ indirectly. Pursuant to the wording of the *Nordsee*-decision this seems not to be permitted.[84] Despite severe restrictions stipulated by § 617 ZPO, consumer-related disputes are considered arbitrable as well.[85] According to § 611(2)(7) ZPO, an arbitral award can be set aside when the underlying dispute lacks arbitrability.

33 **c) Form of the arbitration agreement.** § 583 ZPO provides for special form requirements for arbitration agreements.[86] Accordingly, the arbitration agreement must either be part of a document signed by the parties or must to be contained in an E-Mail, a telefax or other means of telecommunication that gives a proof of the underlying arbitration agreement.[87] If a contract that fulfils the latter form requirements refers to a document that contains an arbitration agreement and this document was made part of the contract by way of reference, an arbitration agreement is deemed to be duly established. A lack of from of the arbitration clause heals together with the filing of acknowledgement of service by one party.[88]

34 There are, however, special form requirements stipulated in regard to consumer-related disputes.[89] Arbitration agreements with consumers must be contained in a document

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[73] *Zeiler/Steindl,* Arbitration in Austria, 2nd ed., 2007, 33.
[74] *Reiner,* The new Austrian Arbitration law, 2006, § 582 remark 36.
[75] *Hausmaninger,* in: Fasching/Konecny (eds), ZPO, 2nd ed., 2007, § 582 mn. 6.
[76] *Hausmaninger,* in: Fasching/Konecny (eds), ZPO, 2nd ed., 2007, § 582 mn. 6.
[77] *Fremuth-Wolf,* in: Riegler *et al.* (eds), Arbitration Law of Austria, 2007, § 582 mn. 19.
[78] *OGH,* 19 April 2012, 6 Ob 42/12 p.
[79] *Fremuth-Wolf,* in: Riegler *et al.* (eds), Arbitration Law of Austria, 2007, § 582 mn. 13 *et seq.*
[80] ECJ Case 102/81 *Nordsee v Reederei Mond,* [1982] ECR 1095.
[81] ECJ Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV,* [1999] ECR I-3055.
[82] ECJ Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium,* [2006] ECR I-10421.
[83] § 602 ZPO.
[84] *Nueber,* ecolex 2014, 31 (35).
[85] § 617 ZPO; see in more detail *infra* mn. 34.
[86] § 583 ZPO.
[87] § 583(1) ZPO.
[88] § 583(3) ZPO.
[89] §§ 617, 618 ZPO.

personally signed by the consumer. This document must not contain any other agreements than those relating to the arbitration agreement.[90] In addition, a written legal instruction explaining the (major) differences between state court and arbitration proceedings must be provided to the consumer prior to the conclusion of the arbitration agreement.[91] Further, an arbitration agreement with a consumer must stipulate the seat of the arbitral tribunal. The arbitral tribunal is only permitted to meet in another place to conduct hearings or to take evidence, if the consumer (explicitly) agrees to or if substantial obstacles prevent the taking of evidence at the seat of the arbitral tribunal.[92] In addition, if the consumer's domicile, place of habitual residence or place of employment is neither at the time of the conclusion of the arbitration agreement nor when the disputes arises in the territory of the state where the arbitral tribunal is located, the arbitral agreement is only deemed valid if the consumer relies on it.[93]

It is worth to be mentioned that the Austrian Supreme Court recently ruled that the question whether a person is to be qualified as consumer must always be assessed according to Austrian law.[94] Moreover, in a line of decisions, the Austrian Supreme Court qualified certain types of shareholdings (which are not accompanied by entrepreneurial activities of the shareholder) of a limited liability company as consumers.[95] This jurisprudence might cause problems in regard to arbitration clauses where shareholders are involved, who according to the Supreme Court must be qualified as consumers.[96] 35

The form requirements of arbitration agreement under Austrian law must comply with Art II NYC.[97] This result further complies with the intent of the Austrian legislator when drafting the Arbitration Act 2006 to interpret national form requirements of arbitration agreements according to the NYC.[98] 36

d) Termination of the arbitration agreement. In general, the parties have the right to terminate their arbitration agreement consensually without applying any specific form requirements.[99] Only the date when the arbitral award gains legal effect is decisive for the parties whether they are (still) able to terminate the arbitration agreement by mutual consent.[100] However, an arbitral award always gains legal effect when it is delivered to the parties.[101] The Supreme Court further ruled that the implied termination of the underlying contract automatically involves the termination of the arbitration clause as well.[102] 37

It is worth to be mentioned that an arbitration agreement does not expire as soon as an arbitral award has been issued or the parties settled their dispute.[103] Also, in the case one party agrees to the commencement of proceedings before a state court despite the existence of a valid arbitration agreement between the parties, the arbitration agreement is considered (partly) terminated up to the extent a dispute has arisen.[104] 38

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[90] § 617(2) ZPO.
[91] § 617(3) ZPO.
[92] § 617(4) ZPO; *Zeiler/Steindl*, Arbitration in Austria, 2nd ed., 2007, § 617 ZPO, 92.
[93] § 617(5) ZPO; *Zeiler/Steindl*, Arbitration in Austria, 2nd ed., 2007, § 617 ZPO, 92.
[94] *OGH*, 16 December 2013, 6 Ob 43/13 m; *Liebscher/Zeiler*, ecolex 2014, 425.
[95] *Nueber*, Lexis®PSL Arbitration, 4 July 2014.
[96] *Nueber*, wbl 2014, 194.
[97] *Oberhammer*, Entwurf, 2002, 147; *Reiner*, The new Austrian Arbitration Law, 2006, § 614 remark 217.
[98] ErläutRV 1158 BlgNR 22 GP 9.
[99] *OGH*, RIS-Justiz RS0045079.
[100] *Koller*, in: Liebscher/Oberhammer/Rechberger (eds), Schiedsverfahrensrecht I, 2012, mn. 3/381.
[101] *Zeiler*, Schiedsverfahren, 2nd ed., 2014, § 607 mn. 11.
[102] *Cf. Koller*, in: Liebscher/Oberhammer/Rechberger (eds), Schiedsverfahrensrecht I, 2012, mn. 3/380.
[103] § 606(7) ZPO; *Zeiler*, Schiedsverfahren, 2nd ed., 2014, § 581 mn. 88.
[104] *Hausmaninger*, in: Fasching/Konency (eds), ZPO, 2nd ed., 2007, § 581 mn. 125.

39 In principle, arbitration agreements cannot be terminated unilaterally, unless such termination is based an important reason.[105] There are decisions of the Austrian Supreme Court that financial distress of one party qualifies as such important reason.[106] Some legal scholars advocate that the latter is also the case when a party denies or is unable to pay the advance on costs.[107]

4. The scope and the interpretation of the arbitration agreement

40 **a) Personal scope of the arbitration agreement.** In general, an arbitration clause is only valid between the respective parties of such agreement.[108] Scholars and commentators discuss whether third persons, who are not parties of that respective arbitration clause, are entitled to rely on this arbitration agreement as well. The most important constellations in this context concern questions in regard to group of companies, shareholders and managers.[109] Austrian scholarly writing in this respect is rather restrained and therefore, in line with German scholars,[110] rejects the binding effect of arbitration agreements to third persons.[111] As regards shareholders of partnerships (*Personengesellschaften*) the Austrian Supreme Court took a rather narrow view too. Accordingly, arbitration agreements with partnerships have no binding effect for their shareholders.[112]

41 However, Austrian courts as well as legal scholars advocate in favour for a binding effect of an arbitration agreement as regards successors of parties of such arbitration agreement.[113] Accordingly, arbitration agreements are effective in regard to both the singular successor as well as the universal successor of the right or legal relationship.[114] The latter also applies to universal succession in the context of the restructuring of companies.[115] Moreover, an arbitration agreement passes over to an inheritor and accordingly does not end with the death of one party.[116]

42 Further, Austrian courts accept the binding effect of arbitration clauses contained in contracts for the benefit of third parties.[117] The conclusion of such arbitration clauses in written form also fulfils the form requirements for arbitration agreements as stipulated by Austrian law.[118]

43 Whether an insolvency administrator is bound by an arbitration agreement concluded by the debtor must be assessed case by case. The insolvency administrator is still bound by the arbitration clause in regard to disputes between a party entitled to release their property from the estate and the debtor. The same applies to not yet executed synallagmatic contracts, in which the insolvency administrator enters into by virtue of law.[119] In contrast, Austrian scholars unanimously agree that the insolvency administrator is not bound by the arbitration clause in respect to insolvency claims.[120]

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[105] *Fremuth-Wolf*, in: Riegler *et al.* (eds), Arbitration Law of Austria, 2007, § 581 mn. 58.
[106] *OGH*, 4 September 1936, SZ 18/151.
[107] *Cf. Zeiler*, Schiedsverfahren, 2nd ed., 2014, § 581 mn. 131.
[108] *Koller*, in: Liebscher/Oberhammer/Rechberger (eds), Schiedsverfahrensrecht I, 2012, mn. 3/289.
[109] *Zeiler*, Schiedsverfahren, 2nd ed., 2014, § 581 mn. 104.
[110] *Infra* § 10 mn. 25.
[111] *Hausmaninger*, in: Fasching/Konecny (eds), ZPO, 2nd ed., 2007, § 581 mn. 204.
[112] *OGH*, 5 August 1999, 1 Ob 163/99 y.
[113] *Fasching*, Schiedsgericht und Schiedsverfahren, 1973, 27 *et seq.*; *OGH*, 30 March 2009, 7 Ob 266/08 f.
[114] *OGH*, 11 April 1972, 4 Ob 18/72.
[115] *Zeiler*, Schiedsverfahren, 2nd ed., 2014, § 581 mn. 107.
[116] *Koller*, in: Liebscher/Oberhammer/Rechberger (eds), Schiedsverfahrensrecht I, 2012, mn. 3/296.
[117] *OGH*, RIS-Justiz RS0053109.
[118] § 583 ZPO; *OGH*, RIS-Justiz RS0053103.
[119] *Riegler*, in: Riegler *et al.* (eds), Arbitration Law of Austria, 2007, 715.
[120] *Koller*, in: Liebscher/Oberhammer/Rechberger (eds), Schiedsverfahrensrecht I, 2012, mn. 3/308.

b) **Substantive scope of the arbitration agreement.** In order to interpret an arbitration agreement, the same rules as in regard to contracts under civil law apply.[121] For the interpretation of an arbitration clause one has to consider the party's manifest intention in the context of the conclusion of the arbitration agreement as understood by a *bona fide* third person. Thus, the four corners of the document are the limit for the interpretation of an arbitration agreement.[122] 44

In general, Austrian Courts can be considered arbitration-friendly when interpreting arbitration clauses.[123] As a rule of thumb, the Austrian Supreme Court, in a line of decisions, ruled that if the wording of an arbitration clause is ambiguous, such interpretation result, which renders the arbitration agreement valid must be preferred.[124] Recently, the Austrian Supreme Court confirmed the latter ruling in regard to an arbitration clause, which competed with a jurisdiction clause in the same contract.[125] The Supreme Court decided that an arbitration clause always prevails over a jurisdiction clause, since it does not make the jurisdiction redundant. The latter still has its scope of application, e. g. defining the state court which are competent for ancillary jurisdiction attached to arbitration (appointment of arbitrators etc.).[126] 45

In a line of decisions the Austrian Supreme Court ruled that arbitration clauses contained in statutes of a company govern all disputes related to the corporate relationship. This includes disputes that evolve in connection with the termination of the company as well, since such disputes also "arose out of the corporate relationship".[127] 46

c) **Pathological arbitration clauses.** According to decisions of Austrian courts and scholars some minimum requirements of an arbitration agreement have to be fulfilled in order for the arbitration agreement to be deemed valid.[128] Hence, (at least) the *essentialia negotii* of an arbitration agreement must be sufficiently determined.[129] 47

It is necessary that both the underlying legal relationship (i. e. the contract) the arbitration clause is based on and the competent arbitral tribunal are clearly determined by the arbitration agreement. However, according to the Austrian Supreme court determinability of the arbitration agreement based on the underlying contract suffices for the arbitration agreement to be deemed valid under Austrian law.[130] Therefore, the Austrian Supreme Court deemed even an arbitration clause valid, which provided for jurisdiction of two (or more) arbitral institutions.[131] 48

As already stated above[132], Austrian courts tend to interpret (pathological) arbitration agreements in such way that they remain effective.[133] Accordingly, the Austrian Supreme Court considered an arbitration agreement valid, although it did not refer to an existing arbitral institution; in that case the Supreme Court interpreted the arbitra- 49

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[121] *Zeiler*, Schiedsverfahren, 2nd ed., 2014, § 581 mns 53 *et seq.*

[122] *OGH*, 7 May 2013, 2 Ob 65/13 t; *Wilske/Michou/Fox/Zeiler*, What's new in European Arbitration, DRJ 68/4, 105 (2013).

[123] *OGH*, RIS-Justiz RS0045337.

[124] *OGH*, 19 January 2003, 7 Ob 310/02 t.

[125] *OGH*, 7 May 2013, 2 Ob 65/13 t.

[126] *Wilske/Michou/Fox/Zeiler*, What's new in European Arbitration, DRJ 68/4, 105(2013).

[127] *OGH*, 8 May 2013, 6 Ob 47/12 z.

[128] *OGH*, 3 September 1986, 1 Ob 545/86.

[129] *See* for the *essentialia negotii* of an arbitration agreement *supra* mn. 30; *Hausmaninger*, in: Fasching/Konecny (eds), ZPO, 2nd ed., 2007, § 581 mn. 32.

[130] *Zeiler*, Schiedsverfahren, 2nd ed., 2014, § 581 mn. 21 with further references.

[131] *OGH*, 11 July 1990, 3 Ob 79/90; for the situation that a contract contains both a forum selection and an arbitration see *supra* mn. 45.

[132] *See* for the interpretation of an arbitration agreement *supra* mn. 62.

[133] *See* further *Hausmaninger*, in: Fasching/Konecny (eds), ZPO, 2nd ed., 2007, § 581 mns 191 *et seq.*; *Dorda*, ecolex 2011, 908; *Zeiler*, Schiedsverfahren, 2nd ed., 2014, § 581 mn. 21.

tion clause in favour of the jurisdiction of the arbitral institution established at the chamber of commerce at the seat of the arbitral tribunal.[134]

50 According to § 611(2)(1) ZPO an arbitral award based on an arbitration agreement that does not fulfil the necessary prerequisites to be valid, can be challenged before a state court.

5. The effect of the arbitration agreement and *Kompetenz-Kompetenz*

51 A claim submitted before a state court always has to be dismissed if a valid arbitration agreement exists between the parties. The latter does not apply if the respondent before entering the merits of the case in state court litigation refrains from objecting to this effect. Also, if the state court establishes that the arbitration agreement does not exist or is incapable to be performed, the state court commences its proceedings. Even in that case, however, parallel arbitration proceedings are permitted to commence or continue in the same matter. The arbitral tribunal can even render an award on the merits of the case. Further, if the arbitration proceedings are already pending when one of the parties commences litigation the action brought before a state court must be dismissed by the court.[135]

52 After an arbitral tribunal denied jurisdiction over a matter on the basis that no (valid) arbitration agreement exists, a state court is prohibited to dismiss a claim in regard to that matter.[136] As soon as a claim was brought before a state court, the right to set aside an arbitral award that denies jurisdiction of the arbitral tribunal ceases. If a claim is submitted immediately after its dismissal by a state court due to the jurisdiction of an arbitral tribunal (and *vice versa*) to the competent venue, § 584(4) ZPO stipulates that the proceedings are deemed to be duly pursued. This provision solved years of uncertainty whether or not a claim becomes time-barred when brought before the incompetent venue.[137]

53 § 611(2)(1) ZPO provides that an arbitral award must be set aside by the competent state court if the arbitral tribunal lacked jurisdiction over the respective matter.

54 **a) Enforcing arbitration clauses and *Kompetenz-Kompetenz*.** § 578 ZPO stipulates that state courts are only allowed to intervene where explicitly provided by Austrian arbitration law. Therefore, it is clear under Austrian law that a declaratory court decision on the validity of an arbitration clause or the jurisdiction of an arbitral tribunal are not permitted. Accordingly, anti-suit injunctions of courts are as well inadmissible in Austria.[138]

55 The principle of *Kompetenz-Kompetenz* is explicitly stipulated by § 592(1) ZPO. According to this provision an arbitral tribunal is entitled to render an award on its own jurisdiction. This award can be separately challenged before a state court.[139] Alternatively, the arbitral tribunal's decision on jurisdiction can be made together with the ruling on the merits of the case. Austrian arbitration law is silent to the question whether an arbitral tribunal has to deny its jurisdiction only upon objection of a party or if it must do so *ex officio* under certain circumstances.[140] Some legal scholars argue in favour of such duty in regard to a lack of arbitrability and a violation of public policy.[141]

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[134] *OGH*, RIS-Justiz RS0045026.
[135] § 584(3) ZPO.
[136] § 584(2) ZPO).
[137] *Reiner*, Staatliche Justiz und Schiedsgerichtsbarkeit: Konkurrenz oder Kooperation?, Schriftenreihe niederösterreichische juristische Gesellschaft 2008/103, 13.
[138] *Zeiler/Steindl*, Arbitration in Austria, 2nd ed., 2007, § 584 mn. 6.
[139] *Fremuth-Wolf*, in: Riegler *et al.* (eds), Arbitration Law of Austria, 2007, § 592 mn. 4.
[140] *Zeiler*, Schiedsverfahren, 2nd ed., 2014, § 592 mn. 10 a.
[141] *Fremuth-Wolf*, in: Riegler *et al.* (eds), Arbitration Law of Austria, 2007, § 592 mn. 22.

It is not clear under Austrian law how to deal with a counterclaim raised in the course of state court proceedings, if this counterclaim is subject to an arbitration agreement. The Austrian Supreme Court decided that it is allowed to raise such counterclaim in state court proceedings.[142] However, this decision was primarily based on scholarly writing[143] to the law in force prior to the Arbitration Act 2006. Recently, it had been advocated that this result is not in line with Austrian arbitration law. Therefore, a state court must deny its jurisdiction over the counterclaim.[144] 56

Even if a claim to set aside an arbitral award based on the lack of jurisdiction of the arbitral tribunal is pending before a state court, the arbitral tribunal has the right to continue its proceedings and also may issue an arbitral award.[145] 57

b) **Preclusion of jurisdictional defences.** § 592(2) ZPO stipulates a strict time limit to raise objections against the jurisdiction of an arbitral tribunal. Accordingly, a plea that the arbitral tribunal has no jurisdiction must be raised no later than together with the first submission on the merits of the case. A lack of jurisdiction is cured if an objection is not raised in due time.[146] Participation in the nomination of an arbitrator is not deemed to be a waiver of jurisdictional objections. The latter applies as well if the party appointed its arbitrator directly. 58

If a party objects to the excess of the arbitral tribunal's authority, such plea must be submitted as soon as the respective matter is raised in the course of the arbitral proceedings. A later objection is only admissible if the arbitral tribunal considers the delay sufficiently excused. The preclusion of the objection to the jurisdiction of an arbitral tribunal continues to be effective also in post-award stages, which means that domestic courts in later proceedings to set aside the arbitral award are bound by the so established jurisdiction of the arbitral tribunal.[147] 59

c) **Binding effect of state court decisions on jurisdiction of the arbitral tribunal.** In the case an arbitral tribunal denied its jurisdiction a state court is prohibited to reject a claim in the respective matter. If an arbitral tribunal decides in favour of its decisions a state court must reject a claim concerning a dispute that falls within the scope of the arbitration clause.[148] 60

If a party objects to the jurisdiction of an arbitral tribunal in due time the decision of the state court on the jurisdiction of the arbitral tribunal has binding effect for the arbitral tribunal.[149] However, if the arbitral tribunal's decision on its jurisdiction nevertheless contradicts the court decision, the arbitral tribunal's decision may violate Austrian public policy and can be challenged pursuant to § 611(2)(8) ZPO.[150] 61

III. The arbitral tribunal and the conduct of the arbitral proceedings

Arbitration agreements ordinarily address several issues: the agreement to arbitrate, the scope of dispute submitted to arbitration, the seat of the arbitration, the language of 62

[142] *OGH*, RIS-Justiz RS0033744.
[143] *Fasching*, Schiedsgericht und Schiedsverfahren, 1973, 34.
[144] *Rechberger*, in: Liebscher/Oberhammer/Rechberger (eds), Schiedsverfahrensrecht I, 2012, mn. 6/25.
[145] *Rechberger/Melis*, in: Rechberger, ZPO, 4th ed., 2014, § 592 mn. 3.
[146] *Hausmaninger*, in: Fasching/Konecny (eds), ZPO, 2nd ed., 2007, § 592 mn. 40; *Fremuth-Wolf*, in: Riegler *et al.* (eds), Arbitration Law of Austria, 2007, § 592 mn. 17.
[147] *Fremuth-Wolf*, in: Riegler *et al.* (eds), Arbitration Law of Austria, 2007, § 592 mn. 24.
[148] *Rechberger*, in: Liebscher/Oberhammer/Rechberger, Schiedsverfahren I, 2012, mn. 6/74.
[149] E. g. *Rechberger*, in: Liebscher/Oberhammer/Rechberger, Schiedsverfahren I, 2012, mn. 6/75.
[150] *Power*, The Austrian Arbitration Act, 2006, § 592 mn. 1.

the arbitration, ad hoc or institutional arbitration and a choice of law clause.[151] As already outlined above, the seat of the arbitral tribunal determines the procedural rules to be applied in the arbitration proceedings (*lex arbitri*) and perhaps – in absence of a choice of law clause – the law applicable to the merits of the case (*lex fori*).

1. The arbitral tribunal, impartiality and independence of the arbitrator

63 According to § 586 ZPO the parties are free to determine the number of arbitrators. If the parties agreed on an even number of arbitrators, the (party-appointed) arbitrators have to nominate an obligational person that will act as the chairman. In the absence of an agreement by the parties, the number of arbitrators is three. Further, the parties are free to agree on the procedure to appoint the arbitrators.[152] In absence of such agreement, the following procedure applies:[153] If the parties are unable to agree on a sole arbitrator within four weeks of receipt of a respective party's written request to do so by the other party, the sole arbitrator is appointed upon request of a party by the competent court. Where the parties agreed to a tribunal consisting of three arbitrators, each party must appoint one arbitrator. The two arbitrators appoint the chairman of the tribunal. In addition, in an arbitration with more than three arbitrators, each party has to appoint an equal number of arbitrators. Finally, these arbitrators appoint the chairman of the tribunal. It is important to know that a party is bound by its nomination of an arbitrator when the written notification of the appointment has been successfully received by the other party.

64 The court requested to appoint an arbitrator must consider any necessary qualifications of the arbitrator as stipulated by a party agreement. The decision to appoint an arbitrator is subject to no appeal.

65 The parties conclude a contract with the appointed arbitrator, namely a contract for work and services.[154] This contract is regularly concluded against payment and if not this must be explicitly stated in the contract. The Austrian Supreme Court recently clarified that in institutional arbitration proceedings the arbitrator has no contractual relationship with the arbitral institution.[155] However, the parties and the arbitral institution are bound by a service contract with the purpose to organize the arbitration proceedings.[156]

66 Since the arbitrator is party of a contract for work and services with the party that appointed him, he has a claim for remuneration of his services. If there exists no further agreement, remuneration of the arbitrator shall be appropriate.[157] The arbitrator's claim for his fee arises together with the termination of the proceedings or at any other point of time if agreed so by the parties.[158] The arbitrator even has a claim for remuneration after the beginning of the arbitration proceedings if it turns out that the arbitration agreement is invalid or other defects of the arbitral proceedings emerge.[159] An arbitrator who is in delay with the fulfilment of his obligations can be held liable by the parties for any damage caused by this delay.[160]

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[151] *Born*, International Arbitration: Law and Practice, 2012, 35.
[152] § 587 ZPO.
[153] § 587(2)(2)-(5) ZPO.
[154] *OGH*, RIS-Justiz RS0021668.
[155] *OGH*, 18 September 2012, 4 Ob 30/12 h.
[156] *OGH*, 18 September 2012, 4 Ob 30/12h.
[157] § 1152 ABGB.
[158] *OGH*, 17 February 2014, 4 Ob 197/13 v.
[159] *OGH*, 17 February 2014, 4 Ob 197/13 v.
[160] § 594(4) ZPO.

a) **Duty to disclose.** Every appointed arbitrator must disclose all circumstances likely to give rise to doubt as to his impartiality or independence or which contradict the parties' agreement.[161] The same applies to circumstances that emerge in the course of the arbitral proceedings. If the doubts as to the impartiality or independence are justified the arbitrator can be challenged by a party before the arbitral tribunal and subsequently before the competent state court. However, a party can challenge an arbitrator he appointed only based on such circumstances that the party becomes aware after the appointment. 67

b) **Grounds for challenge.** As mentioned already above, an arbitrator can only be challenged if circumstances give rise to justified doubts as to the impartiality or independence or if he does not fulfil the requirements pursuant to a party's agreement.[162] Accordingly, an arbitrator can only be successfully challenged on the basis of justified doubts as to the impartiality or independence of the arbitrator. This lack of impartiality or independence must be of such nature that in state court proceedings the respective judge would be excluded by law.[163] 68

In order to assess whether circumstances can give rise to justified doubts as to the impartiality and independence of the arbitrator even Austrian state courts make reference to the *IBA Guidelines on Conflicts of Interest in International Commercial Arbitration* as practical guideline to establish the duty of arbitrators to disclose certain matters.[164] This has recently been clarified by the Austrian Supreme Court. In that case, the Supreme Court expressly referred to the Guidelines in its decision.[165] According to a line of decisions of the Supreme Court, an arbitrator can only be challenged by a party as long as the arbitral proceedings are still ongoing.[166] A subsequent arbitral award can only be challenged if it violates Austrian public policy. In principle, a challenged arbitrator can only be held liable if the respective award was subsequently successfully annulled.[167] 69

c) **Procedural aspects and preclusion of grounds for challenge.** According to § 589(1) ZPO, the parties are free to agree on a procedure to challenge an arbitrator. In the absence of such agreement, the party who challenges the arbitrator must do so within a time limit of four weeks after it became aware of the circumstances that give rise to doubt as to the impartiality or independence of the arbitrator.[168] The reasons to challenge an arbitrator must be submitted by the party to the arbitral tribunal in written form. If the arbitral tribunal dismisses the challenge, such challenge can be brought before the competent state court.[169] 70

The arbitral tribunal is entitled to continue its proceedings and even may render an award while the challenge is pending before a state court.[170] However, the arbitral tribunal may be cautious in this respect since an arbitral award based on the decision of an arbitral tribunal in which a successfully challenged arbitrator participated can subsequently be set aside. 71

d) **Failure or impossibility to act.** If an arbitrator is either unable to comply with his duties or fails to comply with them without undue delay and does not withdraw from 72

[161] *Zeiler/Steindl*, Arbitration in Austria, 2nd ed., 2007, § 588 mn. 46.
[162] § 588(2) ZPO.
[163] *See* further on the grounds to challenge an arbitrator *infra*, § 10 mn. 47.
[164] *OGH*, 17 June 2013, 2 Ob 112/12 b = *Wilske/Michou/Zeiler*, (2013) 68(3) Disp. Res. J. 96.
[165] *OGH*, 17 June 2013, 2 Ob 112/12 b = *Wilske/Michou/Zeiler*, (2013) 68(3) Disp. Res. J. 96.
[166] *OGH*, RIS-Justiz RS0126434; *OGH*, 17 February 2014, 4 Ob 197/13 v.
[167] *OGH*, RIS-Justiz RS0119996.
[168] § 589(2) ZPO.
[169] § 589(3) ZPO.
[170] *Platte*, in: Riegler *et al.* (eds), Arbitration Law of Austria, 2007, § 589 mns 24 et seq.

office, each party can request the court to decide on the termination of the arbitrator's mandate. The respective decision of the state court is final and binding.[171] According to § 591 ZPO the parties are entitled to appoint a substitute arbitrator. If the parties agree, the newly constituted tribunal can continue the proceedings on the basis of the outcome up to that point in time.

2. The arbitral proceedings

73 Like in many other jurisdiction the conduct of the arbitral proceedings is mainly subject to the parties' agreement.[172] However, the parties must comply with the mandatory rules of Austrian law. Where Austrian mandatory law is silent and the parties' agreement does not provide a regulation, it is in the discretion of the arbitral tribunal how to further proceed.

74 The parties can choose in which language the arbitral proceedings are conducted.[173] If they parties do not make a respective choice it is in the discretion of the arbitral tribunal to determine the language of the proceedings. Further, the parties can be represented in the proceedings by any person they want to choose. The parties cannot be precluded from this right to be represented by a person of their choice.[174]

75 **a) The request for arbitration, statements of claim and defence, default.** Austrian Arbitration law does not expressly stipulate minimum requirements for a request for arbitration to be valid. However, § 587(4) ZPO stipulates that the request to appoint an arbitrator must contain both the relief sought in the arbitration and the reference to the underlying arbitration agreement. In practice, the appointment of an arbitrator will be submitted together with the statement of claim and by doing so the minimum requirements for initiation of an arbitration are fulfilled.[175]

76 § 597 ZPO stipulates the minimum content of a statement of claim as well as a statement of defence. A statement of claim or statement of defence must be submitted in compliance with the time limit set by the parties or the arbitral tribunal. The Claimant in his statement of claim has to determine the relief sought as well as all the facts supporting its claim. The Respondent in return has to reply to the claim in due time. Further, the parties are free to present any evidence they consider to be relevant or indicate further evidence they intend to rely on. If the Claimant fails to comply with these minimum requirements, the arbitral tribunal according to §§ 600 and 608(2) ZPO must terminate the proceedings, whereas if the Respondent fails to submit a statement in reply the arbitral tribunal must continue the proceedings.[176] The arbitral tribunal must not take Claimant's argument as true only because of the Respondent's failure to act.

77 The Vienna Rules provide for more detailed information to be contained in a statement of claim. Accordingly, a statement of claim pursuant to the Vienna Rules must contain information about the parties, a statement of the facts and circumstances, particulars regarding the arbitrators as well as a request for relief.[177]

78 **b) Equality of arms, fair trial principle and the right to be heard.** § 594(2) ZPO stipulates that the parties have to be treated fairly and that every party must be granted the right to be heard. If the parties are deprived from their right to be heard they can file a claim before the competent state court in order for the award to be set aside. The term

[171] *Rechberger/Melis,* in: Rechberger (ed.), ZPO, 4th ed., 2014, § 590 mn. 2.
[172] § 594(1) ZPO.
[173] § 596 ZPO.
[174] § 594(3) ZPO.
[175] *Zeiler,* Schiedsverfahren, 2nd ed., 2014, § 597 mn. 1 a.
[176] *Platte,* in: Riegler *et al.* (eds), Arbitration Law of Austria, 2007, § 597 mn. 2.
[177] *Rechberger/Pitkowitz,* in: Handbook Vienna Rules, 2014, Article 7 mn. 6.

"*treated fairly*" used in § 594(2) ZPO has the same meaning as in article 6 ECHR.[178] However, a line of decisions of the Supreme Court considers every arbitration agreement as partial waiver of the parties' right to be heard according to the ECHR.[179]

A party must have the right to present all facts it deems to be relevant to properly present its case to the arbitral tribunal as well as to participate in the taking of evidence.[180] § 598 ZPO stipulates that the parties have the right to apply for an oral hearing at an appropriate stage of the proceedings. Recently, the Austrian Supreme Court ruled that the omission of an oral hearing forms a ground to set aside the arbitral award.[181] In general, the Austrian Supreme Court, in a line of decisions, takes a very narrow view in regard to setting aside an arbitral award based on a violation of the right to be heard. Accordingly, the right to be heard is only violated if a party, at all stages of the proceedings, is completely deprived from any possibility to argue its case.[182] This line of decisions dates back to the beginning of the 20th century and has been uphold until yet. If the right to be heard has been violated an arbitral award can be set aside pursuant to § 611(2)(2) ZPO. In the case such violation of the right to be heard has influence on the result of the proceedings, § 611(2)(8) ZPO (violation of the Austrian public policy) might apply as well.[183] 79

c) **Confidentiality.** The arbitral proceedings and the oral hearings are not public. As to a confidentiality obligation of the parties no enforceable and sanctionable confidentiality duty will be established by virtue of law.[184] Accordingly, the parties must include specific confidentiality obligations in the arbitration agreement. However, party representatives (e. g. attorneys at law) will be regularly bound by their professional duties of confidentiality.[185] 80

d) **The arbitral award.** The arbitral award must be rendered in written form.[186] If the parties have not agreed otherwise the law requires a reasoned award.[187] There is no provision on how detailed the reasoning has to be. However, at least under the Vienna Rules it is recommended that an award should cover certain essential points.[188] The award has to be signed by the arbitrator, in arbitration proceedings with more than one arbitrator the signature of the majority of the arbitrators suffice. In such case the award must note the reason why the signatures of certain arbitrators are missing. 81

In addition, an arbitral award must state the date of issuance as well as the seat of the arbitral tribunal as determined according to § 595(1) ZPO.[189] It is advocated by Austrian Scholars that an arbitral award under Austrian law must also meet the minimum contents requirements for decision of state courts pursuant to § 417(1) ZPO.[190] Accordingly, an award must at least contain the names of the members of the arbitral tribunal, the names of the parties as well as the *dictum*, which means that the 82

[178] *Oberhammer*, Entwurf, 2002, 92; *Platte*, in: Riegler *et al.* (eds), Arbitration Law of Austria, 2007, § 594 mn. 15.
[179] *OGH*, RIS-Justiz RS0117294; *OGH*, 1 April 2008, 5 Ob 272/07 x.
[180] *OGH*, 6 September 1990, 6 Ob 572/90 = ecolex 1991, 86.
[181] *OGH*, 30 June 2010, 7 Ob 111/10 i.
[182] *OGH*, RIS-Justiz RS00445092; *OGH*, 27 October 1926, ZBl 1927/60; *OGH*, 20 November 1934, Rsp 1935/17/10, 11.
[183] *Zeiler*, Schiedsverfahren, 2nd ed., 2014, § 594 mn. 24; *Czernich*, JBl 2014, 295.
[184] *Fremuth-Wolf*, in: Riegler *et al.* (eds), Arbitration Law of Austria, 2007, 671.
[185] § 9(2) RAO (*Rechtsanwaltsordnung*).
[186] § 606(1) ZPO.
[187] § 606(2) ZPO.
[188] *Hauser*, in: Handbook Vienna Rules, 2014, Article 36 mns 5 *et seq.*
[189] *Supra* mn. 14.
[190] *Riegler*, in: Riegler *et al.* (eds), Arbitration Law of Austria, 2007, § 606 mn. 22.

award must clearly determine a party's duty to perform.[191] A copy of the award signed by the arbitrators must be delivered to each of the parties. Upon request of a party the chairman or, in case of his incapacity, another member of the arbitral tribunal must confirm on one copy of the award its finality and enforceability.[192]

83 If an award lacks the following prerequisites it is deemed non-existing and therefore cannot be subject to a set-aside claim (*Nichtschiedsspruch*):[193] the award lacks of the written form, the award has been rendered by persons who were not appointed as arbitrators according to §§ 587–591 ZPO[194] or no request for arbitration[195] has been submitted by any of the parties. § 612 ZPO provides for the right to apply for determination before the competent state court whether an arbitral award exists or not. By contrast, if the arbitral tribunal has just exceeded its power to decide, the underlying award can be challenged before a state court.[196]

84 § 605 ZPO provides for the opportunity of the arbitral tribunal to render an award by consent. Accordingly, the arbitral tribunal may record a parties' settlement during the arbitral proceedings upon request of the parties as award by consent, provided that the content of the settlement does not violate Austrian public policy.[197]

85 **e) Termination of the arbitration without an award.** According to § 608(2) ZPO the arbitral tribunal has the right to terminate the arbitral proceedings, if the Claimant fails to file a statement of claim, the Claimant withdraws its claim, the parties agree on the termination of the proceedings and communicate this to the tribunal or the continuation of the proceedings has become impossible for the arbitral tribunal due to the conduct of the parties (e. g. non-participation).[198]

86 **f) The costs of the arbitration.** Pursuant to § 609(4) ZPO the arbitral tribunal has to render its decision on costs in form of an award either in the award on the merits or in a separate award. The order for reimbursement of costs may include all reasonable costs for adequate enforcement or defence.[199] Even if the arbitral tribunal decides that it has no jurisdiction for the dispute due to a non-existent arbitration agreement, it can render an award on costs upon request of the Respondent in order to establish the Claimant's obligation to reimburse the costs of the proceedings.[200] Further, the arbitral tribunal, when deciding about the reimbursement of costs, shall simultaneously determine the amount of cost to be reimbursed to the extent that it is already possible.[201] The provision on the allocation of costs is not of mandatory nature and can therefore be derogated by an agreement of the parties or by reference to a set of arbitration rules.[202] An award on costs can be challenged separately before the competent state court.[203]

3. Evidence, discovery, disclosure

87 § 599 ZPO governs the procedure of taking evidence in arbitral proceedings. As a rule of thumb, the taking of evidence is in the discretion of the arbitral tribunal. Accordingly,

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[191] *Riegler,* in: Riegler *et al.* (eds), Arbitration Law of Austria, 2007, § 606 mn. 22.
[192] § 606(6) ZPO.
[193] *Rechberger,* in: Rechberger, ZPO, 4th ed., 2014, § 606 mn. 2.
[194] *Supra* mns 81–84.
[195] No statement of claim under Austrian Law.
[196] *Zeiler,* Schiedsverfahren, 2nd ed., 2014, § 606 mn. 19.
[197] *Zeiler,* Austria, in: International Bar Association, Arbitration Guide, 2014, 13.
[198] *Zeiler/Steindl,* Arbitration in Austria, 2nd ed., 2007, § 608 ZPO mn. 76; *infra,* § 10 mn. 62.
[199] § 609(1) ZPO.
[200] § 609(2) ZPO; *Zeiler/Steindl,* Arbitration in Austria, 2nd ed., 2007, § 609 ZPO mn. 78.
[201] § 609(3) ZPO.
[202] *Power,* The Austrian Arbitration Act, 2006, § 609 mn. 2.
[203] *Hausmaninger,* in: Fasching/Konecny (eds), ZPO, 2nd ed., 2007, § 609 mn. 89.

the arbitral tribunal decides on the admissibility of the taking of evidence as well.[204] This rule builds a mandatory rule of law which the parties cannot deviate from by agreement.[205]

In order to avoid a violation of the parties' right to be heard Austrian courts have elaborated some minimum requirements regarding the taking of evidence by an arbitral tribunal. Hence, an arbitrator has to listen to the parties directly.[206] Further, the examination of witnesses can be conducted by just one member of the arbitral tribunal.[207] The principle of immediacy that applies in state court proceedings (§ 276(1) ZPO) does not apply in arbitral proceedings.[208] Accordingly, it is subject to a parties' agreement or in absence of such in the discretion of the arbitral tribunal to accept written witness statements.[209] 88

In practice, the proceedings to take evidence are mostly governed by the parties' agreement or procedural orders of the arbitral tribunal. In this context, the arbitral tribunal often refers to the IBA Rules on the Taking of Evidence in International Arbitration.[210] If an arbitral tribunal violates the above obligations this might lead to the award being set aside pursuant to § 611(2) no 2 ZPO.[211] 89

Whether a so-called "discovery" and "disclosure" method of taking evidence is permitted under Austrian law is difficult to say. Austrian arbitration law does not expressly govern on this issue and leaves the procedure of taking evidence to a parties' agreement. In absence of such agreement it is always the arbitral tribunal that decides whether "discovery" or "disclosure" methods may be applied in the proceedings.[212] 90

4. The law governing the dispute and *lois de police*

§ 603 ZPO is the core provision in regard to the law applicable to the dispute: The arbitral tribunal has to decide the dispute according to the *rules of law* that the parties have chosen. If a choice of law clause refers to the legal system of a state such referral is deemed to be a choice of the substantive law of this state not including the private international law (conflict of law rules) of that state. Of course, the parties are free to agree on the application on the conflict of law rules of a state as well. 91

In the absence of such agreement, the arbitral tribunal is free to apply the *laws of a state* it considers appropriate. The principle of the closest connection is not explicitly stipulated by Austrian arbitration law. However, the principle of the closest connection is broadly accepted in international arbitration and therefore is in many cases also applied by an arbitral tribunal with its seat in Austria.[213] 92

§ 603(1) and (2) ZPO provide for a precise distinction regarding the applicable law: In absence of a parties' agreement, the arbitral tribunal can only apply the laws of a state. Only if the parties agree on the application of so called rules of law, the arbitral tribunal is entitled to apply other provisions than the laws of a state.[214] 93

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[204] *Platte*, in: Riegler *et al* (eds), Arbitration Law of Austria, 2007, § 599 mn. 2.
[205] *Rechberger/Melis*, in: Rechberger (ed.), ZPO, 4th ed., 2014, § 599 mn. 1.
[206] *OGH*, 3 May 1899, GlUNF 603, printed in *Neuteufel*, Schiedsgerichtliche Entscheidungen 1898–1998, 2000, Decision No. 4, 7.
[207] *OGH*, RIS-Justiz RS0045359.
[208] *Schwarz/Konrad*, The Vienna Rules, 2009, mn. 20.201.
[209] *Kröllensberger*, in: Schumacher (ed.), Beweiserhebung im Schiedsverfahren, 2011, mn. 389.
[210] *Welser*, in: Liber Amicorum 50 Jahre ZfRV, 2013, 239 (245).
[211] *Platte*, in: Riegler *et al.* (eds), Arbitration Law of Austria, 2007, § 599 mn. 17.
[212] *Schumacher*, Urkundenbeweis, in: Schumacher (ed.), Beweiserhebung im Schiedsverfahren, 2011, 74.
[213] *Nueber*, Transnationales Handelsrecht, 2013, 63.
[214] *Zeiler*, Schiedsverfahren, 2nd ed., 2014, § 603 mn. 15.

94 According to most of the Austrian scholars this gives the parties the right to agree on the application of the *lex mercatoria* or the UNIDROIT Principles of International Commercial Contracts.[215] Some scholars even advocated that an application of the *lex mercatoria* without the parties' consent forms no ground to challenge the respective arbitral award and primarily based their view on the famous decision of the Austrian Supreme Court in the case *Noroslor v. Pabalk*.[216] This view does not correspond to the new legislation implemented by the Arbitration Act 2006, according to which the parties must agree on the application of so called rules of law.[217]

95 § 603(3) ZPO gives the arbitral tribunal the right to decide *ex aequo and bono* if the parties have expressly authorized it to do so. Although at some point similar, decisions based on the lex mercatoria must be precisely differentiated from those made *ex aequo and bono*.[218]

96 **a) Choice of law and domestic cases.** Whether there are less restrictions regarding the choice of law in arbitration proceedings is subject to discussion by Austrian scholars. It has been advocated that only such provisions of Austrian law cannot be derogated by party agreement, which are part of Austrian public policy.[219] Accordingly, the parties can deviate from mere mandatory provisions of Austrian law.[220]

97 **b) Choice of law and *lois de police*.** It is questionable whether mandatory provisions of third countries must be applied by the arbitral tribunal. However, the following general rule has been established in order for such mandatory rules to be applied in arbitrations seated in Austria: a close link to the dispute must be existing and the values protected by the foreign state's mandatory provisions must at least be compatible with the values protected by the forum state.[221] Whether the parties can deviate from mandatory provisions of third countries by agreement is subject to discussions in scholarly writing. It has been advocated that the parties cannot derogate mandatory provisions of third countries which qualify as part of the public policy of the forum state.[222]

5. Interim relief in arbitration

98 **a) Interim relief before state courts.** § 585 ZPO stipulates that the existence of an arbitration agreement does not prohibit a party in the course of arbitration proceedings to request a preliminary or protective measure from a state court. In addition, § 577(2) ZPO stipulates that § 585 ZPO is as well applicable if the seat of the arbitral tribunal is located outside of Austria. § 585 ZPO is a mandatory rule of Austrian law and is therefore not subject to an agreement by the parties.[223] The district court where the opponent of the endangered party has its seat, domicile or habitual residence has jurisdiction to order an interim measure.[224] In general, if one of those links is fulfilled Austrian courts are competent to order interim or protective measures.[225] However, the

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[215] *Hausmaninger*, in: Fasching/Konecny (eds), ZPO, 2nd ed., 2007, § 603 mn. 48.

[216] *OGH*, 18 November 1982, 8 Ob 520/82; *Von Hoffmann*, IPRax 1982, 107; *Kappus*, Lex Mercatoria in Europa und Wiener Kaufrechtskonvention in Europa 1980, 1990, 97.

[217] *Nueber*, Transnationales Handelsrecht, 2013, 99.

[218] *Nueber*, Transnationales Handelsrecht, 2013, 93 *et seq.*

[219] *Hausmaninger*, in: Fasching/Konecny (eds), ZPO, 2nd ed., 2007, § 603 mn. 54.

[220] *Verschraegen*, in: Rummel (ed.), ABGB, 3rd ed., 2000, § 11 IPRG mn. 1.

[221] *Siwy*, in: Klausegger *et al* (eds), Austrian Yearbook on International Arbitration, 2012, 165 (169).

[222] *Beulker*, Die Eingriffsnormenproblematik in internationalen Schiedsverfahren, 2005, 246.

[223] § 593(4) ZPO; *Zeiler*, Schiedsverfahren, 2nd ed., 2014, § 585 mn. 4 a.

[224] *Siwy/Beisteiner*, in: Klausegger *et al.* (eds), Austrian Yearbook on International Arbitration, 2011, 275 (276); *Zeiler*, Schiedsverfahren, 2nd ed., 2014, § 585 mn. 12.

[225] *Zeiler*, in: Liebscher/Oberhammer/Rechberger, Schiedsverfahren I, 2012, mn. 7/24.

mere agreement to arbitrate in Austria does not establish jurisdiction of Austrian courts for interim or protective measures.[226]

b) **Interim relief before the arbitral tribunal.** § 593 ZPO provides for the power of the arbitral tribunal to order, upon request of a party, such interim or protective measure it deems necessary to secure the enforcement of the claim. Before its decision the arbitral tribunal must first hear the opposing party. Also, the tribunal can require any party to provide appropriate security in connection with the respective measures. According to § 593(2) ZPO interim measures must be ordered in writing. A signed copy must be delivered to the parties. Pursuant to § 593(3) ZPO, upon request of a party, an interim measure of an arbitral tribunal can be enforced by the competent Austrian district court. The court has to hear the respondent prior to the enforcement of the measure ordered by the arbitral tribunal. 99

6. Multi-party arbitration

As outlined above, the Austrian arbitration law contains special provisions for the appointment of arbitrators in cases where more than two parties are involved. 100

a) **Arbitration agreement involving several parties**[227] Possible constellations of multi-party arbitrations can evolve when more than two parties conclude a contract or two or more closely related contracts allow for multi-party arbitration.[228] In any case, the parties' origin intention and the possibility for all the parties to participate in the formation of the arbitral tribunal are necessary prerequisites for multi-party arbitrations to be admissible under Austrian law.[229] Especially the mutual consent of all parties is a crucial prerequisite for a third party to join arbitration proceedings under Austrian law. This is similar to German law, where a contract between two specific parties cannot bind a third party by virtue of law.[230] 101

As from 1 July 2013 the revised set of arbitration rules of the VIAC ("Vienna Rules") contain specific provisions for multi-party arbitrations, joinder of third parties and consolidation of proceedings. Whereas article 18 of the Vienna Rules governs the procedure to appoint arbitrators in multi-party arbitrations, pursuant to article 15 of the Vienna Rules two or more arbitral proceedings can be consolidated upon request of a party if either all parties agree or the same arbitrators have been appointed in each of the proceedings.[231] However, in all consolidated cases the place of arbitration must be the same. Finally, article 14 of the Vienna Rules stipulates under which circumstances third parties can join an arbitration that has already been instituted between other parties according to the Vienna Rules.[232] Pursuant to article 14(1) of the Vienna Rules the joinder of a third party and the manner of such joinder is to be decided by the arbitral tribunal upon request of a (third-)party and after hearing all (third-)parties as well as considering all relevant circumstances. 102

b) **Equality of arms and appointment of arbitrators**[233] If several parties on claimant's or respondent's side cannot agree on a joint arbitrator, article 18(4) of the 103

[226] *OGH*, 4 September 2001, 5 Nd 510/01.
[227] See *supra* mns 40 *et seq.*
[228] *Zeiler*, in: Fitz *et al.* (eds), Liber Amicorum Hellwig Torggler, 2013, 1403 (1405).
[229] *Zeiler*, Schiedsverfahren, 2nd ed., 2014, § 587 mn. 2.
[230] *Geimer*, in: Böckstiegel/Berger/Bredow (eds), Die Beteiligung Dritter an Schiedsverfahren, 2005, 71 (74).
[231] *Zeiler*, in: Fitz *et al.* (eds), Liber Amicorum Hellwig Torggler, 2013, 1403 (1407).
[232] *Oberhammer/Koller*, in: Handbook Vienna Rules, 2014, Article 14 mn. 1.
[233] *Infra* § 10 mn. 77.

Vienna Rules provides for the power of the Board of VIAC to appoint the arbitrator after having heard all parties involved. This procedure is very similar to the subsidiary appointment of arbitrators in multi-party arbitrations under Austrian arbitration law by the competent state court.[234]

IV. The control and the enforcement of arbitral awards

104 According to § 607 ZPO an arbitral award has the effect of a legally binding judgement between the parties. The parties, however, are free to agree on an appellate arbitral tribunal.[235]

1. Correction and amendment of arbitral awards

105 § 610 ZPO governs the correction of the arbitral award upon request of any party by the arbitral tribunal if: the award contains errors in computation or clerical and typographical errors. The arbitral tribunal, on the basis of a parties' agreement, give an interpretation of specific parts of the award. Further, the arbitral tribunal can render an additional award as to claims asserted in the arbitral proceedings but not yet decided by the arbitral tribunal.[236]

2. Review of arbitral awards before state courts

106 In general, an arbitral award is final and binding. There is however the possibility for the parties to challenge the arbitral award pursuant to § 611 ZPO before the competent state court. The parties cannot waive certain or all grounds to set aside an arbitral award.[237]

107 **a) Procedural framework (time limits, competent court, appeal).** According to § 611(4) ZPO an application to set aside must be filed within three months of the day on which the claimant has received the arbitral award. The grounds for challenge must be specified in the claim otherwise the state court will not take them into account.[238] This does not apply to the grounds that a dispute is not arbitrable under Austrian law or an arbitral award violates Austrian public policy, which the court will take into account even if the challenging party does not explicitly rely on them.[239] Further, § 613 ZPO stipulates that these latter two challenge grounds are relevant in any other proceedings before a state court. Accordingly, any state court must ignore an arbitral award, which is made in a matter that is not arbitrable or which violates Austrian public policy.[240]

108 Austrian courts will only set aside arbitral awards that have been rendered by an arbitral tribunal with its seat in Austria.[241] As from 1 January 2014 the competent court for proceedings to set aside arbitral awards is the Austrian Supreme Court.[242] Against the decision of the Supreme Court no appeal is available. This is relatively unique in Europe and leads to relatively short setting-aside proceedings. The one tier procedure does not apply to consumer- and employment related disputes. According to § 617(8) ZPO and § 618 ZPO in consumer- and employment related disputes the competent

[234] § 587(5) ZPO.
[235] *Oberhammer*, Entwurf, 2002, 120.
[236] *Zeiler/Steindl*, Arbitration in Austria, 2nd ed., 2007, § 610 ZPO mn. 80.
[237] *Fasching*, Schiedsgericht und Schiedsverfahren, 1973, 147.
[238] *OGH*, RIS-Justiz RS0045085.
[239] § 611(3) ZPO.
[240] § 611(2)(7) and § 611(2)(8) ZPO.
[241] *Hausmaninger*, in: Fasching/Konecny, ZPO, 2nd ed., 2007, § 611 mn. 67.
[242] § 615 ZPO.

istrict court in civil law matters has jurisdiction. In sum, such proceedings can pass ıree procedural levels (Trial Court, Appellate Court and Supreme Court).[243]

b) **The Grounds for setting aside arbitral awards: An overview.** The list of grounds 109
or setting aside an arbitral award as stipulated by § 611(2) ZPO is exhaustive.[244] The tate courts must not review the merits of the case and thus a *révision au fond* is rohibited by Austrian law.[245] An arbitral award can only be set aside if: a valid rbitration agreement does not exist, the arbitral tribunal denied its jurisdiction, a party vas incapable of concluding a valid arbitration agreement[246], a party was not given roper notice of the appointment of an arbitrator or was unable to present its case[247], he arbitral tribunal exceeds its authority to decide[248], the composition of the arbitral ribunal does not comply with the requirements of Austrian arbitration law[249], the rbitration proceedings violate Austrian public policy[250], the preconditions under which judgement of a court of law can be appealed by a revision according to § 530 ZPO[251] xist, the matter in dispute is not arbitrable[252] or the arbitral award violates Austrian ublic policy[253].

c) **Invalidity of the arbitration agreement and lack of jurisdiction of the arbitral** 110
ribunal. In case arbitral proceedings lack an underlying arbitration agreement an ıward can be set aside upon request of a party. Practical grounds for the set aside are hat the form requirements according to § 583 ZPO are not fulfilled.[254] Further that the lispute lacks arbitrability or the arbitration agreement lacks determinability.[255] How- ver, the parties are precluded to base their annulment claim on this ground if it has not lready been brought up by the parties in the course of the proceedings.[256]

In addition, if the arbitral tribunal denies its jurisdiction this forms a ground to 111
hallenge an arbitral award as well. Another ground for challenging an arbitral award ursuant to § 611(2)(1) ZPO is fulfilled when one party lacks the capability to conclude rbitration agreements according to the laws of its *personal status*.[257] If a party's ersonal status is Austrian, the capability to conclude an arbitration agreement corre- ponds to the capacity to conduct proceedings in one's own name.[258] Finally, § 611(2)(7) ZPO stipulates a ground to set aside an arbitral award if a matter in dispute s not arbitrable.

d) **Right to be heard**[259] Several constellations can fulfil a violation of a party's right to 112
e heard. Accordingly, an award has to be set aside if the parties had no opportunity to

[243] Such proceedings take on average 32.5. months (*Nueber*, ZfRV 2013, 75 FN 15).
[244] *Riegler*, in: Riegler *et al.* (eds), Arbitration law of Austria, 2007, § 611 mn. 4.
[245] *Rechberger*, in: Rechberger, ZPO, 4th ed., 2014, § 611 mn. 11.
[246] § 611(2)(1) ZPO.
[247] § 611(2)(2) ZPO.
[248] § 611(2)(3) ZPO.
[249] § 611(2)(4) ZPO.
[250] § 611(2)(5) ZPO.
[251] § 611(2)(6) ZPO; these preconditions are primarily circumstances under which criminal acts led to he making of a court decision.
[252] § 611(2)(7) ZPO.
[253] § 611(2)(8) ZPO.
[254] *OGH*, 27 February 2001, 1 Ob 273/00 d.
[255] *Hausmaninger*, in: Fasching/Konecny (eds), ZPO, 2nd ed., 2007, § 611 mn. 96.
[256] *Pitkowitz*, Die Aufhebung von Schiedssprüchen, 2008, mn. 145.
[257] *Zeiler*, Schiedsverfahren, 2nd ed., 2014, § 611 mn. 13.
[258] *Backhausen*, Schiedsgerichtsbarkeit unter besonderer Berücksichtigung des Schiedsvertragsrechts, 1990, 22.
[259] *Supra* mn. 27.

participate in the constitution of the arbitral tribunal[260] or were not given proper notice of the arbitral proceedings. Further, the right to be heard is violated if a party due to other reasons was unable to present its case.

113 e) **Arbitral award *ultra petita*.** Whether an arbitral tribunal exceeded its authority to decide, must be assessed according to the matter in dispute. This matter in dispute is primarily determined by the statement of claim or counterclaim[261] or by the arbitration agreement itself[262]. However, the parties must give notice as soon as the arbitral tribunal exceeds its authority, otherwise their right to claim for setting-aside an award based on this ground is precluded.[263]

114 f) **Public policy.** Austrian arbitration law provides for two possibilities to base a set-aside claim on a violation of public policy (*ordre public*). § 611(2)(5) ZPO governs on a violation of procedural laws that qualify as part of Austrian public policy, whereas § 611(2)(8) ZPO only applies in the case of a violation of substantive (municipal) laws, which form part of Austrian public policy as well. In general, both alternatives are violated if fundamental principles of substantive or procedural Austrian law were breached.[264] A mere violation of mandatory provisions of law does not automatically qualify as breach of Austrian public policy.[265]

3. Enforcing arbitral awards

115 § 1(16) EO (*Exekutionsordnung*) stipulates that an arbitral award constitutes an enforceable title under Austrian law. According to § 18, 19 EO the respective district court has jurisdiction to enforce domestic arbitral awards.[266] § 614 ZPO and § 86 EO stipulate that the provisions of the EO are not applicable if international law or acts of the European Union provide otherwise. This is a clear reference to both the NYC and Geneva Convention 1961. In the course of the ratification of the NYC Austria did not implement a condition of reciprocity.

116 According to a line of decisions of the Austrian Supreme Court, preliminary and interim decisions are not enforceable decisions pursuant to the NYC.[267] On the contrary, partial awards that decide a certain part of a dispute finally, are enforceable titles under the NYC.[268] The grounds to deny the recognition and enforcement of foreign arbitral awards are nearly identical to the grounds for setting-aside an arbitral award.[269]

117 a) **Enforcement of awards that were set aside.** As long as setting-aside proceedings are pending the court competent for the enforcement of a foreign arbitral award can suspend its proceedings.[270] Whether an Austrian court is bound by the decision of a foreign court to set aside an arbitral award, which should be enforced in Austria, is much debated. Within the European Union article 33 Brussels I Regulation provides for the duty of each member state to recognize decisions from courts of another member state. However, article 1(2)(d) Brussels I Regulation excludes arbitration from its scope

[260] § 611(2)(2) and (4).
[261] *Zeiler*, Schiedsverfahren, 2nd ed., 2014, § 611 mn. 20.
[262] *Heller*, Verfassungsrechtlicher Rahmen, 60.
[263] *Zeiler*, Schiedsverfahren, 2nd ed., 2014, § 611 mn. 24.
[264] *OGH*, RIS-Justiz RS0110743.
[265] *OGH*, 31 August 2005, 3 Ob 566/95.
[266] *Nueber/Boltz*, RZ 2013, 168 (171).
[267] *OGH*, 25 June 1992, 7 Ob 545/92.
[268] *Czernich*, New Yorker Schiedsübereinkommen, 2008, Article I mn. 1.
[269] *Nueber/Boltz*, RZ 2013, 168 (172).
[270] Article VI NYÜ.

of application, which also applies to decisions of state courts on the setting-aside of arbitral awards.[271] Such binding effect can be further established via bilateral treaties as well.[272]

b) **Set-off and similar defences.** A defence against the enforcement of an arbitral award based on set-off is successful if the claim for set-off has been addressed in the underlying award.[273] If the state court affirms the enforceability of an arbitral award, the obliged party has the possibility to appeal within one month.[274] 118

4. Preclusion of grounds for challenge and defences to enforcement

If a party fails to timely reprehend such challenge grounds that are precluded at some point in the course of the arbitral proceedings, this effect extends to the recognition and enforcement proceedings as well.[275] 119

[271] *Czernich,* New Yorker Schiedsübereinkommen, 2008, Article V mn. 10.
[272] *Czernich,* New Yorker Schiedsübereinkommen, 2008, Article V mn. 10.
[273] *OGH,* 21 March 2001, 3 Ob 172/00 s.
[274] *Hausmaninger,* in: Fasching/Konecny (eds), ZPO, 2nd ed., 2007, § 614 mns 63 *et seq.*
[275] *Fremuth-Wolf,* in Riegler *et al.* (eds), Arbitration Law of Austria, 2007, § 592 mn. 24.