The Dispute Resolution Review

Seventh Edition

Editor
Jonathan Cotton

Law Business Research

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EDITOR'S PREFACE

The Dispute Resolution Review covers 48 countries and territories. Disputes have never respected national boundaries and the continued globalisation of business in the 21st century means that it is more important than ever before that clients and lawyers look beyond the horizon of their home jurisdiction.

The Dispute Resolution Review is an excellent resource, written by leading practitioners across the globe. It provides an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. It is written with both in-house and private legal practitioners in mind, as well as the large number of other professionals and businesspeople whose working lives bring them into contact with disputes in jurisdictions around the world.

This Review is testament to the fact that jurisdictions face common problems. Whether the issue is how to control the costs of litigation, which documents litigants are entitled to demand from their opponents, or whether a court should enforce a judgment from another jurisdiction, it is fascinating to see the different ways in which different jurisdictions have grappled with these issues and, in some cases, worked together to produce a harmonised solution to international challenges. We can all learn something from the approaches taken by the 48 jurisdictions set out in this book.

A feature of some of the prefaces to previous editions has been the impact that the turbulent economic times were having in the world of dispute resolution. Although at the time of writing the worst of the global recession that gripped many of the world's economies has largely passed, it is has left its mark. Old and new challenges and risks remain in many parts of the world such as renewed speculation on the future of the eurozone, the sanctions imposed on Russia, and falls in the price of oil. In some regions, the 'green shoots' of recovery have blossomed while in others they continue to need careful nurturing. Both situations bring their different challenges for those involved in disputes and, while the boom in insolvency-related disputes and frauds unearthed in the recession remain, the coming year could see an increase in investment and acquisitions with a subsequent focus on disputes concerning the contracts governing those investments.

I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in *The Dispute Resolution Review*. Their biographies start at p. 739 and highlight the wealth of experience and learning from which we are fortunate enough to benefit. I would also like to thank the whole team at Law Business Research, in particular Nick Barette, Eve Ryle-Hodges and Shani Bans, who have impressed once again in managing a project of this size and scope, and in adding a professional look and finish to the contributions.

Jonathan Cotton
Slaughter and May
London
February 2015

Chapter 2

AUSTRIA

Bettina Knötzl[1]

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

The Austrian legal system is based on codified principles of civil law. Judicial precedents are not binding, but are strongly taken into consideration by courts and the parties in dispute.

All courts are federal courts. Austria's court system is composed of district courts, regional courts, courts of appeal and the Austrian Supreme Court. In addition to the general court system, there are specialist courts that rule on specific subject matters. For example, the Commercial Court decides commercial law disputes and the Labour Court handles labour and employment law disputes.

Generally, minor cases (i.e., cases valued at up to €15,000,[2] are heard before the district courts at first instance, and the regional courts act as the appellate courts. Major cases, (i.e., cases valued above the aforementioned thresholds) are heard before the regional courts at first instance, and appeals are decided by the courts of appeal at second instance.

The courts for commercial matters are competent to decide on matters concerning the judicial protection of the rights and legal interests of physical persons and legal entities, including claims in excess of €15,000.[3] The majority of cases, however, are disputes arising in connection with a commercial relationship between the parties.

At the top of the judicial hierarchy is the Austrian Supreme Court, which functions primarily as a court of cassation. It is a court of appellate jurisdiction in criminal and civil cases, commercial matters, cases of administrative review, and labour and social security disputes. It is the court of third instance in almost all civil cases within its jurisdiction.

1 Bettina Knötzl is a partner at Wolf Theiss Rechtsanwälte GmbH & Co KG.

2 €20,000 as of 1 January 2015 and €25,000 as of 1 January 2016.

3 Id.

Grounds of appeal to the Supreme Court are limited to serious questions of substantive or procedural law.

Questions of procedural law are mainly provided by the Code of Civil Procedure (CCP). This Code also covers arbitration proceedings,[4] as apart from state court litigation, Austria's capital city, Vienna, has traditionally been a major hub for arbitration in Europe. The Vienna International Arbitral Centre of the Federal Economic Chamber (VIAC) is not only the most important arbitration institution in Austria but also one of the leading arbitration institutions in Europe, especially regarding disputes relating to central and eastern Europe. In addition to the VIAC, Vienna also boasts a specialist arbitral panel established by the Vienna Stock and Commodity Exchange. This is a permanent specialist arbitral panel that has exclusive jurisdiction over disputes arising from exchange transactions (i.e., disputes between members of the Vienna Stock and Commodity Exchange and disputes concerning merchandise contracts related to the Vienna Stock and Commodity Exchange).

Austria's focus on resolving disputes with the help of alternative dispute resolution (ADR) methods led to the Austrian Civil Mediation Act,[5] which came into force 10 years ago. Since then, mediation has become a popular tool in family disputes, in particular, divorce cases. Some courts, such as the Commercial Court in Vienna, also promote business mediation by recommending mediation in cases that they believe can be settled with the help of mediation. Still, even at the suggestion of the court, parties cannot be forced into mediation, as it is a voluntary tool.[6]

II THE YEAR IN REVIEW

As an after-effect of the global financial crisis, which also hit Austria, in 2008, financial litigation proceedings are still a major topic, particularly in the commercial courts. The Vienna Commercial Court alone deals with more than 10,000 litigation cases pending per year, producing a vast number of court decisions. These cases also specify advisory and information duties and legal instructions as to how to unwind securities contracts if unlawful advice has been provided.

Another important area of case law under rapid development has been in the liability of directors and officers. In areas of both civil and criminal law we have recently seen major developments.[7]

At the same time, in an international context, using criminal proceedings as a tool with which to gain access to information and to freeze assets has become increasingly popular.

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4 Chapter 6, Part 4 of the CCP.

5 Federal Law Gazette No. I, 2003/29.

6 Since 2013, in specific family law matters the parties can be forced to attend an introductory session to mediation.

7 See, for instance, the 'Libro decision' rendered on 30 January 2014 by the Austrian Supreme Court concerning breach of fiduciary duties to the company when extracting money with the consent of the shareholder (12 Os 117/12s / 12 Os 118/12p).

In Austria, more business crime cases are going to be sent to trial, finally bringing a long stage – lasting several years – of criminal investigations to an end. We also expect the trend of rather harsh sentences for purely business crime cases (with only financial damages) to continue. Obviously, criminal courts still sense the need for severe sentences to prevent and generally deter crimes, especially in cases in the public domain – for instance, in corruption matters and cases with a foreign aspect, and therefore also in the sights of the OECD – or against former politicians and other high-profile figures dealing with taxpayers' money.

Since the challenge procedure to an arbitral award has been amended, effective in 2014, the first Supreme Court decision[8] has been rendered. As intended by the recent amendment, the procedure has had the effect of resolving challenges swiftly.

III COURT PROCEDURE

i Overview of court procedure

The Austrian court system is rather efficient. Civil proceedings are commenced by the filing of a complaint with the competent court. The complaint must contain allegations of the facts on which the claim is based and offer evidence in support of those facts. Recently, the Supreme Court dismissed a damages claim due to lack of conclusiveness, as the claimant had not properly specified its damages.[9] Under Austrian law, the claimant must also include the relief or remedy sought in the matter, such as performance of an obligation or a declaratory decision.

After a complaint is filed, the court will consider whether it has jurisdiction over the claim. If it does, it will then serve the complaint on the defendant, along with an order for the defendant to submit a statement of defence within a specified period of time. The defendant's statement of defence must include an explanation of the facts and any evidence on which the defendant will rely, including the judgment sought in response to the complaint, such as dismissal of the complaint in whole or in part.

Once the defendant submits its statement of defence, the court will then initiate the trial proceedings, which typically consist of several oral hearings. In Austria, jury trials do not exist in civil proceedings. The trial is held and decided upon before a judge or panel of judges, depending on the type and stage of the proceedings.

Trials serve the important purpose of allowing the presentation and gathering of evidence. Evidence presented by either party during the proceedings may include documents, witnesses, expert witnesses (expert witnesses normally submit a written opinion but may be questioned upon the request of either party), and testimony of the parties to the dispute. Witnesses are questioned by the judge followed by examinations by the attorneys for the parties. After the hearings and taking of evidence have been concluded, the judge will close the proceedings and issue a judgment, usually in writing.

8 18 OCg 2/14i, dismissing the challenge.

9 6 Ob 108/13w.

ii Procedures and time frames

In simple litigation cases, a first instance judgment may be rendered within one year. According to statistics provided by the Austrian Ministry of Justice, first instance proceedings pending before a district court take on average six months; in regional courts, the average time is 12.2 months.[10] In appellate proceedings, evidence is generally not re-examined and new evidence or new allegations are not admitted. Appellate proceedings may take between six months and one year. The Supreme Court usually renders its judgment within one year.

The final judgment issued by the court will also include an order specifying which party has to bear the costs of the proceedings. Litigation costs are mainly composed of court and attorneys' fees, expenses for expert opinions and travel expenses for witnesses. Generally, litigation costs are awarded against the losing party, who should reimburse the winning party; however, if either party prevails with a portion of their claim, the costs are divided on a *pro rata* basis.

Injured parties often seek recovery of damages by turning to the criminal authorities. In many cases, criminal proceedings are conducted parallel to civil proceedings. Criminal proceedings can be a powerful tool for recovering or securing assets or any other funds that are derived from criminal offences.

Furthermore, since the CCP is characterised by rather restrictive disclosure rules, criminal proceedings represent an effective tool for obtaining evidence that would otherwise not be accessible from the opposing party. In addition, a criminal court may also decide on civil claims brought against the accused by issuing a binding and enforceable decision, thereby avoiding time-consuming and costly civil proceedings that bear a substantial cost risk for the parties. Under Austrian law, both individuals as well as legal entities can be subject to criminal prosecution.

Parties may also request interim remedies. A court may order a preliminary injunction to secure monetary claims, either before or during litigation proceedings. In order to obtain preliminary injunction, the court must have a sufficient reason to believe that (1) the defendant will prevent or endanger the enforcement of a potential judgment by destroying, concealing or transferring assets, or (2) that the judgment would otherwise have to be enforced in a non-EU Member State. Potential preliminary injunctions may include an order for the freezing of bank accounts or attachment of the defendant's assets, including real estate, and the court may even extend an injunction to order that a third party not pay accounts receivable to the defendant.

iii Class actions

Several years ago, a draft bill was published by the Ministry of Justice concerning an amendment to the CCP to implement a 'group action', but these attempts have currently stalled and it is not clear whether the next governmental period will be able to complete this process.

The existing legal provisions actually offer several tools that permit bundling of a series of related claims or proceedings. These tools enable a group of claimants to

10 2012, median.

bring their claims simultaneously and in a joint case against a single respondent. For instance, two or more holders of a claim or claims against one respondent may initiate civil proceedings as joint plaintiffs if:

a they are considered joint holders of a single claim;
b the facts of the case are identical in each claim (material joinder of parties); or
c the claims are related and the same court is competent for all proceedings (formal joinder of parties).

Apart from various specific tools for joining certain related claims in one action, for certain claims of public interest (for instance, consumer protection) specific associations (such as the Consumer Protection Association or Chamber of Labour) are entitled to file 'representative actions'; however, such representative action is for declaratory or injunctive relief only (as opposed to monetary compensation).

iv Representation in proceedings

Except for some cases that are less relevant in an international context, parties – both legal entities and natural persons – need to be represented by outside legal counsel. This also applies to companies. Companies may work together with outside counsel who only represents this single client. This lawyer may not be an in-house counsel, but rather admitted to the Bar and subject to Austrian Bar rules.

v Service out of the jurisdiction

A claimant's counsel files the lawsuit with the help of an electronic court mailing system.[11] Service of the complaint or other documents initiating proceedings on the defendant's side is then initiated by the court. Usually, the court uses the official mail service to deliver the documents initiating the lawsuit.[12] Receipt must be confirmed in writing by the defendant, or its representative if the defendant is a company or has a legal representative for such services. The Austrian courts ensure service of process to defendants domiciled outside Austria according to the (bilaterally or multilaterally agreed) rules for judicial assistance applicable towards the specific state, where service shall be effected, or failing such rules via the diplomatic channels.

Once the defendant is also represented by legal counsel, both sides should then use the electronic court mailing system.

vi Enforcement of foreign judgments

The enforcement of foreign judgments (i.e., non-EU judgments) in Austria is contingent on the issuance of a declaration of enforceability by the competent Austrian court. The enforcement proceedings are governed by the Austrian Enforcement Act.

11 Called 'WEB-ERV'. It is operated by a state-owned company that assists the court in providing a web-based electronic communications system.

12 For details and exceptions of when service with the assistance of a bailiff can be requested, see Section 88 of the CCP.

By virtue of its membership of the EU, the procedure for the enforcement of EU judgments in Austria is subject to a standardised and simplified procedure, which was governed by Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters until 9 January 2015.

Since 10 January 2015, the enforcement of EU judgments in Austria will be governed by Council Regulation (EU) No. 1215/2012, which replaced the above–mentioned Regulation. One of the main changes and aims of the amendment was to limit the scope of forum shopping. The previous legal situation allowed parties to stall anticipated proceedings by pre-emptively initiating proceedings in other jurisdictions known for overly lengthy proceedings; as long as the pre-emptively addressed court needed to decide upon its (non-)competence over the matter, all other EU courts were prevented from hearing the case. The amendment blocks this strategy by strengthening the procedural effect of choice of forum agreements. Consequently, the amendment already has to be taken into account in the wording of contracts.

As a general rule, a judgment rendered in an EU Member State is recognised in any other Member State without any special procedure. Notwithstanding the foregoing, there are a number of limited grounds on which recognition of a foreign judgment can be denied. These exceptions include cases in which such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought, or when the judgment was rendered in violation of due process.

Other grounds for the denial of recognition are, *inter alia*, if the decision is 'irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought', or if the judgment is 'irreconcilable with an earlier judgment given in another Member State or in a third state involving the same cause of action and between the same parties', provided that the earlier judgment can be enforced in the state in which recognition is sought.

According to the Supreme Court, the requirement that the foreign judgment be enforceable in the state of origin does not imply a requirement that the title be executed in the country in which it was rendered, but rather that such judgment is only formally enforceable.

With respect to judgments of foreign or non-EU Member States, the requirement to have the judgment declared enforceable can turn out to be rather a cumbersome procedure depending on the origin of the judgment. If reciprocity cannot be established, meaning that the foreign state does not enforce Austrian judgments, success is unlikely.

vii Assistance to foreign courts

In general Austria provides judicial assistance upon request of foreign courts according to existing bilateral or multilateral agreements in place with the particular foreign state and failing any such agreement via diplomatic channels. Regarding multilateral agreements it is notable that Austria is party to the Convention of 1 March 1954 on Civil Procedure (the Hague Convention on Civil Procedure). It has not, however, acceded to the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention). Further, judicial assistance within EU Member States (except Denmark) is governed by Council Regulation (EC) No. 1206/2001 of

28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

Austria and the United States, for example, have not finalised any bilateral agreements on judicial assistance. Therefore, the judicial assistance between the United States and Austria is solely governed by the CCP.[13]

The request for judicial assistance between the United States and Austria is usually transmitted at a consular level. That means that a US court requesting judicial assistance transmits an official letter of request (letter rogatory) to the US State Department, which then forwards the letter of request to the US consulate in Austria. The US consulate next forwards the request to the Ministry of Justice, which, in turn, calls upon the competent Austrian court (e.g., the Austrian district court where the witness is domiciled) to grant judicial assistance.

The execution of a request for judicial assistance may be refused by the Austrian court if:

a the execution of the request for judicial assistance would not fall within the scope of duties of the judiciary according to Austrian law; or

b such judicial assistance requested is prohibited by Austrian law.

viii Access to court files

Judgments that form Austrian case law – and as such an important part of Austrian jurisprudence – are published on an anonymous basis. Legal databases[14] provide access to such decisions to members of the public. Otherwise, a legal interest must be alleged and shown to the court, which decides upon the request to gain access to court files.

As court hearings are – in general – open to the public, the court is able to disclose the time and date of court hearings upon request or, in cases of public interest, using press releases.

ix Litigation funding

Third-party funding of civil litigation is common practice in Austria. It is most popular in consumer protection and financial litigation cases, where many injured parties – often with smaller claims – jointly bring their actions. The trend started more than 10 years ago and has continually gained popularity.

While contingency fees that entitle counsel to a certain percentage of the amount obtained by the claimant are – for ethical reasons – prohibited for private practitioners (members of the bar), litigation funding companies base their business models on such participation. The Austrian Supreme Court already approved the system despite the *quota litis* prohibition, as this limitation restricts only private practitioners.

13 Sections 38 to 40 of the Act on Jurisdiction.

14 Such as the Rechtsdatenbank; see www.rdb.at.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

According to the Austrian Bar rules, a lawyer may not represent opposing sides at the same time; a certain timely distance needs to be observed. The principle is applied in a very broad sense: a lawyer may not represent a party in a case that has a connection with another matter, in which he or she represented the party on the opposing side. If it is possible for a lawyer to use confidential information disclosed to him or her during the course of prior representation of party A, that lawyer's participation against party A is prohibited – it is sufficient that this knowledge could be used against party A, in theory. Even if party A – or even if all involved parties – were to agree to this representation, the lawyer may not accept this mandate. A law firm cannot circumvent this prohibition by assigning the matter to a different lawyer with the firm. Chinese walls are common where no legal or ethical bars exist, but where only economic conflicts of interests might occur. Standard common market practices for setting up and maintaining Chinese walls apply in Austria.

ii Money laundering, proceeds of crime and funds related to terrorism

The European Union's Third Anti-Money Laundering Directive[15] has been transposed into Austrian law by amendments to the Austrian Banking Act and other federal laws. The amendments not only provide for stricter reporting requirements, but also broaden the reporting threshold by replacing the 'well-founded suspicion' with 'suspicion or probable reason to assume' that a transaction serves the purpose of money laundering or terrorist financing or that a customer has violated his or her duty to disclose trustee relationships.[16] Furthermore, the amendments introduce new customer identification procedures that require the personal appearance of trustees and renewed identification if there is a suspicion about the previously obtained identification. According to these amendments, the banks are required to determine the identity of beneficial owners and introduce risk-based customer analyses. Anti-money laundering compliance requirements are also applicable to the subsidiaries of institutions outside Austria.[17]

iii Data protection

Austria has adopted the data protection regime of the European Union. The foundation of data protection law in Austria is the Data Protection Act,[18] which has been in force since 1 January 2000.[19]

Similar principles apply in Germany and other civil law countries that are also Member States of the European Union.

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15 European Union Directive 2005/60/EC.

16 Sections 40 and 41 of the amended Austrian Banking Act.

17 United States Department of State 2008 International Narcotics Control Strategy Report, Volume II: Money Laundering and Financial Crimes.

18 Federal Law Gazette I, No. 165/1999.

19 For more information please visit the official website of the Austrian Data Protection Authority: www.dsb.gv.at/site/6248/default.aspx.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

On the one hand, parties to legal proceedings enjoy only a limited privilege in Austrian proceedings. On the other hand, the duty to produce confidential documents is, in general, extremely narrow (see below).

Confidential information disclosed by the party to its outside counsel is protected in civil as well as criminal proceedings, but very important exceptions should be taken into consideration. Whereas the legal representative's duty of confidentiality is protected in both civil and criminal proceedings and must not be circumvented, the parties may not rely on such a privilege, if the (narrowly set) rules applicable to disclosure apply (see below). Even more importantly, information that is fully protected due to the lawyer–client privilege, if in possession of outside counsel, can be seized in the course of criminal proceedings at the client's site. Despite severe criticism by legal scholars, this even applies to attorney work product. Whereas such privileged information has full protection at the outside counsel's site, it can be seized in a house search at the client's site during the course of criminal proceedings.

Work products of in-house counsel are not privileged under Austrian law. Only documents produced during the course of the representation by outside lawyers are privileged. In criminal proceedings, privilege is limited to evidence documenting the attorney–client relationship. Evidence that had been created before the lawyer's engagement cannot be made subject to privilege by handing it over to the lawyer.

The party may choose to release its counsel from the duty of confidentiality; in such a case, counsel may no longer refer to or rely on such a duty when requested to make disclosures, unless it would otherwise cause damage to its client. Such assessment is ordered by the Austrian Bar Rules and has to be carried out by the lawyer.

ii Production of documents

The Code of Civil Procedure does not provide for any pretrial discovery proceedings, as the taking of evidence is considered a sovereign act that may only be performed by the court.

It is each party's responsibility to produce the evidence necessary to support its respective case or claim and the court will hear the evidence in the course of the main proceedings upon the parties' requests. Separate proceedings before the main trial with the sole purpose of taking evidence may be initiated under certain circumstances, for example, if the evidence is in danger of perishing.[20]

There are three options available for obtaining evidence from an opposing party or a third party:

a Disclosure of documents from the opposing party or non-party: in the course of ongoing civil proceedings, a party may request that the court order the opposing party or a third party to disclose evidence if certain criteria are met.

20 See Section 384 et seq. of the CCP.

b Disclosure through international judicial assistance: in cases involving international judicial assistance, the requesting (foreign) court may request that the Austrian court apply foreign procedural concepts, for example, discovery proceedings.

c Disclosure through criminal proceedings: the initiation of criminal proceedings may be a powerful option by which to gain access to and preserve assets or evidence if there is plausible suspicion of a crime.

If the rules for the disclosure of documents allow for an order, the court will order the opposing party or third party to produce the requested evidence. According to the Code of Civil Procedure, the opposing party has the duty to disclose relevant documents[21] if the following conditions are met:

a the document has been referred to during the course of the proceedings by the opposing party in its line of argument;

b the opposing party is ordered to hand over the document by substantive law; or

c the document may be considered a 'joint deed' between the parties and the court orders the opposing party to disclose such documents.

Joint deeds are documents created in the interests of the party requesting disclosure that contain information regarding reciprocal rights and obligations between the parties, or written communications or negotiations between parties to a contract (i.e., correspondence before (and in some cases also after) the conclusion of a contract).

If documents are in the custody of a person's legal counsel, the court will still order the person to disclose the documents rather than its legal counsel.

Parties' legal counsel is not considered an opposing party or non-party, but rather persons within the sphere of influence of either the party or non-party.

A third or non-party to the civil proceedings may only be ordered to produce documents if certain (narrow) criteria are met. As opposed to the disclosure of evidence by the opposing party, where the court simply takes the party's failure to produce the documents into consideration when judging the evidence, the court may exercise coercive means should the non-party fail to comply with the court order.

In dealing with evidence, it has to be considered that the power of disposal over documents that may serve as evidence in legal proceedings (be they civil or criminal) is protected by criminal law: any holder of any type of evidence loses the power of disposal over such evidence if it may be subject to disclosure in foreseeable civil, criminal or administrative proceedings. It is a criminal offence to intentionally withhold any such evidence, and persons who engage in such behaviour may be sentenced to a term of imprisonment.[22]

21 See Section 304 of the CCP.

22 See Section 295 and Section 229 of the Criminal Code.

VI ALTERNATIVES TO LITIGATION

i Arbitration[23]

Arbitral awards rendered in Austria are granted the same effect as court judgments under Austrian law, while the international treaties signed by Austria facilitate transnational recognition and enforceability of such arbitral awards in some 150 countries worldwide.

Arbitration in Austria is governed by Chapter 6, Part 4 of the CCP, which defines the prerequisites for arbitration, including the validity of arbitration agreements and the minimum standards that must be observed for a fair trial.

Arbitration in Austria takes place within a framework that will be familiar to all international practitioners as being based on the UNCITRAL Model Law in 2006. In 2013, the Austrian legislator even went a step further to ensure the celerity of arbitral proceedings by, *inter alia*, providing that challenges to arbitral awards rendered in Austria be submitted directly to the Austrian Supreme Court as first and final instance.

Generally, an arbitration agreement may be concluded between parties for both existing and future civil claims that may arise out of or in connection with a defined legal relationship. Exceptions include public law matters, which include marital and family matters, tenancy matters and certain labour law matters.

In addition, arbitration agreements relating to employment contracts (except for managing directors of limited liability companies and stock corporations) and arbitration agreements involving consumers have stricter form and content requirements. Specifically, agreements to arbitrate must be contained in a separate document and be personally signed by the consumer or employee. The seat of arbitration must be stipulated. Prior to conclusion of the arbitration agreement, the consumer or employee must have been provided with written notice explaining the significant differences between arbitration and court proceedings, but individual negotiation of the arbitration agreement is not required.

The standard prerequisites for the valid conclusion of a legally binding arbitration agreement (if neither an employee nor a consumer is involved) are far more lenient: the arbitration agreement must be in writing and indicate the parties' will to submit (certain or any) disputes arising out of a defined legal relationship to arbitration. Further, the parties may determine the specifics of the arbitral procedure; this is usually done by referring to the rules of a specific arbitral institution, such as the VIAC, the International Chamber of Commerce (ICC) or the London Court of International Arbitration (LCIA).

If the parties do not stipulate a specific procedure (be it individually negotiated or by reference to the rules of an arbitral institution), Austrian law contains a number of default provisions regulating the most important procedural aspects. Arbitrators must be impartial and independent. The only other restriction that parties must observe is that Austrian judges may not accept appointments as arbitrators. Otherwise, arbitrators may be freely chosen by the parties to the dispute.

Regarding interim measures, Austrian law foresees that an arbitral tribunal's competence includes the issuance of interim protective measures, unless the parties

23 Chapter is based on Florian Haugeneder's contribution to the *Wolf Theiss Guide to Dispute Resolution*, 3rd edtion.

have agreed otherwise. The competence of an arbitral tribunal to issue interim protective measures does not affect or limit a party's right to apply to a state court to issue interim measures.

Interim measures must always be enforced by the state courts.

Austrian law contains an exhaustive list of the grounds for challenging arbitral awards.[24] A challenge must be filed within three months of receipt of the award.

In terms of the enforcement of foreign awards, Austria is party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, with the reservation that the Convention will only be applied to the recognition and enforcement of awards made in the territory of another contracting state. Austria is also party to the 1961 European Convention on International Commercial Arbitration.

Generally, Austrian courts have a very arbitration-friendly attitude. Consequently, Austrian businesses are generally willing to conclude arbitration agreements, especially in the context of international business transactions.

ii Mediation

Austria's focus on resolving disputes with the help of alternative dispute resolution (ADR) methods led to the Austrian Civil Mediation Act,[25] which came into force in 2004. Since then, mediation has become a popular tool in family disputes. Some courts, such as the Commercial Court in Vienna, also promote business mediation by recommending mediation in cases that they believe can be settled in such a way.

The popularity of mediation as a form of ADR is slowly but steadily growing. Co-mediation, where two mediators with different educational background sit as mediators, is quite popular in Austria. The tool is often used, for example, to resolve environmental disputes[26] and is common in schools. It is also gaining considerable popularity in construction matters.

iii Other forms of alternative dispute resolution

In Austria, standard ADR methods are either part of the system established and provided by law or voluntarily introduced on an *ad hoc* basis by the parties. For instance, a patient bringing a professional negligence damage claim against a doctor or hospital may turn to a special council of referees that helps settle the matter before a – costly – action is filed in court. For disputes between certain professionals, such as doctors, auditors or lawyers, ADR procedures must be attempted before launching state court proceedings. In addition, parties subject to a legal dispute more often tend to find alternative resolution solutions, such as introducing neutral evaluation methods or expert determinations. In general, Austria offers a huge number of 'court sworn experts' who are used to render opinions to help settle disputes.

24 Section 611 of the CCP.

25 See footnote 4, *supra*.

26 For instance, used in the mediation concerning a new runway at Vienna International Airport.

These ADR methods rarely result in an outcome with binding effect, but, if successful, they grant swift access to justice, as settlement agreements can be easily turned into an enforceable title,[27] with the agreement of the parties.

VII OUTLOOK AND CONCLUSIONS

It remains to be seen whether the recent amendment of arbitration proceedings will boost Vienna as a hub for arbitration. As long as the Austrian state court system does not consider introducing a cap on state court fees[28] for cases disputing large amounts, arbitration and other ADR methods should continue to gain popularity.

Also, the trend of using – or more precisely, abusing – criminal proceedings due to lack of comprehensive disclosure proceedings, thereby burdening the criminal authorities with a vast number of cases that could otherwise be resolved by the civil courts, should provide reason for discussions to take place.

Finally, the use of court-appointed experts to determine cases that require special knowledge is being scrutinised. The factual power of the court-appointed expert to determine the outcome of a matter and the limited tools to challenge the court expert's opinion led to increased discussions calling for an overhaul of the system. In 2014, some significant amendments have already been introduced to criminal proceedings. A parallel improvement of civil proceedings is still in the discussion stage.

27 The settlement agreement can be concluded in the form of a *Vollstreckbarer Notariatsakt* (enforceable notarial deed) or *Prätorischer Vergleich* (district court settlement). Both are equivalent to a settlement agreement concluded during the course of a state court litigation.

28 The state court fees amount to roughly 1.2 per cent of the amount in dispute at first instance, with an increasing percentage for the appeal procedure to the court of appeal and the Supreme Court. For example, in a dispute over €400 million, court fees of more than €20 million may apply.

Appendix 1

ABOUT THE AUTHORS

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