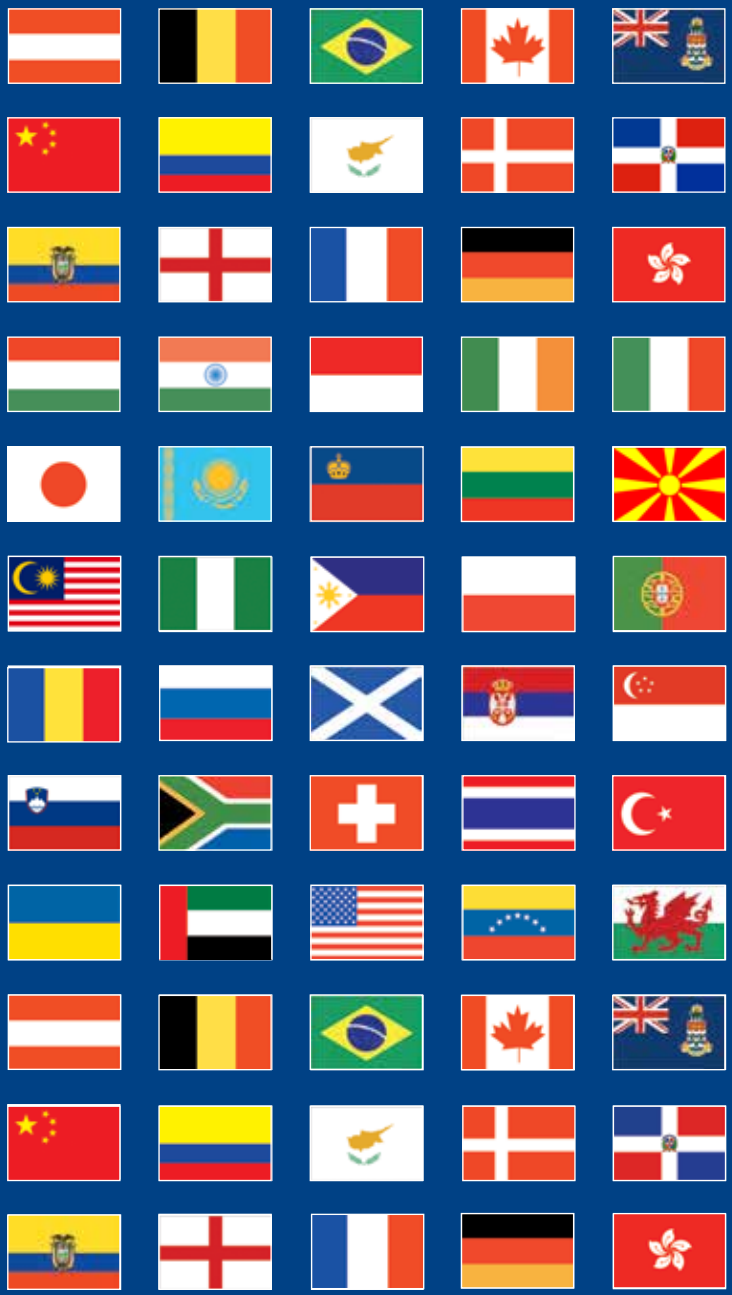
GETTING THE DEAL THROUGH

Dispute Resolution

in 49 jurisdictions worldwide

2014

Contributing editor: Simon Bushell



Published by
Getting the Deal Through
in association with:

Anderson Mōri & Tomotsune
Andreas Neocleous & Co LLC
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Getting the Deal Through is delighted to publish the twelfth edition of *Dispute Resolution*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 49 jurisdictions featured. New jurisdictions this year include Ecuador, Hong Kong, Indonesia, Kazakhstan, the Philippines, Portugal and the United Arab Emirates.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.gettingthedealthrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would also like to extend special thanks to contributing editor Simon Bushell of Latham & Watkins for his continued assistance with this volume.

Getting the Deal Through
London
June 2014

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Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

First published 2003
Twelfth edition
ISSN 1741-0630

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Austria

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Specht Böhm

Litigation

1 What is the structure of the civil court system?

Austria's court system is composed of district courts, regional courts, courts of appeal and the Austrian Supreme Court. Additionally, there are specialised courts, eg, the Commercial Court, deciding on commercial law disputes, and the Labour and Social Court, which handles labour and employment law disputes.

The district courts have jurisdiction, as a general rule, for cases with an amount in dispute of up to €15,000 (this threshold will be raised to €20,000 from 1 January 2015, and then to €25,000 from 1 January 2016) and for a number of matters irrespective of the amount in dispute, such as claims arising from tenancy agreements concerning immoveable property, claims of family law (divorce, alimony, parentage, civil partnership disputes, etc), curatorship and a number of other subjects.

Regional courts have, in general, jurisdiction for claims with an amount in dispute exceeding €15,000 (this threshold shall be gradually raised to €25,000, as explained above) and for a number of matters irrespective of the amount in dispute, such as claims brought by a judge or against a judge, government liability claims, nuclear liability claims and several other subjects. The regional courts also have exclusive jurisdiction on labour and social benefit disputes. In Vienna, there is a separate Labour and Social Court. The district and regional courts have specialised departments for commercial disputes. However, in Vienna there is a separate Court of Commerce for claims exceeding €15,000 (this threshold will be gradually raised to €25,000, as explained above) and a District Court for Commercial Disputes for smaller claims.

Appeals against decisions of a district court are decided by a regional court, whereas appeals against decisions of the regional courts go to the courts of appeal. There are four courts of appeal in Austria (in Vienna, Linz, Graz and Innsbruck), plus the Supreme Court in Vienna.

2 What is the role of the judge and the jury in civil proceedings?

Austrian procedural law does not provide for juries in civil proceedings. Judges are career judges (with only a few exceptions). After graduating from the law faculty, the prospective judges get on-the-job training and additional education for four years, first as court trainees and then as assistant judges. Having passed the exam, they are appointed judges by the Minister of Justice or the President and can apply for their first position, usually at a district court.

Labour disputes are usually decided by a three-judge panel chaired by a career judge, with two lay judges assisting him or her. Usually, one lay judge is chosen by the chamber of labour and the other by the chamber of commerce or another professional body of employers.

In commercial disputes, if a three-judge panel were to decide on the case, such panel would include one lay judge from a business profession and two career judges.

Judges have an inquisitorial role in civil proceedings. Usually, they would interrogate the parties and witnesses first, and only then would the party or witness be left to be examined by the attorneys. The judge may appoint a court expert, summon witnesses and order the parties to produce documents, in order to establish the relevant facts of the case.

3 What are the time limits for bringing civil claims?

A defence based on the statute of limitations must be raised by the defendant.

The periods of limitation are deemed to be a matter of substantive, not procedural, law. Therefore, Austrian courts would apply the period of limitation provided for by the applicable substantive law, either foreign or Austrian. The Austrian Civil Code provides for a long limitation period of 30 years, or 40 years if the claimant is a legal entity. This long, or ordinary, limitation period would apply unless special provisions provide for a shorter limitation period. However, the short limitation period of three years applies to most everyday claims, such as claims for the delivery of goods or performance of works or services, claims for the payment of rent and claims for the fees of doctors, veterinarians, midwives, private teachers, attorneys, notaries, patent attorneys and some other professions, damage claims (unless resulting from certain criminal offences, which would be subject to the long limitation period), claims for interest and a number of other claims. The limitation period begins when the claim or right in question could first be exercised. Therefore, the limitation period for money claims commences on their due date.

Different periods of limitation apply to slander or libel actions (one year in most cases, if damages are not sought), certain claims of insurance law (in principle, three years, but just one year from the date of an express notice by the insurer rejecting a specific claim) and of corporate law (five years).

The debtor cannot waive the defence of the statute of limitation in advance or agree on a longer limitation period than provided for by law, but he or she can interrupt the running of the limitation period, thereby causing the limitation period to start anew.

4 Are there any pre-action considerations the parties should take into account?

It is usual for a prospective plaintiff, but not required by law, to send an attorney's letter before starting a legal action, in order to give the prospective opponent a chance to meet his or her obligations before going to court. There is no pre-trial discovery, and it is neither usual nor required to exchange documents or other evidence before the trial.

It is highly recommended to collect and analyse all relevant evidence before starting a legal action, since the possibilities of obtaining additional evidence through the court are rather limited. (See also questions 9 to 11.)

5 How are civil proceedings commenced? How and when are the parties to the proceedings notified of their commencement?

Civil proceedings are commenced by submitting a written statement of claim to the competent court. The statement of claim should set out the relevant facts giving rise to the claim and the relief sought. The statement of claim should include an offer of evidence, but it is not necessary to submit evidence at this stage. If not obvious, the statement of claim should contain arguments as to the jurisdiction of the court.

A court fee for the first-instance proceedings, which depends on the amount in dispute and can be substantial, must be paid at this stage.

Once the statement of claim has reached the competent court, the period of limitation is interrupted.

After filing the complaint, the court will consider, on the basis of the plaintiff's allegations, whether it has jurisdiction over the claim. If the court finds, in proceedings before a regional court, that it has jurisdiction, it will serve the statement of claim on the defendant by certified mail with return receipt, along with a request to submit a statement of defence, which should contain all facts and an offer of evidence on which the defendant plans to rely, within four weeks.

In proceedings before a district court, the judge would appoint a day for the first hearing and summon both parties. The summons will be served on the defendant by certified mail.

If a defendant's seat or residence in not in Austria, the service of process will be carried out according to applicable international treaties (eg, Regulation (EC) No. 1393/2007), in most cases through the local court at the defendant's seat or residence.

6 What is the typical procedure and timetable for a civil claim?

Once the defendant has submitted his or her statement of defence within the given time period, the court will then set a date for the hearing. In civil proceedings, several hearings are usually needed to take the relevant evidence. The judge would then close the trial and give judgment, usually in writing. The proceedings before the district courts are somewhat different.

Should the plaintiff fail to submit his or her statement of defence in time, a default judgement may be made against him or her.

According to data published by the Austrian Ministry of Justice for 2010, the average duration of civil proceedings before the court of first instance is 8.7 months for the district courts, and 15.3 months for the regional courts. Only 3.2 per cent of proceedings took more than three years. These data do not include proceedings where defendants have not raised objections, thereby allowing the court to issue a default judgment or a payment order, which usually takes six to eight weeks.

7 Can the parties control the procedure and the timetable?

In principle, the judge controls the procedure and its timetable. Sometimes the defendant manages to considerably delay the proceedings by applying for additional (preferably unavailable) witnesses to be heard and expert opinion to be obtained. The judge can dismiss such applications for protraction of the lawsuit.

When a hearing is adjourned, the judge will usually agree the date of the next hearing with the parties or their attorneys.

The parties can apply to have a court hearing postponed or a time limit extended. Finally, the parties can agree to suspend the proceedings for at least three months, for instance, to conduct settlement negotiations.

8 Is there a duty to preserve documents and other evidence pending trial? Must parties share relevant documents (including those unhelpful to their case)?

There is no general obligation to keep documents that are or may become relevant in a court proceeding. However, entrepreneurs have an obligation to keep their records, correspondence, commercial books, inventories, financial accounts, etc, for seven years, or longer if they are relevant to pending court or administrative proceedings. In addition, some tax and administrative laws contain specific preservation periods. Such preservation periods do not imply an obligation to submit the documents in court proceedings.

It is, of course, in a party's vital interest to keep all documents in support of its allegations or that may eventually become relevant in the course of proceedings (eg, to invalidate objections of the opposing party). The parties have no general obligation to preserve or to share evidence that is unhelpful to their case. Documents submitted to the court as evidence must be shared with the opposing party.

9 Are any documents privileged? Would advice from an in-house lawyer (whether local or foreign) also be privileged?

Communications with attorneys or in-house lawyers are not privileged as such.

Austrian procedural law does not provide for discovery. The parties can apply for a court order directing the opponent to submit specific documents. The documents' content must be described in detail. However, the opposing party can refuse the submission of documents, provided that:

- they concern family life;
- a duty of honour would be breached by their submission;
- they would expose the opponent or a third party to criminal prosecution or disgrace;
- their submission would breach a legally recognised confidentiality obligation, or a technical or business secret; or
- for other equally important reasons.

There are, however, three categories of documents that must be submitted regardless of the above grounds for refusal, namely:

- if the opposing party has itself referred to the document for the purpose of tendering evidence;
- if the opponent has an obligation under civil law to hand over the document; or
- documents that have been issued on behalf of both parties or that reflect their mutual legal relations.

10 Do parties exchange written evidence from witnesses and experts prior to trial?

It is neither required nor usual to exchange any evidence prior to trial. There is no pre-trial discovery.

11 How is evidence presented at trial? Do witnesses and experts give oral evidence?

Copies of the relevant documents are usually submitted in writing to the court and the opposing attorney. If their authenticity is questioned, the court may order the submission of the original document. The parties and witnesses would usually appear before the court and give oral evidence. Written witness statements are, in general, not admitted. Experts are usually requested to submit a written opinion. The expert can be asked additional questions either in writing or at a hearing.

12 What interim remedies are available?

In support of money claims, the court can grant interim remedies if there is reason to believe that the debtor would prevent or impede

the enforcement of a (subsequent) court decision by damaging, destroying, concealing or transferring his or her assets (including by prejudicial contractual stipulations); or if the (subsequent) court decision would need to be enforced in a country that is not party to the Brussels or Lugano Conventions.

The following remedies are available:

- to place money or moveable property into the court's custody;
- a prohibition to alienate or pledge moveable property;
- a garnishment order with respect to the debtor's claims (including bank accounts);
- the administration of immoveable property; and
- a restraint on the alienation or pledge of immoveable property, which is to be registered in the land register.

In support of non-pecuniary claims, the court can grant interim remedies to prevent imminent violence or irretrievable damage, and under certain conditions similar to those mentioned above in relation to money claims. Interim remedies are often granted in unfair competition disputes and sometimes in media disputes. Search orders are not available in civil cases.

Interim remedies are also available in support of foreign proceedings, if a subsequent foreign court decision would in principle be enforceable in Austria.

Finally, injunctions given by a foreign arbitral tribunal (article 593 Code of Civil Procedure) or by a foreign court can be enforced in Austria under certain circumstances. The enforcement measures, however, must be compatible with Austrian law.

13 What substantive remedies are available?

Available remedies under Austrian law include the following:

- performance of an obligation;
- orders for a declaratory judgment;
- orders for a constitutive judgment; and
- cease-and-desist orders.

Orders for specific performance are certainly the most frequent, such as money claims (including claims for damages), claims to deliver goods or perform services. In proceedings for a declaratory judgment, the court may have to decide on the validity of a contract or the authenticity of a document. In proceedings for a constitutive judgment, the court can, by virtue of its decision, create, change or cancel a legal relationship.

Austrian law does not provide for punitive damages.

The statutory interest rate of civil law claims is of 4 per cent. If both parties are entrepreneurs, then a variable interest rate published every six months by the Austrian National Bank would apply. It is currently 9.08 per cent. Bills of exchange are subject to an interest rate of 6 per cent.

14 What means of enforcement are available?

The enforcement proceedings are governed by the Austrian Enforcement Act. If the debtor does not comply with an enforceable court or arbitral decision, an application for enforcement can be filed with the competent district court. Available enforcement measures include the attachment, and eventual sale, of the debtor's moveable or immoveable property and the garnishment of the debtor's claims against third parties. This would include the attachment of salary and the attachment of a bank balance. The court can also order the compulsory administration of immoveable property or of a business.

An obligation to desist from certain behaviour can be enforced by imposing increasing fines and eventually imprisonment on a party who is not complying.

15 Are court hearings held in public? Are court documents available to the public?

Austrian civil procedure provides for public court hearings. The judge can exclude the public in certain cases, such as if it would endanger public order or morals. The court file is not public, but the parties have a right to inspect the file.

16 Does the court have power to order costs?

A court judgment will also include an order specifying which party must bear the costs of the proceedings. These costs are mainly composed of court and attorneys' fees, expenses for expert opinions, interpreters and travel expenses for witnesses. Generally, the successful party is entitled to reimbursement of its costs. The legal fees are calculated according to the Austrian Act on Attorneys' Tariff, which can be lower than the hourly fees agreed between the attorney and his or her client. If a party was only in part successful, he or she may claim partial reimbursement of costs.

The defendant can request a court order directing the plaintiff to pay a security for the defendant's costs. However, such order cannot be granted in a number of cases, including if the plaintiff has his or her place of residence inside the EU or in a country that would enforce Austrian decisions, or if he or she has sufficient immoveable property in Austria. Therefore, such orders are rather rare.

17 Are 'no win, no fee' agreements, or other types of contingency or conditional fee arrangements between lawyers and their clients, available to parties? May parties bring proceedings using third-party funding? If so, may the third party take a share of any proceeds of the claim? May a party to litigation share its risk with a third party?

An agreement between an attorney and his or her client to the effect that the former would obtain a share of any proceeds of the amount awarded (pactum de quota litis) is illegal under Austrian civil law. However, other kinds of success fee agreements, such as a higher hourly fee or a lump sum in the event of success, are permitted.

Although the legality of a pactum de quota litis between a client and a litigation-funding company is doubtful under Austrian law (see below), there are a few litigation-funding companies in Austria. The usual agreement would provide for the funding company to bear all the costs and the liability to reimburse opponent's costs. If successful, the funding company would recover all its expenses and would be entitled to a substantial share of any proceeds of the claim.

The Vienna Court of Appeals held, in a decision of August 2012, that the prohibition of pacta de quota litis does apply to attorneys, notaries, tax advisers, certified public accountants and auditors, but not to litigation-funding companies (Vienna Court of Appeals [OLG Wien] File No. 3 R 41/12i). On appeal, the Austrian Supreme Court left the question undecided whether the pactum de quota litis between the claimant and his or her litigation-funding company was invalid, but pointed out that the purpose of such prohibition lies in protecting clients and the honour of the legal profession, but not in protecting possible opponents (that is, opponents of a party that decides to assign his or her claim to a litigation-funding company or consumer protection association). Therefore, the opponent cannot rely on the nullity of a pactum de quota litis. The court further held that the possible nullity of a pactum de quota litis would not entail nullity also of the claim's assignment (Austrian Supreme Court, 27 February 2013, File No. 6 Ob 224/12b). Therefore, the question of whether litigation-funding companies can validly conclude pacta de quota litis is still open, but a defendant cannot successfully raise the objection that the claimant or plaintiff entered into such an arrangement.

18 Is insurance available to cover all or part of a party's legal costs?

Legal expenses insurance is available and would usually cover the litigation costs of the insured person and his or her potential liability for his or her opponent's costs. The insurance would cover the fees as calculated according to the attorneys' tariff, which can be lower than the hourly fees agreed between an attorney and his or her client. The insurance would provide coverage only for disputes that emerged after the insurance contract was entered into. Some insurance classes require a waiting period of up to six months.

19 May litigants with similar claims bring a form of collective redress? In what circumstances is this permitted?

Austrian law at present provides only for legal actions taken by certain associations, such as the Federal Economic Chamber, the Federal Chamber of Labour and, most notably, VKI, the Association for Consumer Information. These and a few other associations and corporations under public law are entitled to bring actions on behalf of or in the interest of their members, such as applying for a declaratory judgment to have certain clauses used in general terms and conditions declared invalid.

Efforts to introduce class actions in Austrian procedural law failed a few years ago. The Ministry of Justice apparently does not plan to propose any new legislation concerning class actions for the moment.

20 On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

Judgments issued by a court of first instance can be appealed against on the grounds of:

- nullity (ie, the most serious procedural irregularities);
- (other) procedural irregularities (eg, an important witness has not been heard);
- incorrect assessment of facts; and
- incorrect legal assessment.

If the amount in dispute is below €2,700, an appeal cannot be brought against the court's findings of fact or on the grounds of a procedural irregularity. The courts of second instance have a tendency to uphold the lower court's assessment of facts; it is very rare that the second-instance court would hear evidence again.

A further appeal to the Austrian Supreme Court is possible both in cases originating from the district courts or from the regional courts. However, this further appeal is restricted in several ways. The Supreme Court's purpose is to provide for a uniform interpretation and development of the law. An appeal to the Supreme Court can be brought only to decide legal questions; the lower courts' findings of fact cannot, in principle, be challenged before the Supreme Court. The basic requirement for all appeals to the Supreme Court is an essential question of substantive or procedural law that needs to be decided by the Supreme Court, in particular if the Supreme Court has not yet dealt with that legal question, if its rulings are at variance or if the appeal courts have departed from precedent established by the Supreme Court. Further, an appeal to the Supreme Court is excluded (with only a few exceptions) if the amount in dispute is below €5,000. If the amount in dispute is between €5,000 and €30,000, the court of second instance has to grant leave to appeal to the Supreme Court (either in its main decision or in a separate decision). These thresholds do not apply for labour and social benefit disputes, legal actions brought by a consumer protection association and certain tenancy and family disputes.

21 What procedures exist for recognition and enforcement of foreign judgments?

Foreign judgments can be enforced in Austria on the basis of the European Jurisdiction and Enforcement Regulation (Council Regulation (EC) No. 44/2001) or of bilateral or multilateral enforcement treaties, or if the Ministry of Justice has issued a decree confirming reciprocal enforcement with another country. Without such legal basis, the judge does not have discretion whether to grant enforcement. Thus, judgments from EU countries, from Canada, Iceland, Israel, Liechtenstein, Norway, Switzerland and Turkey, and from a few additional countries, are enforceable. However, judgments from the US, Russia and most other countries are generally unenforceable. Most treaties provide only for the enforcement of specific kinds of judgments, for instance, on civil and commercial matters, or on maintenance orders.

The enforcement proceedings are for the most part in writing. Usually, one would apply at the same time for the declaration of enforceability of the foreign judgment (exequatur) and for an order granting specific enforcement measures, and the competent district court can grant both requests at once. The judgment debtor's assets can be attached pending appeal against the declaration of enforceability and against the enforcement order.

European Enforcement Orders can be enforced without the need for an exequatur.

22 Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

International legal assistance is granted on the basis of the Evidence Regulation (EC Regulation No. 1206/2001), the Hague Convention on Civil Procedure of 1954 and on the basis of a number of bilateral treaties to which Austria is a party. Available legal assistance includes both oral and documentary evidence.

Arbitration

23 Is the arbitration law based on the UNCITRAL Model Law?

Arbitration in Austria is governed by part 6, chapter 4 of the Code of Civil Procedure (articles 577 to 618 CCP). Arbitration law was the subject of a major reform that took effect on 1 July 2006. The Arbitration Act 2006 brought the law into line with the UNCITRAL Model Law. When amending the law, Austria drew upon the experience gathered in Germany, when German arbitration law was brought into line with the UNCITRAL Model Law with effect from the beginning of 1998.

The chapter of the CCP that deals with arbitration law (chapter 4 of part 6) comprises 10 sections. The first eight sections follow the structure of the UNCITRAL Model Law. There are then two further sections concerning court proceedings and special provisions relating to consumers, respectively.

The form requirements for an arbitration agreement are less strict than those in the UNCITRAL Model Law, as arbitration agreements can also be contained in e-mails or other forms of communication between the parties that preserve evidence of a contract.

24 What are the formal requirements for an enforceable arbitration agreement?

An arbitration agreement must sufficiently specify:

- the parties (they must at least be determinable);
- the subject matter of the dispute in relation to a defined legal relationship (this must at least be determinable, and it can be limited to certain disputes or include all disputes). The subject matter of the dispute can be a pecuniary claim that falls within the jurisdiction of the courts, or a non-pecuniary claim where the parties are capable of concluding a settlement concerning the matter; and
- the parties' intent to have the dispute decided by arbitration, thus excluding the state courts' competence.

The arbitration agreement must be contained either in a written document signed by the parties, or in faxes, e-mails or other communications exchanged between the parties that preserve evidence of a contract.

Matters that are excluded from arbitration agreements are:

- family law matters;
- disputes concerning contracts governed by the Landlord and Tenant Act or the Non-profit Housing Act; and
- employment law disputes (except for managing directors of limited liability companies and stock corporations).

In contrast, most shareholder disputes are arbitrable.

An arbitration agreement can be validly concluded in the form of a separate agreement or as a clause within a contract.

25 If the arbitration agreement and any relevant rules are silent on the matter, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

An arbitral tribunal must consist of an uneven number of arbitrators. If the parties have not determined the number of arbitrators, an arbitral tribunal with three arbitrators decides the case.

Each party must appoint one arbitrator. The arbitrators have then to appoint the chair by mutual consent.

The courts are competent to make the necessary default appointments if the parties do not agree on another procedure and if one party fails to appoint an arbitrator or the arbitrators fail to appoint the chair.

The court's decision by which it appoints an arbitrator is final and binding.

An arbitrator can be challenged only if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence, or if he or she does not possess the qualifications agreed to by the parties.

26 Does the domestic law contain substantive requirements for the procedure to be followed?

The parties are free to agree on the rules of procedure (eg, by reference to specific arbitration rules) within the limits of the mandatory provisions of the CCP. Where the parties have not agreed on any set of rules, or set out rules of their own, the arbitral tribunal must, subject to the mandatory provisions of the CCP, conduct the arbitration in such manner as it considers appropriate. Mandatory rules of Austrian arbitration procedure include that the arbitrators must be, and remain, impartial and independent. They must disclose any circumstances likely to give rise to doubts about their impartiality or independence. The parties have the right to be treated in a fair and equal manner, and to present their case. Further mandatory rules concern the arbitral award, which must be in writing (see also question 29).

27 On what grounds can the court intervene during an arbitration?

A court can only intervene in arbitrations if this is expressly provided for in the CCP. In particular, the court can (or must):

- grant interim or protective measures before or during arbitral proceedings; it may also enforce interim and protective measures ordered by the arbitral tribunal;
- appoint arbitrators;
- decide on the challenge of an arbitrator if the challenge before the arbitral tribunal was not successful; and
- provide judicial assistance in matters for which the arbitral tribunal does not have authorisation.

28 Do arbitrators have powers to grant interim relief?

An arbitral tribunal can (unless the parties have agreed otherwise) grant interim or protective measures considered necessary to the subject matter of the dispute, provided that the enforcement of the claim would be frustrated or considerably impeded without the measures, or there is a danger of irreparable harm without the measures.

Interim or protective measures can only be granted upon the request of one party once the other party has been heard on the matter.

29 When and in what form must the award be delivered?

The CCP does not provide for a time period within which the award must be rendered.

The award must be in writing, signed by at least the majority of the members of the arbitral tribunal and be reasoned, unless the parties have agreed otherwise.

30 On what grounds can an award be appealed to the court?

On 1 January 2014, the arbitration law has been somewhat amended. According to the newly introduced article 615 CCP, the Austrian Supreme Court shall, as first and last instance, have jurisdiction to decide on actions for setting aside an arbitral award and actions for declaration of existence or non-existence of an arbitral award. This centralisation of arbitration matters at the highest court level aims at significantly enhancing the speed and sophistication of arbitration-related court proceedings.

The Austrian Supreme Court is not entitled to review an arbitral award on its merits. There is no appeal against an arbitral award. However, it is possible to bring a legal action to set aside an arbitral award (both awards on jurisdiction and awards on merits) on very specific, narrow grounds, namely, if:

- the arbitral tribunal accepted jurisdiction although no arbitration agreement exists, or denied jurisdiction although an arbitration agreement exists;
- a party was incapable of concluding an arbitration agreement under the law applicable to that party;
- a party was unable to present its case (eg, it was not given proper notice of the appointment of an arbitrator, or of the arbitral proceedings);
- the award concerns matters not contemplated by or not falling within the terms of the arbitration agreement, or concerns matters beyond the relief sought in the arbitration; if such defects concern a separable part of the award, such part must be set aside;
- the composition of the arbitral tribunal was not in accordance with articles 586 to 591 CCP or the parties' agreement;
- the arbitral procedure did not, or the award does not, comply with the fundamental principles of the Austrian legal system;
- the requirements to reopen a case of a domestic court in accordance with article 530(1), 1–5 CCP are fulfilled, namely:
  - the judgment is based on a document that was, initially or subsequently, forged;
  - the judgment is based on false testimony (of a witness, an expert or a party under oath);
  - the judgment is obtained by the representative of either party, or by the other party, by way of criminal acts (eg, deceit, embezzlement, fraud, forgery of a document or of specially protected documents, or of signs of official attestations, indirect false certification or authentication or the suppression of documents);
  - if the judge has committed a criminal act relating to the decision in question; and
  - the judgment is based on a criminal verdict that was subsequently lifted by another legally binding judgment; or
- the award concerns matters that are not arbitrable in Austria.

Update and trends

On 1 July 2013, the new Vienna Rules of Arbitration and Conciliation (Vienna Rules) entered into force, amending the previous Rules established in 2006. The aim of the new Rules is to provide further flexibility, clarity and efficiency for arbitration proceedings. The amendments and additions shall allow arbitrators and parties to navigate complex arbitral proceedings in an efficient manner. In particular, the following amendments have been made to the Vienna Rules:

- joinder of third parties: the joinder of a third party is decided by the arbitral tribunal upon request of a party to the proceeding or a third party, after consideration of all relevant circumstances and after hearing the parties. The 'relevant circumstances' are left for the arbitral tribunal to decide, thus allowing the arbitrators some discretion. The request for the joinder of a third party can be submitted at any time during the proceedings;
- constitution of the arbitral tribunal in multi-party proceedings: in constituting the arbitral tribunal in multi-party proceedings, all parties on one side must agree on the nomination of an arbitrator. If an agreement is not reached, the arbitrator is appointed by the board of the VIAC. In this case, the board is not only allowed to appoint the arbitrator of one side, but the whole arbitration panel. While doing so, the board also has discretion to revoke previous appointments; and
- expedited procedure: this provision aims at accelerating the arbitral process in appropriate cases. The Rules do not contain any conditions or requirements for its applicability; most notably, it does not depend on the amount in dispute. Rather, the expedited Rules only apply if the parties have agreed on their application in advance, or in the early stages of the proceedings.

The Ministry of Justice is currently planning a major reform of the Code of Criminal Procedure, which shall become effective in 2015. The purpose of the reform is to accelerate complex proceedings, and to strengthen the rights and legal protection of defendants and suspects and due process in general. Changes are expected to include:

- introduction of a time limit for investigations: the duration of criminal investigations shall be limited to three years. Upon expiry, the public prosecution shall have the possibility to apply to the courts for an extension, which shall be granted for complex or difficult proceedings, for an additional period of two years;
- legal protection of suspects: the official commencement of criminal proceedings shall be clarified, and the role or position of a 'suspect' will be newly defined to avoid stigmatisation or damage to someone's reputation before charges have been preferred by the prosecutor;
- clarification of the objectivity and independence of experts: defendants' rights to raise objections against experts (in cases of lack of objectivity or reasonable doubt concerning their expertise), and to propose a different expert than the one envisaged by the court, shall be more clearly defined. Should the prosecution decide to dismiss the application, then they are obligated to give a reasoned decision; and
- minor offences, punishable by a fine or a prison term of up to one year, shall be adjudicated in expedited procedures, without any formal hearing.

Furthermore, a party can also apply for a declaration for the existence or non-existence of an arbitral award.

31 What procedures exist for enforcement of foreign and domestic awards?

Domestic arbitral awards are enforceable in the same way as domestic judgments (without the need for an exequatur). Foreign awards are enforceable on the basis of bilateral or multilateral treaties that Austria has ratified, namely the New York Convention, the Convention on the Execution of Foreign Arbitral Awards (Geneva, 26 September 1927) and the European Convention on International Commercial Arbitration (Geneva Convention), as well as bilateral treaties with Bosnia-Herzegovina, British Columbia, Croatia, Kosovo, Liechtenstein, Macedonia, Montenegro, Serbia and Slovenia. The enforcement proceedings are essentially the same as for foreign judgments (see question 21).

32 Can a successful party recover its costs?

The arbitral tribunal is granted discretion in the allocation of costs, but it must take into account the circumstances of the case, in particular the outcome of the proceedings. As a rule of thumb, costs follow the event and are borne by the unsuccessful party, but the tribunal can also arrive at different conclusions if this is appropriate in the circumstances of the case.

Where costs are not offset against each other, the arbitral tribunal must, as far as possible at the same time as it decides on the liability for costs, also determine the amount of costs to be reimbursed.

Alternative dispute resolution

33 What types of ADR process are commonly used? Is a particular ADR process popular?

Mediation is often used in disputes concerning divorce, child custody and other family-related matters, but is currently also gaining

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ground in other areas: in schools, older students are trained and supervised by teachers to act as peer mediators in conflicts between younger students. With respect to public projects, mediation is being used to deal with the concerns of residents. Business and workplace mediation can also be mentioned. At several courts in Vienna (the Court of Commerce, Civil Court and Labour and Social Court) and beyond, a project is being promoted to refer suitable cases to mediation with the parties' consent. Judges may invite a mediator to a court hearing, present the advantages of mediation and encourage the parties to have their case mediated. Other forms of ADR, such as mini-trial, last-offer arbitration, early neutral evaluation or adjudication, are new territory in Austria.

34 Is there a requirement for the parties to litigation or arbitration to consider ADR before or during proceedings? Can the court or tribunal compel the parties to participate in an ADR process?

Neither in arbitration nor in litigation is there a requirement to consider or to engage in ADR before or during the proceedings, with only few exceptions. Certain disputes concerning tenancy agreements and cooperative apartment ownership must be brought before a conciliation panel if such a panel has been set up by the local authority. However, these conciliation panels are in fact just specialised offices of the local administrative authority that conduct administrative proceedings. Despite their misleading name, they can hardly qualify as ADR. If the conciliation panel has not decided within three months, one party can bring the matter before the local district court.

Further, in disputes between neighbours concerning the deprivation of light or air by trees or plants, the party wishing to start litigation is required to either file an application according to article 433 CCP (see below), or to submit the case to a registered mediator or a conciliation board (article III of the fourth civil legislation amendment act, article III 4.ZivRÄG, BGBl I 91/2003).

Finally, before starting civil litigation, it is possible to have the prospective defendant summoned before the district court with local jurisdiction for his or her place of residence to discuss the potential for an amicable settlement before the court (article 433 CCP), thus compelling the prospective defendant to participate in a settlement hearing. This provision dates back to 1914.

Miscellaneous

35 Are there any particularly interesting features of the dispute resolution system not addressed in any of the previous questions?

In most cases, civil litigation in Austria would lead to a fair or at least comprehensible decision at a reasonable price. By international standards, the average duration of civil proceedings is good.

In international arbitration, the Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber has gained acceptance and respect for its independence and the quality of its proceedings.

DISPUTE RESOLUTION 2014 ISSN 1741-0630