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Online Arbitration Guide

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Online Arbitration Guide

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I. GENERAL

1.1. Advantages of International Arbitration

Although litigation and arbitration share the same objective, i.e. the resolution of a dispute by a third party, they differ substantially. Most obviously, in arbitration, the **hearings** are **held in private** (see *infra* VIII.) and **before a single arbitrator (or an arbitral tribunal)** who renders a **final** and binding award. An arbitrator is not a state court judge but rather a (legally) qualified individual, appointed by the parties to the dispute, subject to an arbitral institution making such appointment (see *infra* III.).

There are numerous reasons why arbitration is selected over state court litigation in international business:

- **The parties to the dispute can freely choose their arbitrator(s)** – hence, they may select an individual with the experience required in the particular case. An arbitrator does not have to be legally trained, although this will mostly be the case (see *infra* III.);

- Arbitral procedures are **private** and generally **confidential** to the parties and the arbitrator(s) (see *infra* VIII.);

- Arbitration is generally **quicker than litigation**. In particular, arbitral tribunals are often quicker in reaching a final decision than national state courts. This results from the flexibility of the arbitration procedure itself, and the fact that there is **no appellate court** or further judicial instance in arbitration proceedings (except for very severe reasons; see *infra* VII.);

- Arbitrations are more **flexible** than state court proceedings. The procedure may be tailored to a particular case to make the best use of time, whilst still ensuring a proper consideration of the matters in dispute (see *infra* V.);

- An arbitral award may be enforced just like a state court decision. In addition, it can be enforced in another country, provided the respective country has adopted the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards (currently 154 countries) (see *infra* IX.); and

- Hearings can be held anywhere that is convenient for the parties, and at any suitable time (including holidays or weekends).

Hence, arbitration is the preferred method for finally resolving commercial disputes if (i) the parties place value on privacy; (ii) they are not part of the same legal jurisdiction; (iii) the nature of the dispute requires particular expertise; and (iv) the parties attach importance to a swift resolution of their case in dispute.

1.2. Institutional Arbitration vs *ad hoc* Arbitration

It is important to distinguish between institutional arbitration and *ad hoc* arbitration. Arbitral proceedings are either conducted under the auspices of an arbitral institution or *ad hoc*, meaning without the involvement of any such institution.

1.2.1. Benefits of Institutional Arbitration

Regularly, the contract between the parties containing an arbitration clause will determine a particular **institution** to act as arbitration administrator. The benefits of institutional arbitration are obvious. In particular: (i) **existing rules and procedures** that guarantee the arbitration commences and proceeds to a conclusion without undue delay; (ii) **administrative assistance from institutions**; (iii) **lists of qualified arbitrators**; (iv) **appointment of arbitrators by the institution** should the parties request it or be in default of making any such appointment; (v) **physical facilities and support services** for arbitrations; and (vi) **fixed fees for arbitrators**.

1.2.2. *Ad hoc* Arbitration

***Ad hoc* arbitration** is a proceeding that is not administered by an institution, and therefore requires the parties to make their own arrangements. One common misunderstanding when comparing these two possibilities to conduct arbitral proceedings is that *ad hoc* arbitration is less expensive than institutional arbitration. At first sight, this seems to be true: In *ad hoc* arbitration there are no fees to be paid to an institution for administrative services. However, the administrative services that arbitral proceedings require do not cease to exist. In *ad hoc* arbitration the arbitrators themselves have to handle these administrative aspects, and they do not undertake these tasks without charging the parties. Furthermore, the negotiating power of the arbitrators with respect to their fees, regularly necessary in *ad hoc* arbitration, is rather

high. This leads to the conclusion that *ad hoc* arbitration tends to be more expensive than institutional arbitration.

Parties nevertheless wishing to conclude an *ad hoc* arbitration clause, or seeking to proceed to arbitration after a dispute has arisen, have the option to negotiate a complete set of rules, establishing procedures which fit precisely their particular needs. Experience has shown that this approach requires significant time, attention and expense without providing assurance that the terms agreed will address all eventualities.

Other options available to parties wishing to proceed ***ad hoc*** include: (i) **adoption of the rules of an arbitral institution**, amending provisions for selection of the arbitrator(s) and removing provisions for administration of the arbitration by the institution (where possible)[1], (ii) incorporating **statutory procedures such as the Austrian Arbitration Act** (or applicable state law), or (iii) **adopting rules crafted specifically for *ad hoc* arbitral proceedings** such as the UNCITRAL Rules which may be used for both domestic and international disputes.

1.3. Other Forms of Dispute Resolution

Increasingly, clauses are inserted in international business contracts to provide that, if a dispute arises, the parties shall try to resolve it primarily by (amicable) negotiation. Such formula can be to the effect that in the event of a dispute, the parties will in the first place endeavour to settle such dispute by negotiating "in good faith". Negotiations are only likely to succeed if the parties involved are capable of observing the substantial issues objectively with the eyes of a third party. Obviously, it is hard to remain objective where vital interests are threatened and/or at stake. Therefore, an impartial third party may be able to lead the parties' discussions that otherwise are at risk of getting nowhere.

This is why international contracts often provide that, before the parties commence arbitration (or litigation as the case may be), they shall endeavour to settle any dispute by some other form of alternative dispute resolution (ADR). These ADR methods typically involve **mediation**, or other forms of conciliation procedures (which are sometimes considered, depending on the wording of the clause, to constitute an additional condition for the tribunal's jurisdiction). It is recognized by Austrian courts that such procedures are admissible. In terms of drafting, parties should take care to ensure that the arbitration agreement remains operable.

[1] This could trigger diverse complications as the bodies of the arbitral institutions are designed within a specific framework. *See in detail* A. Redfern *et al.*, *Redfern and Hunter on International Arbitration* (2nd edn, New York, Oxford University Press, 2009), para. 1-157 *et seq.*

II. THE ARBITRATION AGREEMENT

A prerequisite for the arbitrator's jurisdiction is a valid arbitration agreement. This includes in particular (i) the **ability of an individual to enter into a legally binding agreement** to arbitrate; (ii) the **arbitrability of the subject matter**; (iii) the fulfilment of certain **form requirements**; and (iv) the requirement to **identify the parties, the dispute(s) and the legal relationship(s)** that are subject to arbitration.

The arbitration agreement provides for two different **procedural effects**: Firstly, it constitutes the **foundation of the arbitrator's jurisdiction** – that is the positive procedural effect. Secondly, it excludes the state courts jurisdiction and serves as a **procedural bar** due to the parties' agreement to arbitrate – that is the negative procedural effect.

2.1 Subjective Arbitrability

The subjective capacity of a person to validly conclude a binding arbitration agreement (and to be a party to arbitration proceedings) is regularly referred to as **subjective arbitrability**. If this subjective capacity of the person concluding the arbitration agreement is lacking, the award may be challenged before the Austrian Supreme Court (see *infra* VII.). Whether a person has subjective capacity follows from the **law applicable to that particular person**. Under Austrian law, the Private International Law Act (IPRG) usually determines the law applicable to a natural person by reference to his or her nationality. With respect to legal entities, it is the registered head office that is decisive. However, for EU companies, because of the foundation theory developed by the European Court of Justice (ECJ), the place of establishment is decisive. It is therefore recommended to clearly identify the parties in the contract by referring to registration numbers for companies or the like.

2.2 Objective Arbitrability

Objective arbitrability is the characteristic *sine qua non* for a legal matter to be the subject of an arbitration agreement. If the subject matter of the dispute is not arbitrable, the award may be set aside. According to Austrian law, **any pecuniary claim** that lies within the jurisdiction of the courts can be subject of an arbitration agreement. An arbitration agreement concerning non-pecuniary claims shall be legally effective insofar as the parties may conclude a settlement on the issue in dispute. Examples for matters which cannot be referred to

arbitration are (i) family law matters such as divorce, patrimony or adoption, disputes concerning personal or marital status; and (ii) public law disputes such as criminal cases.

2.3 Form Requirements

When parties agree on arbitration clauses, the potential dispute is taken away from the state court's jurisdiction. This can be considered to be in tension with constitutional rights to have one's case heard before a state court – as a consequence most legal systems impose particular **form requirements** when entering into an arbitration agreement, notably the requirements that the arbitration agreement must be concluded "in writing".

The arbitration agreement must be contained in either a **written document signed** (including every adequate form of electronic signature) **by the parties** or in an exchange **letters, faxes, e-mails**, or **other forms of communication exchanged between them** that provides proof of the existence of the agreement. In addition, when a contract which fulfils the form requirements set out above refers to a document which contains an arbitration agreement, it shall also constitute an arbitration agreement provided that the reference is such that it makes the arbitration agreement part of the contract. It has to be noted that a **defect of form of the arbitration agreement shall be cured (or rather, waived) in the arbitration proceedings when the party (that may seek to object on the grounds of defect) addresses the substantive matters in dispute**. This waiver will occur unless an objection is raised, at the latest, when the said party enters into argument on the substance of the dispute.

2.4 Minimum content of the arbitration agreement

As mentioned above, the arbitration agreement must **identify the parties, the existing or future dispute(s) and the legal relationship** (contractual or non-contractual) out of which the dispute(s) arose or might arise.

2.5 Special Requirements for Consumers

Arbitration agreements between an entrepreneur and a consumer may be validly concluded only for **disputes that have already arisen**. In addition, arbitration agreements with consumers must be contained in a document which has been **personally signed by the consumer**. This document may not contain any agreements other than those that refer to the

arbitration proceedings. As a consequence, under Austrian law, it is practically almost impossible to conclude an arbitration agreement with a consumer.[2]

III. THE ARBITRATION TRIBUNAL

3.1 Constitution of the Arbitral Tribunal

3.1.1 Number of Arbitrators

The parties to an arbitration agreement are in general free to determine the number of arbitrators. However, **Austrian law does not allow for an even number of arbitrators**. Where the parties have agreed on an even number of arbitrators, the arbitrators appointed by the parties have to appoint another arbitrator to act as the presiding arbitrator of the tribunal. This provision was enacted to ensure that the effectiveness of the arbitration is not hampered in cases where the arbitrators cannot reach an unanimous decision. Absent an agreement of the parties as to the number of arbitrators, Austrian law stipulates that the tribunal shall consist of three arbitrators.

3.1.2 Method for Selection

Further, the parties are free to designate the method for the selection of the arbitrators. Therefore, it is possible to provide for a particular appointment by reference to arbitration rules or by stipulating a procedure in the arbitration agreement. Such an agreement as to the appointment procedure is only limited by the mandatory requirements for minimum qualifications (see 3.1.4 below) of the arbitrators, and procedural fairness.

3.1.3 Default Procedure under Austrian Law

Where the parties have not agreed on such a procedure, or the chosen method for selecting an arbitrator(s) fails, Austrian law provides for a **default procedure** for the appointment of an arbitrator(s):

- Where the parties have agreed on a **sole arbitrator** but not on the appointment procedure, the parties must **jointly appoint** such an arbitrator. If the parties cannot reach such an agreement within four weeks upon receipt of a written

[2] *See in detail* F. Schwarz and C.W. Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (The Hague, Kluwer Law International, 2009), Article 1 at para. 1-037 *et seq.*

request to do so, the sole arbitrator will be appointed by the state court upon request of one of the parties; and

- In case the parties have agreed on an **uneven number of arbitrators**, each party shall appoint an equal number of arbitrators and the **party-appointed arbitrators shall appoint the presiding arbitrator**. If a party does not nominate its arbitrator(s) or the party-appointed arbitrators cannot agree on a presiding arbitrator within four weeks upon receipt of a written request to do so, the arbitrator(s) shall be appointed by the state court.

The Austrian Code of Civil Procedure contains a special provision for a default appointment procedure in **multiparty proceedings**. Where several parties (on either the claimant's or respondent's side) jointly appoint an arbitrator, they have to do so within a period of four weeks. If no appointment is made within this time, any party (i.e. any of the defaulting parties as well as any of the opposing parties) may request the state court to render a substitute appointment. It should be noted that this provision provides only for the substitute appointment of the defaulting side's arbitrator. The other side does not lose its right to appoint an arbitrator.

In most cases, the state court competent for the substitute appointment is the Austrian Supreme Court.

If the parties commence arbitatration under the auspices of an institution, the respective rules (such as the Vienna Rules) provide for a specific appointment procedure that does not involve state courts. Generally, the board of the institution will act as the appointing authority in case of default.

3.1.4 Personal Qualifications to Act as an Arbitrator

Austrian law does not contain any special pre-requisites on the qualification of arbitrators. Therefore, **any natural person who has full legal capacity may be appointed as an arbitrator**. There are no further requirements to act as an arbitrator. Specifically, Austrian law does not require any particular education or accreditation. However, **active Austrian judges** are prohibited from accepting appointments as arbitrators.

The parties may, however, require the arbitrator to have certain skills or qualifications, for example particular experience in a given field or command of a certain language.

3.1.5 Independence and Impartiality of Arbitrators

Austrian law enshrines the principle that an arbitrator has not only to be **impartial and independent**, but must also be seen to act impartially and independently from an objective point of view. Hence, any potential arbitrator must disclose any circumstances likely to give rise to doubts as to his or her impartiality or independence, or if he or she does not possess the qualifications agreed upon by the parties. The duty to disclose is a continued obligation. Therefore, the arbitrator has a duty to inform the parties without undue delay of any relevant circumstances he or she becomes aware of during the entire arbitration proceedings.

3.2 Challenge of an Arbitrator

3.2.1 Grounds for Challenge

In line with international standards, arbitrators may be challenged if there are **justifiable doubts as to the arbitrator's impartiality and/or independence**. A challenge of an arbitrator can only be successful if, on the basis of an objective analysis, i.e. from the perspective of a reasonable third person, circumstances exist that can be perceived to give justifiable doubts as to the arbitrator's impartiality and/or independence. Moreover, an arbitrator may be challenged if he or she lacks the skills and qualifications agreed upon by the parties.

3.2.2 Challenge Procedure

Under Austrian law, the **challenge procedure** consists of **two tiers**. In the first tier, the parties are free to agree on the challenge procedure. In the absence of such an agreement between the parties, the default rule is that the arbitral tribunal itself shall decide on a challenge (such decision is made by all members of the tribunal, including the challenged arbitrator). Institutional rules might provide for a different procedure, such as the Vienna Rules, where the board of the institution is competent to decide upon such a challenge. If the challenging party were not successful in the first tier, it may proceed to the second tier and request the courts of law (usually, again, the Austrian Supreme Court) to decide on the challenge. The second tier is binding. Hence, the parties cannot ignore the court's decision to reject a challenge.

3.3 Replacement of an Arbitrator

In case of a successful challenge or an early termination of the mandate by the arbitrator, a **substitute arbitrator** is to be appointed. If the parties have not agreed otherwise, the appointment of the substitute arbitrator follows the same procedure as that followed for the original arbitrator. The arbitral tribunal can – but is not obliged to – continue with the proceedings without repetition of any procedural steps that have already been taken.

3.4 Relationship between the Parties and the Arbitrator

Austrian law does not contain any specific provisions as to the relationship between the arbitrators and the parties. The **contract between an arbitrator and the parties** is a **separate agreement** distinct from the parties' arbitration agreement. The conclusion of this agreement usually coincides with the acceptance of the mandate by the arbitrator. The foremost duty of the arbitrator under this contract is to resolve the parties' dispute by rendering an award. This is in line with the Austrian Supreme Court's qualification of the agreement as a contract for works and services containing elements of an agency contract.

In return for the performance of the mandate, the arbitrator is entitled to financial remuneration. The amount of the remuneration is usually stipulated in the arbitrator's contract, or by reference to the cost scales of an institution. In the absence of such an agreement, arbitrators are entitled to "reasonable remuneration" under Austrian law.

3.5 Jurisdiction

3.5.1 Competence-Competence

An arbitral tribunal with the seat in Austria has the **power to rule on its own jurisdiction**. However, the arbitral tribunal's award on its jurisdiction is subject to review by the courts of law (again, in most cases the Austrian Supreme Court is court of first and final instance). Hence, the tribunal only has preliminary competence-competence. Court review cannot be excluded by the parties' agreement.

If an award granting jurisdiction is challenged before the state courts, the tribunal may nevertheless continue the proceedings and can even issue the final award, despite the fact that its jurisdiction is not finally determined.

3.5.2 Timely Objection against Jurisdiction

Under Austrian law, the parties to arbitration proceedings are under a duty to raise any objection against the arbitral tribunal's jurisdiction and against an excess of the scope of its authority without undue delay. The objection against the jurisdiction must be made no later than at the time of the **first submission on the subject matter of the dispute**. Participating in the constitution of the arbitral tribunal does, however, not have preclusive effects. A plea that the matter exceeds the tribunal's authority must be raised as soon as such matter is made the subject of a substantive motion or petition. In case a party does not raise an objection, or does so belatedly, the lack of jurisdiction is cured and that party is deemed to have waived its right to raise any such objection.

IV. THE LAW APPLICABLE TO THE SUBSTANCE OF THE DISPUTE

Austrian arbitration law enshrines the principle of party autonomy. Consequently, the arbitral tribunal shall base its decision primarily on the law agreed on by the parties. Such **choice of law** can be made **explicitly** but also **implicitly**. If there is no agreement between the parties, the arbitral tribunal has full discretion to determine the statutory provisions it considers applicable.

4.1 Party Autonomy

In general, the parties are entirely free to agree on the substantive law which shall be applied by the arbitral tribunal in deciding their dispute. Hence, the parties can either choose a specific national law, or also agree on the application of certain rules or principles (e.g. UNIDROIT Principles on International Commercial Contracts. Moreover, the parties can give the arbitral tribunal the power to base solely their decision on reasons of equity. However, to allow the tribunal to decide *ex aequo et bono*, the parties have to agree expressly to such course of action.

The autonomy of the parties is only curtailed by mandatory rules of **public policy** and **objective arbitrability**. Consequently, an arbitral award adjudicating on non-arbitral matters, or violating Austrian public policy, would be subject to challenge in Austria, even if this award were based on a foreign law according to which the subject matter of the dispute was indeed arbitrable or the outcome of the dispute based on the chosen law did not violate the public policy of that jurisdiction.

4.2 Arbitrator's Discretion

Failing an explicit or implicit choice by the parties, the arbitral tribunal shall apply the statutory provisions it considers appropriate. Hence, Austrian law gives the arbitrator (arbitral tribunal) a **wide discretion** when determining the applicable law. It can choose the applicable law directly, without any recourse to the conflict of law rules. Nevertheless, the arbitral tribunal should consider basic **conflict of law rules** as the closest connection test when determining the applicable law.

However, the legislator has limited the arbitral tribunal's wide discretion insofar as it is only allowed to apply national laws. Therefore, the application of mere rules of law is only possible when the parties have chosen so, or if the institutional rules choosen by the parties, allow the arbitrators to apply "rules of law" (e.g. Vienna Rules).

V. THE ARBITRAL PROCEDURE

5.1 Party Autonomy

5.1.1 Guiding Principle for the Arbitration

Generally, there are **no fixed rules of procedure** in arbitration; this provides a high degree of flexibility on how to conduct arbitral proceedings (see *supra* 1.1.). Even though institutional (and *ad hoc*) rules of arbitration (see *supra* 1.1.) provide for an outline of various procedural steps, the detailed regulation of the procedure to be followed is established either by agreement of the parties or by directions from the arbitral tribunal. The arbitrators' discretion to determine the arbitral procedure, in the absence of agreement by the parties on such matters, is another foundation of arbitral proceedings.

Party autonomy is the **guiding principle** in determining the procedure to be followed in arbitration. On this basis, the parties may confer upon the arbitral tribunal such powers and duties as they consider appropriate regarding the specific case. They may choose e.g. (i) formal or informal methods of conducting the arbitration; (ii) adversarial or inquisitorial procedures; and (iii) documentary and/or oral methods of presenting evidence.

5.1.2 Limits

Once the procedure is agreed with the parties, or otherwise determined by the arbitral tribunal, the arbitral tribunal must conduct the arbitral proceeding in accordance with those rules of procedure. If it fails to do so, the award may be set aside or its recognition and enforcement may be refused (see *infra* VIII.). However, the autonomy of the parties to determine the procedure is not unrestricted. The **procedure must comply with any mandatory rules** and **public policy requirements of the law** of the judicial seat of the arbitration. The Austrian Code of Civil Procedure, for instance, provides that the parties shall be treated fairly and that each party shall be granted the **right to be heard**. Such a rule requires that each party should be given a fair hearing and, more generally, a reasonable opportunity to present its case. Moreover, the procedure should take into account the provisions of international arbitration conventions that aim to ensure that arbitral proceedings are conducted fairly (e.g. the New York Convention, see *infra* VIII.). Limitations may also be introduced by the arbitration rules chosen by the parties.

5.2 Control of the Proceedings

At the beginning of an arbitration, the parties are in control of the process. In *ad hoc* arbitration (see *supra* 1.2.), where no institution is involved, they may write a complete set of procedural rules to govern the way in which the proceedings are to be conducted. In institutional arbitration, the procedural framework is provided by the institution's rules, to which the parties agreed when they signed the arbitration agreement referring to the rules of the institution concerned.

Upon establishment of the arbitral tribunal, day-to-day control of the proceedings moves to the tribunal. However, it is fair to say that the transfer of control is neither total nor immediate. The arbitral tribunal usually engages in a dialogue with the parties on procedural matters, and often a "Procedural Order No 1" is issued to determine the essential elements of the proceedings and the time limits within which each procedural step is to take place.

5.3 Commencement of the Proceedings

5.3.1 Request for Arbitration

In order to commence the arbitration, the first procedural step in most arbitration proceedings is the submission of a "**request for arbitration**" or "**notice of arbitration**". The function of such a document is to inform the other party or parties – the respondent(s) – that (i) arbitral proceedings have been initiated against it/them; (ii) a particular claim has been submitted for arbitration; and (iii) to provide the general context of the claim asserted against it/them.

The required contents of a request for arbitration vary depending on the parties' arbitration agreement, the applicable institutional rules and national law. Under the 2013 Vienna Rules for instance, only skeletal information is required, including the parties' identities, specification of the arbitration agreement, a summary of the facts, a specific request for relief and particulars regarding the arbitrators and their nomination. As a practical matter, it may be advisable to include more detailed allegations about the claims, but this is usually optional, for tactical reasons, and is not often mandatory.

5.3.2 Reply and Potential Counterclaim

National law – like the Austrian Code of Civil Porcedure – does not address the procedures relating to **replies to a request for arbitration** or the **assertion of counterclaims**. Instead, it leaves this to the arbitration agreement or the arbitrators' procedural discretion. Under most institutional rules (including under the 2013 Vienna Rules), the respondent will be granted an opportunity, within a specified time limit, to reply to the request for arbitration and assert counterclaims, if any. The time to submit a reply is generally rather short, and the arbitral tribunal, or arbitral institution (whichever is appropriate in the circumstances) often extends these deadlines upon request of the respondent.

5.3.3 Advance on Costs

At the commencement of most arbitrations, the parties are required to provide in equal shares an **advance on costs** with respect to the fees of the arbitrators. Most institutional rules (including the 2013 Vienna Rules) contain provisions for payment of an advance on costs, and arbitrators often have the power under national laws to require payment of an advance, even absent an express provision to that effect. The amount of the advance on costs is based on the

expected total amount of fees and expenses of the arbitrators (see *infra* VI.). If the parties do not pay the advance, the arbitration will usually not proceed; if one party (often the respondent) fails to make payment, the other party may do so on its behalf so that the proceedings may continue. Under the 2013 Vienna Rules, it is expressly provided that the tribunal may in such instances order the defaulting party to reimburse the party who has paid the full advance on costs.

5.3.4 Constitution of the Arbitral Tribunal

The **constitution of the tribunal** is a critical procedural step at the outset of any arbitration. There are a variety of mechanisms for appointing arbitrators, found in both institutional rules and in arbitration agreements (see *supra* III.).

5.4 Evidentiary Matters

5.4.1 Content

Evidentiary matters essentially include the **admissibility and weight of evidence** and the relevance of certain lines of questioning. In general, arbitration laws in numerous jurisdictions grant arbitrators broad authority to decide these evidentiary issues. Under certain institutional rules (the 2013 Vienna Rules for instance), the tribunal may (also) on its own initiative collect evidence, question parties and/or witnesses, request the parties to submit evidence, and call experts. In practice, tribunals typically do not apply strict rules of evidence that may be applicable under domestic litigation laws.

5.4.2 Basic Structure

In practice, the parties must – following the request for arbitration and the respondent's answer thereto (if any) (see *supra* 5.3.) – as a first step present the case in writing in a comprehensive way including: (i) substantiated allegations of the relevant facts; (ii) the identification and submission evidence in support of the allegations; and (iii) legal reasoning of the remedies requested (see *infra* VI.). As a second step, the evidence is presented to the tribunal through the following procedures: (i) the questioning of the parties' witnesses; (ii) hearing of the experts designated by the tribunal (if any) and/or the parties (again, if any); and (iii) concluding comments of the parties, mostly in writing (so-called *post-hearing submissions or briefs*).

5.4.3 Specific Features

Document production is an essential evidentiary instrument in most arbitrations. The IBA Rules on Taking of Evidence in International Commercial Arbitration provide guidelines pursuant to an international standard, which ensures that such procedure may be conducted in a fair and efficient manner. Moreover, it combines elements of document production of both the civil law and common law jurisdictions, which generally differ considerably.

In an arbitration, the **preparation of witnesses** is common practice in order to structure the evidentiary hearing more efficiently. Moreover, so-called **witness statements**, which are commonly used in English practice, are usually submitted to the tribunal with the parties' submissions. This simplifies the preparation for the evidentiary hearing as it helps to achieve a focused questioning of the witnesses on the issues on which they have already given (written) evidence. In turn, this usually leads to a reduction of the length of the hearing (and, hence, a reduction of costs; see *infra* VI.).

5.5 Structure of a Typical International Arbitration

While there are many different variations, depending on a wide range of factors, a **typical arbitration** will usually proceed along a path such as:

- Request for arbitration / answer to the request for arbitration;
- Constitution of the tribunal;
- Establishing Procedural Order No 1 to set out the procedural aspects of the arbitration;
- Exchange of written submissions (usually in one or two rounds, and usually accompanied by supporting documents, e.g. witness statements and expert reports, on which the parties rely);
- Requests for production of additional documents (typically, after the first round of written submissions and before a second round);
- Pre-hearing administrative conference, often conducted by telephone;
- Oral hearing;

- Post-hearing submissions, including submissions on costs;
- Closure of the proceedings by the tribunal;
- Award; and
- Proceedings after the award, as the case may be (correction, interpretation, or additional awards)

5.6 Judicial Assistance from State Courts

There are **limited grounds for judicial intervention** or assistance in an ongoing international arbitration. These include:

- Challenge of an arbitrator(s);
- Provisional measures in aid of arbitral proceedings;
- Assistance in the taking of evidence for use in arbitral proceedings;
- Annulment of awards; and
- Recognition and enforcement of awards.

In each of these instances, judicial intervention or assistance is intended to facilitate the arbitral process by providing limited support or supervision.

VI. REMEDIES AND COSTS

The Austrian arbitration law does not explicitly provide for limits regarding the types of remedies available. However, Austrian law does not provide for punitive damages.

6.1 Monetary Compensation

The type of arbitral award most often issued by an arbitral tribunal is one that directs the payment of a sum of money by one party to the other (**monetary compensation**). Such payment may represent money due under a contract (debt) or compensation (damages) for loss suffered. The amount awarded is usually expressed in the currency of the contract or the currency of the loss. Arbitral awards may also cover the following **range of remedies**:

- Specific performance and restitution;
- Penalties;
- Injunctions;
- Declaratory relief; and
- Rectification of written agreements.

6.2 Interest

Where an arbitral award provides for monetary compensation, it has become rare for **interest** not to be awarded. The legal basis upon which interest is awarded in international arbitration varies. Most institutional rules (so the 2013 Vienna Rules) do not contain express provisions for the payment of interest, largely because it is understood that a tribunal has the power to make an award in respect of interest as it has the power to render an award for any other claim submitted to it. The legal basis has therefore to be sought in the underlying contract or by virtue of the applicable (substantive) law.

6.3 Costs

In most arbitrations, an arbitral award also entails a **decision on costs**. The term "costs" in the context of arbitration may be divided into two broad categories: the costs of the arbitration and the costs of the parties.

The **costs of the parties** include not only the fees and expenses of legal counsel engaged to represent the parties in the arbitral proceedings, but also expenses for the preparation and presentation of the case. There will sometimes also be other professional fees and expenses, such as those of expert witnesses, including e.g. accountants, along with the hotel and travelling expenses of legal counsel, witnesses, and others involved.

The **costs of the arbitration** usually include the fees and travelling and other expenses payable to the individual members of the tribunal, and any related expenses including e.g. the fees and expenses of any administering institution (for *ad hoc* arbitration see *supra* I.). Also included in the costs of the arbitration are the fees and expenses of any administrative secretary, and any other incidental expenses incurred by the tribunal.

The costs for the use of conference rooms for meetings and hearings, as well as the fees and expenses of any translators, interpreters, transcript reporters, and any experts appointed by the arbitral tribunal are usually paid directly by the parties. These costs are usually paid by the parties in equal shares pending the tribunal's final award, in which the tribunal usually apportions payment to one or more parties in whole or in part (see *supra* V.).

VII. SETTING ASIDE AN AWARD

Judicial control is confined to a minimum when it comes to challenging an arbitral award before the Austrian courts. These narrow grounds are set out in Section 611 Austrian Code of Civil Procedure (ACCP) and only apply to awards rendered in proceedings having their seat of arbitration in Austria. The Austrian Supreme Court is the court of first and final instance – except in consumer and labour law arbitrations – in which to challenge an arbitral award (see *infra* 7.3).

7.1 Structure of Section 611 ACCP

Section 611 ACCP comprises an **exhaustive list of grounds for setting aside** an arbitral award. An important distinction is made between those grounds which are only considered upon application by a party – Section 611 para 2, nos 1 to 6 ACCP – and those to be considered *ex officio* by the state court – Section 611 para 2 nos 7 and 8 ACCP. The parties cannot waive in advance their right to challenge the arbitral award or waive any grounds enumerated in Section 611 ACCP.

7.2 Specific Grounds

Due to the following grounds, each party may challenge an award rendered in Austria:

- A **valid arbitration agreement does not exist**, or the arbitral tribunal denies its jurisdiction despite the existence of a valid arbitration agreement, or a party was not capable of concluding a valid arbitration agreement under the law which was personally relevant to that party;

- A party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or for another reason was **unable to adequately defend itself** or challenge the claims of the opposing party;

- The award deals with a dispute not falling within the terms of the arbitration agreement, or contains **decisions on matters beyond the scope of the arbitration agreement** or **beyond the claims of the parties**; however, if the defect concerns only a separable part of the award, then only that part of the award shall be set aside;

- The formation or **composition of the arbitral tribuna**l is not in accordance with a provision of Section 611 ACCP or with an admissible agreement of the parties;

- The arbitral procedure was not carried out in accordance with the basic elements of the Austrian legal system (**procedural ordre public**);

- The **requirements have been met according to which a judgment of a court can be appealed under Section 530 para 1 nos 1 to 5 ACCP** via an application for the proceedings to be reopened;

- The **subject matter** of the dispute is **not arbitrable** under Austrian law; and

- The award is in conflict with basic elements of the Austrian legal system (**material ordre public**).

An award may not be challenged before the Austrian courts on any other grounds (see *infra* 7.3). The setting aside of an award has **no impact on the effectiveness of the underlying arbitration agreement**. If, however, an award on the same subject matter has already been set aside twice in a final and binding manner, and if a further, third award on the same subject matter is to be set aside for a third time, then the court, upon the application of a party, shall declare the arbitration agreement invalid with respect to that subject matter.

Where an award has been set aside, its legal existence no longer subsists – it no longer has the effect of a final and binding court judgment between the parties and is no longer enforceable.

7.3 The Austrian Supreme Court as Competent Authority

On 1 January 2014, a government bill introducing changes to the Austrian Arbitration law has came into force. In particular, the **Austrian Supreme Court is now both the first and last instance to decide on the challenge of an arbitral award** for setting aside claims brought before the state courts on or after 1 January 2014. Instead of thre previous regime of three procedural levels (court of first instance, court of appeal, Supreme Court), the decision about

a challenge to an arbitral award is now made by just one judicial instance: the Austrian Supreme Court. The former provisions had been considered as a major disadvantage for promoting Austria as place of arbitration. However, the system of three procedural levels remain in force for awards in consumer and labour law disputes.

Within the Austrian Supreme Court, a **separate arbitration senate** (known as the "Senate 18") has been constituted. It deals solely with setting aside proceedings.

VIII. PRIVACY / CONFIDENTIALITY

In addition to the ease of enforceability of an arbitration award, privacy and confidentiality of arbitration proceedings is often cited as one of the main advantages of arbitration over state court litigation.

8.1 Privacy of Arbitration

The **basic concept of privacy** provides that third parties are not allowed to participate in arbitral proceedings - especially that third parties are not allowed to attend oral hearings. Austrian law does not contain any provisions as to the privacy of the arbitration proceedings. However, it is well recognized that arbitration hearings are in general to be conducted in private (*in camera*).

This general principle is indirectly confirmed by Austrian statutory law, as the Austrian Code of Civil Procedure stipulates that the exclusion of the public is permissible state court proceedings concerning arbitration matters.

8.2 Confidentiality

The **concept of confidentiality** deals with the question of whether the participants to an arbitration are obliged to keep confidential the contents of the arbitration, or even the existence of the dispute, towards third parties. Austrian arbitration law is silent in relation to confidentiality.

8.2.1 Express Confidentiality Agreement

As there is no express statutory regulation – according to the principle of party autonomy – the participants to an arbitration are in general free to agree whether and to what extent an

obligation exists to keep the proceedings itself, and the documents pertaining to it, confidential. However, party autonomy in this regard is limited by the parties' rights to protect and/or pursue their rights and claims. Hence, a confidentiality agreement cannot restrict a party in relation to the initiation of enforcement proceedings, or to bring setting-aside proceedings against the arbitral award. If such proceedings are public proceedings – despite an agreement to keep the arbitration proceedings confidential – a party is free to bring any evidence to pursue its claims. However, the *mala fide* initiation of state court proceedings, with the mere intent to bypass a confidentiality obligation, could lead to a claim for damages.

8.2.2 Implied Obligation of Confidentiality

If the parties have not concluded an express agreement concerning the duty to keep the proceedings confidential, it is questionable whether the conclusion of an arbitration agreement implies such a duty. An implied obligation of confidentiality has been *inter alia* repeatedly recognized by English and French courts. In line with this, it is often argued in English legal literature that, according to the expectations of the parties, the arbitration agreement implicitly contains a confidentiality duty regarding all information of the arbitral proceedings, as well as of the arbitral award. Whether Austrian courts would follow this line of reasoning is unknown, especially as Austrian scholars are mainly of the opinion that such an implied duty of confidentiality has no basis in Austrian law. Hence, **parties are well advised to include an explicit confidentiality agreement in their arbitration clause**.

IX. RECOGNITION AND ENFORCEMENT

Unless the parties to an arbitration settle their claims, an arbitral award terminates the arbitration. An arbitral award is analogous to a judgment of a state court such that an arbitral award has, between the parties, the effect of a final and binding court judgment (see *supra* 1.1.).

9.1 The New York Convention

Once the arbitral award is rendered at the seat of arbitration (see *supra* III.), it may be enforced in currently 154 jurisdictions worldwide on the basis of the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards (see *supra* 1.1.). As so many countries are signatories to the New York Convention, including those actively engaged

in international trade and commerce, it is fair to say that the relative ease and scope of enforceability is the primary advantage of international arbitration over state court litigation.

9.2 Article V of the New York Convention

The core provision of the New York Convention is Article V, which contains the grounds on which recognition and enforcement of an arbitral award may be refused. These grounds are similar to the grounds upon which an arbitral award rendered in Austria may be challenged (see *supra* VII.). Certain defences against enforcement or recognition must be raised by the party against whom the arbitral award is invoked, such as:

(i) the **invalidity of the arbitration agreement**, either pursuant to the law chosen or applicable to the dispute, or pursuant to the incapacity of a party under the law applicable to it;

(ii) the **inability of such party to present its case in the arbitration**, due to not having been properly informed about the appointment of the arbitrator(s) or the arbitration proceedings at all;

(iii) the arbitral award containing a **decision *ultra petita*** (i.e. the arbitral award deals with a **dispute which is outside the scope of the arbitration agreement**);

(iv) **deficiencies with the arbitration agreement**, due to a defective formation or composition of the tribunal, or due to procedural irregularities in the conduct of the arbitration proceedings; and

(v) the arbitral award is **not (yet) binding** on the parties.

Certain defences against enforcement or recognition are considered directly by the court from whom the recognition or enforcement is sought:

(i) the **non-arbitrability** of the dispute, meaning that the subject matter of the dispute is not capable of settlement by arbitration under the law of the country where the recognition or enforcement is sought; and

(ii) **violations of public policy** of such country (material *ordre public*).

Settlement or voluntary compliance with an arbitral award is, however, the most common outcome of arbitral proceedings.

X. INVESTOR STATE ARBITRATION / PROPOSAL EU AND ICSID

10.1 Foreign Investment – a Major Component of Today´s Economy

The increase of global investment has consequently led to an increase in arbitrations to resolve disputes between investors and states.

Unsurprisingly, investors planning on major capital-intensive projects in other countries - such as, for example, the construction of a long-distance gas pipeline, the construction of a power plant or the financing and development of communications infrastructure - seek to **protect their investments** in the best possible way against any acts of **expropriation** or **changes in the host country´s laws and regulations,** that effectively amount to expropriation and/or significantly decrease the value of their investment.

Moreover, foreign investors usually seek to avoid litigation in state courts, as they fear they may not receive fair and equal treatment in local courts when the opposing party is the state or any state entity. This need to provide security to foreign investors for their investments has led the majority of states to adopt **investor protection legislation,** and to enter into various **bi- or multilateral investment treaties**. Such treaties usually provide for investor-state disputes to be resolved by arbitration as the most obvious alternative to state court litigation.

Despite the fact that there is substantial foreign direct investment in Austria, there is currently no reported investment dispute involving Austria as a host country. Due to the high involvement of Austrian companies, especially in the CEE region, there are, however, a number of investor-state disputes involving Austrian nationals as investors.

10.2 The ICSID Convention

10.2.1 Historical Background

In 1965, the ICSID Convention – sometimes also referred to as Washington Convention – was launched. Its primary aim was the promotion of foreign direct investment by establishing a neutral, autonomous forum for the resolution of disputes between states and nationals of other states. The ICSID Convention created an independent organization to administer international investment disputes, the International Centre for the Settlement of Investment Disputes (**ICSID**). ICSID is an autonomous body, but is closely linked to the World Bank. Today, 150 states are signatories to the ICSID Convention; this shows the importance of ICSID in the

context of international investment. Austria signed the ICSID Convention on 17 May 1966, and it entered into force on 24 June 1971.

10.2.2 **Legal Framework for Cases Brought before the ICSID**

While originally most disputes were referred to ICSID by way of arbitration agreements in contracts between states and foreign investors, most of the cases brought before ICSID today are based on arbitration provisions contained in **bilateral or multilateral investment treaties.**

10.2.3 **Overview of the Prerequisites for Cases to Be Resolved by ICSID**

In order to have a dispute resolved by ICSID, **three conditions** have to be met:

- Both parties must in some way have given their **consent to arbitration** in accordance with the ICSID Rules;
- One of the parties has to be a **Contracting State** of the ICSID Convention while the other is a **national of another Contracting State**; and
- The **dispute to be resolved needs to be one arising directly out of an investment**.

10.3 <u>The Prerequisites in Particular</u>

10.3.1 Consent to Arbitration

Concering the first requirement, it is important to consider that the fact that a state is a party to the ICSID Convention does not mean that this state has given its blanket consent to refer any investment dispute to arbitration. Rather, this consent has to be given elsewhere – either in **national legislation**, applicable bi- or multilateral **investment treaties**, or directly by way of an **arbitration clause** contained in the contract with the foreign investor.

It is certainly advisable for investors to include an arbitration clause in contracts with states or state entities so as to preclude comprehensively any challenges to jurisdiction, and to ensure the dispute is settled pursuant to the ICSID Rules. However, if investors – for one reason or another – fail to do so and the host state has given its consent to ICSID arbitration in an

applicable bilateral treaty, the investor´s treaty-based claims will still be arbitratable. In practice, the investor usually tries to bring all its claims under the investment treaty.

Where national legislation provides for arbitration for investment disputes, or the host state is party to an investment treaty providing for arbitration, these provisions are generally seen as offers to arbitrate, which a foreign investor is free to accept. This acceptance may be given by a written statement; similarly, the investor is also considered as having accepted the offer to arbitrate by merely filing a request to arbitrate with ICSID.

10.3.2 Contracting State and National of another Contracting State

The information on which states are Contracting States to the ICSID Convention is freely accessible on the ICSID website. Currently, the list of **Contracting States** comprises **150**. Issues might arise under the second requirement where the party to an investment agreement is not the Contracting State itself, but any of its subdivisions or agencies.

In order to have any arising dispute settled before ICSID in such cases, the Contracting State has to declare that the relevant subdivision or agency is subject to its jurisdiction and must either give its approval to the agency´s or subdivison´s consent to arbitrate, or else declare that its approval is not needed. Thus, if an investor is contracting with a state agency or subdivision, it is advisable for such an investor to draft an arbitration clause that meets these requirements.

Even if these requirements are met, independent consent by the host state must be given before a claim can be raised directly against the state before ICSID.

A "national of another Contracting State" is either a citizen of another state party to the ICSID Convention, or an entity or organization incorporated in another Contracting State.

10.3.3 Legal Disputes Arising out of an Investment

The term "**investment**" is not defined in the ICSID Convention. However, tribunals have tended to interpret this **term rather broadly**. An investment is any project with economic value, including not only any kind of assets and capital contribution, but also non-equity investments such as, for example, service contracts. There are limitations: Alleged wasted expenses incurred by a party in pursuing a potential investment that did not eventually

materialize, have been considered by a tribunal not to be an investment (ICSID case No. ARB/00/2).

10.3.4 Specifics of ICSID Arbitrations

Investor-state arbitration is special in that the **involvement of state courts is generally undesired**: Investors pursuing a claim against a state do not wish to submit to the laws of that state, usually due to concerns of bias and unfair treatment by the state courts. States on the other hand are usually unwilling to submit to the laws of another state. Thus, an ICSID arbitration is entirely de-localized: The law of the place of the arbitration does not have any impact on it. It is the arbitral tribunal that decides on interim measures, without any assistance from any local courts (Art 47 ICSID Convention).

Moreover, there is no review of the arbitral tribunal´s award by state courts. Rather, the ICSID Convention provides for a review procedure by a second tribunal – the so-called "**ad-hoc committee**". This committee is constituted of three members that are appointed by the Chairman of the Administrative Council. It has the **power to annul an award** in full or in part; it cannot, however, modify an award. There are only five reasons on which the annulment of an ICSID award may be based:

- The tribunal was not properly constituted;
- The tribunal manifestly exceeded its powers;
- Corruption on the part of a member(s) of the tribunal;
- A serious departure from a fundamental rule of procedure; and
- The award does not contain the reasons on which it is based

There is **no review on the merits** of the award.

10.4 Bilateral Investment Treaties (BITs)

10.4.1 Definition

One of the main reasons for the increase in ICSID arbitration is the ever-increasing number of Bilateral Investment Treaties (BITs). As indicated by the name, those treaties are **concluded**

between two states and confer special rights and **protections on investors** being nationals of, or incorporated under the law of, one of the state parties to the contract.

As BITs are negotiated and concluded between two sovereign states, the contents of different BITs may vary greatly. Nevertheless, there tend to be at least some common features in most BITs.

10.4.2 General Content

Among the **substantive rights** of protection usually granted in BITs are the following:

- **Fair and equitable treatment**: This means that the state is obliged to provide a reasonably stable environment for investments;
- **Full protection and security**: Investors shall be protected against destruction of their property and/or serious threat thereof;
- **Protection against uncompensated expropriation or nationalization**: Governments are only allowed to expropriate an investment under clearly defined and restrictive conditions: it must be for a public purpose, it must not be done on a discriminatory manner, and prompt and adequate compensation has to be provided;
- **National treatment**: The host state must treat the foreign investor as if it were a national of its own;
- **Most favored nation treatment**: The host state must treat the investor to the same standard as any other foreign investor; and
- **Free transfer of funds**: Funds related to the investment must be freely transferrable in and out of the host state.

10.4.3 Various Dispute Resolution Procedures

BITs usually provide for disputes to be resolved by arbitration, yet there might be some requirements that an investor has to meet before arbitral proceedings may be commenced. Some BITs establish that the parties must first attempt to resolve the dispute through **negotiation and consultation**, usually within a period of about three to six months. This

consultation period is commonly triggered by a letter from the investor to the state. Sometimes BITs provide for a number of different options open to the parties on how to proceed to resolve their dispute. The parties, or perhaps only the investor, may then choose to refer the dispute to ICSID, a different arbitral institution, an *ad hoc* committee, or to commence proceedings before a local court. Investors therefore have to exercise care in selecting the approach that best suits their purposes, as a BIT that provides for different options frequently also provides that once a party has chosen one of those options, the other options are waived.

10.4.4 Austria as Party to BITs

Austria is currently party to 65 BITs, many of which provide for arbitration under the auspices of ICSID. The Austrian model BIT (available at http://www.bmwfj.gv.at/Aussenwirtschaft/investitionspolitik/Documents/Ö%20Mustertext%20für%20bilaterale%20Investitionsabkommen.pdf) aims at providing a high standard of investor protection: In addition to incorporating all the typical substantive standards, it specifically addresses the important issue of **transparency** in investor-state disputes (Art 6 Austrian Model BIT). Moreover, the Austrian model BIT provides for a choice of dispute resolution, either under the auspices of ICSID, the ICC or pursuant to the UNCITRAL Rules of Arbitration.

10.5 Implications of the Lisbon Treaty on BITs Concluded by EU Member States

Under the Lisbon Treaty, foreign direct investment – as a matter of common commercial policy – has fallen **exclusively under the competency of the EU**, meaning that only the EU may adopt legally-binding acts concerning that subject area. This raises the question of what is to happen to BITs already concluded by EU Member States.

EU Regulation No 1219/2012 establishes procedures for the **transition** of BITs concluded between EU Member States and third countries. While EU Member States are required to take the necessary steps to eliminate any existing incompatibilities between EU law and investment agreements with third countries, those agreements may be maintained in force until replaced by an investment agreement between the EU and the respective third state. EU Regulation No 1219/2012, however, does not address intra-EU BITs, which remain an area of uncertainty.