THE RELATIONSHIP BETWEEN ARBITRATION AND OTHER FORMS OF PRIVATE AND PUBLIC JUSTICE

Christoph LIEBSHER

SUMMARY: I. *Recognition and/or Enforcement of Foreign Awards (Conventions, Treaties)*. II. *Abbreviations*. III. *Bibliography*. IV. *Table of Cases*.

1. *What is the legal source of the rules regulating arbitration in your country?*

The most important statutory provisions of Austrian arbitration law are contained in secs 577-599 of the Austrian Code of Civil Procedure (*Zivilprozeßordnung*, ZPO) dated 1 August 1895. So far, these rules have only been amended to a minor degree.

With the exception of commodity arbitrations, such as those administered by the Court of Arbitration of the Vienna Stock and Commodity Exchange, secs 577-599 ZPO apply to all arbitration proceedings if the seat of arbitration is in Austria.[1] These sections of the ZPO apply to mandatory arbitrations prescribed in the Law on Copyright Collecting Associations ("Verwertungsgesellschaftengesetz") if the Verwertungsgesellschaftengesetz does not contain specific rules.[2] The differences between the rules of the ZPO and those of the Verwertungsgesellschaftengesetz regarding arbitration are: a default five-member tribunal (sec. 15(3) Verwertungsgesellschaftengesetz), shorter period (eight days) for an arbitrator's nomination (sec. 15[4] Verwertungsgesellschaftengesetz), establishment of an arbitral tribunal within four weeks of first notice to defendant (§ 15[5] Verwertungsgesellschaftengesetz), and the default competence for nominating arbitrators lies with the Federal Ministry of Justice (sec. 16[1] Verwertung-

[1] Mänhardt [1989] AnwBl 397 at 397 *et seq*. with further refs.

[2] Ciresa, *Österreichisches Urheberrecht Kommentar*, Verwertungsgesellschaftengesetz sec. 7, marg. no. 8.

sgesellschaftengesetz). Austrian law does not distinguish between domestic and international awards.[3]

Special rules apply to the enforcement of foreign awards. A foreign award is an award made outside the territory of Austria (sec. 89 Enforcement Act).

A major reform of the Austrian arbitration law is being undertaken, the main goal being the adoption of the Model Law.[4]

On the international level, the Vienna International Arbitration Centre, which is part of the Austrian Economic Chamber, provides institutional arbitration services according to the Vienna Rules or as an appointing authority.

2. *In your country, does mandatory arbitration, besides voluntary arbitration, exist (i. e. mandatorily imposed by heteronomous rules)?*
There are few areas of practical relevance in which mandatory arbitration is envisaged, the most relevant being the following.

Disputes arising between traders resulting from stock exchange and commodity deals (commodity arbitration), like those administered by the Court of Arbitration of the Vienna Stock and Commodity Exchange, are subject to mandatory arbitration pursuant to sec. 27 (4) of the Stock Exchange Act (*Börsegesetz*). However, this commodity arbitration must not be confused with the regular commercial arbitration services offered, for example, by the Vienna Stock Exchange, which are of a voluntary nature. Articles XIII-XXVII of the Introductory Law to the Austrian Code of Civil Procedure (*Einführungsgesetz zur Zivilprozeßordnung*, EGZPO) set forth the legal framework for these stock exchange arbitrations. According to article XVII, secs 587 to 599 of the Code of Civil Procedure do not apply to stock exchange arbitrations, the other arbitration related provisions of the ZPO, those being secs 577 to 586 ZPO, are however applicable. Instead, the issues covered in these provisions (such as arbitration procedure, as well as the making, setting aside, and enforcement of awards, etcetera) are to be determined individually in the respective stock exchange statutes.

[3] Rechberger and Melis in *Rechberger, ZPO* sec. 595, marg. no. 10; Dolinar and Lanier 35 at 77; Fasching *Lehrbuch* marg. no. 2231; Schönherr [1983] RIW 745 at 747; contra: Krilyszyn and Bajons 234 at 242; unclear: Reiner (1986) 27 ZfRV 162 at 218.

[4] *Cfr*. Oberhammer *Entwurf*.

A further area in which mandatory arbitration is prescribed is in cases involving the above-mentioned Verwertungsgesellschaftengesetz, pursuant to which disputes between a copyright collecting association and a copyright artists' association regarding the conclusion of a contract (sec. 14 [1] Verwertungsgesellschaftengesetz) or other contractual matters may only be decided by arbitration (sec. 14 (2) Verwertungsgesellschaftsgesetz). Sec. 14 (1) Verwertungsgesellschaftengesetz refers to secs 10 and 13 (2) Verwertungsgesellschaftengesetz, which determine that if a copyright collecting association and a copyright artists' association (or broadcaster) fail to reach agreement regarding a contract within the ambit of the Verwertungsgesellschaftengesetz, each association has the right to address an arbitral tribunal. The tribunal's award (so-called "Satzung") creates the rights and duties for the parties' contract.

A further case of mandatory arbitration under Austrian law can be found in sec. 12 Journalists' Act (*Journalistengesetz*).

However, it must be noted that the areas of mandatory arbitration are of little practical importance. For example, the Court of Arbitration of the Vienna Stock and Commodity Exchange did not register a single commodity arbitration case in 2002. In keeping with this, Sec. 12 *Journalists' Act* does not seem to be applied in practice.

In case of negative answer:
What prevents the introduction of mandatory arbitration?

In case of affirmative answer:
Are there rules providing for mandatory arbitration for the settlement of controversies that could not otherwise be subject to arbitration on the basis of the parties' will?

The majority of the issues subject to mandatory arbitration appear to be arbitrable. In order for a dispute to be inarbitrable in Austria, it must be impermissible or impossible to obtain a decision from a court on the particular matter.[5] However, regarding the above mentioned power of an arbitral tribunal to write the contract for the parties pursuant to secs 10 and

[5] OLG Innsbruck 13.3.1987 EvBl 1987/1962; OGH 9.5.1978 5 Ob 580/78 (not published); *Fasching*, Schiedsgericht 16.

13 (2) Verwertungsgesellschaftengesetz, it is at least doubtful whether this could be obtained from an ordinary court. Adhering to the principle that only matters which can be brought before an ordinary court are arbitrable,[6] the Verwertungsgesellschaftengesetz's contract determination facility may be not arbitrable without a clear statutory basis as provided in this statute.

3. *How are arbitrators appointed?*

The parties are free to stipulate the appointment procedure in the arbitration agreement. However, an arbitration agreement in which a party appoints itself or its legal representative as an arbitrator is deemed to be invalid.[7] Furthermore, the OGH held that an arbitration agreement is void pursuant to sec. 879 ABGB if this agreement provides that a person who is closely connected to a party is appointed to act as the chairman of the arbitral tribunal or if this person must appoint the chairman.[8]

Where the arbitration agreement neither names the arbitrator nor provides for the number and method of their appointment, sec. 580 ZPO states that each party should appoint one arbitrator. The two arbitrators appointed by the parties must then appoint a chairman of the arbitral tribunal. If one of the parties does not make its appointment, the other party may, pursuant to sec. 581 (1) ZPO, request that the required appointment be made within fourteen days and that it be accordingly informed of this appointment. If a third party is to make the appointment, then either party may call upon the third party to do so.

Service of the request to appoint an arbitrator can be made by post or through a notary (sec. 581 (3) ZPO). In general, it is permissible to serve this request in any form that provides proof of receipt.[9] According to sec. 581 (4) ZPO, once a party nominates an arbitrator, that party is bound by its appointment as soon as the other party receives notice of the appointment.

If a party does not carry out the required appointment of an arbitrator on time, the other party may ask the court to make the appointment. The designation of an arbitrator who has previously indicated a firm intent to refuse

[6] OGH 29.10.1929, SZ 12/215; *Ballon* in *Fasching*, Kommentar marg. num. 36 to sec. 1 JN.

[7] *Fasching*, Schiedsgericht 60 *seq*.; *Backhausen*, Schiedsgerichtsbarkeit 177 with further annots.

[8] OGH 29.6.1988 JB1 1988, 333.

[9] *Fasching*, Schiedsgericht 86.

the appointment is treated as an appointment that has not been made on time; the same applies to the appointment of a person who lacks the personal prerequisites to hold the position of an arbitrator.[10]

However, sec. 581 ZPO is not applicable to arbitrators who have already been nominated in an arbitration agreement.[11] As regards these arbitrators, the appointment of alternative arbitrators by the courts in accordance with sec. 582 ZPO is excluded. Therefore, if the arbitrator nominated in the arbitration agreement is not available —for example, because he is deceased— then it is only possible to apply to the court for a termination of the arbitration agreement in accordance with sec. 583 (2) num. 1 ZPO (*see* marg. num. 69).[12]

In circumstances where the nominated arbitrators cannot agree upon the appointment of a chairman, sec. 582 (1) ZPO provides that an application can be made to the court to appoint the chairman. The law does not stipulate a particular time period within which the arbitrators must agree upon the appointment of a chairman. Each party, as well as each arbitrator, is entitled to petition the court.[13] However, in those cases where the arbitration agreement provides that the parties must agree upon the appointment of a chairman, and the parties fail to reach such agreement, then sec. 582 ZPO is not applicable.[14] This is also true where a third party must appoint the chairman in the event that the arbitrators cannot agree and where the third party fails to fulfil this obligation.[15] In such a case, the arbitration agreement may be terminated by court decision according to sec. 583 ZPO.

Sec. 582 (2) ZPO provides that an order of the court appointing an arbitrator is not subject to appeal. However, according to the OGH, a dismissal of such an application or a decision without a legal basis may be appealed.[16]

In those cases where the arbitration agreement provides that the parties shall appoint the arbitrators jointly, but where the parties cannot agree upon the nomination of the arbitrators, the courts must, upon petition by one of the parties (sec. 584 (1) ZPO), terminate the arbitration agreement (sec.

[10] *Fasching*, Schiedsgericht 86.
[11] OGH 23.9.1959 SZ 32/109.
[12] *Fasching*, Schiedsgericht 90 and Lehrbuch, marg. num. 2192.
[13] OGH 7.12.1933 SZ 15/249.
[14] *Fasching*, Schiedsgericht 86.
[15] HG Wien 25.9.1936 EvBl 1936/1075.
[16] OLG Linz, 3.12.1996, 2 R 272/96 (not published); 2.5.1972 SZ 45/55.

583 (1) ZPO). The same rule applies in cases where the arbitrator designated in an arbitration agreement dies, refuses the appointment, or withdraws from the arbitrator's agreement (sec. 583 [2] num. 1 ZPO). This rule also applies if an arbitrator refuses or unreasonably delays the carrying out of his obligations (sec. 583 [2] num. 2 ZPO).

However, sec. 583 ZPO is not applicable to an arbitrator appointed after the dispute has arisen. In this case, each party may apply to the courts to appoint an arbitrator pursuant to sec. 582.[17] Secs 582 and 583 ZPO are not mandatory (sec. 585 ZPO). In particular:

3.1. *With reference to voluntary arbitration, is there arbitration in which the parties' will is subject to limitations as to appointment of arbitrators?* The following limits exist:

Only a natural person[18] with full capacity[19] can act as an arbitrator. Under sec. 578 ZPO, active judges are excluded from being arbitrators. This section also applies to those professional judges who are responsible for administrative duties only.[20] According to the scholarship in this area, a violation of this rule does not provide grounds to set aside the award in accordance with sec. 595 (1), num. 3 ZPO.[21]

If the arbitrator is not independent and impartial, he/she may be challenged (see 3.3).

According to the scholarship in this area, an arbitration agreement that provides for a party or its legal representative to be appointed as an arbitrator is void.[22]

Under sec. 879 ABGB, an arbitration agreement is void if it provides for someone who is closely connected to a party to the arbitration to be appointed as the chairman of the arbitral tribunal, or if it provides that such a person must appoint the chairman.[23]

[17] OGH 26.3.1996 EvBl 1998/130; *Rechberger/Mehlis* in *Rechberger*, ZPO, marg. no. 1 to sec. 583 with further annots.

[18] Rechberger and Melis in *Rechberger*, *ZPO* sec. 579 marg. num. 1.

[19] Fasching, *Schiedsgericht* 135.

[20] *Fasching*, Schiedsgericht 57.

[21] *Rechberger/Mehlis* in *Rechberger*, ZPO, marg. num. 1 to sec. 578; *Matscher*, Bl 1975, 456.

[22] Fasching *Schiedsgericht* 60 *seq*.; Backhausen *Schiedsgerichtsbarkeit* 177 with further refs.

[23] OGH 29.6.1988 [1988] JBl 333.

3.2. *With reference to mandatory arbitration, do the parties have any influence on the appointment of arbitrators?*
Pursuant to sec. 15 (3) Verwertungsgesellschaftengesetz, the same rules as above (see 3) apply and the parties are free to appoint one member of the mandatory arbitral tribunal. Similarly, article XVI EGZPO (for example in connection with sec. 19 (1) Statute of the Vienna Stock Exchange) allows the choice of an arbitrator, however in this case the arbitrator must be chosen from a fixed list of arbitrators issued by the stock exchange (Schiedsrichterkollegium).There are two different lists of arbitrators, one for the members and visitors of the stock exchange and another for persons, which do not belong to this category (article XVI [1] EGZPO). It is said that this differentiation was introduced in order to enable non-members of the stock exchange to have their cases heard by arbitrators, who themselves also do originate from stock exchange circles.[24]

3.3. *How is arbitrators' impartiality guaranteed?*
According to sec. 586 (1) ZPO, arbitrators may be challenged upon the same grounds as judges.[25] The application of this provision cannot be waived by the parties (sec. 598 [1] ZPO). The grounds upon which a judge may be challenged are contained in secs 19 and 20 JN. According to these provisions, arbitrators can be challenged if they themselves are parties to the proceedings, if they are married or belong to the immediate family of a party or (of) its counsel, if they have acted or continue to act as a party's counsel, or if there is sufficient reason to doubt the arbitrator's impartiality. According to Austrian scholarship in this area, close contact between one of the parties and the arbitrator amounts to a prima facie bias (Befangenheitsgrund).[26]

Grounds for challenge will be lost if the party does not challenge the arbitrator without delay.[27] A limitation on the right of a party to challenge an arbitrator is contained in sec. 586 (2) ZPO. This section provides that, in cases where a party has itself or in agreement with the other party nominated an arbitrator, this party can only challenge this arbitrator for reasons

[24] *Konecny* in *Fasching*, Kommentar marg. num. 2 to article XVI.
[25] *Rechberger/Rami*, WBJ 1999, 103.
[26] *Fasching*, Schiedsgericht 64.
[27] *Backhausen*, Schiedsgerichtsbarkeit 178 with further annots.

that either this party became aware of after the nomination or that arose after the nomination.

The decision on the challenge is made by the arbitral tribunal. Unless there is a provision to the contrary, the arbitrator who is being challenged takes part in the decision, and a single arbitrator makes the decision himself.[28] The courts may not be called upon during the arbitration proceedings. The award can be set aside (in accordance with sec. 595 [1], num. 4 ZPO) if the challenge was unjustifiably denied. A review by the court is not possible if the challenge is granted. If an arbitrator who was successfully challenged participates in the making of the award then, according to sec. 595 (1), num. 3 ZPO, this award may be set aside.[29]

3.4. *Is arbitration with more than two parties regulated by a specific set of rules?*

There are no statutory rules. In the event that there are multiple parties on one or both sides, Fasching argues that each side must agree on and nominate one arbitrator.[30] Where one side fails to agree on, and thus nominate, its arbitrator, the opposing side may ask for the appointment of this arbitrator by the court.[31] Article 10 (3-7) Vienna Rules is governed by the same principle:

> Multiparty Proceedings
> Article 10
> ...
> 3. If an agreement exists concerning the admissibility of multiparty proceedings, the Defendants must agree among themselves whether they wish to have the dispute decided by one arbitrator or by three arbitrators, and, if a decision by three arbitrators is desired, must jointly nominate an arbitrator.
> 4. In the case covered by paragraph 3 of the present article, if there is no agreement among the Defendants concerning the number of arbitrators, the Defendants shall be requested by the Secretary to provide evidence of such agreement within thirty days after service of the request.

[28] *Reiner*, ZfRV 1986, 195.
[29] *Backhausen*, Schiedsgerichtsbarkeit 179 with further annots.
[30] Fasching, *Schiedsgericht* 104.
[31] Fn 1364.

5. If no evidence of agreement on the number of arbitrators is presented within the period mentioned in paragraph 4 of the present article, the Board shall determine whether the dispute is to be decided by one arbitrator or by an arbitral tribunal.
6. If the Defendants have agreed that the dispute is to be decided by an arbitral tribunal, but without nominating an arbitrator, they shall be requested by the Secretary to indicate the name and address of an arbitrator within thirty days after service of the request.
7. If no arbitrator is jointly nominated within the period mentioned in paragraph 6 of the present article and if the dispute is to be decided by an arbitral tribunal, the Board shall appoint the arbitrator for the defaulting Defendants.

3.5. *Are there specific rules on the contractual relation between the parties and the arbitrators?*
There are no statutory rules. In *ad hoc* arbitration proceedings, the arbitrator's agreement governs the legal relationship between the arbitrator and the parties. The arbitrator's agreement is a contract under private law and is classified as a works contract (Werkvertrag).[32] As a result of this, the arbitrator obtains certain rights —for example, the right to remuneration— and undertakes various obligations. These obligations include the carrying out of the arbitration proceedings, the making and signing of the award, the duty to be objective, as well as the duty to furnish information and to render accounts.[33]

4. *How is the relationship between arbitrators and judges regulated?*

4.1. *Is there a form of arbitration within the context of a trial whose carrying out is imposed on the parties by the judge they addressed?*
No.

4.2. *Are the rules regarding competence and lawsuit pendency applied?*
In particular, referring to both voluntary arbitration (in its different forms) and, possibly, to mandatory arbitration: *See* 4.3, 4.4, 4.6.

[32] OGH 7.3.1977 JBl 1978, 157; *Fasching*, Schiedsgericht 68 and Lehrbuch, marg. num. 2198 with further annots.; *Matscher*, JBl 1975, 458.
[33] *Rechberger/Mehlis* in *Rechberger*, ZPO, marg. num. 4 to sect. 579 with further annots.

4.3. *How is the arbitration plea deemed? A jurisdiction plea or merits of the case plea?*
A valid arbitration agreement establishes the curable (heilbare) lack of jurisdiction of the domestic courts.[34] The lack of jurisdiction issue may be raised *ex officio* by the court immediately after the action is filed in court (sec. 41 JN), or it may be raised as an objection by the parties. The objection is timely if the defendant invokes the arbitration agreement before any pleadings with respect to the substance of the dispute. If an objection is not raised in time, the lack of jurisdiction of the court is cured and the court is thereby competent in the matter.[35]

4.4. *Can* translatio judicii *(i.e. the shifting) between arbitrators and ordinary judge (and vice versa) be applied?*
No.

4.5. *Does lawsuit pendency before the municipal judge (*lis apud iudicem pendens*) prevent arbitrators from deciding on the controversy?*
There are no specific rules on this issue in the Austrian rules on arbitration procedure; however, a careful analogy to the general rules on civil procedure would allow the arbitrators to adjourn the arbitration proceedings until the issue before the municipal court has been decided, unless the parties agree otherwise. In this respect, sec. 190 ZPO, for example, determines that —in proceedings before municipal courts— a municipal court may suspend proceedings when another court has yet to decide on a prejudicial preliminary issue (präjudizielle Vorfrage). However, there is no rule that forces the arbitrators to adjourn their proceedings in this case. The arbitrators may determine the procedure in their discretion to the extent that the parties have not agreed on procedural rules (sec. 587 [1] ZPO). This also applies to the suspension of the proceedings.[36]

4.6. *Does lawsuit pendency before arbitrators (lis apud arbitros pendens) prevent the municipal judge from deciding on the controversy?*
The same rule will apply as in regards to litigation (*see* 4.5).

[34] OGH 17.4.1997 WB1 1997, 390; *Rechberger* in *Rechberger*, ZPO, marg. num. 12 to sec. 577.
[35] OGH 7.2.1989 JBl 1989, 594; *Fasching*, Lehrbuch, marg. num. 219, 2184.
[36] *Fasching*, Schiedsgericht 100.

4.7. *Is the suspension of arbitral proceedings taken into consideration while waiting for a decision of a preliminary question by the municipal judge?*
There is no rule that obliges a municipal judge to do so.

4.8. *Is the suspension of proceedings pending before the municipal judge taken into consideration while waiting for a decision of a preliminary question by arbitrators?*
There is no rule that obliges an arbitral tribunal to do so.

5. *What are the forms of arbitration proceedings?*
In particular:

5.1. *Is there a voluntary arbitration in which the parties' will is limited as to the proceedings regulation?*
Apart from the basic principles mentioned below, the parties are free to agree on procedural rules. This can be done either in the arbitration agreement or in a subsequent agreement within the limits of public policy. If there is no such agreement or if the agreement is incomplete and does not provide for procedural rules, the arbitrators may determine the procedure according to their discretion (sec. 578 [1] ZPO).

Even though the parties may determine the procedural rules of the arbitration, there are, nevertheless, particular principles that must be observed in arbitration. These principles are derived, in particular, from the mandatory procedural provisions of the ZPO, as well as from certain mandatory principles of the administration of justice (two party system, separation of judge and party, the principle that no decision can be given without an application, the right to be heard, etcetera).[37]

5.2. *With reference to mandatory arbitration, has the parties' will any influence on the regulation of the proceedings?*
No.

5.3. *What are the arbitrators' powers regarding the collection of evidence?*
Sec. 587 (1) ZPO states that it is mandatory that the arbitrators "examine the facts of the dispute prior to making an award". Legal scholars argue that this provision imposes upon the arbitral tribunal a duty of examination that is closer to an inquisitorial system than to an adversarial

[37] *Fasching*, Schiedsgericht 98.

system.[38] The arbitral tribunal must convince itself of the existence of the disputed facts even without the submissions of the parties.[39]

The arbitrators may determine the admissibility and weight to be given to the evidence. A well-settled principle under Austrian civil procedure is the free assessment of evidence. It follows from sec. 587 (1) ZPO that this principle is also applicable in arbitration.[40] It can be argued that rules for the assessment of evidence would contradict not only the above provision, but also the mandatory principles of Austrian civil procedure.[41] It is not clear whether the principle of the free assessment of evidence is considered to pertain to public policy.

The arbitral tribunal may consider any type of evidence in determining the facts of the case. It is not restricted by the more closely-regulated means of proof found in the ZPO.[42] The taking of evidence cannot be carried out by other persons (for example, by an expert alone).[43] If there are no other procedural rules provided by the parties or the arbitrators, the evidence does not have to be presented in the presence of all arbitrators.[44]

5.4. *Is judicial assistance to arbitrators taken into consideration for purposes of evidence collection?*

According to sec. 589 ZPO, the courts are obliged to grant judicial assistance to arbitral tribunals. However, under this provision, the obligation to grant judicial assistance only covers judicial, sovereign acts, *e.g*. summons, examination, administration of oath, appointment of experts, implementation of judicial inspection of documentary evidence, etc. In addition, the request for assistance may only refer to those judicial acts that are considered necessary by the arbitral tribunal, for which it has no jurisdiction in accordance with sec. 588 ZPO (*see* marg. nums. 139 *seq*., 166), and that are legally admissible. However, the courts are not allowed to review the

[38] *Backhausen*, Schiedsgerichtsbarkeit 151 *seq*; *Fasching*, Schiedsgericht 105 *seq*; contra: *Matscher*, JB1 1975, 462 *seq*.
[39] *Backhausen*, Schiedsgerichtsbarkeit 152 with further annots.
[40] *Fasching*, Schiedsgericht 107.
[41] *Idem*.
[42] *Idem*.
[43] OGH 3.5.1899 GlUNF 603.
[44] OGH 13.1.1955 JB1 1955, 503; *Fasching*, Lehrbuch, marg. num. 2209.

expedience of the required judicial act.[45] In our experience, judicial assistance is not used very frequently.

A party is not entitled to this assistance. Therefore, the request for judicial assistance pursuant to sec. 589 ZPO may only be made by the arbitral tribunal.[46]

5.5. *Is it possible for third parties to (a) be joined as parties in arbitral proceedings (b) intervene in arbitral proceedings?*
The intervention of a third party is permissible to the extent that the parties have not otherwise agreed. Secs 17 and 20 ZPO are applicable.[47] The main preconditions for the intervention of a third party are that the third party has a legal interest in the success of one of the parties, and that the third party declares its joinder in writing.[48] The third party may assist during the proceedings.[49] The award does not create any rights or obligations upon the intervening third party. Pursuant to sec. 20 ZPO, the intervening third party may only be joined as a party (Streitgenosse) if the arbitration agreement extends to this third party.[50] Only in this case does the award have the effect of a court judgement for this party.[51]

5.6. *Can more than one connected arbitration proceeding be unified?*
Two or more arbitrations can be consolidated with the agreement of all parties and arbitrators.

6. *What is the possible content of arbitrators' measures?*

6.1. *Can arbitrators render declaratory awards (i. e. awards which clarify a legal relationship which is uncertain) and constitutive awards (i. e. awards which create, modify or extinguish a legal relationship; e. g. the agreement is terminated for default)?*
Yes.

[45] *Fasching*, Lehrbuch, Rz 2213.
[46] *Fasching*, Schiedsgericht, 116.
[47] *Fasching*, Schiedsgericht 100.
[48] *Fasching*, Lehrbuch, marg. num. 395.
[49] *Fasching*, Lehrbuch, marg. num. 403 *seq*.
[50] *Fasching*, Schiedsgericht 29, 100.
[51] *Fasching*, Lehrbuch, marg. num. 405.

6.2. *Can arbitrators deliver summary measures?*
Payment orders, termination orders, as well as transfer and take-over orders may not be referred to an arbitral tribunal.[52]

6.3. *Can arbitrators grant precautionary measures?*
According to leading opinion and precedent, an arbitral tribunal cannot order any temporary injunctions or other interim measures of protection.[53] An arbitral tribunal may not grant interim orders or other protective measures. Only the courts are competent in these matters.

7. *With reference to voluntary arbitration*:

7.1. *Upon which criteria is the area of controversies which can be submitted to arbitration determined?*
As to objective arbitrability, if it is impermissible or impossible to obtain a decision from a court in a particular matter, then it is also not permissible to refer this matter to arbitration.[54] The arbitral tribunal must apply this provision *ex officio*. Any claims may be subject to arbitration if the parties may settle them (Vergleichsfähigkeit) (sec. 577 [1] ZPO).[55]

Therefore, the following legal disputes cannot be submitted to arbitration: compensation claims against managing directors of a limited liability company; claims to the payment of the share capital of a limited liability company (sec. 10 GmbHG); actions to have a judgement set aside and the proceedings reopened (revision); enforcement actions according to secs 35, 36, 37, 233, 258 EO; certain disputes in land leasehold relationships (sec. 2 [2] LPG); collective labour disputes (sec. 9 [2] ASGG);[56] and "non-contentious proceedings" in rent control matters according to sec. 37 (1)

[52] OGH 6.9.1984 RdW 1985, 13; *Fasching*, Lehrbuch, marg. num. 2178 with further annots; *Backhausen*, Schiedsgerichtsbarkeit 117 with further annots.

[53] OGH 12.9.1996 ÖJZ-LSK 1997/58; *Fasching*, Schiedsgericht 22 and Lehrbuch, marg. num. 2177; *Matscher*, JB1 1975, 455; *Backhausen*, Schiedsgerichtsbarkeit 144; *Rechberger/Mehlis* in *Rechberger*, ZPO, marg. num. 14 to sec. 577.

[54] OLG Innsbruck 13.3.1987 EvBl 1987/162; OGH 9.5.1978, 5 Ob 580/78 (not published); *Fasching*, Schiedsgericht 16.

[55] OGH 10.12.1998, 7 Ob 221/98w (not published); 14.7.1993 EvBl 1993/155; OLG Innsbruck 22.11.1988 EvBl 1989/159; 26.5.1986 SZ 59/88; 18.4.1985 SZ 58/60; 6.9.1984 RdW 1985, 13; *Fasching*, Lehrbuch, marg. num. 2173 *et seq*.

[56] *Rechberger/Mehlis* in *Rechberger*, ZPO, marg. num. 5 to sec. 577.

MRG außerstreitige Mietsachen).[57] However, the issue of whether a contractual relationship is to be considered rental of real estate or lease of a business is arbitrable.[58]

A further limitation is contained in sec. 124 KartG. This section provides that where an arbitration clause is contained in a cartel contract, the parties may still refer the matter to the courts, whereupon an arbitral tribunal would lose its jurisdiction. Furthermore, arbitral tribunals have an obligation to inform the parties of this option (sec. 124 [1] KartG). Clauses in the agreement that conflict with this provision are ineffective.

Disputes over industrial property rights are, in principal, capable of being referred to arbitration. However, disputes about the valid grant or revocation of industrial property rights —for example, trademarks and patents— cannot be submitted to arbitration.

Criminal matters, enforcement matters, insolvency proceedings, as well as public law claims cannot be decided by an arbitral tribunal.[59]

7.2. *Is arbitration permitted for controversies whose object consists of rights that cannot be disposed of by the parties?*
No.

7.3. *Does the area of controversies which can be submitted to arbitration coincide with the area of disposable rights and/or with the area of controversies which can be transacted?*
Yes.

7.4. *Can the mandatory nature of rules to be applied be a limit to the possibility to submit the controversy to arbitration?*
Yes.

7.5. *Do controversies that can be submitted to arbitration coincide with controversies that may be subject to an arbitration clause?*
Yes.

[57] OHG 13.7.1999 JBL 2000, 460.
[58] OHG 8.6.2000 RdW 2000, 472; *Reiner*, webl 2001, 161.
[59] *Backhauscn*, Schiedsgerichtsbarkeit 117.

7.6. *What are the subjective limits of validity of arbitration and arbitration clauses?*

Any natural person who is fully capable of entering into a contract, as well as legal entities and partnerships, may conclude arbitration agreements, with the exception of civil law partnerships according to the ABGB and silent partnerships.[60] In relation to civil law partnerships and silent partnerships, only the partners, in their capacity as individuals, can be a party to an arbitration agreement.[61] In principle, municipal agencies may conclude arbitration agreements.[62]

According to sec. 595 (1), num. 1 ZPO, the capacity of foreigners to conclude an arbitration agreement is determined according to the general conflict of laws rules. According to sec. 9 IPRG, the capacity of a natural person is in general governed by the law of the state of which that person is a citizen. The relevant law for a legal entity is the law of the actual seat of its headquarters or, in the absence thereof, the law to which the legal entity has the closest connection (sec. 10 IPRG).

Persons with sovereign immunity who conclude an arbitration agreement are deemed to submit to arbitration and to the domestic courts within the scope of secs 577 *et seq*. ZPO.[63] Therefore, such persons cannot claim immunity either before the arbitral tribunal or before the courts.

7.7. *Is an autonomous action permitted in order to verify the validity of the arbitration agreement?*

In order to obtain a court decision concerning the validity of an arbitration agreement, an action for declaratory judgement may be brought. The permissibility of a declaratory judgement as to the invalidity of an arbitration agreement has been, albeit in a rather dated decision, confirmed by the OGH.[64] Austrian scholarship is divided on this issue.[65]

7.8. *Is arbitration on issues non-exhaustive of the object of jurisdictional proceedings permitted (e.g. where arbitrators are demanded to quantify*

[60] *Fasching*, Lehrbuch, marg. num. 346 *et seq*., 2172.
[61] *Backhauscn*, Schiedsgerichtsbarkeit 23 with further annots.
[62] *Backhausen*, Schiedsgerichtsbarkeit 22; *Fasching*, Lehrbuch Rz 334.
[63] *Fasching*, Schiedsgericht 14 and Lehrbuch, marg. num. 2172.
[64] OGH 3.10.1956 EvBl 1956/353.
[65] Pro: *Mänhardt*, AnwBl 1989, 398 *et seq*. with further annots.; contra: *Backhausen*, Schiedsgerichtsbarkeit 163 with further annots.

the damages resulting from a certain event, without prejudice to the issue relating to the right for compensation of these damages)?
Yes, as long as the arbitrator exercises jurisdictional power; on the difference between arbitrators and experts, *see* 10.1.

8. *Are there different types of voluntary arbitration?*
In particular:

8.1. *Is it possible to distinguish among the different types of arbitration in relation to the nature of the proceedings and/or to the relations between arbitration proceedings and domestic jurisdictional proceedings and/or to the effects acknowledged to the award and/or to its appeal regulation?*
No.

8.2. *Is there a contrast between jurisdictional arbitration and contractual arbitration?*
Contractual arbitration would mean arbitration where the decision on the merits would not have the same legal force as a judgement by a municipal court. There is no such thing as an "*arbitrato irrituale*". In case of affirmative answer:

8.3. *Does the difference between the two types of arbitration concern only the award effects or even its structure and/or nature?*
Not applicable.

8.4. *Is the principle of arbitration clause autonomy valid in relation to both types of arbitration (i.e. the principle according to which the contract nullity does not necessarily affect the arbitration clause contained therein)?*
Not applicable.

8.5. *Is equity arbitration permitted* (ex aequo et bono)*?*
Yes; however, this is only if the parties expressly agree so.[66]

9. *Does voluntary arbitration also include a settlement and assessment agreement (i. e. an agreement aimed at settling a controversy) whenever their content is determined by a third party?*

[66] Fasching, *Schiedsgericht* 108.

Does voluntary arbitration also include the joint mandate to settle and the joint mandate to stipulate an assessment agreement?
No.

10. *How is the contractual expert report (or arbitral expert report) construed?*

10.1. *What is its regulation?*
Austrian scholars distinguish between three different types of activity of an expert:[67] gap-filling; contract adaption; and determination of facts.

This shows that the notion "expert" under Austrian law is very broad. A negative definition has been employed by the Supreme Court by stating that no arbitrator may have functions different from those of a judge.[68]

The third case (determination of facts) consists of two subgroups:[69] clarification of the content of a right or legal relationship (*e.g.* determination of the "fair and reasonable price"), on the one hand, and determination of facts of legal relevance, on the other (*e.g.* determination of the account balance arising from a business relationship).

According to the Supreme Court, the essential difference between an arbitrator and an expert is that the expert determines facts or fills gaps in the contract,[70] while the determination of legal positions, rights, and duties is reserved for the arbitrator.[71]

An agreement whereby a third party should determine the share with which each member of a group of parties should pay compensation was considered an arbitration agreement.[72] However, the distinction is not quite so straightforward.

Already in 1968 the Supreme Court held that, in a case of quaestiones mixtae, an expert may also be authorized to solve legal issues.[73] This was confirmed by a decision in 1980.[74] Again, in 1985, the Supreme Court held that an expert may need to subsume facts under provisions of the law and

[67] Fasching *Lehrbuch* marg. num. 2168.
[68] OGH 13 January 1955 (1955) 77 JBl 503.
[69] Fasching *Lehrbuch* marg. num. 2168.
[70] OGH 13 July 2000 [2001] ARD 5240.
[71] Rechberger and Melis in *Rechberger*, *ZPO* sec. 577 marg. num. 20 with further refs.
[72] Fn. 1404.
[73] OGH 4 September 1968 (1968) 41 SZ num. 104.
[74] OGH 13 March 1980 [1980] ZVR 304.

that this fact alone is not sufficient to determine the qualification of such a person. In this case, it was decisive whether a court should —according to the agreement of the parties— have the power not only to set the decision of this neutral person aside, but also to review the facts.[75]

In cases of ambiguity, the objective task given to the person in question is the primary criteria to determine whether the person shall act as expert or as arbitrator. If this does not lead to a clear result, then the "control test" is applied: Did the parties want the control of the municipal courts to be limited to the grounds that allow a challenge of an award or did they intend a greater degree of control? In the latter case, the person will be considered to be an expert and not an arbitrator.[76]

Expert determination is, under certain circumstances, subject to judicial review.[77]

11. *What is the relation between arbitration and conciliation?*
In particular:

11.1. *Is a conciliation attempt a necessary step in order to have access to arbitration proceedings?*
No. There is no such requirement.

11.2. *Is a conciliation attempt used as a necessary step of arbitration proceedings and as a condition in order to proceed with the latter?*
No. However, the parties may optionally provide for preliminary conciliation attempts. If this is worded as a condition, a court claim started before would be rejected for lack of suability.[78] This also applies to claims in arbitration started before the condition is fulfilled.

11.3. *Is a conciliation attempt used as an optional method in order to define a controversy regulated by arbitration proceedings?*
No.

[75] OGH 27 February 1985 [1985] ÖJZ 119.
[76] OGH 17 August 2001 [2001] WBl 356; Fasching *Lehrbuch* marg. num. 2216; Garger 297 *seq*. with further refs, who believes that in cases where the expert is only authorized to determine facts, no resort must be made to the degree of control by the municipal courts.
[77] *Fasching*, Schiedsgericht 11.
[78] OGH 17.4.1997 (1997) WBl 390; *Fasching*, Schiedsgericht 26.

12. *In your country, are there systems of* "*informal justice*" *aimed at favouring conciliation-mediation between the parties (Mini-Trial, Summary-Jury trial, Moderated-Settlement, etc.)?*
Apart from arbitration, the only forms of alternative dispute resolution used in Austria are mediation and conciliation. However, their importance in international commercial disputes is currently still low. These methods are used, *inter alia*, in domestic marital law, family law, rent law, and disciplinary law matters.

The Draft Law on Mediation (Entwurf eines Bundesgesetzes über Mediation in Zivilrechtssachen) is currently in the process of being passed by Parliament. This new law will regulate various issues concerning the topic of mediation, especially the creation of the official status of "certified mediator," as well as stipulate the mediator's duties. In particular:

12.1. *Are there forms of alternative justice administered by private or public institutions?*
The above-mentioned forms of alternative justice are only offered by private institutions.

12.2. *Is there a legislative discipline of these forms of alternative justice?*
Both in marital law and rent law matters, mediation procedures are provided for in order to facilitate the reaching of agreement between the parties and as an alternative to immediate judicial proceedings.

12.3. *What is the relation between these forms of alternative justice and the municipal courts?*
Unless the parties agree on an adjournment of the juridical proceedings during the mediation process, the mediation procedure has little influence on parallel municipal court proceedings. However, when the parties reach an agreement as a result of the mediation, this settlement, which is regarded as a valid contract between the parties, can be relied on should a claim brought on the same issue. As regards the running of limitation periods during a mediation or conciliation, the rule is that while mediation attempts do not interrupt these periods, they suspend the expiry of such periods as long as these settlement attempts are "concrete" (*i. e.* sincere) enough.[79]

[79] OGH 6.4.1989, SZ 62/64; OGH 13.9.1989, SZ 62/150; Koziol/Welser, *Grundriß des Bürgerlichen Rechts-Band 1* (Manz, 2002), 207.

In contrast to the above said the mentioned draft law on mediation nevertheless provides for a complete tolling of periods of limitation that would be affected during a mediation when professionally administered mediation procedures are initiated. Such an tolling of periods of limitation is currently already in operation for divorce mediations pursuant to sec. 99 Ehegesetz.

12.4. *What is the relation between these forms of alternative justice and arbitration?*
See 11.

13. *Is arbitration award validity described by utilising expressions such as* "*decision validity*", "*judgement validity*" *or similar ones?*
Sec. 594 (1) ZPO states: "The arbitral award has the effect between the parties of a final and binding court judgment".

14. *In your jurisdiction, are there rules containing the following expressions:* "*decision validity*", "*judgement validity*" *or similar expressions used to describe the validity of contractual deeds (e. g. settlement or assessment agreement)? What are these rules?*
Austrian law knows so-called enforceable notarial deeds (vollsteckbarer Notariatsakt) pursuant to sec. 3 Notary Act (Notariatsordnung). Such deeds are regarded as enforceable titles under Austrian law pursuant to sec. 1, no. 17 Enforcement Code (Exekutionsordnung).

15. *Independently of the expressions utilised, do award effects and judgement effects issued by the municipal judge actually coincide?*
In particular:

15.1. *What are the objective and subjective limits of the arbitration award's validity?*
According to sec. 594 (1) ZPO, an award has the legal effect of a final court judgement. Therefore an arbitral award's validity has the same limits as those of a court decision. The objective limits concern the very subject matter of the dispute, which becomes *res judicata* and can not be ruled on again as soon as the award obtains legal force. Thus, a new claim —regardless of whether it is brought before a court or another arbitral tribunal— may not be identical to one already brought and ruled upon by the

judicial or arbitral body, which means it may not request the same performance, declarative statement or creation of rights as well as rely on the same facts and evidence as before (Identität des Anspruchs).[80] The wording of the claim (interpreted objectively) is the basis for the ambit of the subject matter.[81] The same also applies for claims whose ambit is the exact opposite to what was claimed and granted in an earlier trial (begriffliches Gegenteil), for example where the underlying defendant in a declarative statement case in a new claim demands the exact opposite declaration as that ruled on in favour of his counterpart.[82]

An award's subjective limits depend on the type of award, however it can be said that an award is always effective between the parties (*inter partes* effect) and in most cases an award will also extend its validity to the parties' legal successors.

15.2. *Are the consequent effects of the award, both for the parties and third parties, the same effects as those of a judgement issued by a judge?*
The inter partes effect of an arbitral award is the same as that of a judgement. However, while Rechberger[83] states that the subjective effects of arbitral awards are precisely the same as those of court decisions, without making a differentiation between the effects inter partes and with respect to third parties, Fasching states that the award's quasi-judicial effects only apply between the parties, thus leading to the conclusion that they are not effective in relation to third parties.

15.3. *Does an award not appealed within the terms have the same legal force as a final judgement? In the affirmative: even though it is rendered when lacking an arbitration agreement, or for a controversy which cannot be submitted to arbitration? Even though its measures are contrary to public order?*
Yes, an award that was not appealed has the same legal force as a final court judgement. However, where the award covers matters that are not arbitrable or that violate public policy, this is uncertain.

[80] *Fasching*, Lehrbuch marg. num. 1515.
[81] *Ibidem*, num. 1516.
[82] *Ibidem*, num. 1517.
[83] See Fn. 76.

16. *What are the effects on arbitration proceedings of the constitutional legitimacy issue of the rule that arbitrators are due to apply in the controversy decision?*

An unconstitutional act remains valid until it is set aside by the Constitutional Court. Pursuant to sec. 140 (1) Constitutional Law (Bundesverfassungsgesetz), federal and regional laws may be challenged before the Constitutional Court on application by the higher judicial bodies in the state (*e. g*. Supreme Court, Higher Regional Court, etcetera) Arbitral tribunals are not among the courts that have this authority to challenge.[84] However, under sec. 589 (1) ZPO, an arbitral tribunal may ask a municipal court to make such an application.[85]

17. *Is a second instance arbitration permitted?*

The appeal from an award can only be heard by an "appellate arbitral tribunal" within the meaning of sec. 577 ZPO. An appeal to an appellate arbitral tribunal is only permissible when the parties have provided for this in the arbitration agreement or when this is provided for in the rules of procedure to which they have agreed.[86]

Provisions on the grounds for appeal and scope of review can be agreed upon in the arbitration agreement or in the rules of procedure. In the absence of such provisions, there is no limitation on specific grounds for appeal.[87] The rules of the ZPO only apply if the parties have expressly agreed upon their application.[88]

Only the parties may agree on an "appellate arbitral tribunal." The arbitrators are not permitted to stipulate an "appellate arbitral tribunal".[89]

18. *How can an arbitration award be appealed?*

An appeal on the merits to a court is not permissible and any provision in an arbitration agreement to this effect is invalid.[90] Only awards or deci-

[84] *Walter/Mayer*, Grundriß des österreichischen Bundesverfassungsrechts (Manz, 1996), marg. no. 1151 *et seq*.
[85] *Rechberger/Melis* in *Rechberger*, ZPO, marg. num. 1 *et seq*. to sec. 589.
[86] *Fasching*, Schiedsgericht, 110 and Lehrbuch, marg. num. 2210.
[87] *Fasching*, Schiedsgericht, 110.
[88] *Idem*.
[89] *Fasching*, Schiedsgericht, 109.
[90] *Ibidem*, 110.

sions that satisfy minimum requirements may be set aside. These minimum requirements include the following: the award is in written form, the award involves a decision on the merits made by the appointed arbitrators who are capable of entering into contracts, the award involves a matter in dispute that is capable of being settled (*e. g*. criminal matters are excluded), and the parties asked for relief. Decisions that do not satisfy these requirements are termed "non-awards" (Nichtschiedssprüche) and are ineffective by operation of law.[91] The ineffectiveness of an award can be established by the competent court through an action for declaratory judgement.

An award that satisfies the minimum requirements can only be set aside upon the grounds listed in sec. 595 ZPO.[92] With some exceptions, the grounds for setting aside an award correspond to the provisions of the New York Convention. As long as the award is not set aside, it remains in effect.[93] The grounds for setting aside an award are the following (sec. 595[1] ZPO).

According to sec. 595 (1), num. 1 ZPO, an award may be set aside if an arbitration agreement pursuant to sec. 577 does not exist; if the arbitration agreement has become invalid before the making of the award, or has ceased to have effect for the particular case; or if a party was unable to conclude the arbitration agreement because of its status. The arbitration agreement "does not exist" if the claim lacks objective arbitrability (*see* marg. num. 30), or if the formal requirements are not fulfilled (*see* marg. num. 10 *et seq*.). It is "invalid or has ceased to have effect for the particular case" if it was terminated by court decision[94] or in some other way.

An award may be set aside in accordance with sec. 595 (1), no. 2 ZPO if the party applying to have the award set aside was unable to present its case in the proceedings before the arbitrators, or if the party was required by statute to be represented by a legal representative, and no such representation was provided (unless the procedure has been subsequently ratified) (violation of the right to be heard). According to the OGH, an award may only be set aside in accordance with this provision if the party was denied the right to be heard during the arbitration proceedings. This provi-

[91] *Fasching*, Schiedsgericht, 135 *seq*., 144 *seq* and Lehrbuch, marg. num. 2222.
[92] OGH 20.11.1996 RZ 1997, 225 with further annots.; 14.12.1994 SZ 67/228; *Fasching*, Lehrbuch, marg. num. 2225.
[93] *Rechberger/Mehlis* in *Rechberger*, ZPO, marg. num. 1 to sec. 595.
[94] *Rechberger/Mehlis* in *Rechberger*, ZPO, marg. num. 5 to sec. 595.

sion will not apply where the arbitral tribunal has not allowed evidence to be presented, or where it has examined the facts of the case incompletely.[95]

According to sec. 595 (1), num. 3 ZPO, an award may be set aside if statutory or contractual provisions regarding the composition of the arbitral tribunal, or the making of the award, have been infringed; furthermore, it may also be set aside if the original of the award has not been signed in accordance with the provisions of sec. 592 (2) ZPO. The fact that the arbitrators lack the proper professional qualifications provides no ground to set aside an award.[96]

A ground to set aside the award under sec. 595 (1), num. 4 ZPO exists if a challenge of an arbitrator has been unjustifiably rejected by the arbitral tribunal.

If the arbitrators dealt with matters other than those referred to the arbitral tribunal, the award may be set aside according to sec. 595 (1), num. 5 ZPO. The same applies if the arbitral tribunal exceeds the relief or the remedy sought, or the amount claimed by the parties (*ultra petita*).[97]

An award may be set aside pursuant to sec. 595 (1), num. 6 ZPO if the award violates Austrian public policy or if it infringes mandatory provisions governing consumer contracts, contracts concerning the use of real estate, or employment contracts.[98] The OGH held that only a violation of substantive law, and not of procedural law, may provide such a ground for setting aside the award.[99] An incorrect legal evaluation does not provide a ground to set aside the award, as this ground would then amount to a review of the award (no revision au fond).[100] In a recent decision, the OGH argued that articles 81 and 82 (former articles 85 and 86) of the EC Treaty are fundamental provisions and that, due to the principle of the supremacy of EC law, they form part of Austrian public policy.[101] Therefore, an award that is in violation of these provisions may not be enforced in Austria.

[95] OGH 27.11.1991 RdW 1992, 113.

[96] *Matscher*, JB1 1975, 464.

[97] OGH 18.11.1982 GesRZ 1983, 102; 25.1.1968 EvBl 1968/345; *Rechberger/Mehlis* in *Rechberger*, ZPO, marg. num. 9 to sec. 595 with further annots.

[98] OGH 31.8.1995 EvBl 1996/42 with further annots.

[99] OGH 20.11.1996, RZ 1997, 225; 18.11.1982 GesRZ 1893, 102; 1.10.1952 SZ 25/252; contra: *Fasching*, Lehrbuch, marg. num. 2231.

[100] OGH 20.11.1996 RZ 1997, 225; *Rechberger/Mehlis* in *Rechberger*, ZPO, marg. num. 10 to sec. 595 with further annots.

[101] OGH 23.2.1998 WB1 1998, 221; Liebscher, AI 2000.

According to another recent decision of the OGH, tax and duty regulations shall also be treated as public policy provisions, as they also serve to protect public interests.[102]

According to sec. 595 (1), num. 7 ZPO, an award may be set aside if, pursuant to sec. 530 (1), num. 1-7 ZPO, the conditions for the reopening of the case are satisfied. The grounds for reopening a case include, for example, forged documents, quashing of a relevant criminal decision by a final and binding court that governs the subject matter of the arbitration, knowingly giving false testimony or expert evidence in court, fraud, and new facts or evidence. In the case of new facts or evidence, the award may only be set aside if a diligent party would not have been able to present such new facts or evidence to the arbitral tribunal prior to the end of the last hearing. According to the OGH, the specific provisions of the ZPO concerning the proceedings for an action to reopen the case are applicable by analogy.[103] Only entrepreneurs may waive the application of sec. 595 (1), num. 7 ZPO, pursuant to sec. 598 (2) ZPO (*see* marg. no. 261 *et seq*.).

19. *Are the above forms of appeal subject to a previous granting of executive validity to the award, or are they subject to the approval of the award by the municipal judge?*
No.

20. *Is there a specific regulation for arbitration whose object is transnational private controversies?*
No.

21. *How is the granting of executive validity to an arbitration award regulated?*
According to sec. 1, num. 16 EO, awards and settlements in arbitration proceedings are enforceable legal titles (Exekutionstitel). A precondition for the enforceability of the title is the lapse of the time period provided by the arbitral tribunal within which the obligations stated in the award must be performed (Leistungsfrist). An award that contains no specified pe-

[102] OGH 5.5.1998 EvBl 1998/179; contra: *Oberhammer*, RdW 1999, 62 *et seq*.; *Liebscher*, WB1 1999; *Gamarf*, ZfRV 2000, 41; Liebscher, AI 2000.
[103] OGH 12.10.1989, 6 Ob 657/89 (not published).

riod of performance is immediately enforceable once the award is effective.[104] A period of performance begins to run once the award becomes effective (*see* marg. num. 186).[105] After this period has elapsed and the parties have not agreed, in the arbitration agreement, that there shall be the possibility of an appeal against the award to an appellate arbitral tribunal, the chairman shall, at the request of a party, confirm in writing the enforceability of the award. However, if he is unable to act, any other arbitrator may do so (sec. 594 [2] ZPO).[106] The award will only be an enforceable legal title once this confirmation has been issued (sec. 1, num. 16 EO).[107] The confirmation must be made separately from the text of the award and cannot be given in the award itself.[108] To enforce an award, a party must make a request to the court for an order that grants enforcement.

22. *Is there a specific regulation aimed at granting recognition and enforcement to foreign awards?*
Yes.

23. *What is the regulation taken into consideration in order to recognize and enforce foreign awards?*
In principle, the requirements to be fulfilled by the creditor to enforce a foreign award are contained in multilateral and bilateral international treaties on the enforcement of foreign awards, of which Austria is a signatory state. This follows from sec. 86 EO, according to which secs 79-85 EO are not applicable to the extent that treaties (*e. g*. the New York Convention) contain different provisions with respect to the leave for enforcement. In a case where two international treaties are applicable, the OGH held that the enforcement may only be refused if both of these treaties provide grounds for the refusal of enforcement.[109]

In the absence of multilateral or bilateral conventions, secs 79-85 EO are applicable. Pursuant to sec. 79 EO, the order granting enforcement of

[104] OGH 24.9.1981 EvBl 1982/77.
[105] *Rechberger/Mehlis* in *Rechberger*, ZPO, marg. num. 4 to sec. 594.
[106] *Backhausen*, Schiedsgerichtsbarkeit, 160 with further annots.
[107] *Backhausen*, Schiedsgerichtsbarkeit, 161 *seq*.
[108] OGH, 3.8.1925 SZ 7/252; *Fasching*, Schiedsgericht, 133.
[109] OGH 20.10.1993 EvBl 1994/105.

foreign awards presumes that leave for enforcement has been declared in Austria. The leave for enforcement (Vollstreckbarerklärung, *exequatur*) may only be granted if the foreign award is enforceable according to the provisions of the country of origin and if the reciprocity is guaranteed (sec. 79[2] EO). Sec. 84b EO makes it clear that the leave for enforcement ensures the equal treatment of foreign and domestic awards. Secs 80 and 81 EO provide grounds for refusing the leave for enforcement. However, these grounds are not of particular practical importance, as international treaties contain special provisions that supersede the provisions of the EO (sec. 86 EO).[110] The local court is competent to grant enforcement and leave for enforcement for foreign awards (sec. 82 EO). The territorial jurisdiction is usually determined by the seat of the debtor. In the absence thereof, the court located in the district where the award would be enforced is competent (secs 18, 19 EO). According to sec. 83 EO, the court must rule upon an application for the leave for enforcement without a hearing. Secs 1-78 EO concerning the enforcement of domestic legal titles, such as domestic awards are also applicable (sec. 83 [2] EO). In accordance with sec. 54 (2) EO, the application for granting the enforcement of a foreign award must include an official copy of the enforceable award, the confirmation that the award is finally binding and enforceable, and the leave for enforcement. According to sec. 84 a (1) EO, both the grant of enforcement and the leave for enforcement may be combined in a single application.[111]

The creditor and the debtor may file an appeal against the decision granting or refusing leave for enforcement. This appeal must be made within four weeks. Only the debtor is entitled to a so-called "protest" (Widerspruch) in addition to the appeal (sec. 84 [1] EO). The protest can only be made if the court granting the leave for enforcement failed to comply with the requirements of secs 79-81 EO. The deadline for a protest is generally one month. The deadline is two months if the debtor has his domicile or his seat abroad. In addition, the provisions concerning proceedings before the regional courts (sec. 431 *et seq*. ZPO) apply to the procedure of protest.

[110] *Mohr,* ÖJZ 1995, 895.
[111] OGH 29.5.1996 ZfRV 1996/73.

I. Recognition and/or Enforcement of Foreign Awards (Conventions, Treaties)

Austria has ratified the following multilateral treaties concerning the recognition and enforcement of foreign awards:[112]

- Protocol on Arbitration Clauses, Geneva, September 24, 1923, BGBl 57/1928.
- Convention on the Execution of Foreign Arbitral Awards, Geneva, September 26, 1927, BGBl 343/1930.
- Convention on German Foreign Debts, London, February 27, 1953, BGBl 203/1958.
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, BGBl 200/1961; Austria withdrew the reciprocity reservation according to Article I (3) of the New York Convention, February 25, 1988, BGBl 1988/191.
- European Convention on International Commercial Arbitration, Geneva, April 21, 1961, BGBl 107/ 1964.
- Convention on the Application of the European Convention on International Commercial Arbitration, December 17, 1962, BGBl 19/1965.
- Convention on the Settlement of Investment Disputes between States and Nationals of other States, Washington, March 18, 1965, BGBl 357/1971.
- Convention Concerning International Carriage by Rail (COTIF) together with the Protocol on Privileges and Immunities of the International Organisations Concerning International Carriage by Rail (OTIF), Appendix A: Uniform Rules Concerning the Contract for International Carriage of Passengers and Luggage by Rail (CIV) and Appendix B: Uniform Rules Concerning the Contract for International Carriage of Goods by Rail, May 19, 1980, BGBl 225/1985.

Austria has concluded bilateral treaties dealing with the recognition and enforcement of awards with the following States:[113] the former USSR (BGBl

[112] *Duchek/Schütz/Tarko,* Zwischenstaatlicher Rechtsverkehr in Zivilrechtssachen 571 *et seq*. (as of 1 November 1997).

[113] *Duchek/Schutz/Tarko*, Zwischenstaatlicher Rechtsverkehr in Zivilrechtssachen 133 *et. seq*.

193/1956), which is now applicable between Austria and the Russian Federation (BGBl 567/1995); the former Yugoslavia (BGBl 115/ 1961), which is now applicable between Austria and Bosnia and Herzegovina (BGBl III 92/1997), Croatia (BGBl 474/1996), Macedonia (BGBl III 92/1997), the Republic of Slovenia (BGBl. 714/1993), the Federal Republic of Yugoslavia (BGBl III 156/1997); Belgium (BGBl 287/ 1961); British-Columbia (BGBl 314/1970); Germany (BGBl 105/1960); Switzerland (BGBl 125/ 1962); Liechtenstein (BGBl 114/1975); Malaysia (BGBl 601/1986). Article 20 and 21 of the bilateral Treaty with Turkey (BGBl 90/1932) concerning the recognition and enforcement of awards were terminated by the Convention of May 23, 1989 (BGBl 571/1992 amended by BGBl 949/ 1994). This is not of practical relevance, as Turkey acceded to the New York Convention on July 2, 1992.

24. *What is the principle applied in order to distinguish between national awards and foreign awards?*
It is important to differentiate between domestic and foreign awards. According to legal scholarship, an award shall be regarded as domestic if the place of arbitration is within Austria.[114] Awards that are enforceable abroad and that do not fall within the definition of a domestic award are regarded as foreign awards.[115]

25. *How can the same litigation between the same parties pending before a foreign judge affect internal arbitration proceedings?*
The situation here is the same as that regarding pending domestic litigations, *see* 4.5 above.

26. *How can a pending foreign arbitration between the same parties, whose object is the same litigation, affect internal arbitration proceedings?*
The situation here is the same as that regarding pending domestic arbitrations, *see* 4.6 above.

[114] *Rechberger/Mehlis* in *Rechberger*, ZPO, marg. num. 2 to sec. 594 with further annots; *Burgstaller*, ZfRV 2000, 83.
[115] *Rechberger/Simotta*, Exekutionsverfahren, marg. num. 207.

II. Abbreviations

AnwBl	Anwaltsblatt
ARD	Arbeitsrechtlicher Dienst
BGBl	Bundesgesetzblätter
EGZPO	Einführungsgesetz für Zivilprozeßordnung
EO	Exekutionsordnung (Austrian Enforcement Code)
EvBl	Evidenzblatt
GesRZ	Der Gesellschafter
GlUNF	Glaser Unger Neue Folge
IPRG	Internationales Privatrechtsgesetz (Austrian Federal Statute on Private International Law)
JBl	Juristische Blätter
OGH	Austrian Supreme Court
ÖJZ	Österreichische Juristen Zeitung
ÖJZ-LSK	Österreichische Juristen Zeitung (Leitsatzkartei)
RdW	Österreichisches Recht der Wirtschaft
RIW	Recht der Internationalen Wirtschaft
RZ	Österreichische Richterzeitung
SZ	Entscheidungen des österreichischen Obersten Gerichtshofes in Zivil- (und Justizverwaltungs-) sachen
WBl	Wirtschaftliche Blätter
ZfRV	Zeitschrift für Rechtsvergleichung
ZPO	Zivilprozeßordnung (Austrian, German or Zürich Civil Procedure Code)
ZVR	Zeitschrift für Verkehrsrecht

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