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Vavrovsky Heine Marth Rechtsanwälte

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Vavrovsky Heine Marth Rechtsanwälte is a corporate law firm with offices in Vienna and Salzburg with more than 50 professionals who offer support on all aspects of commercial life. The firm's main focus is on dispute resolution and real estate.
The international arbitration practice acts for clients in all aspects of international arbitrations in all stages of arbitral proceedings. They are as adept at dispute prevention and dispute planning as they are at representing parties before domestic and international arbitral tribunals. They offer sector-specific expertise, including corporate and commercial law, M&A transactions, financial transactions, distribution agreements and infrastructure projects.

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1. General

1.1 Prevalence of Arbitration

Austria is an arbitration-friendly jurisdiction with modern arbitration legislation, a pro-arbitration judiciary and highly skilled local arbitration practitioners. Recently, jurisdiction in arbitration-related matters has been unified under the Supreme Court, which has improved the efficiency of arbitrations seated in Austria and strengthened Austria's popularity as an arbitral seat.

A legal framework for arbitral proceedings has been in place since the late 19th century and forms part of the Austrian Code of Civil Procedure (ACCP). Austrian arbitration law has undergone significant revisions in the past 40 years, keeping the relevant legal framework modern and up to date. Its current laws are based on the UNCITRAL Model Law, making it comparatively easy for international practitioners to acquaint themselves when choosing Vienna as an arbitral seat.

Since the end of the cold war, Austria has gained prevalence as a regional hub for international arbitration in Central and Eastern Europe. Its neutral political stance and its geographical location have helped to make it a preferred seat for resolving east-west commercial disputes. As a seat of numerous international organisations and corporate headquarters, Vienna has become one of the focal points for arbitration in Europe. In a similar vein, the Vienna International Arbitral Centre (VIAC) has become one of Europe's leading arbitral institutions, handling a constantly increasing number of cases. Moreover, every year around Easter, the Willem C. Vis International Commercial Arbitration Moot Court brings thousands of students and practitioners from the field of arbitration from all over the world together in Vienna.

Austrian companies engaging in cross-border trade often opt for arbitration clauses in their contractual agreements. However, the majority of domestic commercial disputes are still decided by the courts. The reasons for this are manifold and certainly include the efficiency of the Austrian court system since the majority of decisions of the commercial courts of first instance are rendered within one year. Thus,

many domestic parties see no need to choose arbitration, which is generally considered to be more expensive than court proceedings when it comes to small or mid-size claims.

1.2 Trends

Since 2014, setting aside proceedings have fallen within the exclusive jurisdiction of the Austrian Supreme Court as the court of first and final instance. Thus, decisions on setting aside are not subject to any further appeal, thereby avoiding delays in court proceedings after an award has been rendered. In addition, the Supreme Court has jurisdiction over judicial measures accompanying arbitral proceedings. Setting up a one-stop shop jurisdiction for all arbitration-related matters has certainly furthered the attractiveness of Austria as an arbitral seat, both by making setting aside proceedings more efficient and ensuring an arbitration-savvy bench at the Supreme Court.

With regards to institutional arbitration, the VIAC adopted further amendments to its rules in 2018; under the new rules, the VIAC now administers purely domestic cases. This followed a decision of the Austrian parliament to allow the parties to choose any arbitral institution to hear their domestic disputes. Before, the VIAC was required to refer domestic cases to the arbitration institution of a regional economic chamber. It is expected that this change will significantly increase the caseload of the VIAC.

1.3 Key Industries

The financial services, banking, construction and energy industries have undergone significant international arbitration activity in the past year. Furthermore, there has been an increase in the number of disputes related to commercial contracts in general as well as M&A transactions.

1.4 Arbitral Institutions

The VIAC is the primary arbitral institution seated in Austria and is one of Europe's leading institutions. A new version of the VIAC Rules of Arbitration and Mediation entered into force on 1 January 2018 (Vienna Rules and Vienna Mediation Rules). The VIAC has a steadily-increasing caseload from a diverse range of parties, with a strong focus on Central, Eastern and Southeastern Europe.

Institutional arbitration has a long tradition in Austria. Since the end of the Second World War, arbitral institutions existed in each of the commercial chambers of the nine federal states of Austria. However, the existence of nine different institutions often led to confusion for foreign users of their services. As a consequence, in 1975, following an increase in the number of international arbitral proceedings seated in Austria, the VIAC was established. Initially, most cases concerned east-west disputes between parties from COMECON and western states. However, since the fall of the Iron Curtain, VIAC's caseload has diversified and now operates on a global basis.

Other than the Vienna Rules, many parties choosing Austria as a seat for arbitral proceedings opt for the rules of the International Chamber of Commerce (ICC), which has a direct presence in Vienna through its Austrian national committee.

2. Governing Legislation

2.1 Governing Law

Austrian arbitration law is set out in sections 577 to 618 of the ACCP. Since 2006, it has been predominantly based on the UNCITRAL Model Law, with a few important distinctions. Most importantly, Austrian arbitration law does not differentiate between national and international arbitrations nor between commercial and non-commercial arbitrations, but does provide a uniform arbitration regime for all types of arbitral proceedings. Moreover, it includes specific provisions regarding consumer and labour law related matters as well as having a separate provision on arbitrability.

Furthermore, there is a provision on the allocation of costs that is not found in the original text of the UNCITRAL Model Law. With regard to setting aside proceedings, procedural errors only lead to the setting aside of an arbitral award if Austrian procedural public policy has been violated.

2.2 Changes to National Law

Austrian arbitration law underwent a major reform in 2006, predominantly basing Austria's arbitration regime on the UNCITRAL Model Law. The last significant changes took place in 2014, stipulating that (almost) all judicial activity relating to arbitral proceedings falls within the exclusive jurisdiction of the Supreme Court as the court of first and final instance.

As to institutional arbitration, a new version of the VIAC Rules of Arbitration and Mediation entered into force on 1 January 2018 (the Vienna Rules and Vienna Mediation Rules 2018). The most notable amendment is a provision on domestic arbitrations, permitting the VIAC to administer purely domestic arbitrations.

3. The Arbitration Agreement

3.1 Enforceability

The formal requirements for the valid conclusion of an arbitration agreement follow those set out in the UNCITRAL Model Law. Pursuant to section 583 ACCP, an arbitration agreement must be in writing. This requirement may be complied with by including the arbitration agreement in a written document signed by both parties or in letters, faxes, e-mails or other forms of communication that prove the existence of the agreement.

The reference in a contract complying with the form requirements to a document containing an arbitration agreement constitutes an arbitration agreement, provided that the reference is such as to make that arbitration agreement part of the contract.

A defect in the form of the arbitration agreement is cured in the arbitral proceedings by entering into argument on the substance of the dispute, unless an objection is raised, at the latest, when entering into an argument on the substance of the dispute

Arbitration agreements must fulfil certain substantive requirements in order to be enforceable, including the inclusion of a clear expression of the parties' intention to specifically submit a dispute to arbitration.

3.2 Arbitrability

Any pecuniary claim falling within the jurisdiction of the courts of law can be made the subject of an arbitration agreement. An arbitration agreement for non-pecuniary claims is legally effective if the parties are capable of concluding a settlement upon the matter in dispute.

Expressly excluded from being able to be settled by arbitration are claims involving family law, as well as all claims based on contracts which are subject to the Austrian Landlord and Tenant Act or to the Austrian Non-profit Housing Act and all claims resulting from or in connection with co-operative apartment ownership.

3.3 National Courts' Approach

The courts will dismiss claims relating to a matter that is subject to an arbitration agreement. If arbitral proceedings have already commenced, the courts must reject any action on the same matter.

If a party brings a legal action before a court and the matter is subject to an arbitration agreement, an objection to the court's jurisdiction has to be raised before pleadings on the subject matter, either in writing or orally. The court must generally reject such claims if the defendant objected to the court's jurisdiction in time.

The court must not reject the claim if it establishes that the arbitration agreement is non-existent, not valid or impracticable.

3.4 Validity

As is the case in most modern arbitration jurisdictions, Austria recognises the so-called "separability doctrine", which foresees that the arbitration agreement and the rest of the contract do not necessarily share the same fate.

It is noteworthy that, although Austrian arbitration law does not explicitly regulate the relationship between the main contract and an arbitration clause included in such contract, the Supreme Court, in a line of decisions, ruled that a defect of the main contract does not affect the arbitration clause. What is more, the Supreme Court explicitly notes that the nullity of the main contract does not affect the validity of an arbitration clause.

4. The Arbitral Tribunal

4.1 Limits on Selection

In general, the parties are free to choose the arbitrators they deem appropriate, as long as the said arbitrators are impartial and independent and have full legal capacity, ie the power to enter into legally binding commitments. The parties are also free to stipulate certain requirements that arbitrators should fulfil in the arbitration agreement.

Article 16 of the Vienna Rules reflects this liberal stance towards arbitrator appointments and stipulates that the parties shall be free to designate the persons they wish to nominate as arbitrators. Any person with full legal capacity may act as an arbitrator, provided the parties have not agreed upon any particular additional qualification requirements.

However, Austrian law prohibits members of certain professions from acting as arbitrators, most notably active Austrian judges.

Likewise, the parties are free to determine the number of arbitrators. If the parties have determined an even number of arbitrators, a further person shall be selected as chairman by the party-appointed arbitrators. Unless otherwise agreed by the parties, three arbitrators are to be appointed.

4.2 Default Procedures

If the parties fail to select an arbitrator within four weeks of receiving notification to do so, any party may request the court to appoint the same. Since 2013, such appointments have been undertaken by the Austrian Supreme Court, except in cases relating to consumers or labour law.

There are no official statistics concerning substitute appointments of arbitrators by the Supreme Court, but it is known that default appointments are made. With regards to the Vienna Rules, the VIAC Board is concerned with default appointments should the parties' chosen method for selecting arbitrators fails.

4.3 Court Intervention

A court may intervene in the selection of arbitrators if a party fails to appoint an arbitrator, either within four weeks or according to the agreed upon appointment mechanism and another party has filed a request seeking the court's intervention. Also, a court may intervene if an arbitrator's mandate

has been terminated and the arbitrator does not resign or if another party does not agree to the termination.

4.4 Challenge and Removal of Arbitrators

Arbitrators can be challenged if there are justifiable doubts as to their impartiality or independence or if they do not fulfil the requirements set out by the parties' agreement. Party-appointed arbitrators may only be challenged by their appointing party for reasons that become known to the appointing party after the appointment has been made.

Section 588 of the ACCP stipulates that when a person intends to assume the office of arbitrator, he or she shall disclose any circumstances likely to give rise to doubts as to his or her impartiality or independence, or which are in conflict with the agreement of the parties. An arbitrator, from the time of his appointment and throughout the arbitral proceedings shall without delay disclose any such circumstances to the parties, unless they have already been informed of them by him or her.

The parties are free to agree on a challenge procedure. In the absence of an agreement, section 589 of the ACCP provides that a party who challenges an arbitrator shall, within four weeks after becoming aware of the constitution of the arbitral tribunal or after becoming aware the reason for the challenge, submit a written statement of the grounds of the challenge to the arbitral tribunal. Unless the challenged arbitrator resigns from office or the other party agrees to the challenge, the arbitral tribunal, including the challenged arbitrator, shall decide on the challenge.

If a challenge under a procedure agreed upon by the parties or under the default procedure is not successful, the challenging party may, within four weeks after having received the decision rejecting the challenge, request the Supreme Court to decide on the challenge. The Supreme Court's decision shall not be subject to appeal. While the request is pending, the arbitral tribunal, including the challenged arbitrator, may continue with the arbitral proceedings and render an award in the meantime.

4.5 Arbitrator Requirements

Arbitrator independence and impartiality are examined from the perspective of a reasonable third person. The terms "independence" and "impartiality" are not defined by Austrian arbitration law (or the Vienna Rules). However, the IBA Guidelines for Conflicts of Interest in International Arbitration are widely considered to be helpful in assisting the parties and the tribunal with the interpretation of both terms.

According to section 588(1) of the ACCP, which reflects Article 12(1) of the UNCITRAL Model Law, a person who is approached in connection with his or her possible appointment as an arbitrator shall disclose any circumstances likely to give rise to doubts as to his or her impartiality or independence, including circumstances that are in conflict with the agreement of the parties. Likewise, an arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her. If an arbitrator fails to do so and if he or she is successfully challenged as a result, the arbitrator will lose any right to compensation for services rendered prior to termination.

5. Jurisdiction

5.1 Matters Excluded from Arbitration

Under Austrian law, any claim involving an economic interest within the jurisdiction of the ordinary courts of law may be made the subject of an arbitration agreement. This encompasses all monetary claims and all claims based on a proprietary legal relationship. Arbitration agreements regarding non-pecuniary claims are legally effective insofar as the parties are capable of concluding a settlement upon the matter in dispute.

However, there are a number of exceptions to this rule. For instance, matters of family law and certain matters of tenancy law cannot be made subject to an arbitration agreement. Moreover, arbitration agreements between an entrepreneur and a consumer as well as those between an employer and an employee can only be validly concluded after a dispute has arisen.

5.2 Challenges to Jurisdiction

The doctrine of competence-competence is expressly stipulated in section 592 of the ACCP, which is a mandatory provision. Not only is it for the arbitral tribunal to rule on its own jurisdiction (positive competence-competence) while arbitral proceedings are pending, the state courts must reject claims brought before them that are subject to an arbitration agreement (negative competence-competence).

Section 592 of the ACCP stipulates that the arbitral tribunal shall make its decision on jurisdiction either together with its decision on the merits of the case or by a separate arbitral award. A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than the first pleading on the substance of the dispute. A party is not precluded from raising such a plea by the fact that it has appointed or participated in the appointment of an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is made the subject of a request for relief. A later plea is barred in both cases; however, if the arbitral tribunal considers the delay sufficiently excused the plea may subsequently be raised.

Moreover, even while an action for the setting aside of an arbitral award is still pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

5.3 Circumstances for Court Intervention

Issues regarding the jurisdiction of an arbitral tribunal may be raised before the Supreme Court as a ground to set aside an arbitral award. If the arbitral tribunal issued an (affirmative) decision on jurisdiction in a separate arbitral award and the award is subject to setting aside proceedings, the arbitral tribunal may continue with the proceedings and render an award.

5.4 Timing of Challenge

Based on the doctrine of competence-competence, only the arbitral tribunal can decide on its jurisdiction after the arbitral proceedings have been initiated. If the arbitral tribunal's decision on jurisdiction was rendered in a separate arbitral award, the award may be challenged before the Supreme Court while the proceedings continue.

5.5 Standard of Judicial Review for Jurisdiction/ Admissibility

The Austrian Supreme Court is not bound by the findings of the arbitral tribunal (de novo review).

5.6 Breach of Arbitration Agreement

The courts generally dismiss claims relating to matters that are subject to an arbitration agreement unless a party has made submissions on the merits of the dispute or has orally pled before the court without raising a jurisdictional objection or if the court establishes that the arbitration agreement is invalid or unenforceable.

5.7 Third Parties

There is no express provision governing the extension of an arbitration agreement to third parties. In the past, the Supreme Court has held that arbitration agreements are to be extended to legal successors and third-party beneficiaries.

So far, there have been no decisions on the application of the so-called group of companies doctrine, which extends the scope of arbitration agreements to non-signatory companies if the arbitration agreement was signed by another company within the group to which the non-signatory company belongs.

6. Preliminary and Interim Relief

6.1 Types of Relief

In general, the granting of interim relief requires that the enforcement of the claim would be frustrated or considerably impeded without the requested relief or that a risk of irreparable harm would arise. Parties may request interim relief from both the courts and arbitral tribunals.

Section 593 of the ACCP provides that, unless otherwise agreed by the parties, the arbitral tribunal may, upon request of a party and after hearing the other party, order against the other party such interim or protective measures it deems necessary in respect of the subject matter in dispute if the enforcement of the claim were otherwise frustrated or significantly impeded or there was a risk of irreparable harm. The arbitral tribunal may request any party to provide appropriate security in connection with such measures.

Interim measures must be ordered in writing and a signed exemplar of the order must be served upon each party. Upon the request of a party, the District Court in whose district the opponent of the party at risk has its seat, domicile or habitual residence within Austria at the time of the first filing of the request, otherwise the District Court in which the enforcement of the interim or protective measure shall be carried out, shall enforce such measures.

Arbitral tribunals are generally free to order any interim relief they deem appropriate. If the type of relief ordered by the arbitral tribunal is unknown to Austrian law, the court enforcing the interim relief will interpret the relief insofar as to grant an equivalent remedy that is known to Austrian law. Typical interim measures include measures intended to ensure the enforcement of the final award, such as the prohibition from selling assets or from disposing of a bank account, as well as an order to furnish a bank guarantee.

6.2 Role of Courts

Under Austrian arbitration law, a party to an arbitration agreement may request preliminary or interim relief from a court, either before or during arbitral proceedings. Such rights cannot be excluded by the parties' agreement.

Although both arbitral tribunals and courts may order preliminary or interim relief, only courts can enforce such relief. Should the type of interim relief ordered by an arbitral tribunal be unknown to Austrian law, the court will enforce an equivalent remedy known to Austrian law.

Pursuant to section 593(4) of the ACCP, the enforcement court must refuse to enforce an interim measure ordered by an arbitral tribunal, if:

- the seat of the arbitral tribunal is within Austria and the measure suffers from a defect which would constitute grounds for setting aside an arbitral award made in Austria;
- the seat of the arbitral tribunal is not within Austria and the measure suffers from a defect which would constitute grounds for refusal of recognition or enforcement of a foreign arbitral award;
- the enforcement of the measure would be incompatible with an Austrian court measure that was either requested

or issued previously, or with a foreign court measure which was issued previously and must be recognised; and
- the measure provides for a means of protection unknown to Austrian law and no appropriate means of protection as provided by Austrian law has been requested.

Austrian arbitration law does not provide for the appointment of emergency arbitrators, nor do the Vienna Rules foresee the use of emergency arbitrators.

6.3 Security for Costs

The courts may order security for costs. Although arbitral tribunals are not expressly granted the power to order security for costs, security for costs may be ordered as interim or preliminary relief.

Pursuant to section 593(1) of the ACCP, the arbitral tribunal may request any party to provide appropriate security in connection with the ordering of interim or protective measures, thus allowing security for potential claims for damages from the opponent to the measure.

Notably, the Vienna Rules explicitly provide for the provision of security for costs. Pursuant to Article 33(6) of the Vienna Rules, the arbitral tribunal may at the request of the respondent order the claimant to provide security for costs if the respondent shows cause that the recoverability of a potential claim for costs is, with a sufficient degree of probability, at risk. When deciding on a request for security for costs, the arbitral tribunal shall give all parties the opportunity to present their views. Furthermore, Article 33(7) of the Vienna Rules stipulates that if a party fails to comply with an order by the arbitral tribunal for security for costs, the arbitral tribunal may, upon request, suspend in whole or in part or terminate, the proceedings.

7. Procedure

7.1 Governing Rules

In general, the parties are free to agree on the arbitral procedure; for instance, by referring to institutional rules in the arbitration agreement. However, a very limited number of provisions of Austrian arbitration law are considered mandatory and thus cannot be waived by the parties, such as the requirement for arbitrators to be impartial and independent, the parties' right to a fair hearing and the grounds for challenging an award.

In the absence of an agreement by the parties, the arbitral tribunal may conduct the arbitration in whatever manner it deems appropriate, within the limits of the mandatory provisions of Austrian arbitration law.

7.2 Procedural Steps

Subject to the mandatory provisions of the ACCP, such as the right to fair and equal treatment, the right to proper representation and the right to be heard, the parties are free to determine the rules of procedure. They may do so by referring to other rules of procedure such as the arbitration rules of arbitral institutions.

In the absence of an agreement between the parties on the arbitral procedure, the arbitral tribunal shall conduct the arbitration in such a manner as it considers appropriate, subject to the mandatory provisions of Austrian arbitration law as enshrined in the ACCP. The parties shall be treated fairly and be given a full opportunity to present their case and they may be represented or advised by persons of their own choosing.

A number of non-mandatory procedural provisions can be found under Austrian arbitration law, which have their origin in the UNCITRAL Model Law. These include section 596 of the ACCP, which notes that the parties are free to agree on the language or languages to be used in the arbitral proceedings and that, failing such an agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings.

With regard to written submissions, the non-mandatory procedural provisions, particularly section 597 of the ACCP, foresee that, within the time period agreed by the parties or determined by the arbitral tribunal, the claimant shall state the relief and remedy sought and the facts supporting his or her claim, to which the respondent shall reply.

Where the claimant fails to submit a statement of claim, the arbitral tribunal shall terminate the proceedings. Where the respondent fails to respond within the agreed or stipulated time period, the arbitral tribunal shall, unless otherwise agreed by the parties, continue the proceedings without treating such failure in itself as an admission of the claimant's allegations. The same shall apply where a party is in default with any other procedural act. In such cases, the arbitral tribunal may continue the proceedings and may render a decision based on the evidence laid before it. Where, in the arbitral tribunal's opinion, the default is sufficiently excused, the omitted procedural act may subsequently be carried out.

The parties may submit with their statements all documents they consider to be relevant or indicate the documents or other evidence they wish to submit. Unless otherwise agreed by the parties, either party may amend or supplement its claim or pleadings during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment due to delay.

Furthermore, section 598 of the ACCP states that the arbitral tribunal shall decide whether to hold oral hearings or wheth-

er the proceedings shall be conducted in writing, unless the parties have agreed otherwise. Where the parties have not excluded an oral hearing, the arbitral tribunal shall hold such hearings at an appropriate stage in the proceedings, if so requested by a party.

Pursuant to section 599 of the ACCP, the arbitral tribunal is authorised to rule upon the admissibility of the taking of evidence, to carry out such taking of evidence and to freely evaluate the results thereof. The parties shall be given sufficient advance notice of every hearing and of every meeting of the arbitral tribunal for the purposes of the taking of evidence. All written submissions, documents and other communications which are submitted to the arbitral tribunal by one party shall be communicated to the other party. Expert opinions and other evidence on which the arbitral tribunal may rely shall be communicated to both parties.

The arbitral tribunal may appoint one or more experts to report on specific issues to be determined by the arbitral tribunal and require the parties to provide the expert with any relevant information or access to any relevant documents or objects for his or her inspection. If a party so requests or if the arbitral tribunal considers it necessary, the expert shall, upon submission of his or her report, attend an oral hearing. At this hearing the parties may put questions to him or her and may present their own expert witnesses in order to testify on the points at issue. Similarly, each party has the right to submit reports of its own experts. As with the other provisions, the arbitral tribunal's power to appoint an expert and the parties' right to submit reports of its own experts is non-mandatory and can thus be excluded by the parties' agreement.

Moreover, Austrian arbitration law clearly states that the parties are free to agree on the seat of the arbitral tribunal. They may also leave the determination of the seat to an arbitral institution. Failing such agreement, the seat shall be determined by the arbitral tribunal having due regard to the circumstances of the case, including the convenience of such a place.

7.3 Powers and Duties of Arbitrators

Arbitral tribunals are empowered by law to decide on their own jurisdiction (based on the principle of competence-competence) and to render a final and binding award. In doing so, they can decide on the admissibility of evidence and have the discretion to decide on the conduct of the proceedings in all areas not regulated by mandatory law or the parties' agreement. Moreover, arbitral tribunals have the power to render interim and preliminary measures. However, arbitral tribunals lack coercive powers and thus cannot compel witnesses or parties to produce evidence, give testimony or even appear at an oral hearing.

An arbitral tribunal's most important duty is to render an award in accordance with the parties' agreement. Furthermore, arbitrators must remain independent and impartial throughout the proceedings and are required to promptly disclose any circumstances that are likely to give rise to doubts as to their impartiality or independence.

7.4 Legal Representatives

Austrian arbitration law does not require representatives to have particular qualifications or fulfill other requirements in order to represent parties in arbitration proceedings. Although the parties are usually represented by lawyers (admitted to practice law in some jurisdiction, but not necessarily Austrian), both the ACCP and the Vienna Rules foresee that the parties may be represented by any person of their choosing. According to section 594(3) of the ACCP this right cannot be excluded or limited.

However, in setting aside proceedings argued before the Supreme Court, the parties are required to be represented by a lawyer admitted to the Austrian Bar.

8. Evidence

8.1 Collection and Submission of Evidence

The parties are free to agree on any procedure or rules on the taking of evidence. In the absence of such an agreement, it is within the tribunal's discretion to take and evaluate evidence as it deems fit.

In practice, the use of written witness statements as well as the cross-examination of witnesses and experts is common in arbitral proceedings seated in Austria; extensive document production is rarely seen. Often, the parties agree on the IBA Rules on the Taking of Evidence and arbitral tribunals take guidance from them.

8.2 Rules of Evidence

Section 599 of the ACCP is the core provision governing the rules of evidence to be applied by arbitral tribunals. The provision closely follows Article 19(2) of the UNCITRAL Model Law and stipulates that arbitral tribunals are free to decide on whether and how evidence is collected. In particular, arbitral tribunals are authorised to rule upon the admissibility of the taking of evidence, to carry out the taking of such evidence and to freely evaluate the results thereto. The arbitral tribunal's free discretion in assessing the evidence presented by the parties is a paramount principle and is considered mandatory law. Furthermore, the arbitral tribunal must give the parties sufficient advance notice of every hearing and of every meeting of the arbitral tribunal for the purposes of taking of evidence.

It is further stipulated that all written submissions, documents and other communications that are submitted to the

arbitral tribunal by one party shall be communicated to the other party. Expert opinions and other evidence on which the arbitral tribunal may rely shall be communicated to both parties. Arbitral tribunals have the power to decide on the admissibility of evidence, to take evidence they deem necessary and to evaluate it freely. In doing so, arbitral tribunals must comply with the principles of equal treatment and observe the parties' right to be heard.

The arbitral tribunal is free to decide on the manner of examining witnesses. In purely domestic arbitrations, tribunals sometimes follow the rules of court proceedings where witnesses are first questioned by the judge before being examined by the parties' counsel. The common law practice of cross-examining witnesses is increasingly employed. In international arbitrations in Austria, cross-examining witnesses is regarded as standard procedure.

Section 594(1) of the ACCP provides that it lies within the arbitral tribunal's discretion to determine the applicable standard of proof. However, arbitral tribunals typically rely on the standard of proof before Austrian state courts, which requires a "high possibility" of proof.

The ACCP sets out the types of admissible evidence for proceedings before the state courts, such as deeds, witnesses, experts and inspection or examination of the parties. However, arbitral tribunals are not restricted to the means of evidence set out in the ACCP and are free to decide on the admissibility of certain forms of evidence.

In practice, the IBA Rules on the Taking of Evidence in International Arbitration are often used as a guideline.

8.3 Powers of Compulsion

Arbitral tribunals do not possess coercive powers. However, arbitral tribunals may request the assistance of the courts with the taking of evidence, including taking the testimony of a witness who is unwilling to testify or ordering the production of documents. The key provision in this regard is section 602 of the ACCP, which provides that the arbitral tribunal may request the court to conduct judicial acts for which the arbitral tribunal has no authority. Such requests have been successful in the past. Assistance may be requested from both Austrian and foreign courts.

9. Confidentiality

9.1 Extent of Confidentiality

Arbitral proceedings and their constituent parts, such as the award, are not confidential per se under Austrian arbitration law. It is thus advisable to agree on the confidentiality of the arbitral proceedings in the arbitration agreement or to opt for institutional rules that foresee the confidentiality of the proceedings.

For instance, according to Article 16(2) of the Vienna Rules, arbitrators are explicitly obliged to keep confidential all information acquired in the course of their duties, including the contents of the award as well as the deliberations of the panel.

Notably, pursuant to section 616 of the ACCP, in proceedings to set aside an arbitral award before the Austrian Supreme Court, a party may request that the public be excluded where it can be shown that there is a legitimate interest in so doing. It is, however, within the Supreme Court's discretion whether or not to grant such a request.

10. The Award

10.1 Legal Requirements

Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator any decision of the arbitral tribunal, including the final decision on the merits rendered in the award, shall be made by a majority of all its members. Where one or more arbitrators do not participate in a vote without justified reason, the other arbitrators may decide without them. In such a case, the necessary majority of votes shall be calculated by the total of all participating arbitrators. In a case where a vote is taken on an arbitral award, the parties shall be informed in advance of their intention to proceed in this manner.

Arbitral awards must be handed down in writing, signed by the arbitrators and must state the date of the rendering of the award. The award must also state the reasons on which it is based unless the parties have agreed otherwise. There is no mandatory time limit for delivering the award but the parties are free to agree on a time limit.

The chairman or, in the event that he or she is prevented from doing so, another arbitrator shall, upon the request by a party, confirm the res judicata effect and the enforceability of the award on an exemplar of the award.

10.2 Types of Remedies

There are no restrictions on the types of remedies an arbitral tribunal may award, apart from an obligation to comply with Austrian public policy. In this regard, it must be noted that punitive damages are unknown to Austrian law and are considered contrary to Austrian public policy.

The award has the effect of a final and binding court judgment. The underlying arbitration agreement does not cease to be effective by the making of the award.

10.3 Recovering Interest and Legal Costs

The parties are entitled to recover interest and legal costs. An obligation to reimburse the counterparty for legal costs

may include any and all reasonable costs appropriate to the bringing of the action or defence.

It is for the arbitral tribunal to decide upon the obligation to reimburse the costs of the proceedings unless the parties have agreed otherwise. The arbitral tribunal shall take into account the circumstances of the case, particularly the outcome of the proceedings. The decision on costs must be made in the form of an arbitral award.

11. Review of an Award

11.1 Grounds for Appeal

The grounds for challenging an award closely follow those provided by Article V of the New York Convention and Article 34 of the Model Law, and are as follows:

- the invalidity of an arbitration agreement or a lack thereof;
- a party's incapacity to conclude an arbitration agreement;
- violation of the right to be heard;
- the subject matter being beyond the scope of the arbitration agreement;
- a failure in the constitution or composition of the tribunal;
- the proceedings violated Austrian public policy;
- the requirements for an action for revision having been fulfilled (ie section 530 ACCP);
- the matter in dispute is not arbitrable; or
- the award violated Austrian public policy.

There are no other means of appealing against an arbitral award. An advance exclusion of the grounds for setting aside an agreement between the parties is generally regarded invalid. An arbitral award shall be set aside by the court ex officio if one of the last two grounds exists.

A challenge has to be submitted to the Austrian Supreme Court within three months of receiving the award. The Austrian Supreme Court alone acts in such proceedings.

Setting aside an arbitral award has no effect on the validity of the arbitration agreement. Hence, if an award has been set aside, new arbitral proceedings may be commenced by the parties to the arbitration agreement. However, where an arbitral award on the same subject matter has been set aside twice and a further arbitral award regarding that subject matter is to be set aside, the Supreme Court shall upon request of a party concurrently declare the arbitration agreement to be invalid with respect to that subject matter.

Notably, parties may also request the correction of any errors in computation and any clerical or typographical errors or any errors of a similar nature in the award within four weeks of receipt of the award. Likewise, a party may request the tribunal to explain certain parts of the award and to make an additional award with regard to claims asserted in the arbitral proceedings but not disposed of in the award.

11.2 Excluding/Expanding the Scope of Appeal

The parties cannot exclude or expand the scope of challenges to the award.

11.3 Standard of Judicial Review

The merits of the case are not reviewed. Previous attempts to disguise a review on the merits have consistently been rejected by the Supreme Court.

12. Enforcement of an Award

12.1 New York Convention

Austria ratified the New York Convention in 1961 without any reservations. Austria is also a contracting state to several other multilateral conventions on the recognition and enforcement of arbitral awards, including the 1961 European Convention on International Commercial Arbitration and the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States. Moreover, Austria has signed a number of bilateral treaties governing the reciprocal recognition and enforcement of foreign arbitral awards, including treaties with Russia and Switzerland.

12.2 Enforcement Procedure

Domestic awards are enforced in the same way as court judgments. Enforcement is requested at the district court where the obliged is domiciled or at the district court where the enforcement will be undertaken.

If the arbitration was seated outside Austria, the award is considered to be a foreign arbitral award, which are enforced by the Austrian courts pursuant to the New York Convention or other multi- and bilateral treaties. Foreign awards first have to be declared enforceable (recognised) by the courts. A request for recognising the award can be combined with a request for enforcement, and the courts will decide simultaneously on both requests. After being declared enforceable, the foreign award is treated as if it were a domestic award.

12.3 Approach of the Courts

The Austrian courts have an enforcement-friendly approach toward the recognition and enforcement of domestic and foreign arbitral awards.

The grounds for setting aside an award are set out under section 611 of the ACCP and closely follow those of Article 34 of the UNCITRAL Model Law and Article V of the 1958 New York Convention. Grounds for refusing enforcement are generally interpreted narrowly. In particular, the Supreme Court applies the public policy exception very restrictively and only in exceptional cases. For example, the

Supreme Court have refused enforcement based on a public policy violation in cases where the arbitrators had been advising by correspondence instead of personal meetings or the conduct of a legal representative was contrary to his or her duties and may have resulted in the loss of the party's rights. On the other hand, the Supreme Court has affirmed a violation of public policy in a case where the effective interest rate was 107.35% per annum.

13. Miscellaneous

13.1 Class-action or Group Arbitration

Austrian arbitration law does not provide for class action arbitration. However, there are rules applicable to multiparty arbitrations which regulate the procedure for the appointment of the party-nominated arbitrator in cases where two or more parties share one side in an arbitration.

13.2 Ethical Codes

Lawyers admitted to the Austrian bar are bound by the professional ethics rules of the Austrian bar when acting as counsel in arbitrations, irrespective of where the arbitration is seated. Foreign lawyers in arbitrations seated in Austria are not bound by Austrian professional ethics rules but are generally understood to be bound by the ethics rules of their respective home jurisdiction.

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13.3 Third-party Funding

Third party funding is not expressly governed by Austrian arbitration law, nor has the Austrian Supreme Court, so far, dealt with the issue. Nevertheless, third party funding is quite common in arbitrations seated in Austria and there are a number of funders active in the Austrian market.

Since there is no specific legal or regulatory framework concerning third party funding in Austria, the parties and the funder are free to structure their funding agreement. However, it is important to note that Austrian lawyers are prohibited from working on a pure contingency fee basis. Hence, although the funding agreement may stipulate a remuneration model for the party's lawyers which is partially dependent on the outcome of the case, a contingency fee only arrangement would be contrary to the law.

13.4 Consolidation

Austrian arbitration law does not expressly govern the consolidation of arbitral proceedings. Consolidation is, however, generally considered permissible with the consent of the parties and the arbitrators.

The Vienna Rules contain explicit rules regarding the consolidation of separate arbitral proceedings which permit the VIAC Board to consolidate two or more proceedings; ie if the seat of arbitration in all of the arbitration agreements is the same and the parties agree to the consolidation or the same arbitrators were nominated or appointed.

13.5 Third Parties

In general, only the parties to the arbitration agreement are bound by its effects. In the past, Austrian courts have been reluctant to bind non-signatory third parties to an arbitration agreement. However, legal successors are bound by arbitration agreements to which a predecessor is a party.