

Chambers

GLOBAL PRACTICE GUIDE

Definitive global law guides offering
comparative analysis from top ranked lawyers

International Arbitration

Austria

Law and Practice

Vavrovsky Heine Marth Rechtsanwälte

[chambers.com](https://www.chambers.com)

2019

AUSTRIA

LAW AND PRACTICE:

p.3

Contributed by Vavrovsky Heine Marth Rechtsanwälte

The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

Contributed by Vavrovsky Heine Marth Rechtsanwälte

CONTENTS

1. General	p.4	7. Procedure	p.7
1.1 Prevalence of Arbitration	p.4	7.1 Governing Rules	p.7
1.2 Trends	p.5	7.2 Procedural Steps	p.7
1.3 Key Industries	p.5	7.3 Powers and Duties of Arbitrators	p.7
1.4 Arbitral Institutions	p.5	7.4 Legal Representatives	p.8
2. Governing Law	p.5	8. Evidence	p.8
2.1 Governing Law	p.5	8.1 Collection and Submission of Evidence	p.8
2.2 Changes to National Law	p.5	8.2 Rules of Evidence	p.8
3. Arbitration Agreement	p.5	8.3 Powers of Compulsion	p.8
3.1 Enforceability	p.5	9. Confidentiality	p.8
3.2 Arbitrability	p.5	9.1 Extent of Confidentiality	p.8
3.3 National Courts' Approach	p.5	10. The Award	p.8
3.4 Validity	p.6	10.1 Legal Requirements	p.8
4. The Arbitral Tribunal	p.6	10.2 Types of Remedies	p.8
4.1 Limits on Selection	p.6	10.3 Recovering Interest and Legal Costs	p.8
4.2 Default Procedures	p.6	11. Review of an Award	p.8
4.3 Court Intervention	p.6	11.1 Grounds for Appeal	p.8
4.4 Challenge and Removal of Arbitrators	p.6	11.2 Excluding/Expanding the Scope of Appeal	p.9
4.5 Arbitrator Requirements	p.6	11.3 Standard of Judicial Review	p.9
5. Jurisdiction	p.6	12. Enforcement of an Award	p.9
5.1 Matters Excluded from Arbitration	p.6	12.1 New York Convention	p.9
5.2 Challenges to Jurisdiction	p.6	12.2 Enforcement Procedure	p.9
5.3 Circumstances for Court Intervention	p.6	12.3 Approach of the Courts	p.9
5.4 Timing of Challenge	p.7		
5.5 Standard of Judicial Review for Jurisdiction/ Admissibility	p.7		
5.6 Breach of Arbitration Agreement	p.7		
5.7 Third Parties	p.7		
6. Preliminary and Interim Relief	p.7		
6.1 Types of Relief	p.7		
6.2 Role of Courts	p.7		
6.3 Security for Costs	p.7		

Vavrovsky Heine Marth Rechtsanwälte is a corporate law firm with offices in Vienna and Salzburg which fields more than 50 professionals who offer support to corporates and private clients on all aspects of commercial life. The firm's main focuses are dispute resolution as well as real estate and construction, while its Salzburg office is specialised on insolvency, restructuring and private clients.

The International Arbitration Practice acts for clients in all aspects of commercial arbitration at any stage of proceedings. They are as adept advising clients on dispute prevention and dispute planning as they are representing parties before domestic and international arbitral tribunals in complex commercial disputes – on an ad hoc basis or in accordance with the arbitration rules of leading arbitration institutions (ICC, VIAC, DIS, LCIA, SCAI, etc). In post-award stages, the firm's experts act in setting aside proceedings

before the Austrian Supreme Court and in state court proceedings for the recognition and enforcement of international arbitral awards in Austria. They offer sector-specific expertise, including corporate and commercial law, M&A transactions, financial transactions, distribution agreements and infrastructure projects.

Nikolaus Vavrovsky and Anne-Karin Grill, the leading arbitration partners at Vavrovsky Heine Marth, regularly act as arbitrators in proceedings under the auspices of the ICC and other international arbitration institutions, as well as on ad hoc tribunals. They are also both sought-after experts in the field of Investor-State Settlement (ISDS). They act as counsel in arbitration proceedings conducted in accordance with the Arbitration Rules of the World Bank's International Centre for Settlement of Investment Disputes (ICSID) and the UNCITRAL Rules.

Authors



Nikolaus Vavrovsky is a partner in the International Arbitration Practice at Vavrovsky Heine Marth. He specialises in complex commercial litigation and alternative dispute resolution, international arbitration, real estate as well as

corporate and finance. Nikolaus Vavrovsky is a member of several professional bodies including the Austrian Arbitration Association (Arb|Aut), the German Institution for Arbitration (DIS), the Swiss Arbitration Association (ASA) as well as the Liechtenstein Arbitration Association (LIS). As a sought-after arbitration expert, he is a lecturer at the Swiss Arbitration Association and regularly invited to speak at international conferences on arbitration, such as the DIS Spring Conference 2018 held in Zürich or the upcoming Autumn Conference of the German-Romanian Chamber of Industry and Commerce.



Florian Stefan is a senior associate within the firm's International Arbitration Practice. His expertise covers international commercial arbitration, investment treaty arbitration, infrastructure & energy disputes, public international law and

international finance. Florian Stefan has contributed to several industry publications and is a member of various professional bodies such as the Young Austrian Arbitration Practitioners, the Young International Arbitration Group, the Association Suisse de l'Arbitrage Below 40 and the Deutsche Initiative junger Schiedsrechtler.

1. General

1.1 Prevalence of Arbitration

Austria is a very arbitration-friendly jurisdiction. 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).

Although it originally served mostly domestic arbitrations, since 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.

Austrian arbitration law has undergone significant revisions in the past 40 years, which have rendered the legal environment significantly more arbitration-friendly. 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. Also, the Austrian judicial system tends to employ a pro-arbitration stance.

As a seat of numerous international organisations and corporate headquarters, Vienna has become one of the focal points for arbitration in Europe. Likewise, 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.

1.2 Trends

The last big revision of Austrian arbitration law took place in 2014. Since then, proceedings to set aside arbitral awards have fallen within the exclusive jurisdiction of the Austrian Supreme Court as the first and final instance. In addition, the Supreme Court has jurisdiction over judicial measures accompanying arbitral proceedings.

1.3 Key Industries

In general, there has been an increase in arbitrating disputes from the financial services and banking sector in recent years. With the establishment of the Austrian Branch of ARIAS (AIDA Reinsurance and Insurance Arbitration Society) in 2016, an increase in insurance and reinsurance disputes before arbitral tribunals may also be forthcoming.

1.4 Arbitral Institutions

The Vienna International Arbitral Centre (VIAC) is a prominent arbitral institution seated in Austria, and is one of Europe's leading institutions, with its rules (the so-called Vienna Rules) frequently chosen by Austrian as well as international parties. Other than the Vienna Rules, many parties 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 Law

2.1 Governing Law

The Austrian arbitration law is set out in sections 577 to 618 ACCP. Since 2006, it has been based predominantly on the UNCITRAL Model Law, with a few important distinctions. First and foremost, Austrian arbitration law does not differentiate between national and international arbitrations, nor between commercial and non-commercial arbitrations, but provides a uniform arbitration regime for any type of arbitral proceeding. Moreover, it includes specific provisions regarding consumer and labour law-related matters, as well as a separate provision on arbitrability. Similarly, there is a provision on the allocation of costs that is not found in the original text of the UNCITRAL Model Law. Importantly, according to Austrian arbitral law, 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, which predominantly based the Austrian arbitration regime on the UNCITRAL Model Law. The last significant changes

to Austrian arbitration law took place in 2014 and stipulated that (almost) all judicial activity relating to arbitral proceedings falls within the exclusive jurisdiction of the Supreme Court as first and final instance.

As to institutional arbitration, a new version of the Vienna International Arbitral Centre (VIAC) Rules of Arbitration and Mediation entered into force on 1 January 2018 (Vienna Rules and Vienna Mediation Rules 2018). The most notable amendment is a provision on domestic arbitrations, which follows the Austrian parliament's decision to allow parties to choose any arbitral institution to hear their domestic disputes. Before, VIAC was required to refer domestic cases to the arbitration institution of a regional economic chamber.

3. Arbitration Agreement

3.1 Enforceability

The formal requirements for the valid conclusion of an arbitration agreement follow those set out under the UNCITRAL Model Law. Pursuant to section 583 ACCP, an arbitration agreement must be in writing. This may be fulfilled 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.

An arbitration agreement must also fulfil certain substantive requirements in order to be enforceable, including that the parties clearly expressed their 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 were capable of concluding a settlement upon the matter in dispute. Claims stemming from family law, tenancy law and matters concerning social security are not arbitrable.

3.3 National Courts' Approach

Courts will dismiss claims relating to a matter that is subject to an arbitration agreement; if arbitral proceedings have already been commenced, the courts must reject any action on the same matter. If a party brings a legal action before a court although the matter is subject to an arbitration agreement, an objection to the court's jurisdiction has to be raised before pleading on the subject-matter, either in a written manner 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

Like 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. Hence, the invalidity of the main contract does not necessarily render the arbitration agreement invalid.

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 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 an arbitrator should fulfil in the arbitration agreement.

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 a notification to do so, any party may request the court to appoint an arbitrator.

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 files a request for 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.

The parties are free to agree on a challenge procedure. In the absence of such agreement, the rules of the ACCP foresee that the arbitral tribunal, including the challenged arbitrator, will decide on the challenge. If the arbitral tribunal rejects

the challenge, the party can refer it to the Supreme Court within four weeks. However, the arbitral tribunal is not required to wait for the Supreme Court’s decision, and can continue the arbitration in the meantime.

4.5 Arbitrator Requirements

Arbitrator independence and impartiality are to be 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), but 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.

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 ACCP, which is a mandatory provision. Not only is it for the arbitral tribunal to rule on its own jurisdiction (positive competence-competence) but, while arbitral proceedings are pending, a state court must reject claims brought before it that are subject to an arbitration agreement (negative competence-competence).

5.3 Circumstances for Court Intervention

Issues of 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 such award is subject to setting aside proceedings, the arbitral tribunal may continue with the proceedings, and even render an award.

5.4 Timing of Challenge

As a consequence of the doctrine of competence-competence, only the arbitral tribunal can decide on its jurisdiction after the arbitral proceedings have been initiated. An arbitral tribunal's jurisdiction may then only be challenged in front of the courts as a ground to set aside an arbitral award. As noted above, if the arbitral tribunal's decision on jurisdiction has been rendered in a separate arbitral award, such award may be challenged in front of the Supreme Court while the proceedings continue.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

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

5.6 Breach of Arbitration Agreement

Courts will dismiss a claim relating to a matter that is subject to an arbitration agreement, unless a party makes submissions on the merits of the dispute or orally pleads 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 for 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. 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

It is noteworthy that parties may request interim relief from both courts and arbitral tribunals.

Arbitrators are 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.

Ordering 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.

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 right cannot be excluded by the parties' agreement.

Although both arbitral tribunals and courts may order preliminary or interim relief, only courts can enforce preliminary or interim relief.

6.3 Security for Costs

Arbitral tribunals are not explicitly granted the power to order security for costs under Austrian arbitration law, but security for costs may be ordered as interim or preliminary relief. Courts may order security for costs.

7. Procedure

7.1 Governing Rules

The parties are generally free to agree on the arbitral procedure, eg by reference to institutional rules. Only a 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 trial, and the grounds for challenging an award.

If the parties have not agreed on any procedural rules, 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

There are no particular procedural steps required by law for proceedings conducted in Austria, so the parties are free to agree upon the procedure of the arbitration. However, on a general level, proceedings have to observe fundamental procedural rights such as the right to fair and equal treatment, the right to proper representation and the right to be heard.

7.3 Powers and Duties of Arbitrators

Arbitral tribunals have the power to decide on their own jurisdiction (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 that are not regulated by mandatory law or the parties' agreement. Moreover, arbitral tribunals have the power to render interim and preliminary measures, but lack coercive powers so cannot compel witnesses or parties to produce evidence, give testimony or even appear at an oral hearing.

An arbitral tribunal's power to render an award in accordance with the parties' agreement is its most important duty.

Also, arbitrators have to 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 law requires legal representatives to have particular qualifications in order to appear in arbitration proceedings. However, in setting aside proceedings before the Supreme Court, parties are required to be represented by a lawyer admitted to the Austrian Bar.

8. Evidence

8.1 Collection and Submission of Evidence

Austrian arbitration law does not provide explicit rules on the taking of evidence: the parties are free to agree on any procedure or rules they deem appropriate. In the absence of an agreement by the parties, it is within the tribunal's discretion to take and evaluate evidence as it deems fit.

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

8.2 Rules of Evidence

In the absence of an agreement by the parties, arbitral tribunals are free to determine the rules of evidence. Under Austrian arbitration law, arbitral tribunals have the power to decide on the admissibility of evidence, to take evidence they deem necessary and to evaluate it freely. Arbitral tribunals often take guidance from the IBA Rules on the Taking of Evidence.

8.3 Powers of Compulsion

Austrian arbitration law does not grant coercive powers to arbitral tribunals. However, although only courts have powers of compulsion, arbitral tribunals can request the courts' assistance with the taking of evidence, including taking the testimony of a witness who is unwilling to testify, or ordering the production of documents. Such assistance may be requested from Austrian and foreign courts.

9. Confidentiality

9.1 Extent of Confidentiality

Austrian arbitration law does not provide for the automatic confidentiality of arbitral proceedings or their constituent parts, such as the award. Therefore, it is advisable to agree on the confidentiality of the arbitral proceedings in the arbitra-

tion agreement, or to opt for institutional rules that foresee the confidentiality of the proceedings.

10. The Award

10.1 Legal Requirements

An arbitral award must be made in writing and signed by the arbitrators, and must state the date on which it was rendered. The award must also state the reasons on which it is based, unless the parties have agreed otherwise. There is no time limit for delivering the award, unless the parties have agreed on such time limit.

10.2 Types of Remedies

Austrian arbitration law does not provide any restrictions on the types of remedies that an arbitral tribunal may award, apart from compliance with Austrian public policy. What types of remedies are available is considered a question of the applicable law on the merits. In this regard, it has to be noted that punitive damages are unknown to Austrian law, and are considered contrary to Austrian public policy.

10.3 Recovering Interest and Legal Costs

Parties are entitled to recover interest and legal costs. Austrian arbitration law does not define the types of costs a party can recover, but merely notes that an obligation to reimburse the counterparty for legal costs may include any and all reasonable costs appropriate for bringing the action or defence.

Pursuant to section 609 ACCP, the arbitral tribunal shall decide upon the obligation to reimburse the costs of the proceedings, if the parties have not agreed otherwise. The arbitral tribunal shall take into account the circumstances of the case, particularly the outcome of the proceedings. The decision has to be made in the form of an arbitral award.

11. Review of an Award

11.1 Grounds for Appeal

Since 2013, the Austrian Supreme Court has acted as the only instance in proceedings for challenging an award. A challenge has to be submitted within three months of receiving the award.

The grounds for challenging an award under Austrian law closely follow those provided by Art V of the New York Convention and Art 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 violating Austrian public policy;
- the requirements for an action for revision having been fulfilled (section 530 ACCP);
- the matter in dispute not being arbitrable; or
- the award violating Austrian public policy.

11.2 Excluding/Expanding the Scope of Appeal

Parties cannot exclude or expand the scope of challenges to the award under Austrian law.

11.3 Standard of Judicial Review

There is no review of the merits of the case. Attempts to disguise a review on the merits as one of the grounds for setting aside 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 the European Convention on International Commercial Arbitration, and has signed a number of bilateral treaties concerning the recognition and enforcement of arbitral awards.

12.2 Enforcement Procedure

Arbitral awards rendered in proceedings seated in Austria – ie 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.

Foreign arbitral awards are enforced by 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

Austrian national courts have an enforcement-friendly approach towards the recognition and enforcement of domestic and foreign arbitral awards. Grounds for refusing enforcement are interpreted narrowly. According to established case law of the Supreme Court, the public policy exception is applied very restrictively.

Vavrovsky Heine Marth Rechtsanwälte

Fleischmarkt 1
1010 Vienna
Austria

Tel: +43 1 512 03 53
Fax: +43 1 512 03 53 – 40
Email: arbitration@vhm-law.at
Web: <http://www.vhm-law.at>



Vavrovsky Heine Marth