GUIDE TO AUSTRIAN ARBITRATION LAW
1. INTRODUCTION

The purpose of this guide is to provide a practical introduction to Austrian arbitration law which is also of sufficient depth for the legal background of the law to be fully understood. Austrian arbitration law is contained in sections 577 to 618 of the Austrian Civil Procedure Code ("ACPC"). Austria is party to several international treaties on arbitration, most importantly the New York Convention, the European Convention and the ICSID Convention. This guide will refer to these instruments in the relevant context.

2. THE ARBITRATION AGREEMENT

2.1. Definition and Scope

An arbitration agreement is an agreement to submit certain current or future disputes resulting from a legal (in practice mostly but not necessarily contractual) relationship to arbitration. The dispute covered by the arbitration agreement must be of a legal nature. This means that the parties must have conflicting legal views regarding the dispute.

Arbitration agreements can be concluded in a separate contract ("Schiedsabrede"). A separate arbitration agreement of this nature is recommended if the agreement covers several different contracts. An arbitration agreement can also be contained in a comprehensive contract. It is then referred to as an arbitration clause.

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1 Austrian Supreme Court, 25 January 1995, docket no. 3 Ob 543/94.
2 Christian Koller, Die Schiedsvereinbarung, in SCHIEDSVERFAHRENSRECHT I, ¶ 3/1 (Liebscher et al., 2012).
In order to be valid, an arbitration agreement must contain the following content at the very least:

- The parties to the arbitration agreement must be determined.
- The subject-matter of the dispute (or the legal relationship constituting the basis for future disputes) must also be determined.
- The parties have to agree to submit their dispute(s) to arbitration.

In addition, the arbitration agreement can and should contain optional agreements on:

- the seat of arbitration;
- the number of arbitrators;
- the procedure for their appointment;
- the language of the proceedings.

2.2. **Interpretation**

The starting point for interpreting an arbitration agreement is to examine its literal meaning in accordance with Section 914 of the Austrian Civil Code.\(^3\) Additionally, the intention of the parties at the time the arbitration agreement was concluded is to be taken into account.\(^4\) Where the intention of a party cannot be determined, the expression of the party’s intention needs to be examined in accordance with the party’s *bona fide* business practice and according to the hypothetical intention of the party in the event of a change of circumstances which were unforeseen at the time of the arbitration agreement’s conclusion.\(^5\)

In case of doubt, the arbitration agreement is to be interpreted *in favorem validatis* in accordance with Section 914 of the Austrian Civil Code in order to uphold the validity of the arbitration agreement.

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3. [GEROLD ZEILER, SCHIEDSVERFAHREN § 581 ¶ 53 (2d ed. 2014).](#)

4. Austrian Supreme Court, 22 May 2006, docket no. 10 Ob /3/06y.

5. [GEROLD ZEILER, SCHIEDSVERFAHREN § 581 ¶ 55 (2d ed. 2014).](#)
Only in the event of the aforementioned methods of interpretation failing to produce a result is the arbitration agreement is to be interpreted *contra proferentem* as per Section 915 of the Austrian Civil Code. According to this provision, an equivocal statement is to be interpreted to the disadvantage of the party that has made the statement. However, it can be difficult to determine what actually constitutes a disadvantage to a party regarding the interpretation of the arbitration agreement.\(^6\)

The written requirement as set out in Section 583 of the ACPC constitutes the limit for the extensive interpretation of arbitration agreements. Therefore, the result of the interpretation must still be reconcilable with the wording of the clause.\(^7\)

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\(^6\) **Peter Rummel**, *Schiedsvertrag und ABGB*, ¶ 146 (1986); for a detailed list of jurisprudence regarding the interpretation of arbitration agreements, see **Gerold Zeiler**, *Schiedsverfahren* § 581 ¶¶ 58-60 (2d ed. 2014).

\(^7\) Alice Fremuth-Wolf, § 581, in *Arbitration Law of Austria: Practice and Procedure* ¶ 38 (Riegler et al., 2007).
2.3. **Form**

Section 583 Subsection (1) ACPC, first variant

an arbitration agreement is valid if it is part of a written agreement. This agreement must be signed by the parties. The signature does not have to be put next to the arbitration agreement. The arbitration agreement does not even have to be contained in the signed document (see on this below).

Section 583 Subsection (1) ACPC, second variant

The second variant of Section 583 Subsection (1) ACPC recognizes arbitration agreements in communication between the parties. Here the law does not require the signatures of the parties to be put on the documents.1 In particular, e-mail correspondence, even without the use of electronic signatures, offers a proper way to conclude arbitration agreements.

Section 583(2) ACPC

The parties may also validly agree on arbitration by referring to a document, which contains the arbitration clause. Section 583 Subsection (2) ACPC stipulates that such reference in a contract constitutes an arbitration agreement if the contract that contains the reference satisfies the formal requirements of Section 583 Subsection (1), and if the reference can be understood to make the arbitration agreement part of the contract.

Under section 583 of the ACPC, arbitration agreements must be concluded in writing. The written requirement requires that at least the names of the parties and current or future dispute(s) be defined in writing. In addition, the parties have to clearly stipulate their wish to submit their dispute to arbitration. Austrian courts have also held that any further procedural agreement made between the parties (such as the place of arbitration, the language to be used in the arbitration, etc.) has to be in writing in order to be valid.8

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8 Austrian Supreme Court, 31 August 1984, docket no. 1 Ob 20/84; scholarly opinion disagrees Christian Hausmaninger, § 583, in Kommentar zu den Zivilprozessgesetzen ¶ 47 (Fasching & Konecny eds., 2d ed. 2007); Christian Koller, Die Schiedsvereinbarung, in Schiedsverfahrensrecht I, ¶¶ 3/146, 3/210 (Liebscher et al., 2012).
In order for an arbitration agreement under Section 583(2) of the ACPC to be valid, two conditions have to be fulfilled. First, the reference must be contained in a document signed by all parties, or, alternatively, contained in a piece of written communication between the parties. Second, the reference must clearly state that the parties intend for the content of the referenced document to constitute part of their agreement. However, it is not necessary for the parties to refer to the arbitration clause in the referenced document. Moreover, the referenced document does not need to be attached to the written contract or communication. This rule is important for the agreement of arbitration agreements by way of reference to general terms and conditions.

The written requirement also extends to power of attorney given to agents for the conclusion of arbitration agreements. Agents require a special power of attorney which expressly grants them the power to conclude an arbitration agreement in relation to a specific transaction (Section 1008 of the Austrian Civil Code). These powers of attorney must be in writing. These requirements do not apply to board members (Geschäftsführer, Vorstände) of Austrian corporations (Gesellschaften mit beschränkter Haftung, Aktiengesellschaften) as well as partners of general and limited partnerships (Offene Gesellschaften, Kommanditgesellschaften). Such persons are authorized to represent the partnership and do not require any additional power of attorney in order to enter into an arbitration agreement. They represent the company by virtue of their position in the corporation or partnership and thus are also entitled to conclude arbitration agreements.

Any objection to the jurisdiction of a tribunal based on an arbitration agreement’s lack of formal validity must be made by the respondent before he/she enters an appearance in the substance of the dispute (section 583(3) of the ACPC). A claimant can be estopped from arguing that an arbitration agreement is formally defective based on the doctrine of *venire contra factum proprium*. Based on that doctrine, the Austrian Supreme Court held that a party that has initiated arbitration proceedings by filing a statement of claim through his/her attorney may no longer rely on any formal defect contained in the underlying arbitration agreement.

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9 Austrian Supreme Court, 29 March 2006, docket no. 7 Ob 64/06x.
10 Austrian Supreme Court, 29 March 2006, docket no. 7 Ob 64/06x.
11 Austrian Supreme Court, 26 April 2007, docket no. 7 Ob 236/05i.
3. ARBITRABILITY

Section 582 ACPC provides that

| all proprietary claims ("vermögensrechtliche Ansprüche") are arbitrable if they fall "within the jurisdiction of the courts of law", which means that the claim could be decided by a court and that
| non-proprietary claims are arbitrable only if the parties would also be entitled to conclude a settlement agreement over the subject matter in dispute.

Exceptions:

| Claims based on family law.
| Tenancy law under the Austrian Landlord and Tenant Act and the Act on Assisted Housing.
| (Some) labour disputes and social security law disputes.

The term "proprietary claim" is to be interpreted broadly. Given the objective arbitrability of proprietary claims, most corporate disputes can be subject to arbitration proceedings. An arbitral tribunal can therefore decide on disputes regarding the annulment of a resolution passed by the shareholders of a limited liability company pursuant to Sections 41 et seqq. of the Austrian Code on Limited Liability Companies. Other examples of arbitrable corporate disputes include compensation claims directed against executive directors of limited companies, disputes regarding payment of share capital and disputes concerning loans invested by a shareholder as contribution in kind.

While the conduct of insolvency proceedings is not a proprietary claim comprised by Section 581 Subsection (2), certain disputes relating to insolvency proceedings are deemed arbitrable (e.g. claims for selection and segregation, "Aussonderungs- und Absonderungsansprüche").

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13 Austrian Supreme Court, 19 April 2012, docket no. 6 Ob 42/12p; Franz Schwarz & Christian Konrad, The Vienna Rules ¶ 1-127 (2009); Christian Hausmaninger, § 582, in Kommentar zu den Zivilprozessgesetzen ¶ 11 (Fasching & Konecny eds., 2d ed. 2007).
14 Nikolaus Pitkowitz, Schiedsfähigkeit gesellschaftsrechtlicher Streitigkeiten – Alles klar?, in Festchrift für Hellwig Torggler 959 (Fitz et al., 2013); Gerold Zeiler, Zur schiedsrichterlichen Anfechtung von Gesellschafterbeschlüssen, in Festchrift für Gert Delle Karth, 1055 (Schumacher & Zimmermann eds., 2013).
Claims that are non-proprietary are only arbitrable if the parties are able to conclude a settlement on them. This would include claims based on violations of personality rights.\(^{16}\)

An arbitral tribunal seated in Austria is bound to determine the arbitrability of a dispute in accordance with Section 582 of the ACPC as the *lex fori*.\(^{17}\) This follows from Section 611 (2)(7) of the ACPC, according to which an award may be set aside if the matter in dispute is not arbitrable under (Austrian) national law.

An award on a matter which is not arbitrable can be set aside in challenge proceedings regardless of whether the argument was raised or not.

### 4. RELATIONSHIP BETWEEN ARBITRATION AND AUSTRIAN COURTS

One of the main principles governing international commercial arbitration is the so-called competence-competence of arbitral tribunals to rule upon their own jurisdiction. However, the tribunal’s decision on jurisdiction is not exempt from scrutiny by state courts: Sections 584 and 592 of the ACPC establish the relationship between arbitral tribunals and state courts regarding issues of jurisdiction.

For proceedings before courts, section 584 Subsection (1) of the ACPC stipulates that a state court has to reject a claim brought before it if this claim is subject to an arbitration agreement, except where the respondent makes a submission on the subject matter of the dispute (by filing a statement of defense) or pleads his/her defense orally before the court without objecting to the state court’s lack of jurisdiction. Section 592 of the ACPC governs the converse of this, whereby a claim is brought before an arbitral tribunal. However, the mere allegation of the respondent that the dispute brought before the court is subject to an arbitration agreement does not lead to the rejection of the claim by itself. The court has to further examine whether the alleged arbitration agreement indeed exists and whether it is operable. Only after this has been done can the court decide whether it has jurisdiction.

\(^{16}\) Christian Hausmaninger, § 582, in *Kommentar zu den Zivilprozessgesetzen* ¶ 48 (Fasching & Konecny eds., 2d ed. 2007). *Gerold Zeiler, Schiedsverfahren* ¶ 16 (2d ed. 2014).

\(^{17}\) Christian Koller, *Die Schiedsvereinbarung*, in *Schiedsverfahrensrecht* I, ¶ 3/69 (Liebscher et al., 2012).
If the claim is brought before the arbitral tribunal, section 592 of the ACPC stipulates that the tribunal shall rule on its own jurisdiction. The tribunal's award on jurisdiction is then subject to scrutiny by the courts during setting aside proceedings.

Section 584(3) of the ACPC stipulates that while the claim is pending before a tribunal, no claims on the same matter can be filed with a court and vice versa.

Where an arbitral tribunal has denied its jurisdiction over a matter in dispute on the grounds that no arbitration agreement exists in relation to it or that the arbitration agreement is incapable of being performed, a court may not dismiss an action on that matter on the grounds that an arbitral tribunal has jurisdiction over the dispute. If a party files a claim with a state court after an arbitral tribunal has ruled that it does not have jurisdiction over a matter, the party loses the right to initiate setting-aside proceedings against the arbitral award denying an arbitral tribunal’s jurisdiction over the matter.

Finally, under section 584(5) of the ACPC, a party that has previously relied on the existence of an arbitration agreement is prohibited from subsequently arguing the non-existence of the arbitration agreement unless the underlying circumstances have changed significantly. Therefore, if a party relies on the existence of an arbitration agreement in front of a state court and the court declares that it lacks jurisdiction over the matter as a consequence, the same party cannot subsequently argue that the arbitration agreement does not exist before the arbitral tribunal.18

Section 584 (2) of the ACPC provides for the converse situation. It stipulates that a state court must not reject a claim if an arbitral tribunal has previously declared that it lacks jurisdiction over the matter. Therefore, it would be futile for a party which has previously relied on the non-existence of an arbitration agreement in front of an arbitral tribunal to subsequently plead the arbitration agreement’s validity.

5. THE TRIBUNAL

5.1. Constitution of the Tribunal

Parties are free to agree on an odd number of arbitrators either in the arbitration agreement or at the beginning of the arbitration. Alternatively, the parties may refer to institutional

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arbitral rules that set out a procedure for determining the number of arbitrators. Austrian law does not permit parties to agree on an even number of arbitrators.

Where there is no express agreement between the parties as to the number of arbitrators and the parties have not referred to institutional arbitral rules, Section 586 Subsection (2) of the ACPC stipulates that the number of arbitrators shall be three.

SOLE ARBITRATOR

THREE-MEMBER TRIBUNAL
Section 587(7) of the ACPC stipulates that party autonomy also takes precedence as part of the appointment procedure before the competent court. Therefore, as long as the court has not decided on an appointment and the appointment of the arbitrator is made otherwise, the court shall dismiss a request to appoint an arbitrator. In practice, this provision has some relevance as a party striving to delay the arbitral proceedings sometimes only appoints an arbitrator at the last minute to avoid having “its” arbitrator appointed by the court. ¹⁹

Alternatively, parties are free to agree on any other appointment mechanism either explicitly or by reference to institutional rules. Article 587(3) of the ACPC contains a default mechanism in case the appointment procedure agreed on by the parties does not lead to the constitution of an arbitral tribunal, be it that a party fails to act as required, the parties or arbitrators are unable to reach an agreement or a third party fails to perform any function entrusted to it within three months. In such cases, either party may request that the court make an appointment provided that no other means of securing the appointment were provided for.

MULTI-PARTY ARBITRATION

In practice, multi-party arbitrations pose specific questions and problems, especially with regard to the constitution of the arbitral tribunal. As a result, Section 587(5) of the ACCP addresses cases in which several parties are obliged to appoint one or more arbitrators jointly but are unable to agree on a specific person. ²⁰ This may happen on the side of the claimants or (more frequently) on the side of the respondents. If an agreement is not reached within four weeks, each party may request the appointment of an arbitrator by the court. To give the most common example: If a claimant nominates an arbitrator or, as the case may be, several claimants jointly nominate an arbitrator but two or more respondents fail to do so within four weeks, the claimant or each of several claimants may request that the court make a substitute appointment. In this way, only the arbitrator on the respondents’ side is appointed by the court, which means that the arbitrator nominated by claimant(s) continues to act in his/her function.

If there is no obligation for one side to appoint an arbitrator jointly and one side fails to appoint an arbitrator, the court will not only appoint the arbitrator(s) for the side which has not reached an agreement but for the entire arbitral tribunal. ²¹

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²⁰ Cf. GEROLD ZEILER, SCHIEDSVERFAHREN § 587 ¶¶ 37, 38 (2d ed. 2014) arguing that multiple parties are not under an obligation to agree on an arbitrator unless the arbitration agreement is concluded after the dispute arises or explicitly agree to jointly nominate an arbitrator.
²¹ GEROLD ZEILER, SCHIEDSVERFAHREN § 586 ¶¶ 44-45 (2d ed. 2014).
5.2. Challenges

Section 588 of the ACPC provides that a prospective arbitrator "shall disclose any circumstances likely to give rise to doubts as to his/her impartiality or independence, or which are in conflict with the agreement of the parties" both before his/her appointment or thereafter as soon as they arise.

Section 588 of the ACPC constitutes mandatory law. The parties cannot legitimately agree that arbitrators shall act as their partial representatives.\footnote{Gerold Zeiler, Schiedsverfahren § 588 ¶ 2 (2d ed. 2014).} It also follows from the mandatory nature of Section 588 of the ACPC that challenge grounds other than those set out therein may not be agreed upon.\footnote{Gerold Zeiler, Schiedsverfahren § 588 ¶ 3 (2d ed. 2014).} The parties may not waive or agree to waive a challenge ground in advance but may only do so after a specific challenge ground has become known to them.\footnote{Gerold Zeiler, Schiedsverfahren § 588 ¶ 18a (2d ed. 2014).} Arguably, some challenge grounds are so serious – for example, the challenge grounds listed under the non-waivable red list of the IBA Guidelines on Conflicts of Interest in International Arbitration – that the parties may not waive them under any circumstances, meaning that they may not do so even after the specific challenge ground has become known to them.

Section 588 Subsection (2) of the ACPC sets out two categories of grounds for the challenge of an arbitrator: firstly, where there are justifiable doubts as to the arbitrator’s impartiality or independence and secondly, where the parties have agreed that an arbitrator lacks the necessary qualifications.

If the (prospective) arbitrator him-/herself has doubts as to his/her independence or impartiality, he/she must refuse to act as an arbitrator or resign the arbitrator’s mandate.\footnote{Gerold Zeiler, Schiedsverfahren § 588 ¶ 17 (2d ed. 2014); Christian Hausmaninger, § 588, in Kommentar zu den Zivilprozessgesetzen ¶ 41 (Fasching & Konecny eds., 2d ed. 2007).}

Whether or not there are justifiable doubts with respect to an arbitrator’s impartiality or independence must be determined by an objective interpretation of all relevant facts (“reasonable third person test”).\footnote{Martin Platte, § 588, in Arbitration Law of Austria: Practice and Procedure ¶ 17 (Riegler et al., 2007); Gerold Zeiler, Schiedsverfahren § 588 ¶ 11 (2d ed. 2014).}
The wording of Section 588 of the ACPC does not provide any guidance for actual circumstances that might arise. Therefore, it helps to have a look at the IBA Guidelines on Conflicts of Interest in International Arbitration to give some abstract content to the decisive reasonable third person test.

After accepting the nomination, the arbitrator remains obliged to disclose any new circumstances or circumstances he/she was not aware of at the time of the appointment that may cause doubt as to his/her impartiality and independence. He/she must subsequently disclose this information to all arbitration parties and any co-arbitrators simultaneously. The disclosure must also be made as soon as possible and without undue delay.\textsuperscript{27}

Though rarely found in practice, the parties can agree on specific qualifications which an arbitrator must possess. If the parties agree on such qualifications in their arbitration agreement or thereafter, they generally concern the arbitrator’s nationality, his/her legal or other education, membership of professional associations, language skills and experience.

**THE CHALLENGE PROCEDURE**

Pursuant to Section 589 Subsection (1) of the ACPC, parties are free to agree on a challenge procedure. In practice, parties regularly find such agreement by submitting their arbitration to institutional arbitral rules. Virtually all institutional arbitral rules set out a specific procedure for the challenge of arbitrators. In ad-hoc arbitrations, the parties may devise their own challenge procedure either in their arbitration agreement or subsequently. In practice, this rarely happens. In the absence of any agreement to the contrary, section 589 (2) sets out a procedure for the challenge of an arbitrator:

\textsuperscript{27} Martin Platte, § 588, in *Arbitration Law of Austria: Practice and Procedure* ¶ 14 (Riegler et al., 2007).
PARTY BECOMES AWARE OF GROUNDS FOR A CHALLENGE

WITHIN FOUR WEEKS

WRITTEN CHALLENGE TO THE ARBITRAL TRIBUNAL

AGREEMENT OF THE OTHER PARTY TO THE CHALLENGE

RESIGNATION OF THE ARBITRATOR

DECISION OF THE TRIBUNAL (INCLUDING THE CHALLENGED ARBITRATOR) ON THE CHALLENGE

CHALLENGE SUCCESSFUL

CHALLENGE UNSUCCESSFUL

WITHIN FOUR WEEKS

APPLICATION TO THE SUPREME COURT (NOT SUBJECT TO APPEAL)

CHALLENGE SUCCESSFUL

CHALLENGE UNSUCCESSFUL

APPOINTMENT OF A NEW ARBITRATOR IN THE SAME WAY AS THE SUCCESSFULLY CHALLENGED ARBITRATOR
5.3. Early Termination of the Arbitrator’s Mandate

Section 590 of the ACPC demonstratively lists grounds for the early termination of an arbitrator’s mandate. It does not apply in situations where challenge grounds stipulated in Section 588 of the ACPC exist as the challenge procedure set out in Section 589 ACPC will apply in such cases. Section 590 of the ACPC is a back-up provision which enables an arbitrator to resign or be removed without the existence of a challenge ground.\(^{28}\)

Section 590 of the ACPC is mandatory. However, Subsection (1) allows the parties to agree on a procedure for the termination of the arbitrator’s mandate. The parties may do so by either devising their own procedure – which is very rare in practice – or, indirectly, by incorporating institutional arbitration rules that set out such a procedure – which is common.

The early termination of an arbitrator’s mandate has no effect on the existence and validity of the arbitration agreement.\(^{29}\)

**GROUNDS FOR EARLY TERMINATION:**

- Successful challenge
- Agreement of all parties
- Withdrawal from office
- Unable to comply with his/her duties or failure to do so without undue delay (resulting in removal by court)

The early termination of an arbitrator’s mandate will result in the appointment of a substitute arbitrator. The appointment of the substitute arbitrator is made in accordance with the procedure that was applicable to the appointment of the arbitrator being replaced.

After the appointment of a substitute arbitrator, the proceedings need only be repeated if the parties agree on this.\(^{30}\) Without such agreement between the parties, the arbitral

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\(^{28}\) Martin Platte, § 590, in *ARBITRATION LAW OF AUSTRIA: PRACTICE AND PROCEDURE* ¶ 2 (Riegler et al., 2007).

\(^{29}\) Christian Hausmaninger, § 590, in *KOMMENTAR ZU DEN ZIVILPROZESSGESETZEN* ¶ 60 (Fasching & Konecny eds., 2d ed. 2007).

\(^{30}\) Martin Platte, § 591, in *ARBITRATION LAW OF AUSTRIA: PRACTICE AND PROCEDURE* ¶ 14 (Riegler et al., 2007); Gerold Zeiler, *SCHIEDSVERFAHREN* § 591 ¶ 7a (2d ed. 2014).
tribunal may continue the proceedings on the basis of the results already on file in the interest of time and cost.

6. THE ARBITRAL PROCEEDINGS

6.1. General

Section 594 Subsection (1) of the ACPC enshrines the primacy of party autonomy regarding the way in which the arbitration is to be conducted. The parties are free to agree on how the procedure should be conducted within the limits imposed by the mandatory rules of Austrian arbitration law.

In doing so, the parties may not only formulate rules of procedure but also refer to pre-existing rules of procedure, for example, rules provided by arbitration institutions. The parties may choose to agree on the rules which will govern the conduct of any proceedings in an arbitration clause prior to the event or – as is more common in practice – in the course of such proceedings. If the arbitration is not conducted in accordance with the agreement of the parties, recognition and enforcement of the award may be refused under Article V Subsection (1) Litera (d) of the New York Convention.

In the absence of an agreement between the parties, the arbitral tribunal has to apply the provisions of the arbitration chapter of the ACPC, including its non-mandatory provisions. Consequently, the hierarchy of rules within the ACPC regarding the conduct of arbitration proceedings is headed by the mandatory provisions (including annulment grounds) of the ACPC, followed by the parties’ agreement, and – after observance of these rules and of the non-mandatory provisions of the ACPC – the discretion of the arbitral tribunal.

31 GEROLD ZEILER, SCHIEDSVERFAHREN § 594 ¶ 7 (2d ed. 2014).
6.2. **Mandatory provisions**

THE RIGHT TO BE HEARD

The fundamental principles of fair treatment and the parties' right to be heard are enshrined in Section 594 Subsection (2) of the ACPC. A violation of these rights may constitute grounds for annulment under section 611 Subsection (2) Number 2 of the ACPC.

The right to be heard includes, in particular:

- The parties' right to state their case.
- The right to respond to allegations made by the opposing party (including statements of costs).
- Appropriate opportunity to participate in and respond to the evidence taken by the tribunal.
- The arbitral tribunal's consideration of the parties' statements in making its decision. “Letting the parties talk” will, therefore, not suffice.\(^{32}\)
- The right to be informed about the time and place of each individual hearing.\(^{33}\)
- The right to present evidence, participate in the taking of evidence and comment on the results thereof.\(^{34}\)
- The right to be informed of every new fact in the case and to be given the opportunity to comment thereon. More generally, parties must be given the opportunity to comment on all facts and evidence.\(^{35}\)


\(^{33}\) Austrian Supreme Court, 11 November 1951, docket no. 2 Ob 344/51; Austrian Supreme Court, 5 April 1928, docket no. 2 Ob 80/28.

\(^{34}\) Austrian Supreme Court, 6 September 1990, docket no. 6 Ob 572/90.

\(^{35}\) Austrian Supreme Court, 24 September 1981 docket no. 7 Ob 623/81; Austrian Supreme Court, 27 November 1991, 3 Ob 1091/91.
The opportunity to comment on any legal opinion of the tribunal which is not based on the parties' argument, and hence not to be “unduly surprised” by the tribunal's legal reasoning in the award.\textsuperscript{36}

A violation of Section 594 Subsection (2) of the ACPC constitutes grounds for setting aside the award irrespective of whether the violation has had an actual effect on the outcome of the proceedings or not (Section 611 Subsection (2) Number 2 of the ACPC).

According to jurisprudence, however, only a complete denial of the right to be heard will constitute grounds for annulment.\textsuperscript{37} The Supreme Court has repeatedly held that incomplete determination of the facts of the case, deficient evaluation of legally relevant facts, ignoring or rejecting factual and legal allegations or ignoring requests for evidence to be taken would not qualify as violations of the right to be heard as such.\textsuperscript{38} More recent jurisprudence has taken a more lenient approach.\textsuperscript{39}

FREE CHOICE OF REPRESENTATIVES

According to Section 594 Subsection (3) of the ACPC, parties have the right to choose their legal representative(s). Their choice is not restricted to lawyers or persons holding specific qualifications.

Apart from legal representation in the arbitration proceedings, Section 594 Subsection (3) of the ACPC also covers the free choice of advisors other than representatives. Hence, parties may freely choose their team of advisors for arbitration proceedings, including experts.

FURTHER MANDATORY PROVISIONS

Under section 597 of the ACPC, the claimant must submit his/her claim and the facts on which the claim is based within a period agreed by the parties or

\textsuperscript{36} e.g. Austrian Supreme Court, 24 April 2013, docket no. 9 Ob 27/12d.
\textsuperscript{37} Austrian Supreme Court, 19 August 2015, docket no. 18OCg2/15s.
\textsuperscript{38} Austrian Supreme Court, 4 April 2013, docket no. 9 Ob 27/12d; see also the critical scholarly writing on this strict jurisprudence Andreas Reiner, Schiedsverfahren und rechtliches Gehör, 2 ZfRV 52 (2003); Gregor Schett, Ein Schritt des OGH am langen Weg zum rechtlichen Gehör im Schiedsverfahren, ECOLEX 628 (2013); Stefan Riegler, § 611, in \textsc{Arbitration Law of Austria: Practice and Procedure} ¶ 36 (Riegler et al., 2007); Gerold Zeiler, \textsc{Schiedsverfahren} § 594 ¶ 19 (2d ed. 2014).
\textsuperscript{39} Austrian Supreme Court, 24 April 2013, docket no. 9 Ob 27/12d; Austrian Supreme Court, 28 November 2012, docket no. 4 Ob 185/12b; Austrian Supreme Court, 18 February 2015, docket no 2 Ob 22/14w; Austrian Supreme Court, 10 October 2014, docket no. 18 OCg 2/141; Austrian Supreme Court, 29 August 2015, docket no. 18 OCg 2/15s.
determined by the arbitral tribunal. Subsequently, the arbitral tribunal has to grant the respondent the opportunity to respond within an agreed or determined period.

Pursuant to section 599 Subsection (1) of the ACPC, the arbitral tribunal may decide upon the admissibility of evidence and may also collect and freely weigh the evidence.

The rules stipulated in Sections 588 and 589 of the ACPC governing the challenge of arbitrators are also mandatory for experts nominated by the arbitral tribunal (Section 601(3) of the ACPC).40

The parties may not exclude the possibility of judicial assistance from a state court under Section 602 of the ACPC.

The rules in Section 617 governing consumer protection cannot be derogated from.

6.3. **Seat**

**AGREEMENT OF THE PARTIES**

Under Section 595 of the ACPC, the parties are free to agree on the “seat” of the arbitral tribunal. The seat determines the applicable procedural framework provided by the national law of the state “hosting” the arbitration and thus “grounds” the arbitration in the national lex arbitri.41 Furthermore, the state courts at the seat of the arbitration will have the power to support and supervise the arbitration (e.g. the appointment or challenge of an arbitrator). Moreover, the seat will determine the “nationality” of the award, which is particularly relevant for the purposes of potential annulment or enforcement proceedings.

The parties may agree on the seat of the arbitral tribunal in the arbitration agreement either by expressly stipulating the seat or by referring to specific institutional arbitration rules. These often contain provisions determining the seat of the arbitral tribunal. There need not be any nexus between the chosen seat of arbitration and the subject matter of the case or the parties. The parties are also free to agree that the seat of the arbitral tribunal shall yet

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40 Gerold Zeiler, Schiedsverfahren § 594¶ 13 (2d ed. 2014).
be determined in a certain manner. For example, the parties may decide that only one party (e.g. the claimant) or a third party (e.g. the arbitral institution) is to decide on the seat of the arbitral tribunal.\footnote{Christian Hausmaninger, § 595, in \textit{Kommentar zu den Zivilprozessgesetzen} ¶ 47 (Fasching & Konecny eds., 2d ed. 2007).}

**DETERMINATION BY THE TRIBUNAL**

In the absence of any party agreement on the seat of the arbitral tribunal, the arbitral tribunal itself is entitled to determine its seat after hearing the parties. In its determination of the seat, the arbitral tribunal must consider the individual circumstances of the case, especially the ability to enforce the award in future. Therefore, the arbitral tribunal will preferably choose a seat in a member state of the New York Convention.

The determination of the seat of the arbitral tribunal does not constitute a mere procedural question. Therefore, it cannot be delegated to the presiding arbitrator.

### 6.4. Applicable Law

Section 603 grants the parties the freedom to agree on the law applicable to the dispute. The parties can either agree on the law of a specific state or a set of rules not bound to a particular state. Furthermore, Section 603 Subsection (3) gives the parties the opportunity to agree on a decision \textit{ex aequo et bono}. The parties’ choice of law can either be explicit or implicit (other than the agreement on a decision \textit{ex aequo et bono}, which must always be explicit).\footnote{Christian Hausmaninger, § 603, in \textit{Kommentar zu den Zivilprozessgesetzen} ¶ 4 (Fasching & Konecny eds., 2d ed. 2007).} An arbitral tribunal seated in Austria is to apply the substantive law chosen by the parties. Section 603 Subsection (1) final sentence excludes \textit{renvoi}, hence, the chosen law's conflict of laws rule does not apply. The choice of law also includes trade usages and rules on the burden of proof.\footnote{Christian Hausmaninger, § 603, in \textit{Kommentar zu den Zivilprozessgesetzen} ¶¶ 52,53 (Fasching & Konecny eds., 2d ed. 2007).} The parties’ freedom to choose the applicable law is subject to limitations. First, application of the chosen law may not result in a violation of the Austrian \textit{ordre public}. Second, the parties’ choice of law does not override the application of mandatory rules of law. Such rules apply under certain circumstances regardless of the parties’ choice of law.\footnote{Alfred Siwy, Mandatory Rules in International Commercial Arbitration, in \textit{Austrian Arbitration Yearbook} ¶ 165 (Klausegger et al., 2012).}
In the absence of a choice of law, the tribunal is to apply the law it considers appropriate (Section 603 Subsection (2)). The tribunal can apply a *voie directe* and is not bound by any conflict of laws rules, though the choice may not be completely arbitrary.\(^\text{46}\) The arbitral tribunal cannot decide to apply any set of rules other than the national law of a state, for instance, the UNIDROIT Rules.

### 6.5. Language

**PARTIES’ AGREEMENT**

The language of the proceedings is determined by the parties’ agreement. The parties are entirely free in their choosing. They are not bound by their own nationality, the nationality of the arbitrators or any aspects of the subject-matter when agreeing on the language. They may also decide that the arbitration proceedings are to be held in two or more languages. Where they do so, it is recommended that one authoritative language be determined for the text (or at least for the dispositive part) of the arbitral award.

The parties may also indirectly determine the language of the proceedings, for example, by reference to institutional rules or else by stipulating that the language shall be determined by one party only (e.g. by the respective claimant upon the initiation of the arbitration) or by a third party (e.g. by an institution).

**DETERMINATION BY THE TRIBUNAL**

In the absence of an agreement between the parties, the language of the proceedings will be determined by the tribunal. The tribunal shall take the circumstances of the case into account including the language of the contract, the parties’ correspondence, efficiency and the costs of the proceedings etc. In making this determination, the tribunal must ensure both parties’ right to be heard.

### 6.6. Interim Measures

Interim measures under Austrian arbitration law can be issued by both courts and tribunals.

INTERIM MEASURES ISSUED BY THE COURT

Section 585 of the ACPC stipulates that the existence of an arbitration agreement does not prevent the parties from seeking the protection of the courts through interim measures. This provision is in line with Article 9 of the UNCITRAL Model Law and Article VI Subsection (4) of the European Convention. The latter regulation also explicitly states that an application for an interim measure cannot be regarded as a submission to the court regarding the substance of the case. While it is not explicitly stated in Austrian law, it is well understood that an application before an Austrian court for interim measures does not constitute a waiver of arbitration. Section 585 of the ACPC constitutes mandatory law. The parties cannot waive their right to seize the courts for interim measures, for instance, by agreeing on institutional rules which would limit this right, such as article 28(5) of the ICC Rules.47

Austrian courts have jurisdiction to issue interim measures in any of the following cases:48

- Where either the residence or seat of the defendant is in Austria.
- Where any asset to be seized is located in Austria.
- Where a third-party debtor, who is the addressee of a measure, resides in Austria.

The fact that the tribunal is seated in Austria is irrelevant for the jurisdiction of the court.

INTERIM MEASURES ISSUED BY THE TRIBUNAL

Under Section 593 of the ACPC, tribunals seated in Austrian can issue interim measures. Under this provision, interim measures can be issued if the enforcement of that claim would be frustrated or materially impeded without the measure. This requirement is mandatory and cannot be deviated from by agreement between the parties.49

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47 Christian Hausmaninger, § 585, in KOMMENTAR ZU DEN ZIVILPROZESSGESETZEN ¶ 2 (Fasching & Konecny eds., 2d ed. 2007); Martin Platte, § 585, in ARBITRATION LAW OF AUSTRIA: PRACTICE AND PROCEDURE ¶¶ 5, 9 (Riegler et al., 2007).
49 Gerold Zeiler, Schiedsverfahren § 593 ¶ 13 (2d ed. 2014).
PROCEDURE

All interim measures require a party to the arbitration to make particular application for them. The tribunal cannot act *sua sponte*.

All parties have to be heard before an interim measure is ordered. Measures cannot be issued *ex parte* (cf. Section 593 Subsection (1) of the ACPC “after having heard the other party”).

Interim measures can only be directed against a party to the arbitration and have no effect against third persons (cf. Section 593 Subsection (1) of the ACPC “order such interim or protective measure against the other party”).

The arbitral tribunal may also require a party to provide appropriate security in connection with an interim measure. Such security can serve as a fund for potential damage claims brought by the opponent to the measure based on the issue of the interim measure. The arbitral tribunal has broad discretion to determine what type of security must be furnished.

Interim measures must be ordered in writing and a signed copy of the order must be delivered to all parties in accordance with Section 593 Subsection (2) of the ACPC. Unless the parties have agreed otherwise, the measure must state the reasons on which it is based in accordance with Section 606 Subsection (2) of the ACPC. The measure must also state the date on which it was taken and the seat of the arbitral tribunal. The chairperson of the tribunal or, where he/she is incapacitated, another arbitrator shall confirm on one copy of the measure that it is final and enforceable at the request of a party.

TYPES OF MEASURES

Austrian law does not provide for a definition of the term interim or protective measures as applied by Section 593 of the ACPC. Consequently, there is a plethora of possible interim measures which can be issued by the tribunal. These include measures intended to ensure the enforcement of the arbitral award such as a ban on the selling of certain assets, an order to deposit an object in dispute, a ban on the disposal of a bank account or an order to supply a bank guarantee. Other possible measures provisionally regulate a legal relationship, declare an action or omission of a party to be justified for the time being, for instance, permission to discontinue work under a contract for the time being, or order such an act or omission such as an order to continue working under a contract, interim cease and desist.

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50 Karl Hempel, Einstweiliger Rechtsschutz durch Schiedsgerichte – Cui bono?, in FESTSCHRIFT FÜR RUDOLF WELSER 273 (Fischer-Czermak et al., 2004).
orders, or even an order to make interim payments. Interim measures include orders to secure evidence which would otherwise be unavailable at a later stage in the proceedings.

ENFORCEMENT OF INTERIM MEASURES

Section 593 Subsection (3) of the ACPC stipulates that interim measures imposed by arbitral tribunals can be enforced by the courts on request by a party. Austrian law allows for the enforcement of interim measures imposed by domestic as well as foreign arbitral tribunals irrespective of an enforcement treaty and irrespective of reciprocity. Thus, the enforcement regime of interim measures is more liberal than the enforcement of arbitral awards, and much more liberal than the enforcement of judgments handed down by foreign courts.

Where the interim measure provides for a measure which is not enumerated in the Austrian Enforcement Act’s catalogue of protective means, the court shall, on request and after having heard the defendant, apply such other means of protecting domestic law which most closely approximate the means foreseen by the interim measure (Section 593 Subsection (3) of the ACPC).

Section 593 Subsection (4) of the ACPC enumerates the reasons for which the enforcement of interim measures must be denied. The law distinguishes between interim measures ordered by tribunals seated in Austria on the one hand, and foreign arbitral tribunals on the other. The enforcement of interim measures ordered by an Austrian tribunal must be denied on the basis of any grounds which would also justify the annulment of an arbitral award, i.e. the grounds listed in Section 611 Subsection (2), Section 617 Subsections (6) and (7), and Section 618 of the ACPC. Where the arbitral tribunal is seated abroad, interim measures will not be enforced on the basis of any of the grounds which justify a refusal to recognise or enforce foreign arbitral awards, in particular those grounds enumerated by Article V of the New York Convention.

In addition, interim measures will not be enforced if the enforcement of the measure would be incompatible with a measure previously requested or issued by an Austrian court or with a measure previously issued by a foreign court that is recognized in Austria, in accordance with Section 593 Subsection (4) Number 3 of the ACPC.

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51 See in more detail GEROLD ZEILER, SCHIEDSVERFAHREN § 593 ¶¶ 21-26b (2d ed. 2014).
6.7. Evidence

According to Section 599 Subsection (1) of the ACPC, the arbitral tribunal decides which (piece of) evidence is admissible, carries out the taking of evidence and freely evaluates its results. The parties cannot limit these powers of the tribunal. Within the boundaries of the right to be heard and the right to fair treatment, the arbitral tribunal is free to decide whether to admit or reject a certain piece of evidence offered by one party. The rejection or even the disregarding of a request for the taking of evidence will normally not violate the right to be heard under current case law. The tribunal is not required to deal with each and every evidentiary application by the parties.53

The parties may agree on a procedure for the taking of evidence as long as they act within the confines of mandatory law. Notably, the parties may agree on the application of foreign provisions on the taking of evidence or on a set of rules such as the IBA Rules on the Taking of Evidence.54 In the absence of any party agreement, the arbitral tribunal determines the details of the evidentiary proceedings at its own discretion. The discretion of the arbitral tribunal to decide on the conduct of the arbitration, including on the taking of evidence, also extends to the determination of the standard of proof and the allocation of the burden of proof.55

Under Section 599(2) of the ACPC, the tribunal is bound to notify the parties in a timely manner whenever it intends to hold an evidentiary hearing or a meeting of the tribunal for the purposes of taking of evidence. The tribunal must also inform the parties in advance when it appoints an expert.56 Furthermore, the tribunal must forward all written submissions, documents and other communications supplied to the arbitral tribunal by one party or, more generally, all evidence to be relied on by the arbitral tribunal to the opposing party (parties). The parties must be informed of the evidence on which the other party and the tribunal will rely with due advance notice before the oral hearing.57

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6.8. **Oral Hearing**

Party autonomy is the prevailing principle when it comes to the organisation of arbitration proceedings. Parties are free to determine whether the arbitral tribunal should conduct one or several oral hearings (or whether, more generally, certain parts of the arbitration should be conducted orally), or whether the arbitration should be conducted on a document-only basis. The parties may also agree, for example, to hold an arbitration hearing via means of telecommunication or may choose to combine several forms of communication and procedure.

In the absence of an agreement between the parties, it is the arbitral tribunal's task to determine whether an oral hearing should be conducted. In doing so, the tribunal will primarily consider the parties' right to be heard. It will give equal consideration to procedural efficiency. The tribunal also enjoys discretion when determining the form of the hearing (be it oral, televised or other).\(^{58}\) If the parties have not excluded an oral hearing, the tribunal must conduct such an oral hearing if one party requests this. The tribunal's failure to do so may lead to the setting aside of the award.\(^{59}\)

6.9. **Court Assistance**

Arbitral tribunals lack coercive powers. Section 602 of the ACPC therefore enables the arbitral tribunal to seek the assistance of state courts for exercising acts that require such powers. Judicial assistance from Austrian Courts is not limited to requests from arbitral tribunals with their seat in Austria. According to Section 577 Subsection (2) of the ACPC, judicial assistance from Austrian courts is to be granted to “foreign” arbitral tribunals as well.

A request for judicial assistance may be submitted by the arbitral tribunal as a whole or by individual arbitrators who have been authorized accordingly. Subject to the arbitral tribunal's consent, either party to the arbitration may also request judicial assistance from a state court.

According to Section 602 of the ACPC, the arbitral tribunal, an arbitrator authorized accordingly by the arbitral tribunal and the parties may participate in the taking of evidence by the state court. The parties may ask questions to witnesses or experts directly if the court

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\(^{58}\) Christian Hausmaninger, § 598, in **KOMMENTAR ZU DEN ZIVILPROZESSGESETZEN** ¶ 38 (Fasching & Konecny eds., 2d ed. 2007).

\(^{59}\) Austrian Supreme Court, 30 June 2010, docket no. 7 Ob 111/10i.
approves of this. In the absence of such approval, questions have to be directed to the judge who then puts them to witnesses or experts. The arbitral tribunal or authorized arbitrators require no such consent from the court for directly putting questions to witnesses or experts.\(^{60}\)

7. **THE AWARD**

7.1. **The Decision Making of the Tribunal**

Decisions by a panel of three arbitrators are taken by a majority of the tribunal. Purely procedural issues can be delegated to the chairman either by agreement between the parties or by all members of the tribunal. Such decisions do not extend to the determination of points of such fundamental importance as the seat of arbitration, the decision as to the jurisdiction of the arbitral tribunal or the determination of the applicable *lex arbitri*. They only encompass such issues as the determination of the language of the arbitration, the appointment of experts and the decision on whether or not to hold an oral hearing.\(^{61}\)

Decisions are made on the basis of the majority of the arbitrator’s votes and not only on the votes cast. The arbitrators are considered to be obliged to cast a vote, though an agreement between the parties to the contrary is considered possible; the failure of an arbitrator to cast a vote is considered to be a vote in the negative.\(^{62}\)

In the situation in which an arbitrator fails to participate in the voting without a reason, for instance, if an arbitrator seeks to delay proceedings by alleging to be unavailable, Sections 590 Subsection (2) and 591 would provide for the premature termination of the arbitrator’s appointment and the appointment of a substitute arbitrator. This, however, would be unnecessary if two arbitrators have already agreed on a decision.\(^{63}\) In such a case, Section 604 Number 2 grants the two other arbitrators the power to render a decision. If a decision

\(^{60}\) Barbara Kloiber & Hartmut Haller, *Das neue Schiedsverfahrensrecht – eine Einführung*, in *DAS NEUE SCHIEDSRECHT*. SCHIEDSRECHTS-ÄNDERUNGSGESETZ 45 (Kloiber et al., 2006); Alexander Petsche, § 602, in *ARBITRATION LAW OF AUSTRIA: PRACTICE AND PROCEDURE* ¶16 (Riegler et al., 2007); Walter Rechberger & Werner Melis, § 602, in *KOMMENTAR ZUR ZIVILPROZESSORDNUNG* ¶ 3 (Rechberger ed., 4th ed. 2014); Andreas Reiner, *Das neue österreichische Schiedsrecht – SCHIEDSRAG 2006. THE NEW AUSTRIAN ARBITRATION LAW. ARBITRATION ACT 2006 §602 ¶143 (2006).*


\(^{62}\) Christian Hausmaninger, § 604, in *KOMMENTAR ZU DEN ZIVILPROZESSGESETZEN* ¶ 45 (Fasching & Konecny eds., 2d ed. 2007).

is made on the award, the parties are to be informed about the default of the arbitrator before the decision is rendered with regard to all other decisions thereafter.

Section 604 Number 2, however, only governs failure to participate in voting. If an arbitrator fails to participate in the deliberations of the tribunal, the parties have the opportunity to challenge the arbitrator. Under Section 604 Number 2, the decision must still be rendered by a majority of the arbitrators and not a majority of the votes cast. Hence, if the number of the remaining arbitrators is insufficient to constitute such a majority, a decision cannot be taken.

7.2. The Award

THE TERM

While the ACPC does not contain a legal definition of the term “award”, it is clear that an award is a decision of the tribunal on the legal dispute submitted to it. Awards constitute, therefore, declarations of the arbitrators’ will by which a legal dispute is at least partially decided on based on its merits, decisions of a tribunal as to its jurisdiction and decisions on costs between the parties.

TYPES OF AWARDS

Depending on the scope and matter of the decision, a tribunal can render

- final awards,
- partial awards,
- interim awards,
- awards on jurisdiction,
- awards on costs and
- supplementary awards.
Furthermore, depending on the relief sought, tribunals can render declaratory awards, awards ordering the performance of a party or awards amending a legal relationship.\(^6\)

**FOREIGN AND DOMESTIC AWARDS**

- **SEAT IN AUSTRIA**
  - **AUSTRIAN AWARD**
    - **CHALLENGE BEFORE AUSTRIAN COURTS**
      - **ENFORCEMENT LIKE A FINAL AUSTRIAN JUDGMENT**
    - **FOREIGN AWARD**
      - **ENFORCEMENT UNDER NEW YORK CONVENTION**

**NECESSARY ELEMENTS OF THE AWARD**

The award must state:

- the date on which it was rendered,
- the seat of arbitration as determined pursuant to Section 595 Subsection (1),
- a reasoning (if the parties have not agreed otherwise),
- and the identity of the arbitrator(s) and the parties.

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\(^6\) **HANS FASCHING, LEHRBUCH DES ÖSTERREICHISCHEN ZIVILPROZESSRECHTS ¶ 2214 (2nd ed. 1984).**
SIGNING OF THE AWARD

The award shall be signed by the arbitrators. The signature of the majority of a tribunal is sufficient if there is a sufficient reason (not just a temporary one) for one of the members not to sign the award. In this case, the chairman or another arbitrator is to state the reason for refusing to sign on the award. The statement explaining the reason for refusing to sign the award can also be made on the award by the arbitrator refusing to sign. The drafters of the Austrian Arbitration Act only intended for a brief statement explaining the lack of a signature to be included. Section 606 Subsection (1) does not envisage the attachment of dissenting opinions to an award.

If required for the enforcement of the award, the arbitrators’ obligation to sign the award can also be enforced by courts.

7.3. The Legal Effects of the Award

Under Section 607 of the ACPC, the award has the effect of a final and binding judgment between the parties.

EXTENSION TO THIRD PARTIES?

An extension to third parties would require

- the participation in the constitution of the tribunal by the third party
- the right of the third party to have been heard in the arbitration

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69 PAUL OBERHAMMER, ENTWURF EINES NEUEN SCHIEDSVERFAHRENSRECHTS, 116 (2002).
70 Austrian Supreme Court, 7 July 2001, EvBl 212 (2001); Austrian Supreme Court, Jan 29, 1970, SZ 43/25.
It is highly disputed whether and under which circumstances awards could bind third parties who are not party to the arbitration agreement.\(^{73}\)

### 7.4. Decision on Costs

Under Section 609 of the ACPC, the tribunal must issue a decision on costs if the parties have not agreed otherwise. The tribunal will determine the costs of the proceedings and decide which party is to bear which proportion of the costs. The decision on the distribution of the costs shall take the outcome of the proceedings into account in particular, though other factors such as the conduct of the parties during the proceedings may also influence the tribunal’s decision. The tribunal’s decision is to take the form of an award. The tribunal can render an award on costs even if it finds that it does not have jurisdiction over the case.

### 7.5. Termination of Proceedings

Austrian law provides several reasons for the termination of proceedings in addition to the issue of an award or a settlement. Under Section 608 of the ACPC, the proceedings will be terminated by an order of the tribunal

- if the claimant fails to submit a statement of claim as stipulated in Section 597 Subsection (1),
- if the claimant withdraws his/her claim, unless the respondent objects to the withdrawal and the tribunal finds that the respondent has a legitimate interest in the final decision on the claims,
- if the parties agree on termination,

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or if the continuation of the proceedings has become impossible because the parties fail to continue the proceedings. (This also includes cases in which the parties fail to pay the advance on costs or the inability of the tribunal to agree on an award.)

7.6. **Applications for Correction and Interpretation of the Award**

**THE CORRECTION OF CLERICAL ERRORS**

If the tribunal includes formal errors which result in a difference between the wording and the true intentions of the arbitration, any party can request that the tribunal correct its award. Such errors include errors in computation and clerical, typographical or similar errors.

**EXPLANATION OF THE AWARD**

The parties have the right to request that the tribunal explain certain parts of the award. The result of the award, however, may not be changed by an interpretation given by the tribunal.

**REQUEST FOR AN ADDITIONAL AWARD**

If the tribunal has failed to include a decision on all claims raised in the arbitration in its award, the parties can request that the tribunal issue an additional award addressing such gaps. The possibility to request the issuance of an additional award serves to ensure that the parties will obtain a decision on their entire dispute from the arbitral tribunal. Requests for additional awards can only be made after the issue of the final award, not after partial awards.

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75 Christian Hausmaninger, § 608, in *Kommentar zu den Zivilprozessgesetzen ¶ 36* (Fasching & Konecny eds., 2d ed. 2007).


Application of a party for an explanation or correction. Correction is also possible *ex officio*.

Application to be filed with the tribunal within four weeks after the award has been served.

The tribunal must ensure the parties’ right to be heard.

Correction or interpretation must be made in form of an award.

The tribunal should decide on explanation/correction within four weeks and issue additional awards within eight weeks.

### 7.7. Setting Aside Proceedings

Grounds for Setting Aside an Award:

- Lack of a valid arbitration agreement
- Lack of subjective arbitrability
- Violation of the right to be heard
- Decision *ultra petita*
- Constitution or composition of the tribunal not in line with the parties’ agreement or statutory law
- Procedural *ordre public*
- Grounds for re-opening court proceedings
- Lack of objective arbitrability
- Substantive *ordre public*
LACK OF AN ARBITRATION AGREEMENT

Section 611 Subsection (2) Number 1 of the first alternative ACPC applies both to arbitration agreements which do not meet the requirements of form set out in Section 583 of the ACPC and to cases in which an arbitration agreement is entirely lacking. The lack or invalidity of an arbitration agreement must be invoked by the respondent before or together with the first submissions on the merits of the case (Section 592 Subsection (2)). Failure to do so would cause the defect in the arbitration clause to heal.

If one of the parties raises a timely objection, the tribunal will decide on its own jurisdiction. If one of the parties challenges the tribunal’s jurisdictional decision, the tribunal can, nevertheless, continue with the proceedings.

The parties can also challenge an award by which the tribunal has denied its jurisdiction due to the lack of a valid arbitration agreement.

LACK OF SUBJECTIVE ARBITRABILITY

An award can be set aside if a party lacked the capacity to conclude an arbitration agreement under the law applicable to its personal status. The law applicable for determining the capacity of natural persons to conclude arbitration agreements is determined by Section 9 of the Austrian Conflict of Laws Act. Accordingly, with regard to natural persons, citizenship is the decisive criterion for determining the applicable law. Section 10 provides that with regard to legal persons, the effective seat is decisive.

VIOLATION OF THE RIGHT TO BE HEARD

The right to be heard includes the right of the parties to be informed about the constitution of the tribunal and the initiation of arbitral proceedings. Furthermore, it includes the right to raise all possible claims and defences. Hence, if a party was not aware of the initiation of proceedings or cannot raise all claims and defences for another reason, the subsequent award can be challenged. The right to be informed about the constitution of the tribunal or

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78 Christian Hausmaninger, § 611, in Kommentar zu den Zivilprozessgesetzen ¶ 94 (Fasching & Konecny eds., 2d ed. 2007).
79 Christian Hausmaninger, § 611, in Kommentar zu den Zivilprozessgesetzen ¶ 97 (Fasching & Konecny eds., 2d ed. 2007).
80 Gerold Zeiler, Schiedsverfahren § 611 ¶ 13 (2d ed. 2014).
the initiation of proceedings is violated if the respective institutional or statutory rules in this regard were disregarded.\textsuperscript{81}

According to the Supreme Court, a violation of the right to be heard requires that a party is completely deprived of any opportunity to argue its case.\textsuperscript{82} Therefore, errors and deficiencies in the taking of evidence do not constitute a violation of the right to be heard.\textsuperscript{83}

**DECISION ULTRA PETITA**

Arbitral awards which decide matters beyond the claims submitted by the parties can be set aside. Whether the tribunal's decision has exceeded the claims of the parties is to be determined by reference to the claim (and, if applicable, the counterclaim) submitted in the statement of claim (as perhaps extended or amended throughout the proceedings). If only a stand-alone part of the tribunal's award which can be separated from the remaining award exceeds the claims submitted, only this part of the award will be set-aside. The court does not have the discretion to set aside the entire award in such cases but may only address the part of the award rendered in excess of the arbitrators' mandate.\textsuperscript{84} The tribunal does not exceed its mandate if it bases its award on a different legal basis than the one invoked by the claimant.\textsuperscript{85}

**CONSTITUTION OR COMPOSITION OF THE TRIBUNAL NOT IN LINE WITH THE PARTIES’ AGREEMENT**

Awards can be set aside if they were rendered by tribunals which were not constituted in accordance with the parties' agreement or the statutory rules. Such failure in the composition or constitution of the arbitral tribunal need not have had an effect on the decision of the arbitral tribunal.\textsuperscript{86} In order to challenge the award, the parties must object to any defect in the constitution of the arbitral tribunal without delay.\textsuperscript{87} The same applies in cases in which the parties want to set aside the award due to the partiality of an arbitrator.\textsuperscript{88}

\begin{itemize}
  \item Christian Hausmaninger, § 611, in \textit{Kommentar zu den Zivilprozessgesetzen} ¶ 113 (Fasching & Konecny eds., 2d ed. 2007).
  \item Austrian Supreme Court, Legal Holding RS0045092.
  \item Paul Oberhammer, \textit{Entwurf eines neuen Schiedsverfahrensrechts} 132 (2002).
  \item Christian Hausmaninger, § 611, in \textit{Kommentar zu den Zivilprozessgesetzen} ¶ 147 (Fasching & Konecny eds., 2d ed. 2007); Stefan Riegler, § 611, in \textit{Arbitration Law of Austria: Practice and Procedure} ¶ 18 (Riegler et al., 2007).
  \item Austrian Supreme Court, 14 December 1927, docket no. SZ 9/303; Christian Hausmaninger, § 611, in \textit{Kommentar zu den Zivilprozessgesetzen} ¶ 146 (Fasching & Konecny eds., 2d ed. 2007).
  \item Paul Oberhammer, \textit{Entwurf eines neuen Schiedsverfahrensrechts} 133 (2002).
  \item Walter Rechberger & Werner Melis, § 611, in \textit{Kommentar zur ZPO} ¶ 7 (Rechberger ed., 4th ed. 2014); Christian Hausmaninger, § 611, in \textit{Kommentar zu den Zivilprozessgesetzen} ¶ 159 (Fasching & Konecny eds., 2d ed. 2007).
  \item Christian Hausmaninger, § 611, in \textit{Kommentar zu den Zivilprozessgesetzen} ¶ 160 (Fasching & Konecny eds., 2d ed. 2007).
\end{itemize}
PROCEDURAL ORDRE PUBLIC

An award can be set aside if the preceding arbitration proceedings violated the Austrian procedural *ordre public*. Such cases include gross violations of the most basic procedural rights and would include cases, for example, in which the arbitral tribunal refused to take any evidence for the entire duration of the proceedings and simply chose to believe one of the parties.\(^{89}\) The bar set by the Supreme Court, however, is high.\(^{90}\)

GROUND FORS RE-OPENING COURT PROCEEDINGS

An arbitral award can be set aside if the preconditions for filing a request for re-opening court proceedings after the rendering of a final judgement under Section 530 Subsection (1) Numbers 1-5 of the ACPC are met. This includes cases in which a court judgment was wrong due to a criminal act such as the forging of documents, perjury or fraud.\(^{91}\) Further grounds apply if a consumer or employee is a party to the arbitration (which is not very common in practice). The deadline for filing a challenge on these grounds is four weeks after the judgment in criminal proceedings has become final and can only be brought for 10 years after the award has been served.\(^{92}\)

LACK OF OBJECTIVE ARBITRABILITY

An arbitral award shall be set aside if the subject matter of the dispute it decided is not arbitrable. These grounds for annulment must be considered *ex officio* by the courts (Section 611 Subsection (3) of the ACPC). An award which decided an inarbitrable dispute will also not be considered valid in any other court or administrative proceedings regardless of whether or not it was challenged (Section 613).

SUBSTANTIVE ORDRE PUBLIC

An arbitral award must be set aside if it contradicts the Austrian substantive *ordre public*, i.e. the fundamental principles of the Austrian legal system. The courts must consider this ground for annulment *ex officio*. According to Section 613, an award contrary to the Austrian *ordre public* will be disregarded in all courts and administrative proceedings regardless of whether it was challenged or not.

\(^{89}\) **Paul Oberhammer**, *Entwurf eines neuen Schiedsverfahrensrechts* 134 (2002).

\(^{90}\) Austrian Supreme Court, 26 January 2005, docket no. 3 Ob 221/04b.


\(^{92}\) **Gerold Zeiler**, *Schiedsverfahren* § 611 ¶ 30c (2d ed. 2014).
The court hearing the challenge based on an alleged violation of the *ordre public* is precluded from reviewing the merits of the case.\(^93\) Hence, Austrian courts are not entitled to review whether the tribunal's legal analysis or determination of the facts was correct.\(^94\) It is not even relevant whether the disputed right or contract between the parties as such was contrary to the Austrian *ordre public*, only whether the award's result was, for example, where the enforcement of such a legal relationship would constitute a violation.\(^95\)

The Supreme Court takes a very restrictive approach to *ordre public*. It has denied a violation of the Austrian *ordre public* in numerous cases, including a decision misapplying Austrian law on prescription\(^96\) and an agreement on interest at a rate of 26% and 35%.\(^97\) The Court takes a far broader approach when addressing cases pertaining to European law, in particular European competition law.\(^98\)

\(^{93}\) Christian Hausmaninger, § 611, in *Kommentar zu den Zivilprozessgesetzen* ¶ 205 (Fasching & Konecny eds., 2d ed. 2007).

\(^{94}\) Austrian Supreme Court, 26 January 2005, docket no. 3 Ob 221/04b.

\(^{95}\) Austrian Supreme Court, 26 January 2005, docket no. 3 Ob 221/04b.

\(^{96}\) Austrian Supreme Court, 1 April 1960, docket no. 2 Ob 672/59.

\(^{97}\) Austrian Supreme Court, 5 December 1985, docket no. 6 Ob 511/84.

\(^{98}\) Austrian Supreme Court, 23 February 1998, docket no. 3 Ob 115/95; Austrian Supreme Court, 5 May 1998 docket no. 3 Ob 2372/96m.
7.8. Determination of the Existence of an Award

Under Section 612 of the ACPC, parties who are unsure whether a decision of the tribunal constitutes an award or not can request that the court render a declaratory judgment on the existence or non-existence of an award. In practice, such claims are normally filed to clarify whether a decision constitutes an award or an expert determination.\(^99\)

\(^99\) PAUL OBERHAMMER, ENTWURF EINES NEUEN SCHIEDSVERFAHRENSRECHTS 141 (2002).
8. RECOGNITION AND ENFORCEMENT OF AWARDS IN AUSTRIA

Under Section 1 Subsection (16) of the Enforcement Act, arbitral awards and arbitral settlements are immediately enforceable in Austria. This rule, however, only applies to awards rendered by tribunals seated in Austria and not to foreign awards.

Foreign awards, i.e. awards rendered by tribunals which do not have their seat in Austria, are enforced under a number of bi- and multilateral treaties. Austria is party to a number of multilateral treaties on the recognition and enforcement of foreign awards, such as the Genevan Convention of 26 September 1927, the European Convention of 21 April 1961, the New York Convention of 10 June 1958 and the ICSID Convention of 18 March 1965.

The most relevant of these instruments by far is the New York Convention. The New York Convention has 156 parties (as of January 2016). It governs the recognition of foreign arbitral awards (not, however, of arbitral settlements) regardless of whether these awards were rendered in states which are party to the Convention. Austria initially made use of the reciprocity reservation under Article I Subsection (3) of the Convention and, as a result, would only enforce awards rendered in other states party to the Convention. However, Austria has since withdrawn its reservation. Austria has not expressed reservation regarding the enforcement of awards only in commercial matters (Article I Subsection (3) second sentence).

The European Convention contains a provision which distinguishes it significantly from the New York Convention. Under Article IX of the European Convention, the recognition and enforcement of foreign awards can be refused for the reasons set out in that article (essentially the grounds listed in Article V Subsection (1) litera (a) to (d) of the New York Convention). However, an award which was set aside in the state in which it was rendered for a violation of the *ordre public* cannot be refused recognition.100 (Arbitration in Consumer and Labour Law Matters.)

8.1. Procedure

Enforcement is initiated by the application of the party seeking enforcement.

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100 Austrian Supreme Court, 26 April 2006, docket no. 7 Ob 236/05i; Austrian Supreme Court, 26 January 2005, docket no. 3 Ob 221/04b.
The applicant is to submit

| an original award or a certified copy thereof to the court. The award or the copy must be “duly authenticated” under article IV(1)(a) of the New York Convention. Under Austrian law, it is sufficient that an officer of the arbitral institution handling the case authenticates the award if the rules of the institution provide that the officer can make such authentications or at least that the award be served to the parties by the institution and that the institution retains a copy.¹⁰¹

| The applicant must provide a translation of the award in German if this is not the language in which it was rendered. The translation must either be made by a certified translator or certified by a diplomatic or consular representative (Article IV of the New York Convention).

| The arbitration agreement need only be submitted to the court where the court requests this (Section 615 Subsection (2)). Austrian law is more lenient on this point than the New York Convention.

The court will render a decision on the application without an oral hearing and without hearing the other party (Section 83 Subsection (1) of the Enforcement Act).

8.2. Grounds for Refusing Recognition and Enforcement

The grounds listed in the New York Convention are of primary relevance in practice. The New York Convention contains two categories of grounds: Article V Subsection (1) Litera (a) to (e) contains grounds which must be invoked and established by a party. The grounds listed in Article V Subsection (2) must be considered by the court ex officio.

| The lack of subjective arbitrability or of a valid arbitration agreement.

| The violation of the right to be heard.

¹⁰¹ Austrian Supreme Court, 24 August 2011, docket no. 3 Ob 65/11x.
The award was *ultra petita*.

The constitution of the tribunal or the proceedings were not in accordance with the agreement of the parties or the *lex arbitri*.

The award has not yet become binding or has been set aside in the state of origin. Under Article IX of the European Convention, an award set aside owing to a violation of the *ordre public* in the state of origin cannot be denied enforcement for this reason.\(^\text{102}\)

The lack of objective arbitrability under the law of the state in which recognition and enforcement is applied for.

The recognition and enforcement of the award would violate the *ordre public* of the state in which recognition and enforcement is sought.

\(^\text{102}\) Austrian Supreme Court, 26 April 2006, docket no. 7 Ob 236/05i; Austrian Supreme Court, 26 January 2005, docket no. 3 Ob 221/04b; see on this also Andreas Reiner, *Zur Vollstreckung eines Schiedsspruchs nach dem Europäischen Übereinkommen von 1961 trotz Aufhebung im Ursprungsland und zum Umfang der ordre public-Kontrolle nach Artt. 81, 82 EGV*, IPRAX 223 (2000).
9. ARBITRATION WITH CONSUMERS AND IN EMPLOYMENT MATTERS

Austrian arbitration law includes broad restrictions on the possibility to arbitrate with consumers and in employment matters.

9.1. Consumers

Pursuant to Section 617 Subsection (1) of the ACPC, an arbitration agreement between an entrepreneur and a consumer may only be effectively concluded where the dispute has already arisen.

Pursuant to Section 617 Subsection (2) of the ACPC, arbitration agreements involving a consumer must be contained in a document that does not include any agreements other than those relating to the arbitration proceedings. In addition, this separate document must be signed personally by the consumer while the entrepreneur does not necessarily have to personally sign. The most important consequence of Subsection (2) is that an arbitration clause contained either in General Terms or Conditions or simply in a main contract is not sufficient.

Section 617 Subsection (3) of the ACPC requires that a written legal instruction on the major differences between arbitration and state court litigation be issued to the consumer prior to the conclusion of the arbitration agreement. Failure to do so constitutes grounds for setting the arbitral award aside.

Section 617 Subsection (4) of the ACPC requires that an arbitration agreement between an entrepreneur and a consumer determine the seat of the arbitral tribunal. The arbitral tribunal may only meet in another place for the oral hearing or the taking of evidence if the consumer gives his/her consent, or if substantial obstacles prevent the taking of evidence at the seat of the arbitral tribunal.

Section 617 Subsection (5) of the ACPC stipulates that an arbitration agreement that designates a seat of arbitration in a state other than the consumer's domicile, place of ordinary residence or place of employment at the time of the arbitration agreement's conclusion shall only be valid if the consumer invokes it.
In addition, under Section 6 (2)(7) of the Austrian Consumer Protection Act, an arbitration agreement between an entrepreneur and a consumer must be specifically negotiated. A violation of Section 6 Subsection (2) Number 7 of the Austrian Consumer Protection Act can lead to a successful challenge of the arbitral award under Section 611 Subsection (2) Number 1 or Section 617 Subsection (6) Number 1 of the ACPC.

9.2. Additional grounds for setting aside awards

In arbitration proceedings involving a consumer, an arbitral award shall be set aside if overriding mandatory rules arising from Austrian law, i.e. such Austrian law provisions which parties cannot contractually disregard by choosing a foreign law, are violated. This primarily safeguards the consumer against unfair terms in consumer contracts, provisions with unusual content in general terms and conditions or contract forms as well as breaches of good morals and violations of the *ordre public*.

Under Subsection (6) Number 2, an arbitral award involving a consumer may also be set aside if, after the arbitral award has been rendered, the challenging party finds either an earlier and final decision on the same claim or on the same legal relationship that has a *res judicata* effect between the arbitration parties (cf. Section 530 Subsection (1) Number 6 of the ACPC) or new facts or evidence that may have led to a more favourable decision by the arbitral tribunal.

9.3. Arbitration of Employment Disputes

Under Section 618 of the ACPC, the restrictions on arbitration with consumers mentioned above (except for the requirement that the arbitration agreement be concluded in advance) also apply to labour disputes arising out of individual labour law (such as an individual labour contract). Matters of collective labour law, such as social security issues, are not arbitrable.