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PREFACE

I am delighted to have taken on the editorship of *The International Arbitration Review* and to present this latest edition in the series.

Those of us who practise in the field of international arbitration are fortunate to have a seemingly endless supply of topical literature at our fingertips. Comprehensive treatises, scholarly journals and articles, and online resources covering the latest arbitration developments are readily accessible to a global audience.

But what if one wants to understand the law and practice of international arbitration through a more focused, jurisdiction-specific lens, while at the same time ensuring that the information one receives is of the highest quality and reflects the latest developments?

That is where this volume comes in. It fills a niche by undertaking a thorough analytical review of arbitration developments over the past year in the world's leading arbitration jurisdictions (and some that are on the ascent). Written by leading practitioners from around the world, the chapters in this volume put recent arbitration developments in the context of each jurisdiction's legal arbitration structure, and provide expert commentary on the most important legislative and judicial developments. They do so in a manner designed to be maximally useful for practitioners, in-house counsel and academics alike.

As in previous editions, the chapters in this volume address developments in both international commercial arbitration and investor–state arbitration, and seek to provide current information on both of these species of international arbitration. Throughout this volume, important investor–state arbitration developments in each jurisdiction are treated as a separate but closely related topic.

I thank all of the authors for their excellent contributions to this volume and welcome any comments or suggestions from readers as to how this volume might be usefully expanded or improved in future editions.

John V H Pierce
Latham & Watkins LLP
New York
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Chapter 3

AUSTRIA

Venus Valentina Wong, Alexander Zollner and Philipp Theiler[1]

I INTRODUCTION

i The Austrian Arbitration Act: history, scope and application

Austria has a long-standing history of arbitration; the first legal provisions in the Austrian Code of Civil Procedure (ACCP) on arbitral proceedings date back to 1895. In 2006, the legislator adopted the Arbitration Amendment Act 2006,[2] thereby modernising the arbitration provisions mostly based upon the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the UNCITRAL Model Law). Although the legislator also maintained certain provisions of the old law (e.g., Section 594(4) on the liability of arbitrators), it is fair to state that Austria considers itself to be a Model Law country. The Arbitration Amendment Act 2013[3] introduced a major revision to the court system with respect to arbitration-related matters (see Section I.v). Despite the term 'Arbitration Act', the Austrian arbitration law is contained in Sections 577 to 618 ACCP.

Pursuant to Section 577 ACCP, the Arbitration Act is applicable not only if the seat of arbitration is in Austria (Section 577(1) ACCP) but also in certain instances where the seat is not in Austria or has not yet been determined (Section 577(2) ACCP). Thereby, Austrian courts assume jurisdiction in arbitration matters even when the seat is not (yet) determined to be in Austria. This is the case in particular where a claim is brought despite an existing arbitration agreement (Section 584 ACCP), where interim measures are sought (granting or enforcement, or both, by Austrian state courts: see Sections 585 and 593 ACCP) and in other cases of judicial assistance (Section 602 ACCP).

ii Arbitration agreements

The definition of arbitration agreement under Austrian law (Section 581(1) ACCP) resembles that of Article 7 Model Law. Thus, an arbitration agreement may be a separate agreement or a clause contained in a main contract. Both contractual and non-contractual disputes may be subject to arbitration. The jurisprudence (which is confirmed by legal literature) derives from this provision that the following three requirements must be fulfilled for an agreement to qualify as an arbitration agreement under the law: the determination of the parties to the

1 Venus Valentina Wong is a partner, Alexander Zollner is a counsel and Philipp Theiler is an associate at Wolf Theiss.

2 Federal Law Gazette I 2006/7.

3 Federal Law Gazette I 2013/118.

dispute, the subject matter of the dispute that is submitted to arbitration (which can be a certain dispute or all disputes arising out of a certain legal relationship) and an agreement to arbitrate.

Furthermore, Section 581(2) ACCP provides that an arbitration agreement may also be included in statutes – that is, the articles of association of legal entities such as companies or associations – as well as in a testament.

Regarding the form of an arbitration agreement, Austrian law still requires the written form (Section 583(1) ACCP). However, this does not necessarily mean that the arbitration agreement must be signed by both parties: an 'exchange of letters, telefaxes, emails or other means of communications which provide a record of the agreement' also suffices. Apart from the provision in the ACCP, it is generally accepted that Article II of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) is a uniform substantive provision in an international context. Thus, the fulfilment of this uniform standard takes precedence over any stricter requirements under national law.[4]

iii Arbitrability

Section 582(1) ACCP defines the arbitrability *ratione materiae* of claims as follows: claims of an economic or financial interest that fall within the jurisdiction of the ordinary civil courts; and claims without any economic or financial interest, but for which parties may conclude a settlement agreement. Pursuant to Subsection (2), the following claims may not be subject to arbitration: claims in family law matters and certain claims relating to housing law. Furthermore, other statutory provisions may stipulate other non-arbitrable matters.

Although this is not a question of arbitrability in the narrow sense of the law, matters of employment law (Section 618 ACCP) or those concerning consumers (Section 617 ACCP) are subject to very strict limitations and are thus dealt with under this heading. The requirements are essentially the same for both kinds of persons (consumers and employees) and can be summarised as follows:

a an arbitration agreement with a consumer or employee can be validly concluded only after a dispute has arisen;

b the arbitration agreement must be contained in a separate document signed by the consumer or employee in person. Such document may not contain any agreements other than those relating to the arbitration proceedings;

c prior to the conclusion of the arbitration agreement, the consumer or employee shall receive a written instruction on the major differences between arbitration and litigation before state courts;

d determination of the seat of arbitration and other requirements as to the venue of the hearing;

e the seat of arbitration must be at the place of the domicile of the consumer or employee unless it is the consumer or employee who relies on a seat outside of his or her place of domicile;

f further grounds for setting aside; and

g a three instance system for setting-aside claims.

4 See Reiner, 'The New Austrian Arbitration Act', *Journal of International Arbitration*, Section 583, footnote 38.

In conclusion, it is very unlikely that an arbitration agreement with a consumer or an employee is validly concluded in compliance with the above-indicated requirements. Moreover, in arbitration proceedings where individuals are involved, one side might invoke the objection that the individual must be considered as a consumer under the Arbitration Act and that the arbitral award thus runs the risk of being set aside for this reason.

iv Appointment and challenge of arbitrators

Sections 586 and 587 ACCP stipulate that the parties are free to determine the number of arbitrators and the procedure for appointing them. Absent any agreement of the parties (in particular, any agreement on institutional rules) or if the parties agree on an even number, the number of arbitrators shall be three.

Section 587 ACCP stipulates the default procedure for appointing arbitrators if the parties have not reached agreement on their own procedure. Where a party fails to appoint an arbitrator, or the parties fail to jointly nominate a sole arbitrator or a chair, it is the Austrian Supreme Court that acts as appointing authority (see Section 615 ACCP). It is noteworthy that in multiparty proceedings, where several parties on one side, despite an obligation to do so, fail to jointly appoint their arbitrator, either party may ask the court to step in for the failing side, but not for the side that has appointed its arbitrator in a timely manner (see Subsection (5)). Section 587(6) ACCP is a catch-all provision that applies if, for any reason whatsoever, an arbitrator is not appointed within a reasonable period of time.

Sections 588 and 589 ACCP govern the challenge of arbitrators in accordance with Articles 12 and 13 of the Model Law. Thus, a prospective arbitrator has a duty to disclose any circumstances giving rise to doubts as to his or her impartiality or independence. The arbitrator also has the duty to remain impartial and independent throughout the proceedings. Unless the parties have agreed on a certain procedure of challenging arbitrators (in particular, by agreement on a set of Arbitration Rules), Section 589(2) ACCP provides for a default procedure. Irrespective of whether there is an agreed procedure of challenge or the default procedure applies, the challenging party may request the Supreme Court to decide on the challenge if it was not successful.

In numerous recent decisions of the Supreme Court, the question whether a violation of the arbitrator's duty to disclose may constitute a ground for successful challenge has arisen. The Court has confirmed this question in cases where the arbitrator has failed to disclose in a culpable way (very extreme cases). In those decisions, the Supreme Court also explicitly referred to the IBA Guidelines on Conflicts of Interest in International Arbitration as the common international standard.[5]

v The court system

Since the revision of the Arbitration Act in 2013, Section 615 ACCP provides that the first and final court instance to rule on setting-aside claims (Section 611 ACCP) and for claims on the declaration of the existence or non-existence of an arbitral award (Section 612 ACCP) is the Austrian Supreme Court (except for matters involving consumers and matters of

5 Austrian Supreme Court, 17 June 2013, docket number 2 Ob 112/12b, Austrian Supreme Court, 5 August 2014, docket numbers 18 ONc 1/14 p and 18 ONc 2/14 k, see Wong, Schifferl, 'Decisions of the Austrian Supreme Court in 2013 and 2014', in Klausegger et al., *Austrian Yearbook on International Arbitration 2015*, 338 et seq.; Austrian Supreme Court, 19 April 2016, docket number 18 ONc 3/15h; Austrian Supreme Court, 15 May 2019, docket number 18 ONc 1/19w.

employment law). Previously, setting-aside proceedings would have undergone three instance proceedings, like any other ordinary civil proceedings. Furthermore, the Supreme Court is also the exclusive instance on all issues regarding the formation of the tribunal and the challenge of arbitrators (i.e., the Third Title of the Arbitration Act). This 2013 revision of the Arbitration Act was preceded by controversial debates among practitioners, scholars and the judiciary. The reason is that the single instance concept is quite exceptional in the Austrian court system. In ordinary civil proceedings, generally, not only is there a monetary threshold to be exceeded (€30,000) but the case to be tried before the Supreme Court must also touch upon a question of substantive or procedural law that is considered to be essential for legal unity, legal certainty or legal development. However, under Section 615 ACCP, any arbitral award rendered in Austria may be challenged before the Supreme Court. Another reason why the 2013 revision is considered to be a slight revolution in the court system is the fact that the Supreme Court itself must conduct evidentiary proceedings where necessary, including the examination of witnesses.

Although not required under the law, the revision of 2013 prompted the internal organisation of the Supreme Court to establish a specialised chamber (consisting of five Supreme Court judges) that is competent for all arbitration-related matters mentioned in Section 615 ACCP (see Section II.i). This concentration on a limited number of judges should further enhance the reliability and consistency of the jurisprudence in the field of arbitration.

The introduction of this single instance jurisdiction and the establishment of a specialised chamber within the Supreme Court demonstrate both the Austrian legislators' and the judicature's awareness that the legal infrastructure is essential to foster arbitration proceedings seated in Austria.

Apart from the Supreme Court, the other courts dealing with arbitration matters are the district courts, which rule on requests for interim measures, the enforcement of interim measures, and the enforcement of international and domestic awards, as well as other civil courts (see Section II.i).

vi Interim measures and judicial assistance

Section 585 ACCP mirrors Article 9 of the Model Law and stipulates that it is not incompatible with an arbitration agreement for a party to request an interim measure from a state court. An Austrian district court has international jurisdiction to issue an interim measure during or prior to arbitral proceedings if the debtor has its seat or habitual residence, or if the assets to be seized are located, in the court's district (see Section I.v). Thus, it is not necessary that the seat of arbitration is also in Austria. Conversely, the fact that the seat of arbitration is in Austria does not necessarily mean that an Austrian district court is competent to issue an interim measure.

Furthermore, Section 593(1) and (2) ACCP contain the requirements for an arbitral tribunal having its seat in Austria to issue interim or protective measures. Subsections (3) to (6) further govern the enforcement of such measures issued by any tribunal. It is noteworthy that these provisions on enforcement apply to measures issued by tribunals irrespective of whether a tribunal has its seat in Austria (see Section 577(2) ACCP). Thus, the Austrian arbitration law enables the enforcement of interim or protective measures issued by foreign arbitral tribunals without any requirement for exequatur proceedings. In addition, if a measure ordered by the tribunal (whether foreign or domestic) is unknown to Austrian law, the competent enforcement court shall, upon request and after having heard the other side, apply such measure that is most similar to the one ordered by the tribunal.

Under Section 602 ACCP, an arbitral tribunal may ask an Austrian court to perform certain acts for which the tribunal has no authority. Again, Austrian arbitration law enables both foreign and domestic tribunals to make use of such requests, and also includes requests for judicial assistance by other courts, including foreign courts' authorities. Therefore, Section 602 ACCP allows, for instance, a foreign arbitral tribunal to make a request to an Austrian court that the Austrian court ask a court in a third country to perform an act of judicial assistance. The most common acts that a tribunal would request relate to measures of interim or protective measures or measures in the taking of evidence (e.g., summoning witnesses and taking oaths from them).

vii Setting aside of arbitral awards

Under the Arbitration Act of 2006 (as revised most recently in 2013), any kind of arbitral award may be challenged under Section 611 ACCP. This therefore includes interim awards, partial awards and awards on jurisdiction. The provision distinguishes between legal grounds that must be revoked by the plaintiff seeking to set aside the award and legal grounds that are to be reviewed *ex officio* (see Section 611(3) ACCP). The reasons for setting aside are contained in Section 611(2) ACCP and may be summarised as follows:

a lack of an arbitration agreement and lack of arbitrability *ratione personae*;
b violation of a party's right to be heard;
c *ultra petita*;
d deficiency in the constitution of the tribunal;
e violation of the procedural public policy;
f grounds for reopening civil proceedings;
g lack of arbitrability *ratione materiae*; and
h violation of the substantive public order.

The last two grounds are those that the court must review *ex officio*.

The time limit to file a setting-aside claim is three months starting from the date of notification of the award (Section 611(4) ACCP). The competent court is, except for matters involving consumers and matters of employment law, the Austrian Supreme Court as first and final instance (Section 615 ACCP).

viii Recognition and enforcement of arbitral awards

A domestic arbitral award (i.e., an award rendered in Austria) has the same legal effect as a final and binding court judgment (Section 607 ACCP). This means that such an award can be enforced under the Austrian Execution Act (AEA) like any other civil judgment (see Section 1 No. 16 AEA). Once the chair of a tribunal (or, in his or her absence, any other member of the tribunal) has declared an award as final, binding and enforceable, the award creditor can make a request for execution under the AEA. The competent court is usually the district court in the district in which the debtor has its seat, domicile or habitual residence, or where the assets to be attached are located.

A foreign award (i.e., an award rendered outside of Austria) may be recognised and enforced under the AEA subject to international treaties and acts of the European Union (see Section 614 ACCP) – in particular, the NYC and the European Convention on International Commercial Arbitration of 1961 (the European Convention). Both Conventions are applicable in parallel. Therefore, a creditor can simultaneously rely on either Convention or on both, while a debtor must invoke grounds under both Conventions to be successful.

Under the European Convention, the enforcement of a foreign award may be refused if the award was set aside on certain legal grounds. A violation of public policy is, for instance, not a ground recognised under Article IX of the European Convention. Thus, an arbitral award that was set aside for reasons of public policy at the seat of arbitration can, nevertheless, be recognised and enforced in Austria.

There are currently no EU acts applicable to the enforcement of foreign arbitral awards.

A request for exequatur and a request for execution can be jointly filed in the same proceedings under the AEA. The Supreme Court has repeatedly held that in institutional arbitral proceedings, a certified copy of the arbitral award indicating the body or person that has certified the award (including the signatures of the arbitrators) and the reference to the applicable provision under the Arbitration Rules usually suffice to fulfil the formal requirement. In other words, in institutional arbitration, it is not necessary to have the signatures of the arbitrators certified by a local notary and legalised by the local authority (The Hague Apostille). Furthermore, pursuant to Section 614(2) ACCP, it is not necessary to submit the original arbitration agreement or a certified copy thereof as required under Article IV(1)b of the NYC unless the court expressly so requests. Both this legal provision and the Supreme Court's jurisprudence are a clear indication that the recognition and enforcement of foreign arbitral awards in Austria shall not be subject to excessive formal requirements.

ix Arbitral institution

The Vienna International Arbitral Centre (VIAC) attached to the Austrian Chamber of Commerce is the most renowned arbitral institution in Austria. Its recognition and casework are not limited to its geographical region. It has a strong focus on arbitrations involving parties from Central, Eastern and Southeastern Europe and is, as of July 2019, the second foreign (and first European) arbitral institution recognised as a permanent arbitration institution in Russia, thus having received a Russian government permit. Parties from (East) Asia as well as from the Americas and Africa have appeared in VIAC arbitrations in recent years.[6]

As at 1 July 2021, VIAC revised both its Arbitration Rules (the Vienna Rules) and its mediation rules (the Vienna Mediation Rules). The revision of the Vienna Rules was triggered by the drafting of the new VIAC Rules of Investment Arbitration and Mediation (VRI), which also entered into force on 1 July 2021. The VRI are stand-alone investment arbitration and mediation rules, which apply to disputes involving a state, a state-controlled entity or an intergovernmental organisation that arise under a contract, treaty, statute or other instrument. Though based on the Vienna Rules, the VRI contain certain adjustments to account for the unique features and needs of investment disputes involving the participation of sovereign parties and the consideration of public interest issues and matters of public policy. VIAC also provides for specific model clauses regarding investment arbitration (e.g., standard arbitration clause and clause for VIAC as appointing authority or VIAC as administering authority).

As regards the revision of the Vienna Rules, their revision as a result of the drafting of the VRI was taken as an opportunity to also adapt the existing rules for commercial disputes to new needs and developments, and to open up for new business fields such as inheritance disputes for which specific rules were included in Annex 6. The new version of the Vienna Rules provides for VIAC's authority to administer investment proceedings as well as to act as appointing or administrating authority in ad hoc proceedings and to administer proceedings

6 See https://www.viac.eu/en/statistics.

based on unilaterally foreseen arbitration agreements. Further, because third-party funding is more widely used, a definition of third-party funding and further provisions on third-party funding to create the framework for this instrument, mainly to ensure the independence and impartiality of the arbitrators through appropriate disclosure, were included. Also, the Vienna Rules explicitly state that oral hearings may be conducted in person or by other means (e.g., videoconferencing technology, for which VIAC enacted the Vienna Protocol – A Practical Checklist for Remote Hearings). Finally, the Vienna Rules contain a time limit for the issuance of the award: it shall be rendered no later than three months after the last hearing concerning matters to be decided in an award or the filing of the last authorised submission concerning such matters, whatever is the later. The secretary general may extend this period upon reasoned request or on its initiative.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

The most important reform under the 2013 revision of the Arbitration Act was the determination of the Austrian Supreme Court as single instance for certain arbitration-related matters (see Section 615 ACCP). It entered into force on 1 January 2014 and applies to all proceedings initiated on or after that date. Simultaneously, the Supreme Court has established a specialised chamber that deals with the matters under Section 615 ACCP (the docket numbers of these decisions start with '18'). As demonstrated below, apart from the matters referred to in Section 615 ACCP (in most instances, setting-aside proceedings, and proceedings relating to the constitution and challenge of arbitral tribunals), a number of other civil matters involve issues of arbitration and may be tried before first and second instance courts with the Supreme Court as final instance. Finally, proceedings on the recognition and enforcement of foreign arbitral awards are usually initiated with district courts, the decisions of which may be appealed and finally also brought before the Supreme Court. Enforcement matters are usually submitted to the chamber specialised in such matters and not to the arbitration chamber. In conclusion, parties can expect that under the Austrian court system relating to arbitration-related matters – in particular, those with a foreign or international context – the Supreme Court will have the final say on certain legal issues of essential importance to the Austrian legal order.

ii Arbitration developments in local courts

In a decision of May 2022,[7] the Supreme Court was seized by the plaintiff (also claimant in the arbitration) to set aside an interim award on jurisdiction due to the plaintiff's lack of assets. The plaintiff had initiated arbitration proceedings before VIAC. The respondent in the arbitration (and defendant in the setting-aside proceedings) submitted a counterclaim with a significant amount in dispute, which vastly exceeded the plaintiff's original claim. The administrative and arbitrator fees and, thus, the advance on costs for both parties increased significantly. Against this background, the plaintiff (unilaterally) declared the (extraordinary) termination of the arbitration agreement due to its lack of funds. The arbitral tribunal then rendered an interim award on jurisdiction confirming its jurisdiction for the counterclaim (while the proceedings on the plaintiff's claim were declared terminated by VIAC). Thus, the

7 Austrian Supreme Court, 4 May 2022, 18 OCg 1/22d.

major question for the Supreme Court was whether the lack of funds of a party constituted a good cause for the (unilateral) termination of an arbitration agreement. The Supreme Court answered this in the affirmative. It held that a (unilateral) termination is generally permissible if there is a good cause that renders the conduct or continuation of the arbitration proceedings unreasonable for a party. Such good cause exists, in particular, if effective legal protection or due course of the proceedings can no longer be ensured. The Supreme Court in general confirmed that the lack of funds of a party constituted such a good cause. As the argumentation of the plaintiff would, in principle, fall within the scope of Section 611, Paragraph 2, No. 1 ACCP (lack of an arbitration agreement), the Supreme Court generally had to examine the arbitral award from a factual and legal perspective (and is not bound by the factual and legal reasoning of the arbitral tribunal as it would be with respect to other grounds for setting aside an arbitral award). As the plaintiff had not provided a concrete statement or evidence of its alleged lack of funds, the Supreme Court declined the application to set aside the award.

In a decision of May 2022,[8] the Supreme Court reaffirmed its previous jurisprudence on the liability of arbitrators. The Supreme Court held that it is established jurisprudence[9] that any civil liability of an arbitrator for any wrongdoing(s) requires that the underlying arbitral award has been set aside under Section 611 ACCP (this requirement does not apply if the civil liability is based on dilatory behaviour of the arbitrator). The arbitrator's liability privilege applies even if the claimant in the liability proceedings argues that the arbitrator acted intentionally. In the present matter, the Supreme Court also rejected constitutional concerns (which were also not picked up by the Austrian Constitutional Court in parallel proceedings) as well as an analogy argument based on the liability of public authorities (since the latter concerns the liability of the legal entity for damages caused in execution of the law but not the personal liability of the officials and representatives acting on their behalf).

In a decision of June 2022,[10] the Supreme Court discussed the minimum requirements of mediation clauses (thereby also providing relevant guidance for adjudication) in particular, as regards the appointment and number of mediators, the place of dispute settlement and the waiting period of the prejudicial amicable dispute resolution obligation. On the occasion of their divorce by mutual consent in 2016, the parties to the dispute entered into an agreement on spousal support that provided, among other things, for an annual recalculation of the spousal support. This agreement also contained a mediation clause. Later on, party B (the defendant in the present matter) applied for the enforcement of their claim for the outstanding alimony, which was granted by the competent court. No mediation took place prior to the enforcement proceedings since party A (the plaintiff in the present matter) rejected the mediation request. Party A then filed the present lawsuit against party B in order to set aside the granted enforcement, again without having initiated mediation proceedings prior to the present proceedings. The first instance court decided in favour of party A and declared that the obligation of spousal support had been extinguished. The appeal court lifted the judgment of the first instance court, stating that the non-exhaustion of the mediation clause in the agreement prevented the plaintiff (party A) from initiating court proceedings and thus considered the plaintiff's claim to be inadmissible. When the

8 Austrian Supreme Court, 14 May 2022, 4 Ob 64/22y.

9 Austrian Supreme Court, 22 March 2016, 5 Ob 30/16x. See also the discussion in a previous edition: *The International Arbitration Review*, 7th edition (Austrian Supreme Court, 22 March 2016, 5 Ob 30/16x).

10 Austrian Supreme Court, 29 June 2022, 3 Ob 98/22s.

matter was referred to the Supreme Court as the court of third instance, it discussed various statutory adjudication provisions (e.g., in the law on associations (*Vereinsgesetz*)) and the minimum procedural guarantees contained therein. The Supreme Court explicitly referred to the statutory methods of appointment and composition of the adjudicators, which provide for the independence of the adjudicators, as well as statutory provisions in the law of associations, which prevent parties from litigating disputes in state courts for a period of six months. The Supreme Court then referred to these provisions as guiding principles for minimum requirements of mandatory mediation agreements – in particular, as regards the nomination and appointment of adjudicators, the place of adjudication and time limitation. The Supreme Court determined that if an adjudication provision failed to meet those minimum requirements, the clause would be considered as insufficiently determined and, thus, invalid. In the present matter, the mediation agreement did not regulate the number and mode of appointment of the mediators and did not stipulate the required qualifications and how long the adjudication process should last until the parties could refer the dispute to a state court. Therefore, the Supreme Court held that the mediation clause was invalid and referred the matter back to the appeal court to rule on the merits of the appeal.

In another decision of June 2022,[11] the Supreme Court had to deal with the point in time of pendency and termination of arbitration proceedings. In a VIAC arbitration concerning the delivery of face masks, the plaintiff (and claimant in the arbitration) requested the joinder of a third party to the arbitration by means of a statement of claim, which was already served on the third party. Later on, the claimant, however, revoked its request and on the following day filed a claim at the state court against the initial 'third party' in the arbitration, which raised the pendency of the arbitration proceedings in defence as the arbitration proceedings were not formally terminated. The court of first instance rejected the claim due to the pendency of the arbitration proceedings; this decision was confirmed by the court of second instance, which was further appealed by the plaintiff to the Supreme Court. The Supreme Court first considered the pendency of arbitration proceedings and held that pendency commences with the receipt of the statement of claim or notice initiating the arbitration proceedings by the respondent (and, thus, the respondent's knowledge of the proceedings is decisive). In the case of a request for joinder of a third party by means of a statement of claim, the decisive factor was also deemed to be the receipt of the request for a joinder of a third party together with the statement of claim by the third party. The Supreme Court then moved on to assess a potential termination of arbitration proceedings. Referring to Article 34 Vienna Rules, it stated that pending arbitration proceedings are terminated only after a formal decision by the arbitral tribunal or an express declaration by the secretary general of VIAC on the termination of the arbitration proceedings. At the decisive point in time of the state court proceedings, neither a decision of the arbitral tribunal nor a declaration of the secretary general within the meaning of Article 34 Vienna Rules existed, so pendency of the arbitration proceedings was still given. Consequently, the Supreme Court ruled that the lower instance courts rightfully rejected the claim due to the pendency of the arbitration proceedings.

The Supreme Court also dealt with the same arbitration in three further decisions,[12] of which only the latter one will be discussed.[13] The plaintiff (and respondent in the arbitration)

11 Austrian Supreme Court, 29 June 2022, 7 Ob 79/22a.

12 Austrian Supreme Court, 16 September 2022, 18 OCg 2/22a; Austrian Supreme Court, 20 October 2022, 18 OCg 2/22a; Austrian Supreme Court, 11 January 2023, 18 OCg 2/22a.

13 Austrian Supreme Court, 11 January 2023, 18 OCg 2/22a.

requested the setting aside of the arbitral award on the grounds of an alleged lack of a valid arbitration agreement. Both parties had submitted different versions of the sales contract, which differed in one of the main contractual obligations. The defendant (and claimant in the arbitration) relied on a version stipulating the delivery of medical masks with 'FFP3' certification; however, the version of the plaintiff (and respondent in the arbitration) contained the obligation to deliver simple 'face masks'. The plaintiff argued that the contract version submitted by the defendant, which was accepted by the arbitral tribunal, did not exist and, thus, the arbitral tribunal could not base its competence on the arbitration agreement contained therein. The Supreme Court rejected the argument raised by the plaintiff and held that the main contractual obligations (in this case, the quality of the goods to be delivered) did not concern, let alone invalidate, the otherwise (undisputed) arbitration agreement – even more so because the contractual version submitted by the plaintiff contained the identical arbitration agreement. Therefore, the Supreme Court rejected the request to set aside the arbitral award.

In an enforcement matter, the Supreme Court – for the first time – had to decide on the enforcement of an arbitral award that was rendered by an International Centre for Settlement of Investment Disputes (ICSID) tribunal according to the ICSID Additional Facility Rules. In the underlying arbitration, an Austrian holding company obtained a favourable award (amounting to a payment order of approximately €74 million) against Libya under a bilateral investment treaty (BIT) between Austria and Libya. As Libya had not acceded to the ICSID Convention, the arbitration proceedings were conducted under the ICSID Additional Facility Rules.

In the first instance proceedings, the holding company successfully applied for the recognition and enforcement of the arbitral award under the New York Convention (NYC). The second instance court confirmed the approval of recognition and enforcement. In the third instance proceedings before the Supreme Court, the award debtor raised the following grounds for refusal under the NYC: (1) lack of an arbitration agreement pursuant to Article V(1)(c), (2) violation of the right to be heard pursuant to Article V(1)(b) and (3) violation of the public order pursuant to Article V(2)(b).

Regarding the application of the NYC, the Supreme Court held that since the ICSID Additional Facility Rules – in contrast to the ICSID Convention – did not provide for its own enforcement mechanism, and since Article 19 of the said Rules explicitly stipulates that arbitrations may be conducted only in states that are member states of the NYC, the NYC is applicable to the enforcement of the present award.

The main ground for refusal raised by the award debtor was the alleged lack of competence of the arbitral tribunal since the award creditor was allegedly not the directly injured party, thereby failing to meet the 'investment' requirement, and that the obligations arising out of the award should be binding upon the debtor as host state. By relying on Article 11 of the BIT, according to which an arbitration may proceed under the ICSID Additional Facility Rules if only one party has acceded to the ICSID Convention, on Article 12 of the BIT, according to which the parties give their unlimited consent to submit a dispute to international arbitration, and on Article 3 of the said Rules providing for an approval of an agreement of the parties to arbitrate under the said Rules, the Supreme Court raised the question whether the parties had concluded a separate arbitration agreement. Since, in the Supreme Court's view, the lower instance courts had not ascertained any facts in this regard, the Supreme Court referred the matter back to the lower instances for this reason alone.

The Supreme Court further discussed whether the definition of 'investment' was fulfilled in the present case and held that indirect investments may also be the subject matter of the ICSID Additional Facility. Finally, the Supreme Court raised the question whether the BIT stipulates that the obligations under the award must be binding upon the debtor state as host state. In this context, the Supreme Court distinguished between claims for damages in cases of an armed conflict under Article 5 BIT and claims for damages arising out of a breach of contract due to the non-compliance with the umbrella clause under Article 8 BIT. With regard to the latter, the Supreme Court held that the lower instance courts had not ascertained whether the alleged damaging conduct could be attributed to the host state. Also for that reason, the Supreme Court referred the matter back to the lower instance courts. Regarding the other grounds for refusal under the NYC that the award debtor raised in the enforcement proceedings, the Supreme Court found that they were not fulfilled.

iii Investor–state disputes

Under the ICSID regime, there are currently nine cases pending in which an Austrian investor has brought a claim against a state (the respondent states are Slovenia, Germany, Tajikistan, Romania, Argentina, Italy and Croatia). The most recent claims were filed in November 2021 against Romania and in March 2022 against Slovenia. According to news reports, the claim against Romania relates to changes in Romania's legal regime on renewable energy and the claim against Slovenia, filed by an Austrian bank, relates to a law retroactively imposing an upper limit for the foreign exchange rate of loans in Swiss francs. The Austrian bank has already filed claims against Croatia (pending) and Montenegro (concluded) and is represented by the same law firm it is represented by in its dispute against Croatia. On the other side, Austria was sued by a Dutch company relating to a former Austrian bank under the BIT between Austria and Malta in 2015. There are no reports that the claim or related actions of the investor have been successful.

To date, no other cases under Arbitration Rules other than those mentioned above are publicly known.

III OUTLOOK AND CONCLUSIONS

The amendment of the Arbitration Act in 2013 and the revision of the Vienna Rules in 2021 demonstrate that Austria and its arbitration community constantly observe trends in international arbitration and improve the legal framework where necessary. These efforts are supported by the jurisprudence, particularly since the Supreme Court has established a special chamber that rules on all matters relating to setting-aside claims and the composition of arbitral tribunals. The Supreme Court also regularly makes reference to international arbitration standards such as, for instance, the IBA Guidelines on Conflicts of Interest in International Arbitration. These overall developments should enable cost- and time-efficient arbitral proceedings and related state court proceedings, both in compliance with international standards and the requirements under the rules of law. Austria (and, in particular, Vienna) is thus considered to be a regional arbitration hub with a strong focus on countries in the Central and Eastern European and Southeastern European regions. The status of being a

recognised hub for international arbitration can also be seen in the opening of a regional office of the Permanent Court of Arbitration in Vienna in April 2022, which adds a further international organisation in Austria.[14]

As regards investor–state arbitrations, developments in recent years have shown that Austrian investors are more and more willing to make use of their rights under investment treaties. This is illustrated, as an example, by the enforcement of an arbitral award of an Austrian investor under the ICSID Additional Facility Rules before the courts of Austria (see also above in Section II.ii). On 29 May 2020, 23 EU Member States concluded the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union. According to this Agreement, the concluding Member States terminated their intra-EU BITs and declared, among other things, that 'arbitration clauses should not serve as legal basis for new arbitration proceedings' (Article 5). It is noteworthy that Austria – along with Ireland, Finland and Sweden – did not enter into this Agreement, although Austria had, on the political level, previously expressed its consent to such a common approach of the EU Member States. However, Austria at the present day has, in fact, mutually terminated – in agreement with the respective other EU Member State – its remaining 12 intra-EU BITs.[15] In contrast, Austria for now has not terminated nor did it announce its intention to terminate the Energy Charter Treaty. It remains to be seen whether these developments will have an effect on the willingness of Austrian investors to seek investment protection before investment tribunals.

14 See https://pca-cpa.org/en/news/new-international-organization-in-austria-opening-of-the-office-of-the-permanent-court-of-arbitration-in-vienna/.

15 See https://www.bmaw.gv.at/Themen/International/Handels-und-Investitionspolitik/Investitionspolitik/Bilaterale Investitionsschutzabkommen-Laender.html and https://www.bmaw.gv.at/Themen/International/Handels-und-Investitionspolitik/Investitionspolitik/Ausser-Kaft-getretene-oesterreichische-BITs.html (both in German). The last remaining intra-EU BIT with the Republic of Lithuania was mutually terminated on 1 December 2022.