The European Arbitration Review

2019

Austria

The European Arbitration Review

2019

The European Arbitration Review provides an unparalleled annual update – written by the experts – on key developments in the region. The 2019 edition includes new chapters on Limits to the Principle of 'Full Compensation', as well as country overviews on 17 jurisdictions. In addition the rest of the review has been revised in light of recent developments in arbitration, including analysis of the Court of Justice of the European Union's judgment in Slovak Republic v Achmea in Energy Arbitrations, the impact of Brexit in England & Wales and the protection of investments in international armed conflicts in Ukraine.

Austria

Christian W Konrad and **Philipp A Peters**
Konrad Partners

Summary

Austria has successfully defended its position as one of the leading hubs of international arbitration in Europe over the past few years. Its strong reputation is based on a reliable legal framework dating back to the codification of the Austrian Code of Civil Procedure (ACCP) in the late 19th century. To satisfy the requirements of a modern approach to arbitration, the needs and demands of legal practice, and to be one step ahead of its competitors, Austria has amended its arbitration law twice since 2006. Prior to these major reforms, only a few minor changes had been introduced since 1895. Together with its arbitration-friendly case law, this modern legal framework has contributed to the high popularity of Austria as place of arbitration.

The strength and steady expansion of Austria's reputation are supported by its leading arbitration practitioners having an excellent reputation as both party representatives and arbitrators, but also on an academic level. The legal education in the field of arbitration and the training of thousands of students having an interest in international arbitration becomes obvious every year when the Willem C Vis International Commercial Arbitration Moot takes place in Vienna. The University of Vienna in particular has gained recognition as a leading academic centre in the field of investment and commercial arbitration. Moreover, the Danube University recently introduced a special LLM programme in international dispute resolution, with a focus on international arbitration. These efforts at the academic level will help to foster the strength and expand the international recognition of Austrian arbitration practitioners.

Aside from the legal framework and its background, the prominence of Austria as an arbitral seat is founded on its geographical location and stable political conditions, and Vienna and the other major cities in particular are easily accessible and provide a perfect infrastructure for accommodating the needs of users of international arbitration. Vienna, as the home of various international organisations, has maintained a significant position as a top venue for international arbitration for decades, which is attributable to the Vienna International Arbitral Centre, one of the world-leading arbitral institutions fostering the use of arbitration. Therefore, Vienna is one of the preferred places for arbitration, particularly for parties from central, eastern and south-eastern Europe.

AUSTRIAN ARBITRATION LAW

The first codification on arbitration law was enacted as part of the ACCP in the 19th century. At that time, the legal environment was already arbitration-friendly. The former arbitration law already provided for arbitral awards having the effect of a final and binding court judgment, and furthermore, as an ancillary provision, the Austrian Enforcement Act already provided (and still provides) for an avoidance of exequatur proceedings for domestic awards.[1] The law proved to be a well-functioning framework, and – together with the neutral status of Austria – served to attract a large number of East–West disputes, and finally to sustain Austria's reputation as an arbitration-welcoming jurisdiction long after the fall of the Iron Curtain.

In 2006, the 1985 version of the UNCITRAL Model Law (the Model Law) was largely incorporated into the Austrian Arbitration Amendment Act 2006 to meet the recognised international standards of arbitration.[2] These provisions apply to arbitration agreements concluded and arbitral proceedings commenced on or after 1 July 2006. Therefore, provisions of the old law that provide for formal requirements may still be applicable today. Yet, according to section 583(3) ACCP, formal defects of an arbitration agreement are cured

if they are not invoked by a party before entering into an argument on the substance of the dispute.

On 1 January 2014, the Austrian Arbitration Act 2013 came into force, providing for new proceedings for the challenge of an arbitral award, claims regarding the declaration of the existence and non-existence of an arbitral award, and for proceedings concerning the constitution of an arbitral tribunal. Since this latest revision, the Austrian Supreme Court is the first and final instance in relation to these proceedings in most cases. Austria is therefore one of the few countries where arbitral awards are subject to only a single instance of setting aside proceedings.

The current arbitration law is embedded in Part 4 ACCP and closely follows the structure of the Model Law, with Chapters 1 to 10 including provisions on:

- the law's scope of application;
- arbitration agreements;
- constitution of arbitral tribunals and the challenge of arbitrators;
- jurisdiction of arbitral tribunals (including jurisdiction for interim measures);
- conduct of arbitral proceedings;
- the making of awards (including the applicable law) and termination of the proceedings;
- proceedings on setting aside an award;
- recognition and declaration of enforceability of foreign awards;
- applicable procedural rules on state court proceedings relating to arbitration; and
- special provisions on consumer and labour law disputes.

Unlike the Model Law, the Austrian Arbitration Act does not distinguish between domestic and international arbitration and applies to all proceedings, irrespective of whether the dispute is of commercial character. Pursuant to section 577(1) ACCP, the Austrian provisions on arbitration apply to all proceedings having their seat in Austria. Furthermore, according to section 577(2) ACCP, a number of provisions are applicable even if the place of arbitration is abroad or has not yet been determined. These provisions mainly govern topics concerning court assistance and court intervention in support of arbitration.[3] According to section 577(3) ACCP, certain provisions also apply where the place of arbitration has not yet been agreed upon and at least one of the parties has its seat, domicile or ordinary residence in Austria. This set of provisions concerns court assistance on issues relating to the constitution of the arbitral tribunal (and challenges of arbitrators).

Austria is a party to the New York Convention on the Recognition and Enforcement of Arbitral Awards of 1958 (the New York Convention) and the European Convention on International Commercial Arbitration. It is a member state of the International Centre for Settlement of Investment Disputes (ICSID) Convention, which entered into force for Austria in 1971, and of the Energy Charter Treaty and its subsequent documents, namely the Trade Amendment and Protocol on Energy Efficiency and related Environmental Aspects. In 2015, Austria signed the International Energy Charter. So far, the country has signed more than 60 bilateral investment agreements, mostly with capital importing states. Typically, they provide for investor–state arbitration under the UNCITRAL Rules, the ICSID or the International Chamber of Commerce

(ICC) Rules. However, with the entry into force of the Lisbon Treaty, the competence to negotiate and conclude agreements on investment protection has been shifted to the European Union.

ARBITRABILITY

Austrian arbitration law provides for a very broad scope of the notion of arbitrability. According to section 582(1) ACCP, any claim involving an economic interest – and therefore all pecuniary claims – that fall, within the jurisdiction of the courts of law, is arbitrable. Claims that do not involve such economic interest can only be subject to arbitration as far as they may be subjected to a settlement agreement between the parties. According to section 582(2) ACCP, claims in family law matters, claims based on contracts subject to the Tenancy Act, even if only partly so, or the Non-Profit Housing Act, and all claims relating to condominium property are non-arbitrable. However, section 582(2) ACCP does not contain an exhaustive list, and other statutes provide for further cases of non-arbitrability. For example, disputes arising out of collective labour agreements and matters of social security law are non-arbitrable according to section 9(2) of the Labour and Social Courts Act.

CONTENT AND FORM REQUIREMENTS OF THE ARBITRATION AGREEMENT

Section 581(1) ACCP defines the term 'arbitration agreement' as an agreement by the parties to submit to arbitration all or certain disputes that have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not. The arbitration agreement may be concluded in the form of a separate agreement or a clause within a contract. In other words, section 581(1) ACCP refers to minimum content requirements of a valid arbitration agreement. According to these minimum requirements, the parties must be defined or at least definable in the context of the contractual relationship, the arbitration agreement must refer to a defined legal relationship and the parties' will to have their dispute resolved by an arbitral tribunal must be expressed in the arbitration agreement.

Section 583 ACCP regulates the relevant form requirements and provides that an arbitration agreement must be contained either in a written document signed by the parties or in an exchange of letters, telefax letters, emails or other communication between the parties that provides proof of the existence of the agreement. In addition, when a contract that fulfils these form requirements refers to a document that contains an arbitration agreement, it shall also constitute an arbitration agreement, provided that the reference is such that it makes the arbitration agreement part of the contract (ie, the arbitration agreement referred to does not need to be attached to the signed document). Furthermore, a defect of form of the arbitration agreement is cured in the arbitration proceedings by entering into an argument on the merits of the dispute, unless an objection is raised no later than together with the first argument on the merits. Once the formal defect has been cured, the respective party is barred from relying on it in the course of the arbitral proceedings, as well as in pertaining proceedings before state courts.

CONSUMER AND LABOUR LAW DISPUTES

Disputes where at least one party is a consumer are, in principle, arbitrable. However, Austrian arbitration law stipulates in section 617 ACCP numerous preconditions for the validity of respective arbitration agreements.

Such arbitration agreements have to be contained in a separate document, distinct from the main contract. This distinct document must be signed separately by the parties. Thus,

incorporation by means of reference would not constitute a valid agreement (eg, in general terms and conditions, or conclusion by any other means of telecommunication such as email). Furthermore, the arbitration agreement with a consumer is only valid if it is concluded after the dispute has already arisen, and the place of arbitration must be expressly stipulated. The arbitral tribunal may only meet for an oral hearing and the taking of evidence at another place, if the consumer has consented thereto, or if significant difficulties hinder the taking of evidence at the place of arbitration. In addition, in case the arbitration agreement is concluded between an entrepreneur and a consumer, the consumer must, prior to submitting to arbitration, be provided with a written legal advice notice regarding the differences between arbitration and court proceedings. Moreover, if the arbitration agreement was concluded between an entrepreneur and a consumer, and where, either at the time of concluding the arbitration agreement or at the time the arbitral proceedings are commenced, the consumer did not have his or her domicile, ordinary residence or place of work in the country where the arbitral tribunal has its place of arbitration, the arbitration agreement is only binding if the consumer invokes it. Section 617(6) and (7) ACCP provide for additional grounds for the setting aside of an award in case one party to the arbitration was a consumer. As such, arbitration proceedings involving consumers rarely ever occur in Austria.

The same limitations apply to labour law disputes, with an exception for disputes involving the management board members of stock corporations and managing directors of limited liability companies.

The Austrian Supreme Court held that the notion of a consumer under section 617 ACCP corresponds with the definition under the Consumer Protection Act, and that section 617 ACCP applies to corporate transactions.[4] Whether a party may be qualified as a consumer has to be determined from an economic point of view (degree of influence on the management of the corporation).[5] Therefore, in the particular constellation where minority shareholders are involved and where Austrian law is applicable, corporate disputes may be considered consumer disputes and the arbitration clause may be invalid if it is incorporated in the articles of association.

APPOINTMENT OF ARBITRATORS

In deviation from the Model Law, Austrian arbitration law requires an uneven number of arbitrators pursuant to section 586(1) ACCP. Where the parties agree on an even number of arbitrators, the arbitrators appointed have to appoint another arbitrator to serve as chairperson of the tribunal. In the event that the parties have not agreed on the number of arbitrators, Austrian law stipulates that the tribunal shall consist of three arbitrators.

In addition, Austrian law provides for a default appointment procedure in multiparty proceedings, which is not covered by the Model Law. When several parties on one side of the proceedings fail to jointly appoint an arbitrator within the period of four weeks, any party to the arbitral proceedings is allowed to request the state court to appoint an arbitrator for this group of parties (section 586(5) ACCP). However, this does not lead to the opposing party losing its right to appoint an arbitrator of its own choosing. This provision lacks an equivalent in the Model Law.

MANDATORY PROVISIONS, PARTY AUTONOMY AND THE DISCRETIONARY POWER OF THE TRIBUNAL

Arbitration proceedings under Austrian arbitration law are characterised by significant party autonomy and, in matters not governed by party agreement, broad discretionary power of

the arbitral tribunal regarding the conduct of the proceedings. This party autonomy and the discretion of the arbitral tribunal are naturally limited by mandatory rules. Among such mandatory rules are the parties' right to equal treatment, the right to be heard, objective arbitrability and the rules on challenging an arbitrator, applications for interim measures and setting aside an arbitral award. However, Austrian law does not contain an exhaustive list of mandatory provisions. Whether a provision is of mandatory nature or not has to be derived from its purpose.

INTERIM MEASURES

In accordance with the Model Law, the Austrian Arbitration Act does not bar a party from applying for interim measures before a state court even if the dispute is subject to an arbitration agreement. However, the competence to issue interim measures does not lie primarily with the state courts. The arbitral tribunal may render interim or protective measures in accordance with section 593 ACCP.

This said, ex parte interim measures can only be granted by Austrian state courts as section 593 ACCP provides that a tribunal may issue interim measures only after hearing the other party.

The arbitral tribunal has the authority to render such interim measures as it deems necessary and even if such measures are unknown to Austrian law. Interim measures issued by an arbitral tribunal are enforceable before Austrian state courts and only subject to scrutiny on grounds similar to the grounds for refusal of enforcement of an arbitral award. Furthermore, Austrian courts enforce interim measures issued by arbitral tribunals having their seat outside Austria or in the event the seat of arbitration has not yet been determined without separate exequatur proceedings. Where the interim measure is of a type unknown to Austrian law, the courts may – after hearing the opposing party – transform it to a type of interim measure known under Austria law that most closely reflects the measure as issued by the tribunal.

CHALLENGE OF ARBITRAL AWARDS

Section 611 ACCP sets forth the grounds for the setting aside of an award as well as the applicable time limits. Accordingly, an award is to be set aside in the following circumstances:

- a valid arbitration agreement does not exist, or the arbitral tribunal has denied its jurisdiction despite the existence of a valid arbitration agreement, or a party was under an incapacity to conclude a valid arbitration agreement under the law governing its personal status;
- a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was, for other reasons, unable to adequately present its case;
- the award deals with a dispute not covered by the arbitration agreement or contains decisions on matters beyond the scope of the arbitration agreement or the plea of the parties for legal protection – if the default concerns only a part of the award that can be separated, only that part of the award shall be set aside;
- the composition or constitution of the arbitral tribunal was not in accordance with a provision of this chapter (of the ACCP) or with an admissible agreement of the parties;
- the arbitral proceedings were conducted in a manner that conflicts with the fundamental values of the Austrian legal system (public policy) – this provision is

much narrower than the parallel provision contained in the UNCITRAL Model Law and many other jurisdictions, as violations of the agreed procedure constitute grounds for the setting aside of an award only if such violation is severe enough to constitute a violation of procedural public policy;

- certain requirements according to which a court judgment can be appealed by an action for reopening of the proceedings (certain criminal actions);
- the subject matter of the dispute is not arbitrable under Austrian law; or
- the arbitral award conflicts with the fundamental values of the Austrian legal system (public policy).

The grounds for setting aside based on non-arbitrability of the matter in dispute, and relating to the award conflicting with the fundamental values of the Austrian legal system (public policy), have to be considered ex officio. In general, an action for setting aside an award has to be brought within three months after the award has been received by the claimant.[6] Importantly, the setting aside of an arbitral award does not affect the validity of the underlying arbitration agreement.[7]

The most important amendment of the Austrian Arbitration Act 2013, which came into force on 1 January 2014, mainly concerns challenge proceedings – for almost all claims for the setting aside of an arbitral award, the Austrian Supreme Court is now the first and final instance (and also for claims regarding the declaration on the existence or non-existence of an arbitral award and state court assistance concerning the constitution of the arbitral tribunal). Only in disputes involving consumers and in matters of labour law do the former procedural rules of the Austrian Arbitration Act remain in force. Therefore, in these two matters, three instances are in principle available for the proceedings seeking the setting aside of the award.

RECOGNITION AND ENFORCEMENT

Awards rendered by an arbitral tribunal having its seat in Austria are executory titles eo ipso under the Austrian Enforcement Act and do not require a declaration of enforceability of a domestic court. It is sufficient to attach a copy of an award with a confirmation of its final and binding nature and enforceability issued by the chairman, or if he or she is unable to do so, by any other arbitrator to the enforcement request.

The recognition and enforcement of foreign arbitral awards is governed mainly by the New York Convention. Austrian courts widely recognise the necessity for an internationally uniform application of the New York Convention.

Notably, where an arbitral award covered by the European Convention on International Commercial Arbitration of 1961 has been successfully challenged in the country of origin due to a violation of public policy, this does not by itself constitute a ground for refusal of enforcement in Austria, provided that the award is not incompatible with the Austrian legal order.

RECENT DECISIONS AND CASES

Requirements For The Validity Of Arbitration Agreements

Recently, the Austrian Supreme Court upheld the validity of an arbitration agreement concluded through the exchange of faxes that did not bear the respondent's signature.[8]

Pursuant to section 583(1) ACCP, there are two equally valid ways of complying with the form requirements for arbitration agreements:

- a written document signed by the parties; or
- an exchange of letters, telefax, emails or other forms of communication.

The Austrian Supreme Court held that such an exchange must provide record of the agreement but does not have to bear the parties' signatures. Thus, the court resolved a debate in Austrian literature in favour of the prevailing opinion and set a more liberal approach towards the form requirements for arbitration agreements. As emphasised by the court, this is in line with an interpretation of article II(2) of the New York Convention 1958 and also with the prevailing opinion in German literature on section 1031(1) of the German Code on Civil Procedure, ie, a provision that is almost identical to section 583(1) ACCP and also takes its origin from article 7(2) of the UNCITRAL Model Law.

Challenge Of Arbitrators And Arbitrators' Obligations

The Austrian Supreme Court has had the opportunity to provide for more clarity as to the scope and nature of an arbitrator's obligations towards the parties on several occasions. The Supreme Court's case law on this issue is expected to further increase as, with the Austrian Arbitration Act 2013, the Supreme Court has been granted direct competence on all party challenges of appointments of arbitrators.

In a recent case, an arbitrator was successfully challenged before the Austrian Supreme Court.[9] The court found that a lunch attended by the arbitrator and a counsel representing the claimant in the arbitration was, against the background of the circumstances of the case, sufficient to raise doubts as to the arbitrator's impartiality and independence from a reasonable third-party perspective. The lunch meeting had taken place shortly after the Austrian Supreme Court had dismissed another challenge against the arbitrator. The first and unsuccessful challenge was based on a relationship between the arbitrator and the claimant that the arbitrator had failed to disclose. In this first decision on the arbitrator's impartiality and independence, the Austrian Supreme Court found that the relationship was not of the kind that would justify an arbitrator to be removed from office. In its decision on the second challenge, the one regarding the lunch meeting with the claimant's counsel, the court stated that professional contact on matters unrelated to the arbitration may be unavoidable for any well-connected lawyer. However, the work done by the arbitrator and the claimant's counsel could have been done via email or telephone whereas a lunch reveals certain personal connection. The Supreme Court also emphasised that the first challenge, though unsuccessful, had indicated loss of trust on the part of the respondent and that the arbitrator, therefore, should have been more sensitive.

In a separate decision, the Austrian Supreme Court reiterated what has been recognised as established case law in Austria, namely that the successful challenge of an arbitral award is a precondition for the arbitrator's liability for damages in relation to the parties to the arbitration.[10] An arbitrator contract that reflects this notion in its wording and expressly stipulates this precondition for compensation for damages, therefore, does not violate public morals and is valid.

This was reconfirmed in a recent decision by the Austrian Supreme Court, where it held that the successful setting aside of the arbitral award is a precondition for an arbitrator's

liability, unless the arbitrator refuses to issue an arbitral award altogether or unduly delays its issuance.[11]

Res Judicata And Pending Proceedings

In another case, the Austrian Supreme Court ruled that a conviction by a criminal court has binding effect on arbitral proceedings in the same way as it would bind a civil court.[12] An acquittal, on the contrary, would not be binding for an arbitral tribunal. The reason for this seemingly contradictory treatment of criminal convictions and acquittals is that the laws on criminal procedure provide the victim with some, but not all, procedural rights enjoyed by a party to a civil litigation or arbitration. Allowing acquittals to have binding force on dispute resolution proceedings would, therefore, result in denying the victim of a crime part of the rights he or she otherwise would be entitled to in a litigation or arbitration.[13]

Also, with the same decision, the Austrian Supreme Court had to assess whether an arbitration was still pending as this would have prevented a new arbitration on the same subject matter. The first arbitration had been initiated by the same claimant who had later withdrawn the claim. The claimant then raised the same claim again in a different arbitration. Pursuant to section 608 ACCP, once pending, an arbitration must be concluded formally and this may be done either by means of an arbitral award or by a formal order of the arbitral tribunal. This was not the case with respect to the first of the two arbitrations. It was simply discontinued without any formal decision. Both the arbitral tribunal and the Austrian Supreme Court, therefore, considered the first arbitration to be still pending. This would have blocked the claimant from raising the same claim anew in a different arbitration.

However, in the second arbitration, the arbitral tribunal confirmed its jurisdiction by invoking a statutory exception to the rule that blocks a new claim on the pending subject matter. This exception may be applied with respect to pending proceeding where objections have been raised against the jurisdiction of the arbitral tribunal (at the latest when entering into argument on the substance of the dispute) and, in addition, where a decision on this objection may not be obtained within a reasonable period of time. The arbitral tribunal held, and the Austrian Supreme Court subsequently confirmed, that 'a reasonable period of time' may be interpreted to apply to situations where a decision on the jurisdiction objection may not be obtained at all. In this instance, an arbitral tribunal in the first arbitration had not yet been constituted and the parties had not taken any measures to constitute it. This allowed the arbitral tribunal in the second arbitration to predict that no decision may be expected at all and thus may not be expected within 'a reasonable period of time'. Therefore, even though the first arbitration was still pending, the claimant was not prevented from raising the same claim in the second arbitration.

Right To Be Heard

In another decision, the Austrian Supreme Court once more confirmed its strict stance regarding the alleged violation of a party's right to be heard.[14] The court had to assess whether the arbitrator, by failing to discuss his legal view with the parties, had violated the claimant's right to be heard pursuant to section 611(2) ACCP and reiterated that the right to be heard is only violated under Austrian law if one party to the proceedings has not been granted the right to be heard at all.

Review Of Arbitral Awards

In a recent decision, the Austrian Supreme Court held an arbitration clause to be in breach of substantive ordre public and deemed it ineffective. The contract provided for the application of the national law of a non-EU jurisdiction allowing the arbitral tribunal to circumvent mandatory EU law (as transposed by Austrian national law).[15] The dispute involved a European commercial agent and its US principal. The commercial agent had been acting on behalf of the US company on the territory of the European Union and this is sufficient for the application of the commercial agent's right to indemnification under EU law, namely articles 17 and 18 of the Council Directive 86/653/EEC. This right is considered mandatory EU law. Neither the underlying contract nor the applicable law of New York entitled the commercial agent to indemnification. Since the arbitral tribunal had, in a partial award, rejected the applicability of mandatory rules of Austrian law, the Austrian Supreme Court saw no other way to ensure the applicability of the mandatory provisions of said EU directive, but to declare the arbitral clause ineffective.

With respect to procedural ordre public, the Austrian Supreme Court recently ruled that the requirement that an award should provide sufficient reasoning of its findings forms part of the fundamental values of Austrian law and, therefore, non-compliance constitutes a breach of procedural public policy.[16] This is true where, as it was in this case, the parties have not agreed to exclude the statutory requirement of reasoning. The Austrian Supreme Court also held that the required intensity of the reasoning depends on the extent to which the particular issue was discussed during the proceedings. Thus, with respect to issues that have been debated in the course of the proceedings, it is sufficient to simply refer to the position of one of the parties. However, where a matter has only been briefly mentioned in the arbitration, the arbitral award must state reasons in such detail as to allow the parties to understand why the tribunal has come to the particular conclusion.

INVESTMENT ARBITRATION

As explained above, Austria has entered into more than 60 bilateral investment treaties (BITs). Three of these agreements, the ones with Bolivia, South Africa and India, have been terminated. They, however, will continue to apply (until 2023, 2027 and 2034 respectively) to investments made prior to their termination. Most recently, Austria signed a new BIT with Kyrgyzstan, which, however, has not yet entered into force.

Generally, the Lisbon Treaty transferred the competence to conclude investment treaties with third countries from the individual member states to the EU. With respect to such 'extra-EU BITs' that the member states have concluded before the Lisbon Treaty, EU Regulation No. 1219/2012 stipulates that they shall remain effective until they are replaced with new EU investment agreements. The regulation also sets out the conditions under which member states may negotiate amendments to such extra-EU–BITs or even conclude new ones.

With respect to BITs concluded between EU member states, ie, 'intra-EU BITs', the European Commission (EC) is of the opinion that they grant privileged status to investors of specific member states and, therefore, they are in breach of EU law. It has initiated infringement proceedings against Austria and a number of other member states that have refused to terminate their intra-EU BITs. Austria and a group of member states have put forward a 'non-paper' expressing their willingness to phase out such agreements provided that specific alternative steps are taken to ensure that the rights of EU investors are duly protected in all EU member states. In 2017, the EC issued a roadmap for an initiative that outlines the EC's plan to increase the clarity of the already existing EU standards of investment protection. The roadmap includes, among others, a plan to lay down the EC's own interpretation of

such already existing standards. Meanwhile, the European Court of Justice has also issued a preliminary ruling on investor-state dispute settlement provisions in intra-EU BITs and their compatibility with EU law. In its landmark decision of 6 March 2018, the court declared the investor–state arbitration clause in a BIT between the Netherlands and Slovakia to be incompatible with EU law on the basis of its 'adverse effect on the autonomy of EU law'. Although the full implications of the Court's judgment are yet to be seen, it is likely to have wide impact on intra-EU BITs and investor–state dispute settlement in general.

Despite the large number of Austrian BITs, so far, there has only been one investment treaty claim brought against the Republic of Austria.[17] In this case, the holding company BV Belegging-Maatschappij (Far East) brought an ICSID claim over €200 million under the 2002 Austria–Malta BIT. Far East, which owns 99 per cent of Vienna-based private bank Meinl Bank, sought redress for damages allegedly caused through investigations and state court proceedings targeting the bank itself, as well as some of its executives. Julius Meinl V, chairman of the supervisory board of the bank, was subjected to criminal investigations in 2007. He had been accused of having caused considerable harm to investors by employing a stock buy-back scheme for manipulating the prices of a real estate investment fund. Far East accused Austrian state authorities of having appointed biased experts, conducting illegal house searches and improper surveillance, and thus having breached Meinl Bank's due process rights. Further, Far East alleged that the Republic of Austria had impaired its investment by arbitrary and discriminatory means and failed to provide full protection to its investment, committed direct as well as indirect expropriation by progressively dismantling the bank's operations and furthermore failed to attempt a settlement in good faith.[18] The claim was rejected by the ICSID tribunal in 2017 on the basis that it lacked jurisdiction to hear and decide the dispute.

Austrian investors, however, have made more frequent use of Austria's BITs with other countries. Currently, 11 investment arbitration proceedings involving Austrian investors are pending before investment tribunals, namely:

- *LSG Building Solutions and others v Romania, under the Energy Charter Treaty*, ICSID Case No. ARB/18/19;
- *Erste Group Bank AG and others v Republic of Croatia*, under the Austria–Croatia BIT, ICSID Case No. ARB/17/49;
- *Addiko Bank AG and Addiko Bank d.d. v Republic of Croatia*, under the Austria–Croatia BIT, ICSID Case No. ARB/17/37;
- *Addiko Bank AG v Montenegro*, under the Austria–Federal Republic of Yugoslavia 2001 BIT, ICSID Case No. ARB/17/35;
- *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v Republic of Croatia*, under the Austria–Croatia BIT, ICSID Case No. ARB/17/34;
- *UniCredit Bank Austria AG and Zagrebacka Banka d.d. v Republic of Croatia*, under the Austria–Croatia BIT, ICSID Case No. ARB/16/31;
- *Kunsttrans Holding GmbH and Kunsttrans d.o.o. Beograd v Republic of Serbia*, under the Austria–Serbia BIT, ICSID Case No. ARB/16/10;
- *ESPF Beteiligungs GmbH, ESPF Nr 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co KG v Italian Republic*, under the Energy Charter Treaty, ICSID Case No. ARB/16/5;

- *Strabag SE v Libya*, under the Austria–Libya BIT, ICSID Case No. ARB(AF)/15/1;
- *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentine Republic*, under the Argentina–Austria BIT, ICSID Case No. ARB/14/32; and
- *EVN AG v Republic of Bulgaria*, under the Austria–Bulgaria BIT and The Energy Charter Treaty, ICSID Case No. ARB/13/17.

In addition, 11 proceedings initiated by Austrian investors have already been concluded, namely:

- *Nabucco Gas Pipeline International GmbH in Liqu. v Republic of Turkey*, under the Austria–Turkey BIT, ICSID Case No. ARB/15/26;
- *Georg Gavrilovic and Gavrilovic d.o.o. v Republic of Croatia*, under the Austria–Croatia BIT, ICSID Case No. ARB/12/39;
- *Club Hotel Loutraki SA and Casinos Austria International Holding GMBH v Republic of Serbia*, under the Austria–Serbia BIT and the Greece–Serbia BIT, ICSID Case No. ARB/11/4;
- *European American Investment Bank AG (EURAM) v Slovak Republic*, under the Austria–Slovakia BIT, PCA Case No. 2010–17;
- *EVN AG v The Former Yugoslav Republic of Macedonia*, under The Energy Charter Treaty and the Austria–Macedonia BIT, ICSID Case No. ARB/09/10;
- *Mohammad Ammar Al-Bahloul v The Republic of Tajikistan*, under The Energy Charter Treaty, Arbitration Institute of the SCC, Case No. V (064/2008);
- *Austrian Airlines v The Slovak Republic*, under the Austria–Slovakia BIT, UNCITRAL Ad Hoc Arbitration;
- *Adria Beteiligungs GmbH v The Republic of Croatia*, under the Austria–Croatia BIT, UNCITRAL;
- *Alpha Projektholding GmbH v Ukraine*, under the Austria–Ukraine BIT, ICSID Case No. ARB/07/16;
- *ALAS International Baustoffproduktions AG v Bosnia and Herzegovina*, under the Austria–Bosnia and Herzegovina BIT, ICSID Case No. ARB/07/11; and
- *Erste Bank Der Oesterreichischen Sparkassen AG v Republic of India*, under the Austria–India BIT, UNCITRAL Ad Hoc Arbitration.

CONCLUSION

Austria is a very arbitration-friendly jurisdiction with a highly efficient law on civil procedure, modern arbitration provisions, sophisticated case law and an arbitration centre with excellent reputation (the Vienna International Arbitral Centre) that introduced up-to-date rules in 2018. State courts have traditionally always been very reluctant to intervene in arbitral proceedings, and now, due to the latest amendments providing for the sole and direct competence of the Supreme Court, arbitration-related matters lie almost exclusively in the hands of some of the jurisdiction's best judges. The expertise and experience of Austrian arbitration practitioners range from commercial arbitration through investment protection to the particularities of dispute resolution in practically any specific economic sector. Certainly, not only the Austrian arbitration experts, but also Austria's arbitration-friendly arbitration law together with the

recently revised version of the Vienna Rules will continue to attract parties to choose Austria as their arbitral seat.

Notes

[1] Cf. section 1.16. of the Austrian Enforcement Act, BGBl. I Nr. 69/20014.

[2] One minor reform was that of 1983 updating the form requirements for arbitration agreements and incorporation of one provision concerning the challenge of an award on the grounds of the violation of public policy.

[3] Section 577(2) ACCP enumerates the following provisions: section 578 (court intervention only in matters governed by the chapter on arbitration); section 580 (receipt of written communication); section 583 (form of arbitration agreement); 584 (arbitration agreement and action before court); section 585 (arbitration agreement and interim measure by court); section 593(3) to (6) (power of state courts to enforce interim or protective measures rendered by an arbitral tribunal); section 602 (judicial assistance in the taking of evidence); section 612 (declaration of existence or non-existence of an arbitral award) and section 614 (recognition and declaration of enforceability of foreign arbitral awards).

[4] Austrian Supreme Court, 16 December 2013, 6 Ob 43/13m.

[5] However, the mere fact that a shareholder sits in the board of directors does not automatically mean that his or her influence is significant: see Austrian Supreme Court, 25 August 2014, 8 Ob 72/14t.

[6] Special time limits exist with regard to the grounds for the setting aside of an award based on criminal actions.

[7] Where an arbitral award on the same subject matter has been finally set aside twice and if a further arbitral award regarding that subject matter is to be set aside, the court shall, upon request of a party, concurrently declare the arbitration agreement to be invalid with respect to that subject matter.

[8] Austrian Supreme Court, 23 June 2015, 18 OCg/15v.

[9] Austrian Supreme Court, 19 April 2016, 18 ONc 3/15h.

[10] Austrian Supreme Court, 22 March 2016, OGH 5 Ob 30/16x.

[11] Austrian Supreme Court, 22 March 2016, 5 Ob 30/16x.

[12] Austrian Supreme Court, 28 September 2016, 18 OCg 2/16t.

[13] Austrian Supreme Court, 20 November 1996, 7 Ob 2309/96a.

[14] Austrian Supreme Court, 23 February 2016, OGH, 18 OCg 3/15p.

[15] Austrian Supreme Court, 1 March 2017, OGH 5 Ob 72/16y.

[16] Austrian Supreme Court, 28 September 2016, OGH 18 OCg 3/16i.

[17] *BV Belegging-Maatschappij 'Far East' v Republic of Austria*, ICSID Case No. ARB/15/32.

[18] This summary is based on an article by Ladey Yong published on *Global Arbitration Review*'s website: https://globalarbitrationreview.com/news/article/34032/austria-hit-first-icsid-claim.

Christian W Konrad c.konrad@konrad-partners.com
Philipp A Peters p.peters@konrad-partners.com

Tel: +43 1 512 95 00

http://www.konrad-partners.com

Read more from this firm on GAR