

GAR CHALLENGING AND ENFORCING ARBITRATION AWARDS 2020

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# Austria

Christian W Konrad and Philipp A Peters  
Konrad Partners

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## Applicable requirements as to form of arbitral awards

### 1 Must an award take any particular form (eg, in writing, signed, dated, place, the need for reasons, delivery)?

An arbitral award must be in writing. Unless the parties have agreed otherwise, it must be written in the language of the arbitral proceedings.

In general, the award must be signed by all arbitrators. However, this mandatory requirement is satisfied also when a minority of arbitrators refuses to sign it or is unable to do so. Where this is the case, an arbitrator must record the reason for the omission of any signature on the award itself.

An arbitral award must also state its date and the place where it is rendered, ie, the place of arbitration as agreed by the parties. A failure to do so, however, does not constitute a ground to set aside the award.

Unless the parties have agreed otherwise, the arbitral award must be reasoned. Failure to provide reasoning constitutes a breach of Austrian procedural public policy and may be invoked as a ground to set aside the arbitral award. The Austrian Supreme Court recently held that the intensity of the reasoning depends on whether the issue in question was discussed at some point during the proceedings or not. In any case, the reasoning should put the parties in the position to understand how the arbitral tribunal comes to its finding. Notably, the party seeking to have the award set aside is precluded from doing so if the arbitral agreement (including the applicable arbitration rules) provides that the parties may file a request for clarification with the arbitral tribunal and the party has failed to make this request.

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## Applicable procedural law for recourse against an award

### 2 Are there provisions governing modification, clarification or correction of an award?

Once the award has been rendered, the arbitral tribunal becomes *functus officio*. Therefore, in general, it may not alter or rescind its award. However, Austrian arbitration law expressly allows the arbitral tribunal to provide an explanation of the award or to correct calculation, spelling or printing errors in the award.

An arbitral tribunal may also render an additional award to decide on requests raised during the arbitration on which it has not decided in the original award.

A party may request such an explanation, correction or an additional award. The arbitral tribunal may provide a correction of the award on its own motion within four weeks from the date of the award.

Notably, in order for a party to request an explanation of the award, there must be a party agreement to that effect that, naturally, includes the arbitration rules the parties have agreed upon.

The request for explanation, correction or for an additional award must be transmitted to the other party who must be given an adequate opportunity to be heard. The tribunal would have four weeks to decide on a request to explain or correct the award and eight weeks for a request to render an additional award.

An explanation and a correction constitute parts of the original award and do not have any impact on the running of the time period for challenging the award and may not be set aside in independent proceedings. An additional award, however, represents a new, separate award. Therefore, it may be set aside in separate proceedings and the time period for challenging it starts running upon receipt of the additional award by the party seeking to have it set aside.

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## Applicable procedural law for recognition and enforcement of arbitral awards

### 3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

An arbitral award rendered in Austria may become subject to setting aside proceedings under the Austrian Code of Civil Procedure (ACCP). Except for awards rendered in labour and consumer disputes, the challenge will be heard directly by the Austrian Supreme Court. If successful, the motion will result in the setting aside of the award. Unless the parties have agreed on an appeal mechanism, this is the only recourse available under Austrian law. Furthermore, as discussed in question 13, arbitral awards may be scrutinised by Austrian courts within enforcement proceedings.

Importantly, the Austrian Supreme Court is not vested with the authority to conduct a substantive review (ie, it is not allowed to revise the factual and legal basis of the award). An award may be set aside only on basis of very few grounds that have been exhaustively enumerated in section 611(2) Nos. 1 to 8 of the ACCP:

- A valid arbitration agreement does not exist or one of the parties was incapable of concluding a valid arbitration agreement under the law that governs its personal status, or the arbitral tribunal has denied its jurisdiction.
- A party was not properly notified of the arbitral proceedings or of the appointment of an arbitrator or for another reason was unable to present its case.
- The award includes a decision on a dispute or an issue that is not covered by the arbitration agreement or by the parties' requests.
- The composition or constitution of the arbitral tribunal was in breach of a party agreement on this issue or in breach of the applicable ACCP provisions.
- The award represents a violation of public policy (ie, the manner in which the arbitral proceedings were conducted is irreconcilable with the fundamental values of Austrian law (procedural public policy)).
- Circumstances exist that, if the dispute were subject Austrian court proceedings, would have led the revision of the court judgment under section 530(1) No. 1 to 5 ACCP. These circumstances are sometimes referred to as "the criminal law grounds" for setting aside an arbitral award.
- The subject matter of the dispute is non-arbitrable under Austrian law.
- The arbitral award itself is irreconcilable with the fundamental values of the Austrian legal system (substantive public policy).

The parties may not validly agree to provide for further grounds for setting aside the arbitral award. Notably, the non-arbitrability of the subject matter of the dispute and the violation of substantive public policy must be examined by the Austrian Supreme Court ex officio. They may not be waived by the parties. All other grounds must be invoked by the party seeking to have the award set aside. In line with Austrian doctrine, the parties may only validly waive their right to invoke these grounds after the rendering of the arbitral award, in particular after the party entitled to challenge the award has gained knowledge of the circumstances giving rise to the respective ground.

A challenge must be raised within three months upon receipt of the award. However, this does not apply with respect to the criminal law grounds mentioned above. The time period for invoking these grounds is determined mutatis mutandis by the provisions governing the reopening of court proceedings.

If the challenge against the award is successful, enforcement proceedings must be abandoned. The effects of the arbitral award would cease ex tunc (ie, as if it had never been rendered). The arbitration agreement, however, would remain intact. The Austrian Supreme Court may only declare the arbitration agreement ineffective upon request of the party challenging the arbitral award and only if that motion would represent the third successful challenge against arbitral awards in the same subject matter.

#### **4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?**

Domestic awards are awards rendered by an arbitral tribunal having its seat in Austria. Section 1 No. 16 of the Austrian Enforcement Act (AEA) provides that domestic awards (and domestic arbitral settlements) by themselves represent executory titles and hence do not require prior recognition. The enforcement of domestic arbitral awards is thus governed by the general provisions of the AEA and by specific provisions of the Austrian Code of Civil Procedure (ACCP).

Arbitral awards rendered by a tribunal whose seat is abroad (ie, foreign arbitral awards) must first undergo a recognition procedure to acquire the status of executory titles in Austria. The recognition of such awards is governed by section 403 et seqq. AEA.

These domestic statutory provisions are complementary and subordinate to international law. Thus, the multitude of bilateral and multilateral treaties ratified by Austria and governing the recognition and enforcement of foreign arbitral awards take precedence over conflicting provisions of domestic law.

Most importantly, Austria has acceded to the New York Convention (the Convention), which governs the recognition and enforcement of foreign arbitral awards. In 1964, the European Convention on International Commercial Arbitration entered into force for Austria. Article IX of this treaty governs the recognition and enforcement of arbitral awards.

Austria has also ratified the ICSID Convention of 1965. Articles 53 et seqq thereof govern the recognition and enforcement of awards rendered under this convention.

Besides the multilateral treaties mentioned above, Austria has concluded and ratified or succeeded to bilateral agreements with various states, including Belgium, Croatia, Kosovo, Liechtenstein, North Macedonia, Montenegro, Serbia, Slovenia and Switzerland, which provide for the reciprocal recognition and enforcement of arbitral awards.

Importantly, many treaties may apply to one and the same arbitral award. Where this is the case, a court may only refuse enforcement if the award fails to meet the conditions of all the applicable treaties.

## **5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under article I(3) of the Convention?**

Austria acceded to the New York Convention of 1958 on 2 May 1961 and the treaty entered into force on 31 July the same year. Upon its accession to the treaty, Austria made a reciprocity reservation as entitled to under article I(3). However, on 25 February 1988, Austria notified the Secretary-General of the United Nations of its decision to withdraw this reservation. Therefore, the New York Convention fully applies to the recognition and enforcement of arbitral awards in Austria.

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## **Recognition proceedings**

### **6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?**

The district courts are competent to issue a leave for enforcement concerning a given foreign arbitral award.

With respect to local jurisdiction, in general, section 409 AEA effectively entitles the award creditor to choose between the district court where the award debtor has their seat or domicile and the district court where the movable or immovable asset of interest is registered.

Once the leave for enforcement is given, the foreign arbitral award is treated as Austrian executory title, and thus it undergoes the same enforcement procedure that also applies to domestic arbitral awards. The creditor of a foreign award may combine the applications for leave for enforcement and enforcement authorisation to obtain both decisions at once.

Upon appeal, the district court's decision may be reviewed by the respective regional court. That regional court's decision may, in turn, be examined by the Austrian Supreme Court. Notably, however, the Austrian Supreme Court's review is limited to points of law and only to issues of material importance to the uniformity, the certainty or the development of the Austrian legal order.

### **7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?**

Apart from the ones discussed above, there are no further requirements for the jurisdiction of the court. If an applicant chooses to establish the territorial jurisdiction of the district court based on the location of the asset against which enforcement is being sought (rather than based on the debtor's seat or domicile), the applicant must show that the asset is indeed located within the territorial jurisdiction of the court.

An award creditor would typically combine the application for a leave for enforcement with a request for enforcement authorisation. The latter would require the creditor to indicate specific assets he or she is seeking enforcement against.

### **8 Are the recognition proceedings in your jurisdiction adversarial or ex parte?**

Recognition proceedings are ex parte. The court shall decide whether to grant or deny a leave for enforcement based only on documents, ie, without conducting a hearing or else involving the award debtor. This procedure was designed to grant the award creditor the advantage of surprising enforcement access.

This, however, does not mean that the award debtor is denied the right to be heard. Rather, they may appeal against the court order granting a leave for enforcement and, in doing so, they may also introduce new facts. The appeal will be heard by the competent regional court in inter partes proceedings.

### **9 What documentation is required to obtain the recognition of an arbitral award?**

Pursuant to article IV(1)(a) of the New York Convention, an applicant seeking the recognition of an arbitral award shall furnish the original award or a certified copy thereof and the original arbitration agreement or a certified copy thereof.

Notably, section 614(2) ACCP governs the same subject matter but it places the decision whether to request the applicant to furnish the relevant arbitral agreement (or a certified copy thereof) within the discretion of the competent court. In line with

article VII(2) of the New York Convention, the more liberal approach as enshrined in this domestic provision supersedes the stricter approach taken by the international treaty.

**10 If the required documentation is drafted in another language than the official language of your jurisdiction, is it necessary to submit a translation together with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?**

If an arbitral award is not in German, the applicant must furnish a certified translation of the whole award by a sworn or officially appointed translator.

However, awards written in Slovenian may be submitted without a German translation to the district courts in Bleiburg, Ferlach, and Eisenkappel, and their common court of appeal, the regional court in Klagenfurt in the state of Carinthia. Similarly, no translation is required with respect to awards in Croatian where the recognition proceedings are pending before the district courts in Eisenstadt, Güssing, Mattersburg, Neusiedl am See, Oberpullendorf and Oberwart as well before their common appeals court, the regional court in Eisenstadt in the state of Burgenland.

It is within the discretion of the competent court to request the applicant to furnish a fully translated copy of the arbitration agreement. However, the applicant is not required to submit a translation of the entire underlying contract in which the relevant arbitration clause is contained.

**11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?**

Since the district court would only examine whether the formal requirements of the New York Convention are satisfied without hearing the award debtor, the Austrian Supreme Court has adopted a formalistic approach to the proceedings. The court will meticulously examine whether the name of the debtor as indicated in the request for enforcement authorisation conforms with the name indicated in the arbitral award.

The court fees for the recognition and enforcement of arbitral awards are calculated in accordance with a schedule. Their amount depends on the value of the award with the fees for enforcement against immovable assets being slightly higher than the fees required for other assets. The amount of the fees also increases with the number of debtors against whom the award is to be enforced. Ultimately, should the request for enforcement authorisation be successful, the award debtor will be obliged to reimburse the creditor for such procedural costs.

**12 Do courts recognise and enforce partial or interim awards?**

According to the Austrian Supreme Court, the New York Convention applies to decisions on the merits, which finally adjudicate on at least part of the relief sought by the parties and which correspond to judgments of state courts. Furthermore, the Austrian arbitration law expressly states that decisions as to the jurisdiction of the arbitral tribunal and decisions on costs must be rendered in the form of arbitral awards.

Hence, an arbitral award that provides for a final resolution of at least part of a dispute on the merits meets this definition and may be recognised and enforced in Austria.

Interim and conservatory measures are enforceable in Austria. This is expressly provided under Austrian arbitration law and applies regardless of whether such measures may be characterised as awards in the sense of the New York Convention or not.

**13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under article V of the Convention?**

As mentioned above, the New York Convention and in particular the grounds for refusing the enforcement and recognition of a foreign arbitral award provided under article V of the convention are directly applicable in Austria. Austrian statutory law, therefore, does not provide for a domestic catalogue of grounds for refusing recognition.

Notably, the interpretation of article V of the New York Convention is influenced by the jurisprudence of the Austrian Supreme Court developed under section 611 ACCP, which stipulates the grounds for setting aside an arbitral as they parallel the grounds listed in article V.

**14 What is the effect of a decision recognising the award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?**

Once a leave for enforcement is obtained, the foreign arbitral award shall be treated equally with domestic arbitral awards. This, in itself, is not sufficient to render the award enforceable. Rather, as mentioned above, the award creditor has to request the court to issue an enforcement authorisation. As discussed in question 6, the AEA allows applicants to combine this request with the request for a leave for enforcement in order to obtain the decisions on both subject matters at once.

**15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?**

Since the recognition proceedings are ex parte, the award debtor would only learn about the outcome once the district court's decision is served. The debtor may appeal against this decision before the competent regional court within four weeks. This period doubles for cases where the award debtor's seat or domicile is abroad provided that this appeal is their very first opportunity to participate in the recognition proceedings. The appeal must be based on the grounds for rejecting the recognition and enforcement of an arbitral award as listed in article V of the New York Convention. This provision also allows the debtor to invoke grounds for refusal that have not been discussed before the district court.

**16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?**

Under article VI of the New York Convention, the enforcement court may adjourn the enforcement proceedings if a challenge against the foreign arbitral award becomes pending before a court in the country where the award was rendered. If the court decides to do so, it may also order the debtor to provide appropriate security. The Austrian Supreme Court interprets this provision as placing both decisions, whether to adjourn the proceedings and whether to order the debtor to give security, within the discretionary powers of the competent court.

Whether the adjournment will be granted depends on the chances of success of the challenge against the arbitral award in its state of origin. While the Austrian Supreme Court has ruled that it is within the competent court's discretion to treat the application to set aside the award "generously" it has also stressed that it is on the debtor to show why the award is likely to be set aside and that merely proving that a challenge has been raised against it is not sufficient to adjourn the recognition proceedings in Austria.

In addition to article VI of the New York Convention, the AEA allows the debtor to request the adjournment of the enforcement authorisation proceedings where the foreign executory title has not yet become final and binding in accordance with the rules in its jurisdiction of origin. The Austrian Supreme Court regards this provision as a necessary supplement to the article VI of the New York Convention which it interprets as applying only to proceedings to obtain a leave for enforcement and not allowing for adjournment of the enforcement authorisation proceedings.

**17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?**

It is within the court's discretionary powers to order the award debtor to provide security, should the creditor request this. As a general rule, the court will require the debtor to provide such security.

**18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? In case the award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?**

Under article V(1)(e) of the New York Convention, the recognition and enforcement of an arbitral award 'may be refused' if it has been set aside in the jurisdiction of its origin.

Article IX of the European Convention plays an important role as it limits the scope of application of article V(1)(e) of the New York Convention by providing that this ground for refusing recognition of a foreign award may not be invoked if the award has been set aside because of that foreign jurisdiction's public policy (Austrian Supreme Court, 23 February 1998 3 Ob 115/95).

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## Service

### 19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

The service of documents within the territory of Austria is governed by the ACCP, by the Austrian Service Act and by the Court Organisation Law.

Both natural persons and legal entities may appoint a person they trust to serve as their authorised representative for the purpose of documents service provided that this person has its point of delivery within the territory of Austria. Where a party to court proceedings does not have a point of delivery in Austria the court may order it to appoint an authorised representative for document service. It is also within the court's discretion to order a group of two or more parties to appoint a common authorised representative.

Documents may be served to their addressees "in person". In accordance with section 16 of the Austrian Service Act, should the addressee be away at the time of the service the document may be served to any person of age who lives in the addressee's household or who is the addressee's employee or employer. Should these methods fail, the documents may be deposited with the local postal office and the addressee must be notified.

Occasionally, the Austrian law prescribes that a "registered personal service" is required thereby allowing for service on that very person only.

Notably, a special system for electronic service of documents has been put in place in Austria and attorneys, Austrian insurance companies, credit institutions, social insurance providers as well as specific institutions are under obligation to use it.

### 20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

Should the document be served to a point of delivery situated in another member state of the European Union then Regulation (EC) No. 1393/2007 is applicable and must be observed. Beyond the European context, the Hague Service Convention of 1965 allows for service of documents without recourse to consular and diplomatic channels. The latter are, however, required for service of documents to foreigners enjoying immunities under public international law.

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## Identification of assets

### 21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

Austria's land register is publicly available. An extract from the register showing information concerning the ownership of a particular immoveable property may be obtained from the competent court. With the help of licensed software typically used by attorneys and notaries public, a search by property may be done online. However, the database is only searchable by property number. It is therefore difficult to obtain comprehensive information about the registered immoveable property owned by a particular debtor unless the creditor is aware of the location of such property in advance. However, once the creditor has obtained an executory title they may request comprehensive information about the real estate owned by the debtor.

Austria's commercial register lists all limited liability companies and stock companies as well as partnerships and individual businesspeople whose annual revenues exceed a certain amount. The register lists each business entity's shareholders and its management. The database is searchable by name of company.

The website of the Austrian Patent Office maintains a register allowing for a quick and easy online search by name into national and European patents, trademarks and designs and protections.

In addition, creditors may turn to private service providers such as Kreditschutzverband 1870, Creditreform and Compass Gruppe offering information on a person's or a company's creditworthiness as well as indicating bank accounts, shares in other companies and also annual accounts.



## 22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

As mentioned in question 21, creditors who have already obtained an executory title against their debtors may search the Land Register by the name of that debtor.

Also, under specific circumstances stipulated in sections 47(1) no 1 and 2 AEA and in section 364a AEA, the debtor may be ordered to prepare a full list of their assets. Notably, the Austrian Penal Code foresees a sanction of up to six months of forced confinement in case the debtor provides false or incomplete information thus jeopardising the satisfaction of the claim.

Notably, the AEA grants attorneys and notaries public access to an enforcement database including information about the enforcement court, the case number and the amount of the debt subject to the enforcement proceedings. The database also shows previous attempts to seize the debtor's movable assets and if the debtor has been ordered to prepare an inventory of their property within the last year. It, however, does not provide information about proceedings in which the creditor has not taken an action to actively pursue enforcement within the last two years and also proceedings that have taken less than a month to conclude since their respective leave of enforcement. Most importantly, to gain access to this information, attorneys and notaries public do not need to exhibit an executory title, but merely attest the existence of a receivable their clients may have against the debtor as well as reasonable doubt as to the debtor's solvency. This allows also potential claimants to benefit from the new database and evaluate enforcement chances before commencing proceedings.

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## Enforcement proceedings

### 23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

The ACCP authorises arbitral tribunals to order pre-award interim or protective measures upon party request, should they find that the enforcement of the claim would otherwise be frustrated or significantly impeded. Regardless of the arbitration clause, parties may also request such measures from a state court.

Importantly, where the arbitral tribunal has been requested to issue interim measures the opponent of the party at risk must be heard.

Regardless of the arbitration clause, state courts are authorised to grant interim measures, too. This is important as it gives parties a chance to obtain interim measures before the arbitral tribunal is constituted.

Whether or not interim measures may be applied to assets owned by a foreign state depends on whether these assets are used to enable the state to exercise its state powers or not. For more on this issue, see question 34.

### 24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings ex parte?

Interim measures issued by an arbitral tribunal do not need to be recognised before their enforcement. A request for enforcement of an interim measure may be filed with the district court where the opponent of the party at risk has its habitual residence, domicile or seat. Otherwise, the request must be brought before the district court where the enforcement measure is to be carried out.

While arbitral tribunals are free to order interim measures of types that are unknown under Austrian law, section 593(3) ACCP authorises enforcement courts to transform them into interim measures of a type that is in conformity with Austrian law and that comes closest to the interim measure originally ordered by the arbitral tribunal. Importantly, in such cases, the party at risk must specify the Austrian interim measure it considers appropriate. Otherwise, its request for enforcement must be refused by the court under section 593(4) No. 4 ACCP.

Before granting enforcement, the arbitral tribunal must hear the opponent of the party at risk thereby giving it a chance to raise objections based on section 593(4) ACCP. This provision lists four grounds for refusing enforcement of interim measures. In addition to section 593(4) No. 4, which was already discussed above, an interim measure must be refused (i) if it suffers from a defect that would amount to a ground to set aside an arbitral award, (ii) if it is a foreign interim measure and suffers from a defect that would constitute a ground for refusing to recognise an arbitral award, or (iii) owing to incompatibility of the interim measure with prior court measures. The court must examine these grounds ex officio.

The ACCP provides for a list of grounds for suspending the enforcement of interim measures. Importantly, based on this provision, the interim measure must be suspended if the opponent of the party at risk has provided security in connection with the measure.



The decision of the district court may be appealed by both parties.

As mentioned above, the party at risk may choose to bring its request for interim measures before a state court. The court at the seat of the opponent of the interim measure is competent to grant such measures where the request has been raised before or during the arbitration or before enforcement proceedings. Otherwise, if the request has been filed with the court during an ongoing enforcement proceeding, it will be heard by the court in charge with enforcement proceedings.

Notably, the proceedings before the court are *ex parte*. Therefore, the opponent of the party at risk will only be heard upon appeal. Parties at risk may request the court to issue interim measures against third parties. This is an important advantage in comparison to interim measures issued by an arbitral tribunal that may only bind the parties to the arbitration. It is also important to note that the party at risk does not have to prove but merely to attest the fulfilment of the conditions for granting interim measures (ie, the existence of a claim and that its enforcement would be frustrated or significantly impeded if the court refuses to order the requested interim measure). If the claim is for a money payment, the party at risk will have to show that it is in jeopardy owing to circumstances arising from the behaviour of its opponent. Otherwise, it must attest that it is rooted in objective circumstances.

## 25 What is the procedure for interim measures against immovable property within your jurisdiction?

Neither the ACCP, nor the AEA provisions governing the enforcement of interim measures in general distinguish between the types of assets that the interim measures are aiming at. It makes a difference, however, whether the claim at risk is a claim for money payment or not.

In case it is a claim for money payment, the available enforcement measures are the following: (i) deposit and administration of tangible moveable asset and money, (ii) prohibition of any disposal or pledge in relation to a specific tangible movable asset, (iii) prohibition aimed at the opponent of the party at risk to collect specific receivables and a prohibition aimed at that party's debtors (third-party-debtors) to perform their corresponding obligations, (iv) administration of immovable property and (vi) prohibition of any disposal of or pledge in relation to a specific immovable property.

Otherwise, ie, in case the claim is not for money payment, in addition to the measures listed above, the party at risk may request the following interim measures: (i) deposition of assets with the court, (ii) right to retention, (iii) order aimed at the opponent of the party at risk to take specific conservation measures, and finally, under specific conditions, even (iv) arrest.

## 26 What is the procedure for interim measures against movable property within your jurisdiction?

Since there are no specific provisions governing the enforcement of such measures in particular, they must be enforced in accordance with the procedures described in questions 24 and 25.

## 27 What is the procedure for interim measures against intangible property within your jurisdiction?

Since there are no specific provisions governing the enforcement of such measures in particular, they must be enforced in accordance with the procedures described in questions 24 and 25.

## 28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

Court enforcement proceedings are typically based on documents and no oral hearing is required. Where a hearing is nevertheless scheduled, it would only be open to the parties to the proceedings. A streamlined procedure applies to claims not exceeding €50,000 and satisfying the other conditions of section 54b(1) AEA.

Court orders are subject to an appeal, except where it is expressly excluded by the law. While, in general, appeals must be brought within 14 days, with respect to court orders authorising the enforcement of foreign executory titles such as arbitral awards this time period is four weeks. Importantly, also, a recourse against the authorisation of enforcement of a foreign executory title allows for the applicant to refer to new facts.

The court does not examine the merits of the claim in the course of enforcement authorisation proceedings. Therefore, it might authorise the enforcement even where the underlying claim has lapsed or has been satisfied due to a circumstance that occurred after rendering of the executory title (ie, the arbitral award). The debtor may, therefore, raise claims against the creditor with the goal to close or limit the enforcement proceedings. The dispute over such claims will be heard by the court in accordance with the provisions of the ACCP. Similarly, the enforcement would be inadmissible, if the claim was not yet mature or not yet enforceable, where the creditor has waived their right to enforce the claim or under other similar circumstances expressly provided by the law. Finally, third parties whose rights have been violated in the course of the enforcement proceedings are also entitled to raise a claim against the creditor.

Actions of the bailiff (ie, an ancillary organ of the enforcement court in charge with the tracing, collection, exploitation of the debtor's assets) may either be subject to enforcement complaints regarding alleged non-compliance with the law or with court orders on the part of the bailiff or they may be subject to "supervision complaints" with respect to an alleged refusal or delay of enforcement actions.

## **29 What is the procedure for enforcement measures against immovable property within your jurisdiction?**

We distinguish between three types of enforcement measures against immovable assets that an award creditor may combine or apply for separately, namely (i) compulsory mortgage, (ii) compulsory administration with the goal to generate revenue to satisfy the claim and (iii) compulsory sale of the immovable asset.

Naturally, the compulsory sale of the immovable property is most intrusive measure the creditor may choose to request. Once all parties are notified, an independent expert will be appointed to evaluate the property. Its estimated value would then form the basis of the auction procedure. The property may not be sold at a price that is lower than 50 per cent of the estimated value.

## **30 What is the procedure for enforcement measures against movable property within your jurisdiction?**

The provisions regulating the enforcement measure against movable property distinguish between attachment against tangible and movable objects, attachment against receivables, attachment against claims to be handed out tangible property and other property rights (such as trademarks, patents, copyrights, licences and shares). Enforcement against intangible assets will be discussed in our answer to question 31.

Once the enforcement court permits the creditors to attach tangible movable assets, the bailiff takes charge of the remaining part of the proceedings. The bailiff's objective is to generate sufficient revenue to satisfy the creditor's claims within four months. The AEA provides for a very general normative framework for the enforcement measures thus allowing bailiffs a large degree of independence.

The bailiff is obliged to produce a seizure report listing the attached assets. This way, while remaining with the debtor, the respective assets are transferred into the public domain, and only governmental institutions may dispose of them. Notably, the AEA provides a list of certain types of tangible movable assets such as food products, pets, certain goods required for the exercise of religious rites and duties and money amounts before their next payment. Such assets may not be seized by the bailiff. Seized assets must be deposited with the court, with specific institutions or with third-party depositories appointed by the creditor.

The bailiff is the one to decide whether the sale should be direct or through an auction. Auctions may be conducted on the internet, at the court's premises, at the premises of a commercial auction house or at the site where these assets are generally held.

## **31 What is the procedure for enforcement measures against intangible property within your jurisdiction?**

The creditor may request the enforcement court to attach receivables owed to the award debtor by third-party-debtors. The court would then issue an order prohibiting the third-party-debtors from performing their obligations vis-à-vis the debtor and prohibiting also the award debtor from accepting their performance. Importantly, specific receivables such as nursing allowance, rent aid, family allowance and scholarships may not be attached. Other receivables may become subject to attachment proceedings but only to a limited extent or under further specific circumstances. The main purpose of these restrictions is to ensure that the debtor's income does not fall below the subsistence minimum.

Further property rights such as intellectual property rights, shares, licences and fishing rights may be attached provided that they are transferable from one person to another and provided that they may be subject to commercial exploitation. The creditor is required to indicate such rights in the request for attachment but does not need to specify a particular kind of commercial exploitation. Rather, upon issuing a prohibition to dispose of the property rights in question and upon hearing all creditors, the court will decide how best to satisfy their claims.

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## Enforcement against foreign states

### 32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

Austrian domestic law does not provide for a particular set of provisions governing enforcement proceedings against states. However, domestic statutory rules, such as article IX of the Introductory Law to the Law on Jurisdiction as well as international treaties and customary international law do address individual aspects of enforcement against states in the context of sovereign immunity. These provisions will be discussed in the questions that follow.

### 33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

In line with the theory of limited sovereignty, Austria distinguishes between acts of state which are governed by private law (*acta iure gestionis*) and acts through which states exercise state power (*acta iure imperii*). In the latter case, statutory law stipulates that the relevant documents must be served to the foreign state through the Federal Ministry for European and International Affairs. Domestic statutory law, of course, only applies provided that the subject matter is not regulated in an international treaty between the two states.

In general, the relevant state's embassy in Austria is not the right point of delivery. It may, however, accept the service of a particular document and forward it to the state addressee. With unopposed acceptance by the state, the document is then regarded as validly delivered.

### 34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

In line with the theory of limited immunity, foreign states are only exempt from the jurisdiction of Austria's courts to the extent that they act in their capacity as states (ie, where they exercise state power). Thus, foreign states do not enjoy immunity with respect to transactions based on private law and disputes arising from such transactions may be heard by Austrian courts.

Assets owned by foreign states and situated in Austria are exempt from enforcement proceedings depending on the purpose of their use. Where such assets are meant to be used solely for private transactions, they may be seized and become subject to enforcement proceedings in Austria. If, however, their purpose is to enable the foreign state to exercise its state powers (eg, to enable the embassy to perform its tasks), no enforcement measures may be ordered against them. This concerns the premises of foreign embassies as well as the apartments where that state's diplomats reside.

State immunity also extends to assets of mixed use. If an Austrian bank account owned by the embassy of a foreign state is not used solely for private transactions but also for payment enabling the embassy to exercise its state powers, such a bank account would fall under that state's immunity and therefore would be immune from enforcement measures in Austria. The purpose of this broad approach to state immunity is to avoid jeopardising the continued capacity of foreign states to maintain their embassies in Austria. It is on the creditor of the executory title to show that the purpose of the respective asset allows for an exemption from state immunity.

### 35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

Waiver of state immunity is governed by article IX of the Introductory Law to the Law on Jurisdiction. In accordance with this provision, states may waive their right to sovereign immunity at any stage of the proceedings by means of an agreement or through a unilateral declaration. To be effective, such a declaration must be made expressly. However, a state may implicitly confirm that such a waiver has been made. Also, there are no specific form requirements applicable to waivers of sovereign immunity. Such a declaration may also, therefore, be made verbally.

Importantly, a waiver made in relation to litigation or arbitration proceedings does not extend to the enforcement stage of the dispute. This means that an additional waiver referring to enforcement in particular is necessary and must be made under the rules as described above.



**Christian W Konrad**  
Konrad Partners

Dr Christian W Konrad is the founding and managing partner of Konrad Partners. He is an Austrian *Rechtsanwalt*, a solicitor of England and Wales, and admitted as *Euroadvokat* in the Czech and Slovak republics.

He is an advocate in the fields of international arbitration, international litigation and public international law. He has extensive experience in arbitral practice, procedure and advocacy both in civil and common law systems. His practice covers inter-state, international and commercial disputes. He has represented international organisations and businesses in a broad range of cases involving, inter alia, long-term energy contracts, concession agreements and entitlement to natural resources, immunities from jurisdiction, infrastructure projects, mergers and acquisitions. He also advises clients on the protection of their investment and enforcement of arbitration awards and state court judgments. As a chartered arbitrator, he frequently acts as arbitrator and is a member of panels of various arbitration institutions worldwide. He regularly lectures about his field of expertise and serves as vice president of the Kosovo Permanent Tribunal of Arbitration.



**Philipp A Peters**  
Konrad Partners

Philipp A Peters is an Austrian *Rechtsanwalt* and partner at Konrad Partners. He acts both as counsel and arbitrator in international ad hoc and institutional arbitration proceedings. He regularly represents clients in disputes involving international delivery and supply contracts, complex engineering and construction projects and joint ventures, in particular in the area of industrial engineering. Furthermore, he advises clients in relation to the preparation and drafting of international project and delivery contracts, on the growing impact of data protection and data privacy laws, and on the legal structuring of commercial projects.

He regularly lectures on his fields of expertise, in particular on issues of international arbitration, international contract law and international sales law. He is a member of the board of the Austrian Arbitration Association (ArbAut) and a former chairman and member of the advisory board of the Young Austrian Arbitration Practitioners, and a member of the German Institution of Arbitration (DIS), Group 1031 and the Vienna Association of Young Entrepreneurs.



Konrad Partners is a highly specialised international law firm delivering premier international arbitration services. The firm maintains offices in Vienna, Prague, Bratislava, Skopje and London. The lawyers of Konrad Partners serve both as advocates and as arbitrators in ad hoc and institutional proceedings, are qualified in multiple jurisdictions and have extensive expertise in handling high-profile arbitration cases before a wide range of international bodies.

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Our lawyers regularly advise clients throughout the lifecycle of a dispute, from negotiations through arbitration and litigation, including enforcement of arbitral awards and court judgments.

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Rotenturmstrasse 13  
1010 Vienna  
Austria  
Tel: +43 1 512 95 00

[www.konrad-partners.com](http://www.konrad-partners.com)

**Christian W Konrad**  
[c.konrad@konrad-partners.com](mailto:c.konrad@konrad-partners.com)

**Philipp A Peters**  
[p.peters@konrad-partners.com](mailto:p.peters@konrad-partners.com)