Global Arbitration Review

The Guide to Challenging and Enforcing Arbitration Awards

General Editor
J William Rowley QC

Editors
Emmanuel Gaillard and Gordon E Kaiser

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Publisher's Note

Global Arbitration Review is delighted to publish this new volume, *The Guide to Challenging and Enforcing Arbitration Awards*.

For those unfamiliar with Global Arbitration Review, we are the online home for international arbitration specialists, telling them everything they need to know about all the developments that matter. We provide daily news and analysis, and a series of more in-depth books and reviews, and also organise conferences and build work-flow tools. Visit us at www.globalarbitrationreview.com.

As the unofficial journal of international arbitration, sometimes we spot gaps in the literature earlier than other publishers. Recently, as J William Rowley QC observes in his excellent preface, it became obvious that the time spent on post-award matters has increased vastly compared with, say, 10 years ago, and it was high time someone published a reference work focused on this phase.

The Guide to Challenging and Enforcing Arbitration Awards is that book. It is a practical know-how text covering both sides of the coin – challenging and enforcing – first at thematic level, and then country by country. We are delighted to have worked with so many leading firms and individuals to produce it.

If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, M&A and mining disputes in the same unique, practical way. We also have books on advocacy in international arbitration and the assessment of damages.

My thanks to the editors for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

Contents

Editor's Preface

During the past two decades, the explosive and continuous growth in cross-border trade and investments that began after World War II has jet-propelled the growth of international arbitration. Today, arbitration (whether *ad hoc* or institutional) is the universal first choice over transnational litigation for the resolution of cross-border business disputes.

Why parties choose arbitration for international disputes

During the same period, forests have been destroyed to print the thousands of papers, pamphlets, scholarly treatises and texts that have analysed every aspect of arbitration as a dispute resolution tool. The eight or 10 reasons usually given for why arbitration is the best way to resolve cross-border disputes have remained pretty constant, but their comparative rankings have changed somewhat. At present, two reasons probably outweigh all others.

The first must be the widespread disinclination of those doing business internationally to entrust the resolution of prospective disputes to the national court systems of their foreign counterparties. This unwillingness to trust foreign courts (whether based on knowledge or simply uncertainty as to whether the counterparty's court system is worthy – i.e., efficient, experienced and impartial) leaves international arbitration as the only realistic alternative, assuming the parties have equal bargaining power.

The second is that, unlike court judgments, arbitral awards benefit from a series of international treaties that provide robust and effective means of enforcement. Unquestionably, the most important of these is the 1958 New York Convention, which enables the straightforward enforcement of arbitral awards in approximately 160 countries. When enforcement against a sovereign state is at issue, the ICSID Convention of 1966 requires that ICSID awards are to be treated as final judgments of the courts of the relevant contracting state, of which there are currently 161.

Awards used to be honoured

A decade ago, international corporate counsel who responded to the 2008 Queen Mary/PricewaterhouseCoopers Survey on Corporate Attitudes and Practices in Relation to Investment Arbitration (the 2008 Queen Mary Survey) reported positive outcomes on the use of international arbitration to resolve disputes. A very high percentage (84 per cent) indicated that, in more than 76 per cent of arbitration proceedings, the non-prevailing party voluntarily complied with the arbitral award. Where enforcement was required, 57 per cent said that it took less than a year for awards to be recognised and enforced, 44 per cent received the full value of the award and 84 per cent received more than three-quarters of the award. Of those who experienced problems in enforcement, most described them as complications rather than insurmountable difficulties. The survey results amounted to a stunning endorsement of international arbitration for the resolution of cross-border disputes.

Is the situation changing?

As an arbitrator, my job is done with the delivery of a timely and enforceable award. When the award is issued, my attention invariably turns to other cases, rather than to whether the award produces results. The question of enforcing the award (or challenging it) is for others. This has meant that, until relatively recently, I have not given much thought to whether the recipient of an award would be as sanguine today about its enforceability and payment as those who responded to the 2008 Queen Mary Survey.

My interest in the question of whether international business disputes are still being resolved effectively by the delivery of an award perked up a few years ago. This was a result of the frequency of media reports – pretty well daily - of awards being challenged (either on appeal or by applications to vacate) and of prevailing parties being required to bring enforcement proceedings (often in multiple jurisdictions).

Increasing press reports of awards under attack

During 2018, *Global Arbitration Review*'s daily news reports contained literally hundreds of headlines that suggest that a repeat of the 2008 Queen Mary Survey today could well lead to a significantly different view as to the state of voluntary compliance with awards or the need to seek enforcement.

A sprinkling of last year's headlines on the subject are illustrative:

- 'Well known' arbitrator sees award set aside in London
- Gazprom challenges gas pricing award in Sweden
- ICC award set aside in Paris in Russia–Ukrainian dispute
- Yukos bankruptcy denied recognition in the Netherlands
- Award against Zimbabwe upheld after eight years
- Malaysia to challenge multibillion-dollar 1MBD settlement
- Uzbekistan escapes Swiss enforcement bid
- India wins leave to challenge award on home turf

Regrettably, no source of reliable data is available as yet to test the question of whether challenges to awards are on the increase or the ease of enforcement has changed materially

since 2008. However, given the importance of the subject (without effective enforcement, there really is no effective resolution) and my anecdote-based perception of increasing concerns, last summer I raised the possibility of doing a book on the subject with David Samuels (*Global Arbitration Review*'s publisher). Ultimately, we became convinced that a practical, 'know-how' text that covered both sides of the coin – challenges and enforcement – would be a useful addition to the bookshelves of those who more frequently than in the past may have to deal with challenges to, and enforcement of, international arbitration awards. Being well equipped (and up to date) on how to deal with a client's post-award options is essential for counsel in today's increasingly disputatious environment.

David and I were obviously delighted when Emmanuel Gaillard and Gordon Kaiser agreed to become partners in the project.

Editorial approach

As editors, we have not approached our work with a particular view on whether parties are currently making inappropriate use of mechanisms to challenge or resist the enforcement of awards. Any consideration of that question should be made against an understanding that not every tribunal delivers a flawless award. As Pierre Lalive said in a report 35 years ago:

> *an arbitral award is not always worthy of being respected and enforced; in consequence, appeals against awards [where permitted] or the refusal of enforcement can, in certain cases, be justified both in the general interest and in that of a better quality of arbitration.*

Nevertheless, the 2008 Queen Mary Survey, and the statistics kept by a number of the leading arbitral institutions, suggest that the great majority of awards come to conclusions that should normally be upheld and enforced.

Structure of the guide

This guide is structured to include, in Part I, coverage of general matters that will always need to be considered by parties, wherever situated, when faced with the need to enforce or to challenge an award. In this first edition, the 13 chapters in Part I deal with subjects that include (1) initial strategic considerations in relation to prospective proceedings, (2) how best to achieve an enforceable award, (3) challenges generally, (4) a variety of specific types of challenges, (5) enforcement generally, (6) the enforcement of interim measures, (7) how to prevent asset stripping, (8) grounds to refuse enforcement, and (9) the special case of ICSID awards.

Part II of the book is designed to provide answers to more specific questions that practitioners will need to consider when reaching decisions concerning the use (or avoidance) of a particular national jurisdiction – whether this concerns the choice of that jurisdiction as a seat of an arbitration, as a physical venue for the hearing, as a place for enforcement, or as a place in which to challenge an award. This first edition includes reports on 29 national jurisdictions. The author, or authors, of each chapter have been asked to address the same 35 questions. All relate to essential, practical information on the local approach and requirements relating to challenging or seeking to enforce awards in each jurisdiction. Obviously, the answers to a common set of questions will provide readers

with a straightforward way in which to assess the comparative advantages and disadvantages of competing jurisdictions.

Through this approach, we have tried to produce a coherent and comprehensive coverage of many of the most obvious, recurring or new issues that are now faced by parties who find that they will need to take steps to enforce these awards or, conversely, find themselves with an award that ought not to have been made and should not be enforced.

Quality control and future editions

Having taken on the task, my aim as general editor has been to achieve a substantive quality consistent with *The Guide to Challenging and Enforcing Arbitration Awards* being seen as an essential desktop reference work in our field. To ensure content of high quality, I agreed to go forward only if we could attract as contributors, colleagues who were some of the internationally recognised leaders in the field. Emmanuel, Gordon and I feel blessed to have been able to enlist the support of such an extraordinarily capable list of contributors.

In future editions, we hope to fill in important omissions. In Part I, these could include chapters on successful cross-border asset tracing, the new role played by funders at the enforcement stage, and the special skill sets required by successful enforcement counsel. In Part II, we plan to expand the geographical reach with chapters on China, Saudi Arabia, Turkey and Venezuela.

Without the tireless efforts of the Global Arbitration Review team at Law Business Research, this work never would have been completed within the very tight schedule we allowed ourselves; David Samuels and I are greatly indebted to them. Finally, I am enormously grateful to Doris Hutton Smith (my long-suffering PA), who has managed endless correspondence with our contributors with skill, grace and patience.

I hope that all my friends and colleagues who have helped with this project have saved us from error – but it is I alone who should be charged with the responsibility for such errors as may appear.

Although it should go without saying, this first edition of this publication will obviously benefit from the thoughts and suggestions of our readers on how we might be able to improve the next edition, for which we will be extremely grateful.

J William Rowley QC

April 2019

London

Part II

Challenging and Enforcing Arbitration Awards: Jurisdictional Know-How

15

Austria

Christian W Konrad and Philipp A Peters[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., 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 when a minority of arbitrators refuse to sign it or are unable to do so. If 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 the date and place where it is rendered (i.e., the place of arbitration as agreed by the parties), although a failure to do so 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.

1 Christian W Konrad is the founding and managing partner and Philipp A Peters is a partner at Konrad Partners.

Applicable procedural law for recourse against an award

Applicable legislation governing 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 an arbitral tribunal to provide an explanation of an 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, and the arbitral tribunal may provide a correction of the award on its own motion within four weeks of the date of the award.

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

A 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. A tribunal would have four weeks to decide on a request to explain or correct an 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 effect on the running of the time limit for challenging the award and may not be set aside in independent proceedings. However, an additional award represents a new, separate award. Therefore, it may be set aside in separate proceedings and the time limit for challenging it starts running upon receipt of the award by the party seeking to have it set aside.

Appeals from an award

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, a motion will result in the setting aside of an 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 (i.e., it is not allowed to revise the factual and legal basis of the award). An award may be set aside only on the basis of very few grounds, which 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 presents 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 the matter or in breach of the applicable ACCP provisions;
- the award represents a violation of public policy (i.e., 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 was subject to Austrian court proceedings, would have led to a revision of the court judgment under Section 530(1), Nos. 1 to 5 of the 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; or
- 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. According to scholars, 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 of receipt of the award. However, this does not apply with respect to the criminal law grounds mentioned above. The time limit for invoking these grounds is determined *mutatis mutandis* by the provisions governing the reopening of court proceedings.

If a challenge against an award is successful, enforcement proceedings must be abandoned. The effects of the arbitral award would cease *ex tunc* (i.e., as if it had never been rendered); however, the arbitration agreement 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.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

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 those 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 ACCP.

Arbitral awards rendered by a tribunal whose seat is abroad (i.e., 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 seq. of the 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, which governs the recognition and enforcement of foreign arbitral awards. In 1964, the European Convention on International Commercial Arbitration (the European Convention) entered into force for Austria; Article IX thereof governs the recognition and enforcement of arbitral awards.

Austria has also ratified the ICSID Convention of 1965; Article 53 et seq. thereof govern the recognition and enforcement of awards rendered under this Convention.

Besides the above-mentioned multilateral treaties, Austria has concluded and ratified or succeeded to bilateral agreements with 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. If this is the case, a court may only refuse enforcement if all conditions in all the applicable treaties are fulfilled.

The New York Convention

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 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 Convention fully applies to the recognition and enforcement of arbitral awards in Austria.

Recognition proceedings

Competent court

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, thus recognising it.

With respect to local jurisdiction, in general, Section 409 of the AEA effectively entitles an award creditor to choose between the district court where the award debtor has its 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 Austrian legal policy.

Jurisdictional issues

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 those already discussed, there are no further requirements for the jurisdiction of the court. With respect to enforcement proceedings, 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 on the debtor's seat or domicile, the applicant must show that the asset is indeed located within the territorial jurisdiction of the court where the enforcement application is pending. An applicant would typically combine the recognition proceedings with a request for enforcement authorisation. However, a request for enforcement authorisation requires the indication of specific assets.

Form of the recognition proceedings

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 (i.e., without conducting a hearing or otherwise involving the award debtor). This procedure was designed to grant the award creditor the advantage of unannounced enforcement access.

However, this 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.

Form of application and required documentation

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 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) of the ACCP governs the same subject matter but it places the decision whether to request that the applicant 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.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation 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, an applicant must submit 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 (i.e., the regional court in Klagenfurt in the state of Carinthia). Similarly, no translation is required with respect to awards in Croatian if the recognition proceedings are pending before the district courts in Eisenstadt, Güssing, Mattersburg, Neusiedl am See, Oberpullendorf or Oberwart as well before their common appeals court (i.e., the regional court in Eisenstadt in the state of Burgenland).

It is within the discretion of the competent court to request that an applicant submit 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.

Other practical requirements

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 a debtor as indicated in a 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. The 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 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 the procedural costs.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

An arbitral award that provides for a final resolution of at least part of a dispute on the merits meets the criteria of the New York Convention and thus may be recognised and enforced in Austria provided that the substantive issues it concerns are separable from the rest of the dispute.

Interim awards, on the other hand, do not represent a final resolution of a dispute regardless of whether they claim to resolve the dispute in its entirety or only parts of it. Hence, such awards are not enforceable.

However, interim and conservatory measures are enforceable in Austria. This is true regardless of whether they may be characterised as awards in the sense of the New York Convention or not.

Grounds for refusing recognition of an award

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?

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 Convention is influenced by the jurisprudence of the Austrian Supreme Court developed under Section 611 of the ACCP, which stipulates the grounds for setting aside an arbitral award as they correspond with the grounds listed in Article V.

Effect of a decision recognising an award

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

Once 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 in question 6, the award creditor has to request the court to issue an enforcement authorisation. As also discussed in question 6, the AEA allows applicants to combine this request with a request for a leave for enforcement to obtain the decisions on both subject matters at once.

Decisions refusing to recognise an award

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

Since recognition proceedings are *ex parte*, an 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 if the award debtor's seat or domicile is abroad, provided that this appeal is the debtor's 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.

Stay of recognition or enforcement proceedings pending annulment proceedings

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 a 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 an application to set aside an award 'generously', it has also stressed that the onus 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 if 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 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.

Security

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 an award debtor to provide security, should a creditor request this. As a general rule, the court will require the debtor to provide the security.

Recognition or enforcement of an award set aside at the seat

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? If an 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 has 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).

Service

Service in your jurisdiction

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 document service, provided that this person has its point of delivery within the territory of Austria. If 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.

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

Service out of your jurisdiction

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. However, the latter are required for service of documents to foreign parties enjoying immunity under public international law.

Identification of assets

Asset databases

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 immovable 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 immovable property owned by a particular debtor unless the creditor is aware of the location of the property in advance. However, once the creditor has obtained an executory title they will, upon request, receive comprehensive information about the real estate owned by the debtor.

Austria's commercial register lists all limited liability companies and stock companies, and those partnerships and individual business peoplewhose 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 of national and European patents, trademarks and designs, and protections.

Creditors may turn to private service providers, such as Kreditschutzverband 1870, Creditreform and Compass Gruppe, that offer information about a person's or a company's creditworthiness as well as indicating bank accounts, shares in other companies and annual accounts.

Information available through judicial proceedings

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

As mentioned in question 21, the Land Register is searchable by name for creditors who have already obtained an executory title against their debtors.

Under specific circumstances stipulated in the AEA, a 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 if a debtor provides false or incomplete information that jeopardises the satisfaction of the claim.

Notably, recent amendments to the AEA allow attorneys and notaries public access to enforcement data (i.e., 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 a debtor's movable assets and whether the debtor has been ordered to prepare an inventory of its property within the past year. However, it does not provide information about proceedings in which a creditor has not taken an action to actively pursue enforcement within the past two years or 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 to the existence of a receivable their clients may have against the debtor, and to reasonable doubt as to the debtor's solvency. This allows potential claimants to benefit from the new database and evaluate enforcement chances before commencing proceedings.

Enforcement proceedings

Availability of interim measures

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 a claim would otherwise be frustrated or significantly impeded. Regardless of the arbitration clause, parties may also request such measures from a state court.

Importantly, if 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 their 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 matter, see question 34.

Procedure for interim measures

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) of the 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, or its request for enforcement must be refused by the court under Section 593(4), No. 4 of the 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) of the ACCP. This provision lists four grounds for refusing enforcement of interim measures. In addition to Section 593(4), No. 4, as discussed above, an interim measure must be refused (1) if it suffers from a defect that would amount to a ground to set aside an arbitral award, (2) 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 (3) if the interim measure is incompatible 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, an interim measure must be suspended if an 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 has already been discussed, 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 the measures if 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 a current enforcement proceeding, it will be heard by the court in charge of the 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

with interim measures issued by an arbitral tribunal that may only bind the parties to the arbitration. Note also that the party at risk does not have to prove but merely to attest the fulfilment of the conditions for granting interim measures (i.e., 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.

Interim measures against immovable property

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. However, it does make a difference whether the claim at risk is a claim for money payment or not.

If the claim is for money payment, the available enforcement measures are the following: (1) deposit and administration of tangible movable assets and money; (2) prohibition of any disposal of or pledge in relation to a specific tangible movable asset; (3) prohibition aimed at an 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; (4) administration of immovable property; and (6) prohibition of any disposal of or pledge in relation to a specific immovable property.

If the claim is not for money payment, in addition to the measures listed above, the party at risk may request the following interim measures: (1) deposition of assets with the court; (2) right to retention; (3) order aimed at the opponent of the party at risk to take specific conservation measures; and even, under specific conditions, (4) arrest.

Interim measures against movable property

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.

Interim measures against intangible property

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.

Attachment proceedings

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. If a hearing is nevertheless scheduled, it would be open only 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) of the AEA.

Court orders are subject to an appeal, except if is expressly excluded by the law. In general, appeals must be brought within 14 days; however, with respect to court orders authorising the enforcement of foreign executory titles, such as arbitral awards, the time limit is four weeks. Note also that a recourse against the authorisation of enforcement of a foreign executory title allows for an applicant to refer to new facts.

The court does not examine the merits of a claim in the course of enforcement authorisation proceedings. Therefore, it might authorise the enforcement even if the underlying claim has lapsed or has been satisfied as the result of a circumstance that occurred after rendering of the executory title (i.e., the arbitral award). A debtor may therefore raise claims against a creditor with the aim of closing or limiting the enforcement proceedings. A dispute regarding such claims will be heard by the court in accordance with the provisions of the ACCP. Similarly, an enforcement would be inadmissible if the claim was not yet mature or not yet enforceable, if the creditor has waived its 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 a creditor.

Actions of the bailiff (i.e., an ancillary organ of the enforcement court in charge of tracing, collecting or making use 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.

Attachment against immovable property

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

We distinguish between three types of enforcement measures that an award creditor may combine or apply for separately, namely (1) compulsory mortgage, (2) compulsory administration with the aim of generating revenue to satisfy a claim, and (3) compulsory sale of an immovable asset.

Naturally, the compulsory sale of an immovable property is the most intrusive measure a creditor may choose to request. Once all parties are notified, an independent expert will be appointed to evaluate the property. Its estimated value will 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.

Attachment against movable property

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

The provisions regulating an enforcement measure against movable property distinguish between attachment against tangible and movable objects, attachment against receivables, attachment against claims to be handed out in respect of tangible property and other property rights (such as trademarks, patents, copyrights, licences and shares). Enforcement against intangible assets is discussed in 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. In this way, while remaining with the debtor, the respective assets are transferred into the public domain, and only government 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. These types of 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 the assets are generally held.

Attachment against intangible property

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

A creditor may request the enforcement court to attach receivables owed to the debtor by third-party debtors. The court would then issue an order prohibiting the third-party debtors from performing their obligations as regards the award debtor and prohibiting 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.

Enforcement against foreign states

Applicable law

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, and international treaties and customary international law do address individual aspects of enforcement against states in the context of sovereign immunity. These provisions are discussed in the questions that follow.

Service of documents to a foreign state

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 that 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 Europe, Integration and Foreign 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. However, it may 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 being validly delivered.

Immunity from enforcement

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 (i.e., 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. If the assets are meant to be used solely for private transactions, they may be seized and become subject to enforcement proceedings in Austria. However, if their purpose is to enable the foreign state to exercise its state powers (e.g., 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. The onus is on the creditor of the executory title to show that the purpose of the respective asset allows for an exemption from state immunity.

Waiver of immunity from enforcement

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 therefore be made also 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 is necessary, referring to enforcement in particular, and must be made under the rules as described above.

Appendix 1

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Enforcement used to be an irrelevance in international arbitration. Most losing parties simply paid. Not so any more. The time spent on post-award matters has increased vastly.

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