The Dispute Resolution Review

Third Edition

Editor
Richard Clark

Law Business Research

The Dispute Resolution Review

This article was first published in The Dispute Resolution Review, Third Edition (published in April 2011 – editor Richard Clark).

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGER
Adam Sargent

MARKETING MANAGERS
Nick Barette
Hannah Thwaites

EDITORIAL ASSISTANTS
Nina Nowak
Lydia Gerges

PRODUCTION MANAGER
Adam Myers

PRODUCTION EDITOR
Kathryn Smuland

SUBEDITOR
Davet Hyland
Sarah Morgan

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN: 978-1-907606-05-2

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: +44 844 2480 112

CONTENTS

Chapter 3

AUSTRIA

Christian Dorda and Felix Hörlsberger[*]

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

The Federal Republic of Austria is a civil law country. Austrian law is thus codified in statutes and acts. The General Civil Code, the Commercial Code and the Austrian Code on Civil Procedure as well as the Competence Code are federal laws.

In civil law matters Austria has a three-tier court system, structured as follows:

a For specific disputes, e.g., disputes relating to tenancy law, and for disputes with an amount in question not exceeding €10,000, district courts are the first instance, regional courts the second instance and, provided the amount in dispute exceeds €4,000 and the issue to be dealt with is a legal question of major importance, the Supreme Court can be invoked as the third instance.

b For all other disputes the regional courts are the first instance; second instance is one of the four higher courts and third instance the Supreme Court, provided the legal question is of major importance.

In addition, there exist courts specialised on labour matters and on commercial disputes (to be precise, the Vienna Commercial Court and specialised benches at the other regional courts).

In principle, decisions of the first instance are rendered by a single judge. Parties may demand that three judges decide a case, if the amount in dispute exceeds €100,000, a demand made quite rarely. However, three judges are deciding on employment law and social security law proceedings.

The courts of first and second instance deal with the facts, whereas the Supreme Court deals only with legal questions. Parties are obliged to state their case in the first oral hearing, the 'preparatory hearing'. In that hearing the judge will discuss with the

* Christian Dorda is a senior partner and Felix Hörlsberger a junior partner at Dorda Brugger Jordis Rechtsanwälte GmbH.

parties the programme for the proceedings. In an appeal, the parties are, in general, limited to the factual assertions made before the court of first instance.

II THE YEAR IN REVIEW

i Impact of the financial crisis (in general)

Dispute resolution practices have seen the impact of the financial crisis in recent years globally – Austria is no exception. Many companies and wealthy individuals suffered significant losses and are now seeking compensation. There are more than 12,000 cases pending at the Vienna Commercial Court alone, most of them directly connected with unsuccessful investments or business dealings. Although additional judges were appointed to the Vienna Commercial Court, a judge still has to deal with more than 350 cases, which has lead to extended waits between hearings.

ii Information to be provided to investors

Before the recent financial crisis the market at the Vienna Stock Exchange was quite bullish. Some market players tried to take advantage of the active state of the stock exchange. To give an example, a rather small Austrian private bank developed a structure whereby three companies carrying its well-known brand name were established in the form of off-shore companies (in Jersey), the shares of which were listed on the Vienna Stock Exchange in the form of Austrian depositary certificates ('ADCs'). The ADCs, however, were advertised and marketed to small investors as 'share certificates', under the pretence of high returns although the off-shore companies had entered into high-priced management agreements with subsidiaries of the private bank and into market maker agreements and licence agreements with the private bank itself. As is common business knowledge, companies loaded with high costs do not work well in a crisis. The matter became even more dramatic when criminal charges were brought against the managers and even the owner of the private bank that, *inter alia*, over-optimistic reports without a reasonable basis had been launched in *ad hoc* notifications, whereas, in reality, the rise in prices resulted from secretly buying back ADCs without previously informing the market. When investors finally found out what had happened, the share price slumped and the Financial Market Authority ('the FMA'), together with the public prosecutor, started investigations. The penal matter is pending. Before the civil courts, investors, however, were successful to some extent: the Supreme Court recently decided in a leading case[1] and in two subsequent decisions[2] that proper information on financial products shall be given to investors not only in the prospectus but also in advertisements of the issuer, failing which investors may challenge the purchase agreements on the basis of having been provided with misleading information.

Thus, not only issuers but also other market participants are well advised to carefully avoid incomplete or misleading information, in particular in any kind of

1 Austrian Supreme Court, 20 January 2009, docket No. 4 Ob 188/08p.

2 Austrian Supreme Court, 31 August 2009, docket No. 4 Ob 65/10b; Austrian Supreme Court, 22 September 2010, docket No. 8 Ob 25/10z.

advertisement, and to even include risk sections in folders, presentations and other information provided to investors.

iii Directors' and officers' liability

Austria's fourth largest bank, BAWAG, suffered a loss of about €640 million in 1998 and of another €400 to €500 million in 2002. Management decided to conceal these losses, allegedly in order to avoid a crisis. When the case was finally discovered in 2006, the management had to face criminal charges of having concealed the losses from shareholders and the banking supervisor by a series of manipulative transactions. Recently, the Supreme Court convicted the former CEO and his successor for infidelity of trust and falsification of the balance sheet in this regard; the decision of the first instance court with regard to all other accused was lifted.[3] A new trial is to be scheduled in this regard.

Furthermore, BAWAG's sole shareholder, an investment vehicle of the Austrian trade union, sued the (meanwhile defunct) board members and the (former) president of the Austrian trade union for damages. Under Austrian law the management, however, is liable for mismanagement towards the company but not the company's shareholders who are deemed to suffer only 'reflex damage'. With that argument, the claim was dismissed by the lower instances, whereas the Supreme Court recently held that the theory of reflex damage shall not prevent the management from becoming liable towards the shareholders if acting in a criminal way or willingly *contra bonos mores*. On the other hand, the Supreme Court followed management's argument that any benefit the shareholders may derive from management's fraudulent actions shall reduce the amount of the damage.[4]

iv Squeeze-out in an international context

Under Austrian company law a squeeze-out of minority shareholders (i.e., shareholders with a share not exceeding 10 per cent) is possible for fair-value compensation in cash. The main shareholder of an Austrian leading bank applied this procedure to the effect that the bank became a wholly owned subsidiary of an Italian parent controlling a group of financial institutions. Minority shareholders contested the cash compensation as being inadequate and initiated proceedings before the Austrian court geographically competent at the bank's place of incorporation. The bank, however, raised jurisdictional objections arguing that the place of incorporation of the receiving shareholder, the Italian parent company, shall be relevant. The matter was taken to the Supreme Court,[5] which held that Austrian courts do have jurisdiction. This is the first decision in Austria dealing with the question whether contesting the cash compensation in the context with a squeeze-out comes within the general ambit of Article 2 (1) in conjunction with Article 60 of the Brussels I Regulation as a pecuniary claim (in which case Italian courts would be competent) or the special rule of Article 22 No. 2 of the Brussels I Regulation) as a claim challenging a shareholders' resolution (in which case Austrian courts are competent).

3 Media information available at www.ogh.gv.at/aktuelles/index.php?nav=18.

4 Austrian Supreme Court, 23 December 2010, docket No.8 Ob 6/10f.

5 Austrian Supreme Court, 17 February 2010, docket No. 6 Ob 221/09g.

The Supreme Court held that these proceedings are functionally similar to challenging a shareholders' resolution.

III COURT PROCEDURE

i Overview of court procedure

The rules for the jurisdiction of courts are set forth in the Competence Code. As to cross-border cases, the international jurisdiction of Austrian courts is determined by EU regulations and international conventions which supersede national law. In particular, these are the Brussels I Regulation[6] for general civil and commercial matters, the Insolvency Proceedings Regulation[7] for insolvency matters, the Brussels I Regulation[8] for family law matters and the Lugano Convention (as revised in 2007) for cases concerning parties in EFTA member states.[9] The rules of (contentious) civil procedure themselves are set forth by the Austrian Code on Civil Procedure, which also provides the legal framework for arbitration proceedings. Recently, the traditional court holidays in summer (15 July to 25 August) and winter (24 December to 7 January) have been removed from the Code to accelerate proceedings. Also worth mentioning is the Court Organisation Act, which governs the internal operations of the courts, and the Act on Non-Contentious Procedure, which provides procedural rules for proceedings in non-contentious matters like adoption, alimony or inheritance.

The Austrian Enforcement Act applies to the enforcement of both domestic and international judgements and arbitration awards in Austria. The recognition of foreign judgements is governed by several EU laws, like the Brussels I and II Regulations, the Lugano Convention and by a number of bilateral and multilateral enforcement treaties Austria has signed in the past.

A major change in Austrian civil procedure was the introduction of the new Insolvency Code, which came into force on 20 May 2010. It replaced the traditional bipolar system of bankruptcy and forced restructuring and aims to ease the restructuring of insolvent companies, instead of closing them down.

At EU level, the strong activities of the previous years slowed down, giving practitioners and scholars the chance to work with and elaborate on the extensive set of new rules that have been introduced in recent years.

ii Procedures and time frames

Normally, civil actions start with filing a complaint. The claimant has to demonstrate the court's jurisdiction, the facts supporting the claim, a request for a specific relief and an index of the evidence supporting the claim. In cases where exclusively monetary relief not exceeding €75,000 is sought against a domestic defendant, a standardised procedure

6 Regulation 44/2001 of 22 December 2000.

7 Regulation 1346/2000 of 29 May 2000.

8 Regulation 2201/2003 of 27 November 2003.

9 Revised Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007.

must be used. Against defendants residing in another Member State, claimants can use, for any amount claimed, the standard claim forms provided by the European Payment Procedure Regulation[10] and, for claims of up to €2,000, the European Small Claims Procedure.[11] It should be noted that Austria has concentrated the jurisdiction for all European small claims at the Vienna District Court for Commercial Matters.

Upon service of the complaint by the court, the defendant may file an answer to the complaint within four weeks. In the answer, the defendant may reply to the factual and legal allegations in the complaint, include (affirmative) defences, provide a list of the evidence supporting its case and a request for relief. A challenge of the court's jurisdiction shall be raised already in the answer. After the court has received the defendant's answer, it sets a date for an oral hearing and usually orders the parties to exchange another round of written pleadings to prepare the first hearing. These preparatory pleadings must reach the court and the opponent one week before the hearing, unless the court grants an extension.

The judge will then discuss the substantive and legal allegations with the parties in the first oral hearing, sound out a potential settlement and, if that fails, establish a plan for the further conduct of the proceedings. In order to sensibly attempt a possible settlement, the party or an informed representative of the party must attend the first oral hearing.

After the trial has started, the parties may orally introduce new factual allegations and evidence until the close of proceedings. However, the court may reject belated submissions *ex officio* or upon a party's request if it concludes that they were introduced too late due to gross negligence or if their admission would greatly delay the proceedings.

Whereas legal arguments are usually exchanged in writing, evidence is taken during the oral hearing. The Austrian Code on Civil Procedure provides a detailed framework for the testimony of lay and expert witnesses and the parties, the submission of documentary evidence, expert reports, the inspection of objects and on-site inspection. While the parties may not be forced to testify in court, witnesses of fact are obliged to give their testimony and to tell the truth. As untruthful unsworn testimony of witnesses already qualifies as perjury, a sworn testimony of witnesses is rare. Written witness statements are not admissible in regular civil court proceedings in Austria.

Expert witnesses are employed by the court and not by the parties; nevertheless, the latter have to bear the costs.

As soon as all necessary evidence has been taken, the proceedings are closed. In general, unlike in common law countries, elaborated oral opening or closing statements are not customary before Austrian civil courts.

Although the Austrian Code on Civil Procedure allows for the oral promulgation of judgements, decisions, in practice, are rendered in writing. Despite the rule that judgments shall be issued within four weeks upon the closure of the proceedings, it is more realistic to expect them within three to six months, depending on the complexity of the case. The judicial system has been reformed repeatedly in the past years to decrease

10 Regulation 1896/2006 of 12 December 2006.

11 Regulation 861/2007 of 11 July 2007.

the workload and to allow for faster decision-making; whether this can be achieved, however, remains to be seen. According to a survey undertaken in January 2009, on average 45 per cent of the proceedings brought before the Austrian courts ended (by judgment, settlement or otherwise) within six months; 32 per cent lasted up to one year; 17 per cent lasted between one and two years; 4 per cent took between two and three years; and only 2 per cent continued for longer than three years.

With regard to decision-making, judges are not bound by any formal rules of evidence. After carefully considering the outcome of the entire proceedings and the taking of evidence, it lies at the discretion of the judge whether an alleged fact is held to be true or not. The court has to exercise the same discretion if parties have refused to answer questions. Circumstances and considerations that have affected the court's opinion in a crucial way must be reflected in the reasoning of the judgment.

The Act on Non-Contentious Procedure gives the judge more influence in the collection of evidence and differs in many ways from general civil procedure. Within that framework, a case does not start with a complaint, but with an application, and proceedings are less formal.

The Austrian Code on Civil Procedure provides a set of different urgent or interim applications. The preservation of evidence (i.e., on-site inspection, witness testimony, expert testimony) may be requested prior to and during any stage of the proceedings, if otherwise the evidence will be lost or its taking hampered or the requesting party has a right to have an object's current status determined.

Interim measures may be granted upon a party's request pursuant to the Enforcement Act. Their purpose is to secure (1) monetary claims, (2) other individual claims (e.g., claims for performance or to cease and desist) or (3) the personal sphere of the applicant (e.g., against imminent thread or violence among family members). Interim measures may be requested before or together with the filing of a complaint or while the proceedings are pending.

A court may issue an interim measure in order to secure a monetary claim if it is likely that the defendant would prevent or endanger the enforcement of a later judgment through the destruction, concealment or transfer of assets. Such a measure may also be granted in the event that a later judgment would need to be enforced in countries that neither signed the Brussels nor the Lugano Convention.

To secure other individual claims, courts may issue an interim measure, if the lack of such injunction would endanger the objective of the enforcement or the pursuance of the basic claim, which includes the necessity to enforce the later judgement in states that did not sign the Conventions. A court may also order an interim measure to protect the applicant from imminent violence or the imminent danger of irrecoverable damage. Generally, for interim measures to be granted, the underlying claim has to be alleged and sufficiently verified, and the measure must not create irrevocable situations. Interim measures may include court orders, the freezing of bank accounts, attachment of the defendant's assets, prohibitions for third parties to transfer funds to the defendant or the seizure or administration of physical objects or businesses.

In Austria, the general limitation period is 30 years. However, many claims are time-barred after three years, in particular claims for rent and leasehold payments, for employees' salaries and for account receivables, for example, resulting from goods delivered or works performed. Damage claims based on contract or tort law also expire after three

years; the period, however, does not start before the injured party has discovered the damage and the identity of the offender. If either the damage or the offender is not discovered or identified, or if the injury is the result of felony, the general limitation period of 30 years applies. After a complaint has been filed with the court, the period of limitation is being suspended.

iii Class actions

There are no forms of class actions available in Austria that could be considered equal to those in common-law countries. Yet there are comparable forms of collective action. A collective claimant – typically an independent organisation like a consumer organisation – may collect and accumulate individual claims and bring a suit in the organisation's own name, but in the interest of all participants. After the proceedings are concluded, the secured damages or assets are distributed among the participants. This form of collective action is not directly set forth in the Austrian Code on Civil Procedure, but was established by a ruling of the Supreme Court in 2005.[12] According to the judgment, claims must be founded on materially similar legal grounds and the main issue of the proceedings must relate to the same factual or legal questions.[13]

Another form of collective action is explicitly set forth in the Consumer Protection Act. Certain interest groups like the Federal Chamber of Labour or the Association for Consumer Information may bring an action in their own name for the common benefit. They may only request a cease-and-desist order against an entity that (1) uses or recommends standard terms and conditions in its business transactions that violate the principles of *bonos mores*, or (2) uses unfair practices in advertising. If the action is successful, the company must not use the incriminated provisions or engage in the unfair practice in the future and must not invoke the incriminated provisions in existing contracts with consumers. Even though such judgments are only enforceable inter partes, they have shown far-reaching effect as to business practices in business-to-consumer markets like telecommunications or bank services.

iv Representation in proceedings

As to general and contentious civil proceedings, parties need to be represented by an attorney before all courts and in all types of proceedings if the amount in dispute exceeds €5,000. The law does not differ between natural persons and legal entities.

For specific matters falling within the district courts' exclusive jurisdiction, for example interference with possession, a party may represent itself in court proceedings even where the amount in dispute is above this threshold.

v Service out of the jurisdiction

Regardless of whether a natural person or a legal entity is served, service abroad is principally performed (1) in accordance with bilateral and multilateral treaties to which Austria is a signatory, (2) through the Austrian consulates and embassies, if necessary,

12 Austrian Supreme Court, 21 August 2003, docket No. 4 Ob 116/05w.

13 Austrian Supreme Court, 14 July 2010, docket No. 7 Ob 127/10t.

pursuant to the regulations of the state in which service is to be performed or (3) on the basis of international usages.

In civil and commercial matters, service of judicial and extrajudicial documents is performed within all EU Member States in accordance with the European Service Regulation.[14] The Service Regulation derogates all bilateral treaties for the service of documents in civil and commercial proceedings concluded between Austria and other EU Member States, except for the bilateral treaty of 6 June 1959 between Austria and Germany, which further eases the requirements for service.

All Austrian courts act as 'transmitting authorities' to be designated in accordance with Article 2 of the Service Regulation. The 'central body' to be designated pursuant to Article 3 of the Service Regulation is the Austrian Ministry of Justice. As opposed to service through embassies and consulates (Article 13 of the Service Regulation), which is admissible in Austria as well, direct service by judicial officers, officials or other competent persons is not possible. For other countries, the Hague Civil Procedure Conventions of 1954 may apply. Austria is not a signatory of the Hague Service Convention of 1965.

vi Enforcement of foreign judgments

To enforce a foreign judgment in Austria, it has to be declared enforceable by an Austrian court. The court examines whether two preconditions are met: First, the judgment must be enforceable in the country where it was rendered and, second, reciprocity of enforcement must be ensured by a treaty. Within the EU, the enforcement procedure is governed by the Brussels I Regulation and the Brussels II Regulation. In relation to EFTA member states, the Lugano Convention applies. Austria has also signed numerous bilateral and multilateral enforcement agreements.

vii Assistance to foreign courts

According to the Austrian Code on Civil Procedure legal assistance to foreign courts shall be rendered upon their request, unless treaties or regulations provide otherwise. Legal assistance is rendered pursuant to the Hague Convention on Civil Procedure of 1954. Assistance will only be denied if the action required is prohibited in Austria or if the action requested by the foreign court is not a judicial matter pursuant to Austrian law. In the latter case, however, the court may transfer the request for legal assistance to the relevant administrative authority. The legal assistance requested shall be rendered pursuant to the law applicable at the site of the requested court. The requested court shall *ex officio* conduct all arrangements necessary for the performance of the legal assistance and may therefore diverge from national law only if so specifically requested, and only to the extent as it is required to apply the foreign law and does not appear to violate national law.

Also worth mentioning is the European Evidence Regulation.[15] For rendering legal assistance under this regulation, the Austrian district courts are the competent courts. The

14 Regulation 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

15 Regulation 1206/2001 of 28 May 2001.

'central body' according to Article 3 of the Evidence Regulation is the Austrian Ministry of Justice. Representatives of the requesting court may be present during the taking of evidence by the requested court (Article 12 of the Evidence Regulation); this right is also granted to representatives of non-EU Member States. The foreign requesting court itself may only take evidence in Austria with the permission of the Ministry of Justice (Article 17 of the Evidence Regulation). However, the Ministry of Justice's permission is not necessary for any fact finding or examination by foreign experts. Austria is not a signatory to the Hague Evidence Convention.[16]

viii Access to court files

The parties to ongoing proceedings have access to and may copy the entire court file with the exception of draft judgments and decisions and protocols on the votes of the judges. The costs for copying court documents have strongly increased in recent years due to public budget necessities; parties have to pay a fee of €1 for each copied page. Third parties may access court files of ongoing proceedings and copy the documents only with permission of the parties to the proceedings. In the absence of the parties' permission, this right may be granted to a third party only if, and to the extent that, the third party is able to prove its legal interest in the file. On the other hand, oral court hearings are open to the general public. The public may only be banned from the hearing in certain situations, namely, if there is a concern regarding the endangerment of *bonos mores* or public order, or if the public access to the oral hearing is abused. The court then may order the exclusion of the public *ex officio*. Upon a party's request, the public may also be excluded if family matters are set to be discussed before court or if business, trade or official secrets would be endangered by the public's presence. Judgments of all civil, criminal and administrative proceedings that have been completed are collected in a searchable online database[17]. The database also contains all decisions of the Supreme Court, but only selected decisions of the minor courts. As to non-published decisions and the content of court files on completed proceedings, the same rules as for ongoing proceedings apply.

ix Litigation funding

The funding of legal actions by third-party financiers is rather new to Austrian litigation. The market for such services has emerged and steadily increased over the past years. Lately, the companies offering litigation funding were heavily involved in class actions by private investors against banks and investment consultants in connection with losses due to alleged misconduct before and during the financial crisis.

Under a typical finance agreement, the financier will incur the risk of costs and expenses of a party to the litigation in return for the party promising the financier a percentage of the compensation awarded should the party prevail in the proceedings (*de facto*, a contingency fee agreement). The percentage is contractually fixed in advance

16 The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1979.

17 http://ris.bka.gv.at/Judikatur/.

between the financier and the party, and depends on the party's prospects of success, the duration of the proceedings, the amount claimed and the financial strength of the opposing party. Prior to financing the respective litigation, the third-party financier will carefully assess the claims in dispute. Third-party financiers will usually not intervene in the proceedings, recommend a specific representative to a party or provide any legal advice to the latter. Attorneys, on the other hand, are prohibited by Austrian law from acting on the basis of a strict contingency fee; any provision in a contract stipulating such an agreement is considered void.

IV LEGAL PRACTICE

i Conflicts of interest and Chinese walls

Attorneys are not allowed to give, at any time, advice or represent a party if they previously represented the opponent or acted as a judge or a public prosecutor in the same or a related matter. On the other hand, even in an unrelated matter, they must not simultaneously represent the opponent side, and a cooling-off period shall be observed. These ethical rules also apply to attorneys belonging to the same law firm. Thus, formal procedures like 'Chinese walls' within the law firm are not a truly viable solution when contradictory interests prevail in the matters at hand.

In accordance with the rules of professional conduct, an attorney is obliged to carefully review all financial or real estate transactions performed on account of the client. Furthermore, an attorney must employ appropriate strategies and procedures in order to fulfil the duty of care with respect to the identification of parties, the notification of suspicious incidents, the safe keeping of records, internal monitoring, assessment and management of risks, as well as assurance that the relevant regulations are complied with.

ii Money laundering, proceeds of crime and funds related to terrorism

Attorneys have to apply the above strategies and procedures in order to prevent and obviate any transactions relating to money laundering or the financing of terrorism. In the event a suspicious transaction shows up, an attorney must (1) comply with certain enhanced obligations of research and monitoring, (2) discontinue the transaction and (3) notify the authorities as necessary.

iii Other areas of interest

Due to budget cuts, the length of the judicial clerkship, which is a mandatory part of an attorney's training in Austria, will be reduced from nine to five months as of 2012. Thus, associates will then have to spend another four months of training either in law firms or legal departments of private enterprises.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

The issues relating to documents, electronic discovery and privilege are similar everywhere. This provides an opportunity to discuss how each jurisdiction is dealing with these issues.

i Privilege

The Austrian Code on Civil Procedure sets forth that an attorney is entitled to refuse to reveal information provided to the attorney by the client. Corresponding rules can be found in the Austrian Code on Criminal Procedure and in the Rules of Professional Conduct for Attorneys. These provisions, known as the attorney-client privilege, include all matters that become known to the attorney during the period of his or her mandate for the client. By the same token, the privilege becomes an obligation of the attorney when the confidential treatment of such facts is in the client's interest. As to an in-house counsel, no similar privilege exists under current law.

The privilege may lapse if the attorney is suspected to have taken part in the criminal action of his or her clients. The attorney's right to refuse testimony as embedded in the Austrian Code of Civil Procedure and the Austrian Code on Criminal Procedure also applies to foreign attorneys. However, foreign attorneys will be subject to their respective national rules of professional conduct.

ii Production of documents

In Austria, discovery procedures *sensu stricto* of common law jurisdictions are not available. Court orders for the production of documents are rare and may only be requested on the basis of a quite restrictive framework. Generally, a party may only be ordered to submit documents as evidence to the court if it is probable that the other party possesses the documentation in question, and if the party contends that the documents in question are relevant for its case. The submission cannot be rejected if the documents fall into one of the following three categories: (1) the possessing party itself specifically referred to the document to support its own allegations; (2) the party is obliged by substantive civil law to deliver the document to the requesting party; or (3) the document was drawn up in the parties' joint interest, certifies their mutual legal relationship or records the parties' statements in the course of the negotiation regarding a legal act.

As Austrian provisions on civil procedure do not include any formal rules of evidence, but rather is subject to the discretion of the judge, a full and formal definition of 'relevance' is not provided by law. Rather, evidence shall be 'material' to the dispute on hand.

Documentation stored overseas could be argued to be 'in possession' of the other party, therefore it is not unthinkable that a court would request access to such documentation via legal assistance through foreign courts, on the basis of one of the international treaties. However, in Austrian civil court proceedings such requests or orders would be considered highly unusual.

A third party may be requested to produce specific documents in the event that such documentation is held by a third party and (1) the third party is under an obligation based on substantive civil law to deliver the requested document or (2) the document

was drawn up in the joint interest of the requesting and the third party, certifies their mutual legal relationship or records their statements in the course of the negotiation regarding a legal act.

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

In Austria arbitration, by well established tradition, is the alternative form of dispute resolution. On a global scale, Vienna is a leading venue for international commercial arbitration. Sometimes parties may rely on expert determination, in particular in technical matters. Mediation, unless family law matters are concerned, are rarely used, and then rather as a pre-arbitration mechanism or an exit to 'hung' adversarial proceedings.

ii Arbitration

Austrian arbitration law covers both domestic and international arbitration proceedings. On 1 July 2006, the amendment of Austria's arbitration law,[18] incorporated in the Austrian Code of Civil Procedure[19] entered into force (the 2006 Austrian Arbitration Code – 'the AAC'[20]). It follows the UNCITRAL Model Law and thus allows the parties to freely determine the procedural rules of arbitration. In this respect, reference will be usually made to established arbitration rules (in particular the UNCITRAL Arbitration Rules, as recently revised in 2010[21]), the Rules of the ICC International Court of Arbitration[22] or the Rules of Arbitration and Conciliation of the Vienna International Arbitral Centre ('the VIAC', 'the Vienna Rules'[23]). Otherwise the arbitral tribunal will conduct the proceedings in such manner as it considers appropriate and set forth optionally by the AAC. The few mandatory provisions of the AAC warrant that a party will be treated fairly and will receive full opportunity to present its case.[24] Recently, the Supreme Court, however, highlighted the importance of an oral hearing: In line with the UNCITRAL model law, when the parties have not agreed to exclude an oral hearing, the Arbitral Tribunal, pursuant to Section 598 AAC, shall upon the motion of a party hold an oral hearing. Not to comply with such a request amounts to the violation of even public order and thus results in the setting-aside of the award.[25]

18 Federal Gazette I 17/2006.

19 Sections 577 to 618.

20 See www.internationales-schiedsgericht.at/images/stories/documents/en/New_Code_of_Civil_Procedure.pdf.

21 See www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf.

22 See www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf.

23 See www.internationales-schiedsgericht.at/images/stories/documents/en/VIAC_Arbitration_Rules_2006_1.pdf.

24 Section 594(2) of the AAC.

25 Austrian Supreme Court, 30 June 2010, docket No. 7 Ob 111/10i.

Pursuant to the AAC,[26] the arbitration agreement must be in writing, either contained in a signed document or an exchange of letters, facsimiles, e-mails and other forms of communication which ensure a record of the agreement. In their contract the parties may refer to a document containing the arbitration clause, provided that the reference is such that it renders the arbitration agreement a part of the contract. Additional strict requirements must be observed if an employee or a consumer is involved[27].

In line with the UNCITRAL Model Law, three arbitrators shall be appointed unless otherwise determined by the parties. In any case, the number of arbitrators must be odd and, in the negative, must be complemented by selecting an additional arbitrator as the chairman of the panel.

If the parties have not agreed on the place of arbitration or the language, it is for the arbitral tribunal to decide.

State courts may intervene only if provided for in the AAC. Typically, a party may turn to the state court if its challenge of an arbitrator was not successful or if its adversary fails to appoint an arbitrator in accordance with the agreed appointment mechanism. In multiparty proceedings, if co-claimants or co-respondents are under the obligation to jointly appoint an arbitrator, the missing appointment will be made by the state court, without, however, substituting also the other members of the Tribunal (as distinct from the UNCITRAL Model law[28]).

Interim measures, like in most jurisdictions, can be requested either before the state court or (provided the parties did not agree otherwise) before the arbitral tribunal.[29] Distinct from the more liberal regime of the UNCITRAL Model Law, such protective measures cannot be granted *ex parte* and may only extend to another 'party'.

Arbitral awards rendered under the AAC have the same effect between the parties as a final and binding judgement of a state court. Recourse is only possible by way of setting-aside proceedings,[30] which must be initiated within three months as of the date of the service of the award on the Party taking recourse. The grounds for setting aside an award correspond with Article 34 of the UNCITRAL Model Law. As a consequence, an award cannot be appealed on the merits (unless basically in conflict with public policy).

Foreign arbitral awards can be enforced in Austria. They need to be recognised or declared enforceable pursuant to the provisions of the Austrian Enforcement Act. However, this can be more easily achieved on the basis of international conventions Austria is a party to, in particular, the 1958 New York Convention ('the NYC'), the 1927 Geneva Convention, the 1961 European Convention or the 1965 Washington Convention. When enforcing a foreign award under the NYC, the original or a certified copy of the arbitration agreement needs to be presented only if the state court so requests.[31]

26 Section 583 of the AAC.

27 Sections 617, 618 of the AAC.

28 Article 10(3) UNCITRAL Arbitration Rules (as amended 2010).

29 Section 593 of the AAC.

30 Section 611 of the AAC.

31 Section 614(2) of the AAC.

Interim and protective measures of an arbitral tribunal are not put on a level with an award and, thus, cannot be enforced on the basis of the NYC. The AAC, however, separately addresses the enforcement and, if the specific measure of protection is unknown to Austrian law, the state court may execute such measure that comes closest to the measure of the tribunal.[32]

When the arbitration agreement is entered into by a proxy agent, the power shall be in writing and expressly mention arbitral proceedings. If a proxy is inadequate, the adversarial party, however, may not invoke such a deficiency and thus cannot base jurisdictional objections thereon.[33] Moreover, the Supreme Court held in another case[34] that an arbitration clause that had been entered into on the basis of an inadequate proxy shall be remedied retroactively when the request for arbitration is made by an authorised proxy holder (an attorney-at-law, in the case at hand).

In many international commercial matters parties agree on the Rules of the ICC International Court of Arbitration, choosing Vienna, Austria, as the seat of arbitration. Alternatively, the Vienna Rules of the VIAC, as amended and adapted to the AAC in 2006, are frequently selected, in particular when a business relationship with the CEE region is concerned. The most recent figures for new requests filed with the VIAC or the ICC Court and going to Vienna as the place of arbitration continue to show a respectable increase year after year. There exist various centres and installations that can comfortably host even large arbitral proceedings.

If a consumer (in the meaning of Consumer Protection Act) is involved, certain restrictions apply that should be clarified in the individual case by Austrian legal counsel. When it comes to enforcement the Supreme Court[35], however, held that a defendant, who raised jurisdictional objections based on Austrian mandatory consumer protection only belatedly in the arbitral proceedings, may not invoke Article V(1)(a) and(c) of the NYC. The Supreme Court added that a violation of consumer related provisions might amount to a violation of Austrian public policy, but that an agreement to arbitrate does not *per se* violate such basic principles of Austrian law.

iii Mediation

Distinct from other jurisdictions (e.g., Germany), the Austria legislator has enacted a specific law, the 2004 Law on Civil Mediation.[36] It lays down the requirements for enlisting as an 'accredited mediator' and the rights and duties of such persons when conducting mediation proceedings. Yet to actually mediate in a dispute is not reserved for accredited persons. In particular, Austrian attorneys-at-law are called in as mediators in commercial matters. The statute of limitations, however, shall be suspended during mediation proceedings only when conducted by an accredited mediator. In general, mediation is optional, not obligatory. Yet, in a civil proceeding before a state court a judge, when deeming mediation appropriate in the context with a possible settlement,

32 Section 593(3) of the ACC.

33 Austrian Supreme Court, 6 November 2008, docket No. 6 Ob 194/08k.

34 Austrian Supreme Court, 16 December 2009, docket No. 7 Ob 208/09b.

35 Austrian Supreme Court, 22 July 2009, docket No. 3 Ob 144/09m.

36 Federal Gazette I No 29/2003.

Appendix 1

ABOUT THE AUTHORS

CHRISTIAN DORDA

Dorda Brugger Jordis Rechtsanwälte GmbH

Christian Dorda is founding partner of Dorda Brugger Jordis. He specialises in M&A-related arbitration matters. Having served as a member of the ICC International Court of Arbitration (2006 to 2009), he is now vice chairman of the ICC Austria. He is a member of the Austrian Arbitration Association and the Swiss Arbitration Association. He is active on the board of trustees of the American Chamber of Commerce in Austria and is the permanent legal counsel to the French-Austrian Chamber of Commerce. He is also past chairman of the M&A commission of the Union Internationale des Avocats. Christian Dorda is regularly sought after as a chairman, sole arbitrator, party-appointed arbitrator and counsel in both international and domestic commercial disputes. As a mediator, he was involved in settling a major dispute relating to Austria's highway toll collection system. Christian Dorda regularly publishes in the field of international arbitration and corporate law. He is fluent in German, English and French.

FELIX HÖRLSBERGER

Dorda Brugger Jordis Rechtsanwälte GmbH

Felix Hörlsberger is partner of Dorda Brugger Jordis. He specialises in insurance law and litigation, in particular with regard to directors' and officers' ('D&O') insurance as well as data protection law. He is a founding member and vice president of the YACLA (Young Austrian Commercial Litigation Association). Felix Hörlsberger is the author of numerous expert publications in the field of data protection, insurance, corporate and banking law. He also lectures at seminars on data protection, directors' duties including D&O insurance, cash pooling and compliance. Felix Hörlsberger entered Austria's largest Moot Court Competition as a participant in 2001 and thereafter regularly as counsel advising student teams. He is recognised in the *Legal 500* as well as *Chambers Global*, 2010 edition. Felix Hörlsberger is fluent in German and English.

DORDA BRUGGER JORDIS RECHTSANWÄLTE GMBH
Dr Karl Lueger-Ring 10
1010 Vienna
Austria
Tel: +43 1 5334795
Fax: +43 1 5334795 5017
office@dbj.at
www.dbj.at