[LITIGATION ADR QUESTIONNAIRE – AUSTRIA]

CIVIL LITIGATION

1. **In what language(s) may court proceedings be conducted? What arrangements can be made for translation/interpreter services?**

According to Art 8 of the Austrian Constitution, German is the official language of Austria; court proceedings are therefore conducted in German. However, in certain federal states of Austria (Carinthia, Burgenland and Styria) Slovenian, Croatian and Hungarian are also recognized as official languages and may be used in court proceedings.

With respect to translations, briefs, public documents and private documents have to be distinguished:

If a foreign-language brief is filed, the court may demand a translation into German thereof. However, it is not obligated to do so – it can also use the foreign-language brief in the proceedings.

Foreign-language public documents issued by a foreign authority must be accompanied by a translation by a court-certified translator if filed in court.

Foreign-language private documents must be produced in or with a German translation. An official certification of the translation is not compulsory.

The court is obligated to use an official court interpreter in hearings whenever the judge is not able to communicate clearly with the person to be examined. Furthermore, court interpreters must be appointed at hearings at the request of the party/witness to be interrogated at the hearing; equally so the opposing party may move for an interpreter.

2. What types of pre-action measures are available and what are their limitations? Must you send a warning letter before issuing any proceedings?

In Austria, there is no obligation for pre-action measures (e.g. warning letters, mediation or settlement negotiations).

Under the Austrian Enforcement Code, interim injunctions may be obtained by which money or property of the defendant may be frozen by the court. The defendant may also be compelled by the court to perform a certain action or to cease and desist/refrain from certain actions until final judgment is delivered.

An interim injunction may be issued if the injured party submits to the court prima facie evidence of its claim against the defendant. In case the injured party does not provide sufficient evidence, the court may decide to issue an interim injunction only against a security deposit by the claimant at the court. Upon filing for an injunction the injured party must also demonstrate likelihood that the enforcement of its claim will not be possible without injunction.

Although not required by statutory law for the large majority of cases, courts regularly hear the defendant before issuing an interim injunction. The defendant may appeal the injunction within 14 days from service. If the defendant has not been heard before issuance, it may further file an objection against the injunction's admissibility and reasonableness. Appeals against injunctions do not have suspensive effect unless such effect is granted by the court.

3. What are the costs of civil and commercial proceedings? Who bears the costs?

Attorney's fees are agreed upon between the attorney and the client. If there is no such agreement, the Austrian Lawyer's Tariff Act governs fee entitlement of the lawyer.

Under the Austrian Code of Civil Procedure (ACCP), the party losing in court must reimburse the prevailing party for the court fees and additional costs for expert witnesses and interpreters, if applicable.

Irrespective of the arrangement between the lawyer and the client, the party losing in court must only reimburse the attorney's fees according to the Austrian Lawyer's Tariff Act. The fees under the Austrian Lawyer's Tariff Act may be higher or lower than the attorney's fees agreed upon between the attorney and the client. Usually, only in court attorney's fees are reimbursed.

If both parties partly prevail, the costs are split proportionally. The court decides in its final judgment or decision about the amount of the costs to be reimbursed.

4. What are the basic rules of disclosure of documents in civil and commercial proceedings? Which documents do not require disclosure? Is electronic disclosure of documents normal?

The use of documents as evidence is covered by the provisions of the ACCP. Unlike in the Anglo-American system, there is no pre-trial discovery and there are no specific discovery proceedings.

Each party must prove its claims/defenses and may do so also with the production of documents. If documents are in the possession of a public authority, a party may apply to the court that these documents shall be forwarded to the court.

No party has a claim against its opponent for the production of documents, unless within exceptional circumstances where documents are referred to but not produced by the opposing party. If the opponent does not produce these documents, the judge will weigh the evidence and the fact that a specific document has not been produced.

When parties are represented by an attorney (i.e. in most lawsuits, except for minor cases) the attorney must submit briefs and documents *electronically* to the court.

5. What is the process for witness evidence (namely, is it deposition based in advance, or witness statement, or examination or cross-examination)? Can a witness be compelled to attend to give evidence?

If summoned by court, witnesses are obligated to appear before the court and to testify. In case a summoned witness does not appear in court, it has to bear all costs incurred by his absence and will be summoned again. A fine for contempt of court may additionally be imposed. If the witness does not appear for the second time, the fine is doubled and the witness may be brought to the court by the police. Very limited exceptions exist (e.g. sickness).

Witnesses always have to testify *orally*; written testimony is not permitted under the ACCP. They are obliged to tell the truth; otherwise they are liable to prosecution. However, witnesses may decline to answer questions under certain circumstances; e.g. if through truthful testimony the witness would incriminate itself or close relatives, or would violate its legal obligation to confidentiality, if any.

Witnesses are questioned individually and in the absence of other witnesses, first by the court, then by the party that nominated the witness and finally they are cross-examined by the opposing party. If two witnesses give contradicting testimonies, they may be confronted with each other.

At the request of either party, witnesses may be sworn in; such witness statements under oath are weighed as more important by the judge than unsworn statements.

6. How are settlement discussions usually conducted (namely whether oral or written and whether between the parties direct or their representatives)? Is the settlement

correspondence between the parties/counsel privileged (i.e.: may not be disclosed to the court)?

There are no rules how settlement discussions must be conducted; they may be conducted orally, in writing, in court or out of court. Settlement correspondence is not confidential, unless the parties so agree.

If the settlement is reached in writing, this may attract certain stamp duties, but there are perfectly legal ways to avoid these stamp duties.

7. How can foreign judgments be enforced?

Under the Austrian Enforcement Code, foreign judgments may be declared enforceable in Austria if (i) they are enforceable according to the law of the state where they have been pronounced and (ii) reciprocity between Austria and this state is granted by a bi- or multilateral treaty.

The party which seeks enforcement must submit a request for declaration of enforceability to the competent court in Austria. This court decides about the request without a hearing of the opposing party. Once the declaration of enforceability is issued and final, the foreign judgment is enforceable as if it were a final enforceable Austrian judgment.

As Austria is a member of the European Union, it is subject to the provisions of *Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*.

Under this Regulation, the enforcement of titles issued by a foreign EU authority is simplified and the courts of the enforcing state do not initially re-examine the confirmation of

enforceability by the state of origin. For all practical purposes, the declaration of enforceability within the EU is automatically issued.

[LITIGATION ADR QUESTIONNAIRE – AUSTRIA]

ARBITRATION

1. Are mediation clauses in commercial contracts binding and enforceable?

Apart from ad hoc mediation which is agreed upon between the parties in a mediation agreement *after* a conflict has arisen, ex-ante *Alternative Dispute Resolution* (ADR) clauses may be included in commercial contracts for future disputes.

ADR clauses are binding in accordance with their terms. In practice, the parties typically agree that mediation is just an *option*; such ADR clauses are not binding.

2. What is the procedure for mediation? Is it a popular method for resolving commercial disputes?

The Austrian Code of Civil Law Mediation does not establish mandatory mediation procedures. Due to the fact that mediation is based on the consent of the parties, mediation procedures may only be conducted (i) if all parties agree and (ii) if the mediation procedure can be terminated at any time at the request of a party.

Mediation is typically used in large infrastructure projects to settle neighbors' claims and in family law matters. Resolving commercial disputes through mediation is still fairly rare in Austria. Typically, arbitration is preferred over mediation.

3. Are arbitration clauses in commercial contracts binding and enforceable?

Arbitration clauses in commercial contracts are generally binding for all arbitrable matters. Arbitrable matters comprise all claims for payment which can be brought before ordinary courts and other claims which can be settled by the parties.

A number of exceptions to the general rule exist: claims relating to family law and certain disputes involving real estate property are expressly excluded from arbitrability. The latter category encompasses contracts governed by the *Mietrechtsgesetz* (Austrian Lease Act, which covers most urban lease agreements in Austria), the Austrian Co-operative Apartment Ownership Act, and the Apartment Ownership Act. Finally, special provisions apply to consumer and employment disputes.

Arbitration clauses are binding in accordance with their terms. If properly drafted, arbitration clauses are binding even if they are embedded in a contract that is void or that has been terminated (severability).

Arbitration clauses in commercial contracts are also enforceable in that courts must reject jurisdiction if a claim subject to an arbitration agreement is brought before the courts and the respondent either does not enter an appearance or objects to the jurisdiction.

Domestic courts must reject jurisdiction if the matter is already subject to arbitration proceedings.

4. What type of arbitration is commonly used for resolving commercial disputes: ad hoc arbitration or institutional arbitration?

Institutional arbitration is most common for resolving commercial disputes in Austria.

5. Which arbitration institutes are most popular?

Institutional arbitration in Austria is most often administered by the VIAC (Vienna International Arbitral Centre) and the ICC. This is due to the two institutions' outstanding reputation.

6. What influence can the parties have on the identity of the arbitrator(s)?

Parties are free to decide on the procedure of nominating arbitrators. Hence, if the parties have agreed arbitration administered by the ICC or the VIAC, the ICC rules or the VIAC rules for the nomination of arbitrators will be applied.

In absence of an agreement on the procedure of nomination, e.g. when parties have not made reference to institutional arbitration, an arbitral tribunal is to be composed of three arbitrators, of which each party appoints one. These party-appointed arbitrators nominate a chairperson.

If the parties have agreed on a sole arbitrator and cannot agree on its identity, recourse to domestic courts is possible – the court then appoints an arbitrator. The same holds true if the party-appointed arbitrators of an arbitral tribunal cannot agree on a chairperson.

7. In what language is an arbitration proceedings conducted?

The language in which arbitration proceedings are conducted is open to the parties' agreement. The most common languages for international commercial arbitration proceedings seated in Austria are English and German.

8. What types of pre-arbitration measures are available and what are their limitations?

In arbitration proceedings, an arbitral tribunal may order interim measures – of the same type as in domestic litigation – against a party if the tribunal considers them necessary. Such measures may be ordered only after both parties have been heard. Under certain circumstances, protective measures may also be granted without hearing the other party. Interim or protective measures are enforceable at the request of a party to the competent court.

Before arbitration proceedings commence, parties may request interim or protective measures of a domestic court. An arbitration agreement does not exclude this right.

9. What are the costs of arbitration proceedings and who bears these costs?

The costs of arbitration proceedings comprise the administrative costs of the proceedings and the arbitrators' fees.

In institutional arbitration, the costs are regulated by the respective institutional rules. These rules usually govern the amount of the administrative costs and give a range in which the institution will set the arbitrators' fees. Institutional arbitration rules sometimes also contain rules on how a tribunal should allocate the duty to bear costs.

In ad-hoc arbitration by the ACCP arbitration rules, arbitrators have the right to reasonable fees. In practice, tribunals will fix their fees either by hourly rates or according to the Austrian Lawyer's Tariff. Tribunals usually request advances on their costs during the proceedings.

In allocating the duty to bear costs in ad-hoc arbitration according to the ACCP, a tribunal must take into account the circumstances of the case at hand, in particular the outcome of the proceedings. By making this qualification, the ACCP implicitly states the rule that costs follow the event.

10. What are the basic rules of document disclosure in arbitration? Which documents do not require disclosure?

Document disclosure is generally an issue for the parties of an arbitration to decide upon. They may choose to incorporate a referral to the IBA Rules on the Taking of Evidence in

International Commercial Arbitration into their arbitration agreement. Similarly, institutional rules might contain such reference.

Absent such reference, an arbitral tribunal is free to decide about the admissibility of the taking of evidence. If it takes a positive decision, it may take such evidence and freely determine its relevance.

A tribunal – like a domestic court – is further entitled to order a party to produce a document. Reference is made to the explanations given above.

11. What is the procedure for witness evidence in arbitration (namely, is it deposition based or witness examination or cross-examination)?

The ACCP is silent on the procedure for witness evidence in arbitration. The choice of procedure lies with the tribunal and, therefore, with the parties. The parties may also, for example, incorporate certain rules for witness evidence into their arbitration agreement or rules of procedure. Usually, Terms of Reference or supplemental procedural rules will state that witnesses are to submit witness statements and that they be cross-examined during the evidentiary hearing.

12. How are settlement discussions usually conducted (namely whether oral or written and whether between the parties direct or their representatives)? Is the settlement correspondence between the parties and/or counsel privileged (i.e., may not be disclosed to the Arbitrator)?

There are no mandatory rules as to the form in which settlement negotiations must be conducted. The parties to an arbitration are free to settle the matter in dispute before or during the arbitration proceedings.

The parties may request that the tribunal records the settlement, e.g. by having the chairperson and the parties sign the settlement document or by incorporating it into the hearing minutes.

The parties may also request the tribunal to record the settlement in the form of an arbitral award with an agreed-upon wording. Such award has the same effect as any award on the merits of the case – it is therefore enforceable as if the arbitral tribunal had issued an ordinary award on the merits.

13. Under what circumstances can an Arbitration Award be enforced, challenged or annulled?

Arbitration awards are enforceable like judgments of ordinary domestic Austrian courts – between the parties; the award has the effect of a legally binding judgment.

To challenge an arbitral award, any party can file a motion to set aside the award within three months of service of the award. The jurisdiction lies with the *Landesgerichte* (Austrian regional courts) at the place of arbitration. If the circumstances are met, the court's judgment is subject to two further stages of appeal.

The reasons for which an award may be challenged correspond to the reasons for which the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards allows the refusal of an award´s recognition and enforcement.

The result of a judgment granting the motion to set aside an award is the (partial or full) annulment of the award.