I. Sources of law for (international) arbitration

A. Sources of law based on party autonomy: arbitration agreements, arbitration rules and other party agreements

Private conciliation and private arbitration presumably have existed prior to national courts.[1] In modern history, the introduction of arbitration was also an act of self-empowerment. Art. 5 of the French Constitution of 1791 provided that the right of citizens to resolve their disputes in arbitration may not be restricted.[2] Arbitration is seen as a major element of party autonomy, and for good reason. **1**

There is some dispute as to whether the institution of private arbitration is protected by the Austrian Constitution.[3] Based on international treaties (New York Convention, European Convention on International Commercial Arbitration), Austria has an obligation to ensure the validity of international arbitration agreements, and to recognise and enforce foreign arbitral awards.[4]

Substantive law relations are of course based on party agreements. Similarly, arbitration is, primarily, based on private agreements. Such agreements are, firstly, the arbitration agreement and the procedural rules agreed on by the **2**

1 *See*, *e.g.*, A. Lefebvre-Teillard, *L'arbitrage en droit canonique* 2006(1) Rev. Arb. 5; F.-X. Licari, *L'arbitrage rabbinique entre droit talmudique et droit des nations* 2013(1) Rev. Arb. 57; B. Loynes de Fumichon and M. Humbert, *L'arbitrage à Rome* 2003(2) Rev. Arb. 285; A. Mezghani, *Le droit musulman et l'arbitrage* 2008(2) Rev. Arb. 211; D. Papadatou, *L'arbitrage byzantin* 2000(3) Rev. Arb. 349; J. Velissaropoulos-Karakostas, *L'arbitrage dans la Grèce antique – Epoques archaïque et classique* 2000(1) Rev. Arb. 9.

2 B. de Loynes de Fumichon, *La passion de la Révolution française pour l'arbitrage* 2014(1) Rev. Arb. 3, p. 35; *see also* G. Kodek in C. Liebscher et al. (eds.), *Schiedsverfahrensrecht* (Vol. 1, 2011), para. 1/4.

3 *See* G. Kodek in C. Liebscher et al. (eds.), *Schiedsverfahrensrecht* (Vol. 1, 2011), para. 1/6.

4 *See* G. Kodek in C. Liebscher et al. (eds.), *Schiedsverfahrensrecht* (Vol. 1, 2011), para. 1/67; as to the priority of the New York Convention over national legislation, *see* M. Paulsson, *The 1958 New York Convention in Action* (2016), p. 40.

parties (if the parties have reached any agreement at all with respect to procedure). Further procedural agreements include, for example, the Terms of Reference in ICC arbitration, where they are signed by all parties, or other agreements of the parties which are made spontaneously at the commencement or in the ongoing course of arbitration, such as provisions governing the number of arbitrators or the language of the proceedings.

3 Where the parties have reached agreement on procedural rules, one must always bear in mind that the agreement will be binding on the parties and the arbitral tribunal. If the arbitral tribunal fails to take account of an agreement of the parties regarding procedure (and provided that the interested party has objected to the violation of said party agreement in a timely manner), this may even result in the denial of recognition of the arbitral award.[5]

4 Party agreements may be changed by the parties, but not by the arbitral tribunal. This also applies to the rules of procedure of arbitral institutions, as they apply based on an agreement of the parties.

5 The party agreement will only be effective and valid insofar as it is in line with the mandatory arbitration law applicable at the place of arbitration. Thus, the distinction made between mandatory and non-mandatory procedural law (which is much less well-known in the national courts) takes on a great deal of significance in (domestic and international) arbitration.[6]

B. Sources of law based on sovereign legal acts

6 The sources of law for arbitration which are based on sovereign legal acts include, primarily, international conventions and the respective autonomous law of arbitration (in Austria: §§ 577–618 ZPO).

International conventions and treaties which are not given equal status with the Austrian Constitution do not automatically take precedence over autonomous law in Austria.[7] However, within its sphere of application as a *lex specialis*, an international treaty may be applied as a priority over a rule from autonomous national law.

5 Art V(1)(d) New York Convention.
6 *See infra*, para. 17.
7 T. Buergenthal, *Self-executing and non-self-executing treaties in national and international law* (1992), 235(4) Recueil des Cours 303, p. 356.

i. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Further literature: E. Gaillard and D. di Pietro (eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards. The New York Convention in Practice* (2008); H. Kronke et al. (eds.), *Recognition and Enforcement of Foreign Arbitral Awards* (2010); M. Paulsson, *The New York Convention* (2016); R. Wolff (ed.), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (2nd ed., 2019).

7 The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was concluded in 1958, and is nowadays enforced in almost all countries of the world.[8] It was only as a result of the New York Convention that, during the second half of the 20th century, arbitration developed into the leading dispute resolution mechanism for internal business. The New York Convention, which represents the "Law of the Twelve Tables" of international arbitration, has undergone continuous developments in the course of its interpretation by national courts.

8 At this juncture, it is useful to highlight the following main provisions of the New York Convention:

i. Art. II(2) New York Convention contains a substantive rule which is internationally uniform regarding the form of arbitration agreements.[9]
ii. Under Art. II(3) New York Convention, Austrian courts are required to "refer" parties to arbitration (in other words: to dismiss a claim filed by a party for lack of jurisdiction), if the parties have made an arbitration agreement on the subject of their dispute. Only if the arbitration agreement is null and void, inoperative or incapable of being performed (all of which are rare occurrences), the Austrian court is allowed to deal with the matter despite the alleged arbitration agreement.
iii. Art. V New York Convention contains a comprehensive catalogue of grounds entitling courts of Convention Member States to refuse the recognition and enforcement of foreign arbitral awards ("grounds for refusing recognition and enforcement").

9 The legal terms contained in the New York Convention ("arbitration agreement", "arbitral award") should be given internationally uniform interpretation[10] to ensure that the Convention is able to fulfil its purpose.

8 The current status of the Convention can be downloaded from https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 (last accessed: 14 September 2020).

9 *See* para. 115 *infra* and A. Van den Berg, *The New York Arbitration Convention of 1958* (1981), p. 173.

10 C. Liebscher in R. Wolff (ed.), *The New York Convention* (2nd ed., 2019), Prelims 76.

10 The New York Convention is not affected by the provisions of the Brussels Ia Regulation.[11]

ii. The European Convention on International Commercial Arbitration (European Convention)

Further literature: A. Fremuth-Wolf, *The European Convention on International Arbitration as a Tool to Remedy Pathological Arbitration Agreements – "There's still Life in the Old Dog yet!"*, 2013 Austrian Arb. Y. B. 61; D. Hascher, *European Convention on International Commercial Arbitration of 1961*, 2011 XXXVI Y. B. Com. Arb. 507; S. Kröll, *The European Convention of International Commercial Arbitration – The Tale of a Sleeping Beauty*, 2013 Austrian Arb. Y. B. 3; G. Zeiler and A. Siwy (eds.), *The European Convention on International Commercial Arbitration: A Commentary* (2018).

11 The European Convention was established in 1961 against the backdrop of Europe's division into Western countries and COMECON states. It is in force in 30 European countries.[12] The following are of practical relevance:

- the provisions with respect to the capacity of public law legal entities to arbitrate;[13]
- the rules regarding the appointment of *ad hoc* arbitral tribunals;[14]
- the rule that even arbitral awards which have been set aside in their state of origin due to violations of *ordre public* are enforceable in the other Member States.[15]

iii. EU law

Further literature: M. Zahariev, *Chapter I: The Arbitration Agreement and Arbitrability, Mission Impossible: Where GDPR Meets Commercial Arbitration*, 2020 Austrian Arb. Y. B. 3.

12 "Arbitration" is excepted from the scope of the Brussels Ia Regulation.[16] Furthermore, the EU Regulation covering the law applicable to contract relations (Rome I) does not apply to arbitration agreements.[17] The Brussels Ia Regulation and the Rome I Regulation nevertheless raise various issues in arbitrations and proceedings to enforce arbitral awards, which will be dis-

11 Art. 7(2) Brussels Ia Regulation.
12 Albania, Azerbaijan, Belgium, Bosnia-Herzegovina, Bulgaria, Denmark, Germany, Finland, France, former Yugoslavian Republic of Macedonia, Italy, Kazakhstan, Croatia, Latvia, Luxembourg, Macedonia, Moldavia, Austria, Poland, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Czech Republic, Turkey, Ukraine, Hungary and Belarus.
13 Art. II European Convention.
14 Art. IV European Convention.
15 Art. IX(2) European Convention.
16 Art. I(2)(lit. d) Brussels Ia Regulation.
17 Art. I(2)(lit. e) Rome I Regulation.

cussed *infra* in their respective substantive context. This regards particularly the relationship between state courts and arbitral tribunals and the method how arbitral tribunals determine the applicable law.

Commercial arbitration, just like the activities of courts or lawyers, is not excluded from the scope of the GDPR's application. Its provisions apply in principle to all arbitral institutions which have their seat within the EU, arbitrators who are based in the EU and arbitrators and arbitral institutions targeting their services to individuals located in the EU.[18] **13**

iv. §§ 577–618 ZPO and other provisions of autonomous Austrian law

Further literature: C. Aschauer, *The New Austrian Arbitration Law*, 2007 Romanian Rev. Arb. 35; M. Heider et al., *Dispute Resolution in Austria* (2015); C. Liebscher, *The Austrian Arbitration Act 2006 – texts and notes* (2006); S. Balthasar (ed.), *International Commercial Arbitration* (2016) 187; J. Power, *The Austrian Arbitration Act – A Practitioner's Guide to Sections 577–618 of the Austrian Code of Civil Procedure* (2006); S. Riegler et al. (eds.), *Arbitration Law of Austria: Practice and Procedure* (2007); A. Reiner, *The New Austrian Arbitration Law – Selected Issues*, 2006 Croatian Arb. Y. B. 229; A. Reiner, *The New Austrian Arbitration Law – Arbitration Act 2006* (2006); VIAC (ed.), Handbook (2nd ed., 2019); VIAC (ed.), Selected Arbitral Awards, (Vol. 1, 2015); G. Zeiler, *Austrian Arbitration Law* (2016).

§§ 577–618 ZPO, which entered into force on 1 July 2006, are primarily based on the 1985 UNCITRAL Model Law on International Commercial Arbitration. The 2006 Reforms to the UNCITRAL Model Law, which essentially represented a further liberalisation regarding the form of the arbitration clause[19] and an expansion of the permissibility of interim measures by arbitral tribunals[20], have not been adopted. **14**

As a result of Austria's broad adoption of the UNCITRAL Model Law, non-Austrian parties, counsel and arbitrators involved in arbitrations with an Austrian seat can quickly familiarise themselves with Austrian arbitration law. This is an important prerequisite to carrying out international arbitration in Austria. **15**

§§ 577–618 ZPO will apply in any event where the place of arbitration lies within Austria.[21] It is irrelevant whether there is any other legal or factual nexus with Austria.[22] The provisions regarding permissibility of in- **16**

18 M. Zahariev, Chapter I: The Arbitration Agreement and Arbitrability, Mission Impossible: Where GDPR Meets Commercial Arbitration, 2020 Austrian Arb. Y. B. 3 (9).
19 Art. 7 Option 2 UNCITRAL Model Law 2006.
20 Art. 17b UNCITRAL Model Law 2006.
21 § 577(1) ZPO.
22 A. Reiner, *The new Austrian Arbitration Law – Arbitration Act 2006* (2006), p. 2.

terim measures by state courts (§ 585 ZPO), the provisions governing enforcement by state courts of interim measures issued by arbitral tribunals (§ 593(3)–(6) ZPO) and the provisions governing judicial assistance by state courts (§ 602 ZPO) will even apply where the arbitral tribunal does not have its seat within Austria.[23]

17 §§ 577–618 ZPO contain a few mandatory and many optional rules. The question of whether a rule is mandatory or optional should be ascertained by interpretation. The following are mandatory rules:

- the rules regarding arbitrability (§ 582 ZPO);
- the rules governing the arbitration agreement's conclusion (§§ 581 and 583 ZPO);
- the principles of the arbitral tribunal's independence and impartiality (§ 588(1) ZPO);
- in respect of the proceedings' conduct:
  - the mandatory nature of due process and the principle of fairness (§ 594(2) ZPO);
  - the right of the parties to be represented by their chosen counsel (§ 594(3) ZPO);
  - the right of the parties to conduct an oral hearing if they have not excluded the option to do so in advance (§ 598 ZPO);
  - the prohibition on the issuance of interim measures without a hearing of the opponent (§ 593(1) ZPO); and,
- the grounds for setting aside arbitral awards under § 611 ZPO.
- The *res judicata* status of arbitral awards is likewise not subject to disposition by party agreement.

18 Optional rules include the rules regarding the arbitral tribunal's constitution and the arbitration's organisation. A party agreement regarding how the arbitral proceedings should be organised take precedence over the optional rules in §§ 594–602 ZPO ("procedural autonomy").

19 In institutional arbitrations, the optional rules in §§ 577–618 ZPO are largely displaced by the agreed rules of arbitration ("arbitration rules"), such as the ICC Arbitration Rules or the Vienna Rules. Thus, an institutional arbitral tribunal seated in Graz or Salzburg can conduct an arbitration in all essential respects just as an institutional arbitral tribunal would, if the place of arbitration were Zurich or Singapore. This is a further major prerequisite to conducting international arbitration in Austria.

23 § 577(2) ZPO.