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Austria

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Effective 1 July 2006, Austria has adopted a new Arbitration Act (contained as a separate chapter in the Austrian Code of Civil Procedure, ZPO). To coincide with the first major reform since the original Arbitration Act of 1895, the Vienna International Arbitral Centre of the Austrian Federal Chamber of Commerce (VIAC) also revised its set of institutional rules (the Vienna Rules), mirroring in many respects the statutory framework of Austrian law.[1]

These reforms have reinforced both Austria's standing as perhaps the most prominent jurisdiction for arbitration in central and eastern Europe and the status of VIAC as a pre-eminent arbitral institution. VIAC has administered over 50 international cases in 2007, including some multibillion-dollar disputes in the telecoms industry. VIAC is also experiencing increased demand from Russian and Chinese users of arbitration.

As a result of the 2006 reform, Austria's arbitration law is now thoroughly modernised, inspired by the UNCITRAL Model Law and, to some extent, the German Arbitration Act of 1998. As the Working Group on the 2006 reform emphasised, and the legislative materials confirm, the aim was to internationalise Austrian law at the expense of municipal law; restrict the intervention of the courts; and affirm party autonomy as the guiding principle of arbitration.

To date, there is almost no case law on the new Arbitration Act. This is because arbitration agreements concluded prior to the reform (that is, prior to 1 July 2006) continue to be governed by the previous version of the ZPO, which will therefore retain practical importance for a considerable period of time. The new law applies to all arbitral proceedings commenced after 1 July 2006 – however, to the extent that those proceedings have already resulted in awards, those decisions only slowly reach the appellate level of the Austrian courts. Recent decisions of the Austrian Supreme Court, however, adopted in 2008, even if rendered under the previous law, do reflect on the new legal framework and reveal the impact of the 2006 reform on Austrian jurisprudence. Some of these developments – with respect to arbitrator impartiality, the liability of arbitrators and the notion of *ordre public* in settings aside proceedings – are discussed below.

The challenge of biased arbitrators

It is common knowledge that the parties' choice to appoint a particular arbitrator is one of the most critical steps in any arbitration. The arbitrators' legal and cultural background, their procedural preferences and their approach to substantive issues such as contract interpretation (which can vary significantly between jurisdictions) will all have a substantial impact on the character and quality of the arbitral proceedings.[2]

With the 2006 reform, Austrian law has introduced the terms 'impartiality' and 'independence', as used in article 12 of the UNCITRAL Model Law and in most major arbitral rules.[3] Section 588 ZPO now requires arbitrators to be 'impartial' and 'independent' both when they accept their appointment and throughout the proceedings.[4] Lack of 'impartiality' and 'independence' is sanctioned by section 611(2) No. 4 ZPO with the removal by the arbitrator.[5] Section 588(1) ZPO (which is based on article 12 of the Model Law) also requires the arbitrator, if he or she intends to accept the appointment,[6] to disclose all circumstances that from the perspective of the parties 'are likely to' (rather than those that actually will) justify doubts as to the arbitrator's impartiality.

Austrian law also provides for a challenge mechanism. In ad hoc proceedings, challenges are decided by the tribunal (including the challenged arbitrator), or else pursuant to the mechanism that the parties have agreed. Thus, parties are free to delegate such decisions to an arbitral institution. A decision rejecting a challenge – whether made by the tribunal in ad hoc proceedings or by an institution – is subject to review by the Austrian courts. A short four-week appeal period applies; the decision of the court is final and binding.

Recent case law indicates that the Austrian courts will apply a narrow reading of impartiality and independence that is influenced more by Austrian jurisprudence on the bias of state court judges than international doctrine. Although the result is for the most part in keeping with international doctrines, there are some peculiarities that remain. On the one hand, Austrian law accepts that the process of determining impartiality and independence

1 See Schwarz and Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer Law International, forthcoming January 2009).

2 Born, *International Commercial Arbitration: Commentary and Materials*, (2nd ed, 2001), pp620-629; Redfern and Hunter, *Law and Practice in International Commercial Arbitration* (4th ed, 2004), pp4-46.

3 See also articles 7 and 16 of the Vienna Rules.

4 Section 588(2) ZPO provides: 'An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to its impartiality or independence, or if it does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by it, or in whose appointment it has participated, only for reasons of which it becomes aware after the nomination has been made.'

5 Section 611(2)(4) ZPO states that an award shall be set aside if the constitution or the composition of the tribunal was not in accordance with a provision of the Arbitration Act or with an admissible agreement of the parties. However, this is considered to be the basis for the challenge of an award where the court confirmed the challenge of an arbitrator after the award was made or where an arbitrator who was successfully challenged in court continues to participate in the decision-making process relating to the award. See Oberhammer, Entwurf, section 611; also Power, The Austrian Arbitration Act (2006), section 589 Rz 7.

6 The arbitrator obviously can decline the appointment without giving any reasons, and thus, without disclosing potentially disqualifying circumstances. Oberhammer, Entwurf, p69.

calls for an objective standard, requiring disqualification of the arbitrator where bias is shown or feared from the perspective of a neutral observer.[7] A challenge does not turn, therefore, on whether a party has doubts regarding the arbitrator's impartiality, but on whether such doubts are justified in the eyes of a reasonable person.[8] Although the standard is objective, the appearance of impartiality may under Austrian law be sufficient in the interest of the integrity of the judiciary.[9]

On the other hand, first decisions of the Austrian courts have shown a reluctance to apply international standards such as those expressed in the IBA Guidelines on Conflicts of Interest in International Commercial Arbitration. While the courts have acknowledged that the legislature intended an internationalisation of Austrian arbitration law, the courts also noted that the IBA Guidelines are not specifically mentioned in the legislative materials as a point of reference. Although the courts ultimately reached results not so different from what the outcome under the IBA Guidelines, the doctrinal approach is convincing. By adopting article 12 of the UNCITRAL Model Law, the legislature introduced new terms into Austrian law ('impartiality' and independence') that differ semantically from the existing terminology of 'grounds for exclusion' and 'grounds for bias.' By specifically adopting internationally recognised terminology, the Austrian courts should import international doctrine and discussion on how those terms should be interpreted.

In fairness, decisions on the new section 589 ZPO are few and far between, and it is too early to identify a judicial trend. Also, as discussed, the results are unlikely to differ much, irrespective of whether the courts adopt an intra-systemic Austrian approach or apply an internationalised standard, informed by the UNCITRAL Model law and instruments such as the IBA Guidelines.

Arbitrator liability

Section 594(4) ZPO incorporates without changes the former section 584(2) ZPO, stating that '[a]n arbitrator who does not at all or who does not timely fulfil any obligation resulting from the acceptance of his appointment shall be liable to the parties for all damage caused by his culpable refusal or delay.' This may include the damage caused by the arbitrator withdrawing from office without good cause.[10] Section 594(4) ZPO is a provision of mandatory law from which the parties cannot derogate by agreement.[11] The courts interpreted former section 584 ZPO to present a statutory limitation for arbitrator liability: only cases covered by that provision – that is, delayed performance or non-performance of the arbitrator's duties – can give rise to liability. As the legislative materials make clear, the Austrian legislature has incorporated former section 584(2) ZPO – now section 594(4) ZPO – in the new Arbitration Act expressly to ensure that courts would not interpret its absence as an incentive to expand arbitrators' liability.[12]

However, more recent case law somewhat expands the liability of arbitrators, while recognising that it must be limited to exceptional circumstances. Both courts and doctrine recognise that arbitrators perform a judicial function and should therefore benefit from the judicial immunity typically afforded to state court judges. At a minimum, the award must successfully be set aside, for reasons for which the arbitrator is at fault, for arbitrator liability to be conceivable.[13] Indeed, the Austrian Supreme Court confirmed in 2008 that, with respect to procedural mistakes, there would be no liability of arbitrators unless the mistakes were so severe that they resulted in the setting aside of the award.[14] In doing so, the court not only affirmed the narrow application of section 594(4) ZPO, but also expressly recognised that arbitrators enjoy significantly greater discretion than state court judges, resulting in increased flexibility of the arbitral process.[15]

Violations of procedural and substantive public policy as grounds for annulment of an award

Section 611 ZPO provides the grounds on which an award can be challenged in the Austrian courts. It follows in relevant parts the UNCITRAL Model law as well as the grounds for refusing the enforcement or recognition of foreign awards under the New York Convention. Prior to the 2006 Reform,[16] section 595(1) No. 6 of the former ZPO contained the public policy ground for the annulment of arbitral awards that did not contain the term 'public policy' but described the notion by referring to 'the fundamental values of the Austrian legal order.'[17] Thus, its function was defined as the protection of 'fundamental values of the Austrian legal system',[18] and the prevention of 'serious violations of basic values',[19] 'violations of basic principles of the

7 Mayr, in Rechberger, ZPO Kommentar, section 19 JN, paragraph 4, with further references.

8 The IBA Guidelines on Conflicts of Interest in International Arbitration provide in General Standard 2(c) that '[d]oubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.'

9 Mayr, in Rechberger, ZPO Kommentar, section 19 JN, paragraph 4.

10 OGH ZBl 1919/222.

11 Power, The Austrian Arbitration Act, (2006), section 594 Rz 7.

12 Erläuternde Bemerkungen, section 594(4) ZPO.

13 Austrian Supreme Court in 9 Ob 126/04a, 6 June 2005.

14 Austrian Supreme Court in 8 Ob 4/08h, 28 February 2008.

15 Austrian Supreme Court in 8 Ob 4/08h, 28 February 2008.

16 The notion of substantive public policy has in no way been changed by the reform of Austrian arbitration law in 2006; it has been said that '[i]n this respect, the silence preserved by the government bill on section 611 (2) item 8 ACC has proven eloquent.' Consequently, the substantive dimension of public policy is as alive and well as the same legal notion it was prior to the reform, and has now just been presented with a younger sibling, the procedural public policy. This general statement must, however, be qualified by taking into account the significant differences which separate the legislative concept of the procedural and substantive public policy notion; see below.

17 The wording of this provision is based on section 6 Austrian Act on Private International Law (Pitkowitz, Setting Aside, in Klausegger et al (2007), 254). This ground for setting aside was first introduced into Austrian arbitration law in 1983. The second part of this provision also provided that an award could be annulled because of violations of mandatory law which cannot be done away with by a choice of law clause according to the Austrian PILS. This was interpreted to refer to 'especially grave violations' as they are 'best captured in the notion of ordre public' – the sub-categories mentioned by courts (like protective provisions in labour law, landlord-tenant law or consumer law; see OGH 31.8.1995 EvBl 1996/42 with further references) being mere instances of this more general notion. See Oberhammer, Entwurf (2000), 136.

18 Zeiler, Schiedsverfahren (2006), 272 mn 35.

19 Rechberger, Widersprüchlichkeit, *SchiedsVZ* (2006) 169, 170 with further references.

law',[20] 'severe breaches of Austrian law'[21] or 'gravest defects'.[22]

Section 611(2) No. 8 provides that '[a]n arbitral award shall be set aside if […] the award is in conflict with basic values of the Austrian legal system (ordre public).' In addition, however, Austrian law now expressly recognises violations of the *procedural* ordre public as a ground to set aside the award.[23] Specifically, section 611(2) No. 5 provides that '[a]n arbitral award shall be set aside if […] the arbitral proceedings were conducted in a manner that conflicts with the fundamental values of the Austrian legal system (ordre public).' Some authors have questioned the scope of its application, as 'practically any violation of procedural public policy probably also constitutes a violation of [the right to be heard under section 611(2) No. 2 ZPO][24] at the same time'[25] or, more generally, is 'covered by the other grounds for setting aside anyway'.[26] Most commentators, however, have characterised the introduction of section 611(2) No. 2 ZPO as a 'welcome'[27] development, a 'necessary'[28] or 'necessary and wise blanket clause'[29] and 'catch-all clause'[30] that provides a 'welcome legislative clarification'.[31] Notably, this explicit reference to procedural public policy presents a textual deviation from the provisions of the UNCITRAL Model Law and the German arbitration law, which in general served as templates for the Austrian reform.[32] Other leading European jurisdictions also acknowledge public policy as a ground for setting aside awards, without mentioning the term *expressis verbis* in the statute.

Notably, the 2006 reform did not merely 'split'[33] the public policy concept into a procedural and a substantive part, it also opted for a markedly different treatment of these two sides of public policy.

While violations against substantive public policy must be considered by the court ex officio in setting aside proceedings, a violation of procedural public policy is only to be considered upon the application of one of the parties.[34] Thus, a violation of procedural public policy is cured if the parties fail to file an action to have the award set aside within the three-month period in section 611(4) ACCP, while a violation of substantive public policy remains legally relevant. This different treatment of procedural and substantive public policy raises interesting questions.

Notably, the grounds for setting aside an award in section 611(2) Nos. 1 to 6 can be waived.[35] Being at the parties' disposal, a party has therefore a choice of whether to raise a violation of procedural public policy, or not. If it does not raise such a ground, the award will become unchallengeable even if it was based on a proceeding that violated the most fundamental procedural rights.

The legislature[36] and commentators[37] argue that the preferential treatment of substantive public policy is justified because these grounds reflect the 'most severe'[38] errors an award could be tainted by. However, violations of the procedural *ordre public* may be just as severe as substantive ones. Indeed, it is an essential characteristic of public policy that it is not at the parties' disposal.[39] Also, Austria is under an obligation to ensure compliance with the standards of the ECHR (and in particular its article 6) in its territory, which necessarily requires it to oversee arbitration proceedings, in the context of section 611 ZPO, for their compliance with basic, and constitutionally guaranteed, procedural rights. Without the courts being able to consider ex officio violations of such constitutionally guaranteed rights, the state is unable to enforce these guarantees.

The different treatment of violations of the procedural *ordre public* was recently addressed by the Austrian Supreme Court. Although this decision was rendered under the old law, it gives important insight into the approach adopted by the court, which is likely to remain relevant under the new law as well. The Supreme Court held that 'an arbitration agreement constitutes a voluntary partial waiver – permissible under the Human Rights Convention – of the exercise of the rights guaranteed under article 6(1) ECHR. By virtue of the arbitration agreement, the parties can therefore waive the guarantees of article 6; only the minimum guarantees of the right to be heard must be implemented in national law for arbitration as well and only the complete exclusion from the right to be heard justifies a claim to have the award set aside.[40] The Austrian Supreme court therefore views arbitration as a partial opt-out from the procedural guarantees of the European Human Rights Convention, with only the most fundamental guarantees remaining protected. Of course, it will be interesting to see where precisely the delineation between a legitimate partial opt-out from the procedural guarantees of article 6 ECHR, on the one hand, and an imper-

20 Eilmansberger, 81 und 82 EG, *SchiedsVZ* (2006), 5 et seq.

21 Power, The Austrian Arbitration Act (2006), 116 et seq, mn 35.

22 Rechberger, Widersprüchlichkeit, *SchiedsVZ* (2006) 169, 174.

23 See also F Schwarz and H Ortner, The Procedural Ordre Public, *Austrian Arbitration Yearbook 2008* (Manz, 2008).

24 Section 611(2) No. 2 ACCP provides that 'a]n award shall be set aside if […] a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or for another reason was unable to adequately defend itself or challenge the claims of the opposing party.'

25 Pitkowitz, Setting Aside, in Klausegger et al (2007), 250.

26 Wiebecke, Anfechtungsverfahren in Torggler (2007) 223, 234 et seq. mn 54.

27 Paul Oberhammer, Rechtspolitische Schwerpunkte der Schiedsrechtsreform, in: Barbara Kloiber/Walter H Rechberger/Paul Oberhammer/Hartmut Haller, Das neue Schiedsrecht - Schiedsrechts-Änderungsgesetz 2006 (2006) 93, 137. Pitkowitz, Setting Aside, in Klausegger et al (2007), 250.

28 Reiner, SchiedsRÄG (2006), mn 200; Riegler in Riegler et al (2007), section 611, 507, 533.

29 Reiner, SchiedsRÄG (2006), 111, mn 200.

30 Oberhammer, Entwurf (2000), 134.

31 Walter H. Rechberger, Bemerkungen zum neuen österreichischen Schiedsverfahrensrecht, in: Barbara Kloiber/Walter H Rechberger/Paul Oberhammer/Hartmut Haller, Das neue Schiedsrecht - Schiedsrechts-Änderungsgesetz 2006 (2006) 71, 87 et seq.

32 Pitkowitz, Setting Aside, in Klausegger et al (2007), 249; Riegler in Riegler et al (2007), section 611, 507, 532 No. 64; Oberhammer, Entwurf (2000), 133; Power, The Austrian Arbitration Act (2006), 115 mn 27.

33 Pitkowitz, Setting Aside, in Klausegger et al (2007), 255.

34 Kloiber/Rechberger/Oberhammer Haller (eds), Das neue Schiedsrecht (2006), and section 611 (2); Kloiber/Haller, Das neue Schiedsverfahrensrecht (2006) 11, 60. Also, article 613 ACCP provides that an award shall not be relevant for other proceedings only if the award violates substantive public policy – but no such consequence attends the violation of procedural public policy.

35 Rechberger/Melis, in: Rechberger (3rd ed, 2006), section 611, mn 3; 1158 BlgNR 22. GP 26.

36 1158 BlgNR 22. GP 29.

37 See Rechberger, Bemerkungen in: Kloiber et al (2006) 71, 89; Oberhammer, Entwurf (2000), 142 et seq.

38 Rechberger, Bemerkungen in: Kloiber et al (2006) 71, 89.

39 This fundamental characteristic of the public policy concept has been discussed above.

40 Austrian Supreme Court in 5 Ob 272/07x, 1 April 2008

missible transgression against the procedural *ordre public*, on the other hand, is drawn. For the time being, however, the Austrian Supreme Court has reaffirmed its strict jurisprudence that only if a party is entirely deprived of the opportunity to present its case, a challenge to the award will be justified.

In line with precedent in other major jurisdictions, the Austrian Supreme Court has also reaffirmed the position that a violation of the substantive *ordre public* will only be assumed where 'the result of the award would lead to an unacceptable transgression against fundamental principles of the Austrian legal order'.[41] A substantive review of the award, and the factual findings and legal conclusions of the tribunal, is therefore not permissible. In sum, there is no indication therefore that the Austrian Supreme Court is inclined to deviate from its strict approach of setting aside awards only in the most egregious cases.

41 Austrian Supreme Court in 5 Ob 272/07x, 1 April 2008

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