GLOBAL ARBITRATION REVIEW

THE INTERNATIONAL JOURNAL OF PUBLIC AND PRIVATE ARBITRATION

A GLOBAL ARBITRATION REVIEW SPECIAL REPORT

# The European & Middle Eastern Arbitration Review

## 2008

Published by GLOBAL ARBITRATION REVIEW
in association with

Adib & Houalla Law Office
Allen & Overy LLP
Bird & Bird
Bredin Prat
Chiomenti Studio Legale
Clifford Chance LLP
Danders & More
De Brauw Blackstone Westbroek
Dillon Eustace
Dittmar & Indrenius
Freshfields Bruckhaus Deringer
Glatzová & Co
Lambadarios Law Offices
M.Furtek i Wspolnicy
Magister & Partners, Attorneys-at-Law
Morais Leitão, Galvão Teles, Soares da Silva & Associados RL
O'Melveny & Myers LLP
Pérez-Llorca
Studio Legale Associato
Watson, Farley & Williams LLP
Wilmer Cutler Pickering Hale and Dorr LLP

THE QUEEN'S AWARDS
FOR ENTERPRISE
2006

# Austria

Franz T Schwarz
Wilmer Cutler Pickering Hale and Dorr LLP

Arbitration has a remarkably long-standing tradition in Austria, with an arbitration law dating back to 1895. Institutional arbitration, since 1975 prominently represented through the Vienna International Arbitral Centre of the Austrian Federal Chamber of Commerce (VIAC), dates back to 1949.

Today, Austria is perhaps the most prominent jurisdiction for arbitration in central and eastern Europe. VIAC has administered 41 international cases in 2005, including some substantial telecoms disputes in the region, and has seen a further increase of its caseload since. Austria also hosts numerous ICC arbitrations, and an ever increasing number of ad-hoc proceedings.

Austria has recently adopted a new Arbitration Act (as part of the Austrian Code of Civil Procedure, ZPO), which entered into force on 1 July 2006. To coincide with this major reform, the VIAC also adopted a revised version of the Vienna Rules, on 3 May 2006, which also took effect on 1 July 2006, in order to ensure that the Vienna Rules remain compatible with the statutory framework in which they typically operate.[1]

The new Austrian arbitration law is inspired by the UNCITRAL Model Law and the German Arbitration Act, with some significant deviations in order to fit within the system of Austrian law. It is the result of an intensive consultation process with Austrian and foreign arbitration specialists and will serve the business community well. Some of the highlights, and recent trends, are discussed below.

### Arbitration agreements

ZPO, section 583 states:

> *The arbitration agreement must be contained in either a document signed by the parties or in letters, faxes, e-mails, or other forms of communication exchanged between them that provide proof of the existence of the agreement.*

An arbitration agreement can therefore be concluded in two ways: (i) by the signature of the parties on the document containing the arbitration agreement (which includes an adequate form of electronic signature);[2] or (ii) by exchange of letters, faxes, e-mails or other forms of communication exchanged by the parties that provide "proof of the existence of the agreement."[3] It is not sufficient for a letter, facsimile, e-mail, or other form of written communication to be accepted orally – rather, the acceptance must be in writing as well.[4] However, any form of communication that provides a record of the agreement or is otherwise accessible so as to be usable for subsequent reference would suffice.[5]

ZPO, section 583(2) goes on to address separate arbitration agreements:

> *When an agreement which fulfils the form requirements of paragraph 1 refers to a document which contains an arbitration agreement, it shall constitute an arbitration agreement if the reference is such that it makes the arbitration agreement part of the contract.*

This provision confirms that it is not necessary to attach the arbitration agreement to the signed document. What is decisive is the nature of the reference to the separate document – it must be such as to make the separate document "part of the contract". Whether that is so, appears to be a question of the substantive law applicable to interpretation of the arbitration agreement.[6]

It is noteworthy that section 583 is not only applicable when the seat of the tribunal is within Austria.[7] According to ZPO, section 577(2), it also applies when the place of arbitration is not in Austria, or even not yet determined.

Historically, the Austrian courts, as well as the majority of academic opinions, have placed considerable emphasis on the requirement of 'written' agreements. Indeed, while the Austrian Supreme Court can be qualified as arbitration-friendly, arbitral awards are set aside by Austrian courts much more frequently for violation of form requirements (and, hence, lack of jurisdiction) than for any other reason.

The justifications that have been advanced for this strict view on form requirements are plenty. It has been said that the 'in writing' requirement functions as a warning, supposedly increasing the parties' awareness, when concluding an arbitration agreement, as to the consequences of their decision. The requirement also has an evidentiary function, clarifying not only that the parties have, in fact, concluded an agreement, but also what kind of agreement was concluded. However, the historically prominent function of the requirement to warn parties of the consequences is highly anachronistic. While there can be no debate under ZPO, section 583(1) that an arbitration clause can be concluded by way of email exchange, no one familiar with the practice of modern communication would characterise e-mail as a means of communication that carries a particular warning function.

Previously, the Austrian Supreme Court has also held that principles of good faith cannot cure formal defects in the formation of the arbitration agreement. New provisions in the ZPO seem to support the argument that good faith principles should be applied to the formation of arbitration agreements as well.[8] Indeed, recent case law indicates that the Supreme Court appears to be increasingly prepared to do so.[9]

### Arbitrators

The parties' choice to appoint a particular arbitrator is frequently considered one of the most critical steps in any arbitration. Naturally, the identity of the arbitrators will have an important impact on the character and quality of the arbitral proceedings.[10]

The arbitrator's impartiality is expressly prescribed by ZPO, section 588;[11] and lack of this sanctioned by section 611(2), no. 4.[12] According to established doctrine and case law, the process of determining impartiality and independence calls for an objective standard, requiring disqualification of the arbitrator where bias is shown or feared.[13] A challenge will thus be successful only if the circumstances of the case objectively lead to justifiable doubts. In other words, a challenge ought not to turn 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.[14] Although the standard is objective, the appearance of impartiality may under

Austrian law be sufficient in the interest of the integrity of the judiciary.[15]

The duty to disclose is a necessary corollary of the duty to be impartial and independent; one cannot exist without the other. Although Austrian law has for some time recognised a duty of disclosure,[16] this is now expressly prescribed by ZPO, section 588(1) (which in turn is based on article 12 of the Model Law). Although there is some debate on this issue, the better view under Austrian law is that disclosure follows a subjective test. The prospective arbitrator, if he intends to accept the appointment,[17] should therefore 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, which in ad hoc proceedings is to be decided by the tribunal (including the challenged arbitrator). The decision of the tribunal (or of the arbitral institution) rejecting a challenge is subject to review by the Austrian courts. A short four-week appeal period applies; the decision of the court is final and binding. First decisions under the new law indicate a trend that the Austrian courts are hesitant to apply international instruments in this context, such as the IBA Guidelines on Conflicts of Interest in Arbitration.

### Arbitrator liability

ZPO, section 594(4) incorporates without changes the former section 584(2) stating:

> *An 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.[18] Section 594(4) is a provision of mandatory law from which the parties cannot derogate by agreement.[19] Recent case law indicates that (former) section 584 presented a statutory limitation for arbitrator liability in that only cases covered by that provision – that is, delayed performance or non-performance of the arbitrator's duties – can give rise to liability. This would significantly limit the general liability of arbitrators for procedural errors and erroneous awards. Specifically, in 9 Ob 126/04a, dated 6 June 2005, the Supreme Court held that an arbitrator can as a matter of principle only be held liable if the award has been set aside for reason for which the arbitrator is at fault. Indeed, the Austrian legislature has incorporated former section 584(2) – now section 594(4) – in the new Arbitration Act expressly to ensure that courts would not interpret its absence as an incentive to expand arbitrators' liability.[20]

### Jurisdiction of the tribunal

It is generally in the interest of the parties and the arbitral tribunal to establish as quickly as possible if the dispute at bar has been properly referred to arbitration. Austrian law now expressly requires that jurisdictional objections be raised at the very first opportunity, or else be barred. Specifically, ZPO, section 592 (inspired by article 16 of the UNCITRAL Model Law) contains an express obligation for a party to assert the lack of the tribunal's jurisdiction "not later than the first pleading in the matter." In order not to prevent the constitution of the arbitral tribunal, however, "a party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator." An objection to formal defects of the arbitration agreement must, pursuant to section 583(3), always be raised with the first submission on the merits, failing which the formal defect is cured.[21] Similarly, section 592(2) additionally introduces the obligation to raise an objection against the arbitral tribunal exceeding the scope of its authority "as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings." The failure to raise these pleas in time will generally preclude a party from raising the tribunal's lack of jurisdiction (or excess of authority) in an application to set aside the award.[22] However, section 592(2) vests the tribunal with discretionary authority to admit a belated objection for lack of jurisdiction, in circumstances where the defaulting party can show good cause for the delay. It can be expected that tribunals will apply (and courts will uphold) a strict test in this regard, in order not to open the door to dilatory tactics by obstructive parties.

The concept that – at least in the first instance – the arbitrator shall rule on his or her own jurisdiction is not new to Austrian arbitration law. However, it has deliberately been left to the discretion of the arbitral tribunal whether to render a partial award on jurisdiction during the proceedings, or to reserve this issue for the final award, as the circumstances of the case demand. Awards on the arbitral tribunal's jurisdiction are now subject to challenge in the state courts according to ZPO, section 611.[23] While the challenge is pending, the tribunal may, if it deems it appropriate, continue the proceedings and even render a final award on the merits.[24]

### Interim relief

Interim measures have become an important instrument in international arbitration to protect the parties' interests while the proceedings are pending. For years, Austrian doctrine was divided by an intense debate whether an arbitral tribunal can order interim measures of protection, with the traditional view opposing that possibility.[25] ZPO, section 593(1), which adopted article 17 of the UNCITRAL Model Law, put an end to this debate in Austrian doctrine. The arbitrators can now "take such interim measures of protection [that they] may consider necessary... in respect of the subject matter of the dispute", provided that "otherwise the enforcement of the claim would be frustrated or considerably impeded or there is a danger of irreparable harm." The other party needs to be heard prior to any interim order granted by the tribunal. The ZPO also requires the Austrian courts, with some limitations, to enforce interim relief ordered by foreign arbitral tribunals in Austria.

Similar to the requirements attaching to awards, interim measures need to be in writing, reasoned, include the date of their issuance, the place of arbitration and be signed by the presiding arbitrator.[26] Additionally, the arbitrator shall, upon request, confirm that the measure is not subject to appeal and enforceable.

### The award

Awards need be drawn up in writing and contain the reasons upon which they are based.[27] The award shall also state the date on which it was made and the place of arbitration. All copies of the award must be signed by the arbitrators and, upon request by one party, contain the additional confirmation by the chairman that the award is final and enforceable. The signatures of the majority of the arbitrators shall suffice if the award contains a statement that one arbitrator refuses to sign or is prevented from signing by an obstacle which cannot be overcome within a reasonable period of time.

ZPO, section 604 also provides for a majority quorum in the decision-making process. If no majority of votes is obtained, the presiding arbitrator's vote will decide. If a unanimous decision cannot be reached, some arbitrators may feel the desire to submit a dissenting opinion. Article 27(3) of the Vienna Rules makes indirect reference to that possibility in that the arbitrator can request that an express statement be included in the award that it was the result of a majority decision. The possibility of dissenting opinions does not appear to be excluded under Austrian law, although some authors have voiced concerns.

Austrian law also recognises settlement agreements in the form

of an award by consent, desirable in many cases for enforcement reasons. Awards by consent have to comply with the formal requirements of awards as well.[28] The new Austrian arbitration law also provides for the possibility of interim or partial awards, in particular on jurisdiction, which will now, by statute, be treated as challengeable under the regime of ZPO, section 611. Finally, ZPO, section 610 now allows each party within 30 days after receipt of the award to request the arbitral tribunal to correct in the award any errors in computation; any clerical or typographical errors; or any errors of a similar nature; or if so agreed by the parties, to give an interpretation of certain parts of the award; or to make an additional award as to claims presented in the arbitral proceedings, but not dealt with in the award.

### Setting aside

ZPO, section 611 provides the grounds on which an award can be challenged in the Austrian courts. To a larger extent, it mirrors the previous regime on setting aside, and follows the UNCITRAL Model law as well as the grounds for refusing the enforcement or recognition of foreign awards under the New York Convention. As an addition, Austria now expressly recognises violations of the procedural public policy as a ground to set aside the award.[29]

In setting-aside proceedings, the court can examine decisions on non-arbitrable matters and decisions violating the substantive public policy ex officio; all other grounds can only be considered if they are raised by a party. Any challenge must be brought within three months of service of the award, lest any right to take recourse against the tribunal's decision is lost.

* * *

The Austrian reform has brought Austria in line with the family of UNCITRAL Model Law based jurisdictions. It can be expected that these changes, and the commitment of the well-established arbitration community in Austria, will result in a further increase of cases being arbitrated in Austria, whether ad hoc or under institutional rules. The streamlining of court proceedings, in particular with respect to challenges to arbitrators and jurisdictional objections, can also be expected to result in the more specialised application of arbitration law by the courts, notably the commercial courts in Vienna, where most arbitrations taking place in Austria are sited. In short, the future is bright.

## Notes

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

2 See remarks on the ministerial draft of ZPO, section 583; Liebscher, *The Austrian Arbitration Act 2006, Text and Notes* (Kluwer 2006). E-mails have now expressly been inserted in this provision, hence they will not fall under the fall-back provision of 'other forms of communication'. See discussion of the old law in Jud/Högler-Pacher, *Schiedsverfahren mit modernen Kommunikationstechniken* (Ecolex, 1999), p601 et seq.

3 See Haas, 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958', in Weigand, *Practitioner's Handbook on International Arbitration* (2002), p442.

4 Reiner, *Das neue österreichische Schiedsrecht* (2006), p73.

5 The exchange of the means of communication does not require that both parties mention the arbitration agreement. See Roth, UNCITRAL Model Law, in Weigand, *Practitioner's Handbook on International Arbitration* (2002), p1191; also Oberhammer, *Entwurf eines neuen Schiedsverfahrensrechts* (2002), p43 et seq; von Saucken considers it essential that, despite which (future) method of communication is used, the issues of secured transmission, locked storage and proof of origin are complied with – von Saucken, *Die Reform des österreichischen Schiedsverfahrensrechts auf der Basis des UNCITRAL Modellgesetzes über die Internationale Handelsschiedsgerichtsbarkeit* (2004), p68. Although it was inserted in the ministerial draft, the so-called *halbe Schriftform*, as seen in ZPO, section 1031(2), had not been adopted. See Zöller/Geimer, *Zivilprozessordnung: Kommentar mit Gerichtsverfassungsgesetz und den Einführungsgesetzen, mit Internationalem Zivilprozessrecht, EG-Verordnungen, Kostenanmerkungen ZPO* (25th ed, 2005), p2430.

6 Under Austrian law, with the arbitral seat in Austria, ZPO, section 583(2) therefore overrides ABGB, section 864a, whereas ABGB, section 879(3) still persists in applying a limit to content. See, in detail, von Saucken, *Die Reform des österreichischen Schiedsverfahrensrechts*, p82.

7 ZPO, section 577(1).

8 See ZPO, sections 583(3), 584(5) and 592(2) .

9 OGH 26.04.2006, 7 Ob 236/05i, applying the principle of *non venire contra factum proprium* specifically to arbitration agreements, mainly arguing that such conduct amounts to an abuse of rights (*Rechtsmissbrauch*).

10 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.

11 ZPO, section 588(2) 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."

12 ZPO, section 611(2)(4) 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 admissable 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.

13 Mayr, in Rechberger, *ZPO Kommentar*, section 19 JN, paragraph 4ff.

14 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."

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

16 OGH 28.4.1998, 1 Ob 253/97f.

17 The arbitrator obviously can decline the appointment without giving any reasons, and thus, without disclosing potentially disqualifying circumstances. Oberhammer, *Entwurf*, 69.

18 OGH ZBl 1919/222.

19 Power, *The Austrian Arbitration Act*, (2006), section 594 paragraph 7.

20 *Erläuternde Bemerkungen*, ZPO, section 594(4).

21 ZPO, section 583(3) provides: "A defect of form of the arbitration agreement shall be cured in the arbitration proceedings by entering an appearance in the case, if a notification of the defect is not made earlier or at the latest together with entering an appearance."

22 See also Power, *The Austrian Arbitration Act* (2006), sec 592 Rz 9.

23 Under the former Austrian arbitration law, decisions dealing solely with the tribunal's jurisdiction where not considered to be final awards on the merits and therefore not challengeable. In contrast, ZPO, section 611 now provides for a uniform procedure for challenging awards on jurisdiction, irrespective whether the tribunal declines or accepts its jurisdiction. Power, *The Austrian Arbitration Act* (2006), section 611 Rz 7 with further annotations.

24 ZPO, section 592(3) provides: "Even while a request for the setting aside of an award with which the arbitral tribunal accepted its jurisdiction is still pending with the court, the arbitral tribunal may preliminarily continue the arbitral proceedings and even render an award."

25 Fasching, *Schiedsgericht*, p22 and *Lehrbuch*, at paragraphs 2177, 2181; Fasching, *Probleme*, p455, and also OGH, SZ 50/83. For an overview of modern

doctrine, see Liebscher, *Wiener Regeln*, p292.

26 In case of the chairman's unavailability, signing can be effected by any other member of the tribunal.

27 The parties can agree, however, either in the arbitration agreement or in the proceedings, that no grounds are to be stated.

28 In case of consent awards parties will regularly consider whether such a settlement could cause additional charges according to applicable rules of tax and tariffs.

29 Schwarz and Ortner, 'Procedural Ordre Public and the Internationalization of Public Order in Arbitration', *Austrian Arbitration Yearbook 2008* (Manz, forthcoming).

## Franz T Schwarz

### Wilmer Cutler Pickering Hale and Dorr LLP


Franz T Schwarz is a partner with Wilmer Cutler Pickering Hale and Dorr LLP, resident in the firm's London office. He specialises in international arbitration and dispute resolution.

Franz focuses on complex multi-jurisdictional disputes. He has acted in arbitrations under all major arbitral rules and a wide variety of substantive laws. He is closely familiar with arbitral practice and procedure in both civil and common law systems. Franz has particular experience with contractual and corporate disputes in the telecommunications, finance, media, energy and trade sectors. He frequently serves as an arbitrator, including as chairman of arbitral tribunals.

Franz is a lecturer on international arbitration at the University of Zurich, and has published extensively on topical issues of international dispute resolution. He is the co-author of *The Vienna Rules - A Commentary on International Arbitration in Austria* (Kluwer Law International, forthcoming). He is a member of the Chartered Institute of Arbitrators, the LCIA, DIS and the Swiss and Austrian Arbitration Associations, and a founding member and co-chair of the American Arbitration Association's ICDR Young & International Arbitration programme.

Franz is a graduate of Vienna University and the London School of Economics and Political Science. He is a member of the bar of Vienna, Austria.

4 Carlton Gardens
London
SW1Y 5AA
United Kingdom
Tel: +44 20 7872 1000
Fax: +44 20 7839 3537

www.wilmerhale.com

**WilmerHale offers one of the world's premier international dispute resolution practices. Our international arbitration group – based in our London office – is one of the most successful, experienced, and varied of its kind.**

**Our practice covers virtually all forms of international arbitration and our lawyers have recently handled disputes governed by the laws of more than 30 different legal systems in arbitrations seated in Europe, Asia and the Americas. We have recently served as counsel in more than 350 international disputes – a significant number involving amounts in dispute exceeding $50 million – and we are handling disputes under all leading rules (including ICC, LCIA, ICSID, AAA, UNCITRAL, Vienna Centre, and DIS) and in all leading arbitral situses.**

**Among other things, we successfully represented clients in four of the largest, most complex international arbitrations to arise in the past decade as well as several of the most important ad hoc arbitrations in recent history. Our team also has broad experience in matters involving foreign states and state-owned entities and public international law, and has advised clients based in Central Europe and other states in their arbitration legislation.**

**Contact: Franz Schwarz • franz.schwarz@wilmerhale.com**