Hon.-Prof. Dr. Irene Welser*)

Austrian and International Arbitration – Status Quo and Recent Trends

I. Introduction: Austria's long arbitration tradition

Austria and especially Vienna have a notably long history of arbitration that has been of particular interest to CEE countries as well as Turkey. This long history is reflected by the fact that the former arbitration law had been in effect since 1895 (!) without any substantial amendment until its modernization by the Austrian Arbitration Act 2006. A further amendment – which is to be mentioned later – has recently been passed by parliament. This clearly shows that Austria owes the high standards of its arbitration and therefore its good international reputation to modernization, building on a tradition which has developed over decades.

However, merely the years of existence of arbitration in Austria are by no means the only reason for Vienna's popularity as a place of arbitration. Vienna's particularly advantageous geographical location, connecting "the West" and "the East", has also played an important role. During the Cold War in particular, Vienna was considered neutral ground, hence why companies from Western and Eastern countries often agreed on Vienna as an arbitration venue. After the fall of the Iron Curtain, Austria not only preserved its close ties to the former East, but also managed to intensify further the already close relationship to the CEE countries. In fact, this CEE competence is one of the main reasons why Vienna became such an important arbitration venue for Central Europe, and maybe that is also why Vienna is currently among the top ten most popular arbitration venues in the world.

Apart from Vienna's easily accessible position in the heart of Europe, several other factors make Vienna very attractive for arbitration. It has a modern, arbitration-friendly legal system and case-law and – especially when compared to other famous arbitration venues such as Geneva, New York, London or Paris – its price level for institutional arbitration is rather reasonable. Furthermore, there is no closed shop of arbitrators, but only an informal list of practitioners with the Vienna International Arbitral Centre, VIAC. Parties therefore have the possibility to choose from a wide selection of highly experienced and well-trained

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arbitrators from nearly every field of law or industry. And of course the good Viennese infrastructure, its variety of excellent restaurants, bars, hotels, museums, concerts, operas, and so on support a climate in which amicable solutions in arbitration cases may be found more easily.

Austrian practitioners have furthermore made a considerable effort to make arbitration more attractive during the last few years. For example, the Austrian Yearbook on International Arbitration[1]) has become the most important yearly publication on international arbitration in Austria. On the other hand, the Vienna Arbitration Days,[2]) a two-day conference before the famous "Ball for the Legal Profession", as well as the annual Willem C. Vis Moot Court[3]) shortly before Easter – that celebrated its 20th year in 2013 – have become regular highlights for the international arbitration scene to meet in Vienna.

However, the only genuine way to ensure Vienna keeps its outstanding reputation as an arbitration venue is not simply to maintain the status quo, but to improve upon the already excellent quality of arbitral proceedings in Austria. The key to this is to keep up with international standards, trends and developments.

The Austrian legislator is well aware of the fact that arbitration laws need to be dynamic. Therefore, Austrian arbitration legislation is in motion, trying to react appropriately to recent trends in international arbitration. This proves to be quite a challenge for the legislator as well, and it requires the support and advice of experienced arbitration practitioners.

Due to the diverse and numerous ongoing developments, this article focuses only on three of the most significant and remarkable developments: the legal framework and the latest amendment of the Austrian Arbitration Act; the recent revision of the VIAC Rules; and the changes introduced by recent anti-corruption legislation.

II. The existing Austrian legal framework

The legal framework restricts itself to very, very few issues in order to allow the parties and the arbitrators to have the biggest possible freedom in organising the proceedings.

The Austrian Arbitration Act, which is applicable if the seat of the arbitral tribunal is in Austria, is part of the Austrian Civil Procedural Act (ACCP) and only contains about fourty articles.[4]) It was completely reviewed in 2006, and now these provisions in principle correspond to the UNCITRAL Model Law.

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[1]) *Klausegger/Klein/Kremslehner/Petsche/Pitkowitz/Power/Welser/Zeiler* (Editors), Austrian Arbitration Yearbook 2007–2009 and Austrian Yearbook on International Arbitration 2010–2013.

[2]) Vienna Arbitration Days, The Austrian Conference for Arbitration Practitioners; see www.viennaarbitrationdays.at

[3]) Willem C. Vis International Commercial Arbitration Moot; see http://www.cisg.law.pace.edu/vis.html

[4]) *See:* Articles 577–618 ACCP. For further information on the Austrian Arbitration framework, see *Klausegger/Klein/Kremslehner/Petsche/Pitkowitz/Power/Welser/Zeiler* (Editors), Austrian Arbitration Yearbook 2007; *Riegler/Petsche/Fremuth-Wolf/Platte/*

The five main topics regulated in sections 577 to 618 ACCP are arbitrability in general, formal requirements for an arbitration clause, the relationship between courts and arbitral proceedings, interim measures and the possibilities to challenge the award. When going through them in detail, it is obvious that the Austrian legislator wanted to secure all advantages of international arbitration.

A. Arbitrability

In principle, any claim is arbitrable, even non-proprietary claims. Arbitration is, however, not possible for family law claims and claims arising from contracts subject to the Tenancy Act.

Furthermore, arbitration against consumers may only be implemented after the specific dispute has arisen, not in advance. In addition, the consumer has to receive written legal advice about the differences between arbitration and court proceedings. Non-compliance with this provision may result in a final award being set aside.

Most employment law disputes are – similar to disputes against consumers – not arbitrable.

B. Formal requirements for an arbitration agreement

Section 583 ACCP provides for the "written form" requirement, which is also fulfilled if the arbitration agreement is contained in an exchange of letters, faxes, e-mails or other means of telecommunication. The mere oral acceptance of such documents is not sufficient. Each of the parties must transmit one of the above mentioned documents in written form. An arbitration agreement which satisfies the requirements can, however, also be validly concluded by reference to other documents, e. g. to general terms of trade.

Managing directors, holders of procuration and holders of a general commercial power of attorney entitling these persons to run a business on behalf of a businessman, are not required to hold a special power of attorney in order to conclude an arbitration agreement for the principal. Otherwise, under Section 1008 of the Austrian Civil Code (ACC), the conclusion of an arbitration agreement requires a specific power of attorney. Such power of attorney must be in writing and specifically include arbitration agreements and reference to a specific legal transaction must be made.

C. Arbitration and the Courts: Questions of Competency

According to Section 583 (3) ACCP, an eventual argument that the arbitral tribunal does not have jurisdiction must be raised immediately or no later than when the first submission on the merits is made. A later plea is not admissible;

Liebscher, Arbitration Law of Austria: Practice and Procedure, 2007; *Hausmaninger* in *Fasching/Konecny*[2], ZPO; *Rechberger,* ZPO Kommentar[3]; *Rechberger/Simotta,* Grundriss des österreichischen Zivilprozessrechts[7], 2009; *Zeiler,* Schiedsverfahren: §§ 577–618 ZPO des SchiedsRÄG 2006; *Power,* The Austrian Arbitration Act (2006); *Torggler* (Ed.), Praxishandbuch Schiedsgerichtsbarkeit (2007).

in case no such objection has been raised, the defective arbitration clause and/or lack of jurisdiction of the arbitral tribunal are cured.

The arbitral tribunal has the competence to rule on its own jurisdiction.[5]) If an arbitral tribunal decides upon its lack of jurisdiction, the claim that was brought before the arbitral tribunal shall not be time-barred if immediately brought before the court and vice versa (Section 584 ACCP).

D. Interim measures

It is not incompatible with an arbitration agreement for a party to request, either before or during arbitral proceedings, interim or protective measures from a court and for a court to grant such measures.[6])

On the other hand, Austrian arbitration law in Section 593 ACCP also establishes the competence of the arbitral tribunal to order interim measures, which have to be enforced by national courts. The latter is also true if the interim measure is granted by a tribunal seated outside of Austria.

E. Grounds for setting aside an award

What happens after the final award has been issued? An arbitral award can only be challenged for very few reasons. Namely, under Section 611 ACCP, an award can be set aside if:

- a valid arbitration agreement does not exist;
- the arbitral tribunal has denied that it has jurisdiction but a valid arbitration agreement does exist after all;
- a party did not have the capacity to conclude a valid arbitration agreement;
- a party was not given proper notice of the appointments of an arbitrator or of the arbitral proceedings or was unable to present its case for other reasons;
- the dispute is not encompassed by the arbitration agreement;
- the constitution or composition of the arbitral tribunal was not in accordance with the parties' agreement or the Austrian arbitration provisions;
- there has been an infringement of ordre public.

In general, it has to be noted that the Austrian Supreme Court is very reluctant to set aside arbitral awards and is considered as very arbitration friendly.[7])

Unlike in the majority of European countries, in Austria there are – at the time of writing – three successive stages of appeal in case an award is challenged. However, this disadvantage will be corrected as of 1 January 2014, as outlined below in detail.

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[5]) *Welser,* Pitfalls of Competence, in *Klausegger/Klein/Kremslehner/Petsche/Pitkowitz/Power/Welser/Zeiler,* Austrian Arbitration Yearbook 2007, 3 et seq.

[6]) *Vcelouch,* Interim and Protective Measures Under the New Austrian Arbitration Act, in *Klausegger/Klein/Kremslehner/Petsche/Pitkowitz/Power/Welser/Zeiler,* Austrian Arbitration Yearbook 2007, 163 et seq.

[7]) See *Pitkowitz,* Die Aufhebung von Schiedssprüchen (2008).

III. Amendments to the Austrian Arbitration Act

Attempts to make some fundamental amendments to the arbitration provisions of the Austrian Code of Civil Procedure (Amendment to the Arbitration Act, *Schiedsrechts-Änderungsgesetz 2013*) have very recently been successfully completed. A motion to amend the laws on arbitration was launched back in 2012 by the National Council in order to make Austria an even more attractive place for international arbitration. However, the ambitious ministerial draft initially led to controversial reactions.

Many Austrian arbitration practitioners have always been very critical of the fact that in Austria there were three successive stages of appeal at ordinary civil courts in case an arbitral award is challenged. The reason for this criticism is not that annulment proceedings occur frequently, as this is not the case at all – annulment proceedings are rather the exception than the rule. Nevertheless, the mere possibility of an award being challenged by the defeated party makes the system of appeal a relevant topic. The fact that – theoretically speaking – parties in the past would have to go through a three-stage procedure of appeal in case an award is challenged, often served as a deterrent and implied a competition disadvantage for Austria as a place of arbitration.

The respective amendment of the Austrian laws on arbitration therefore aims at abandoning the existing three-stage procedure of appeal and introducing a system with only one instance of appeal, similar to the system used in Switzerland.

Such an innovation was discussed in the run-up to the Amendment to the Arbitration Act of 2006, but it failed at this time because representatives of the Supreme Court vehemently opposed it.[8])

The recent amendment to the Arbitration Act[9]) makes the Supreme Court the sole highly competent body of all annulment proceedings for commercial arbitration. The law, however, excludes cases with consumers involved from the proposed one-stage procedure. The reason for this was that consumers should have the full possibility of a three-stage appeal. On the other hand, the respective materials also indicated that the concentration of annulment proceedings at the Supreme Court would have a positive effect for consumers, as they might profit from the quality of Supreme Court decisions.[10])

The vast majority of Austrian arbitration practitioners, attorneys, notaries and the industrial bodies as well as the Federal Chamber of Commerce and the Austrian provinces have always strongly sympathised with these principles, as they consider the planned modifications a step forward to make Austria an even more attractive place for international arbitration.[11])

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[8]) *Oberhammer,* ecolex 2011, 876, 2.

[9]) 351/ME XXIV. GP – Ministerialentwurf – Gesetztext, Vorblatt, Erläuterungen: http://www.parlament.gv.at/PAKT/VHG/XXIV/ME/ME_00351/imfname_242163.pdf; vgl 2 322 Beil. Sten. Prot. Nr XXIV. GP.

[10]) 351/ME XXIX. GP – Ministerialentwurf – Gesetztext, Vorblatt, Erläuterungen, 5.

[11]) WKO, 10/SN-351/ME XXIV. GP – Stellungnahme zu Entwurf; *Pitkowitz,* Stellungnahme Schiedsrechts-Änderungsgesetz 2012 – SchiedsRÄG 2012; Österreichische

However, officials of the Austrian Supreme Court, when debating the new law, took the opposite view. Their arguments were – amongst others – based on the differentiation between those proceedings including consumers and the purely commercial ones. They claimed that such a "luxury solution" for commercial arbitration meets constitutional concerns.[12]) This criticism was of course not ignored as such, but in the end it was obviously considered rather unconvincing as almost all arbitration cases are of a purely commercial nature.

Some scholars furthermore expressed their doubts as to whether it makes sense to exclude consumers from the one-stage procedure as this would make the system unnecessarily complex and might also lead to problems of classification.[13])

Answering the criticism of the Supreme Court, it may be argued that such scepticism is rather based on its concern about the concentration of annulment proceedings for commercial arbitration at only one specific court leading automatically to a much bigger workload. According to the new law, the Austrian Supreme Court is faced with the task of performing a procedure of taking evidence. Functionally, this means that the Supreme Court has to conduct a procedure of first instance, which sounds in fact complex and time-consuming. In practise though, in such annulment proceedings it is very rare that questions concerning the facts have to be answered by the court of appeal.[14])

A two-stage system was also proposed when discussing the procedure in order to find a compromise which might be more acceptable for both sides – those who are sceptical about the concentration of the procedure at the Supreme Courts and the advocates of such a solution.[15]) Some practitioners feared that the danger of committing errors in a single-instance appeal system would be much higher, especially because – as already mentioned – the competent court would have to go through the process of taking evidence. However, this critical point can be partly compensated by another advantage that is to be expected from the new appeal system in arbitration in Austria: a much higher degree of specialisation of decision makers.[16])

Taking this into consideration – fortunately – the draft for the new Arbitration Act was passed by the "Justizausschuss" on 29 May 2013 and will enter into force on 1 January 2014. This is a highly valuable development. The scepticism expressed over the past two years is definitely not justified, but examples from other countries show that three stages of appeal in arbitration are rather the exception and that a system with only one stage of appeal works perfectly fine.

Notariatskammer, 16/SN-351/ME XXIV. GP – Stellungnahme zu Entwurf; Bundesarbeitskammer, 15/SN-351/ME XXIV. GP – Stellungnahme zu Entwurf; Industriellenvereinigung, 17/SN-351/ME XXIV. GP – Stellungnahme zu Entwurf.

[12]) *Kodek,* Zak 2012, 46 et seq.

[13]) *Burgstaller/Geroldinger,* 18/SN-351/ME XXIV. GP – Stellungnahme zu Entwurf, 3.

[14]) *Oberhammer,* Schiedsrechts-Änderungsgesetz 2012 – Begutachtung, 7.

[15]) See, e.g.: *Burgstaller/Geroldinger,* 18/SN-351/ME XXIV. GP – Stellungnahme zu Entwurf, 3.

[16]) *Burgstaller/Geroldinger,* 18/SN-351/ME XXIV. GP – Stellungnahme zu Entwurf, 1.

Another strong argument against the preservation of a three-stage appeal system lies in the nature of arbitration: it must not be forgotten that parties who decide against proceedings before a civil court and consciously choose arbitration instead are rather unlikely to put an emphasis on a three-stage appeal procedure before three different civil courts.[17]) Furthermore, a three-stage procedure of appeal is no longer "state of the art" in civil proceedings.[18]) In the past, during the procedure of appeal, huge amounts of time were lost during the first two instances with a view to finally obtaining a binding decision from the Supreme Court.[19]) It is a rather hard task to argue why parties should accept higher costs and a longer procedure so that three different instances decide on a legal question that might as well be directly answered by the Supreme Court. Therefore, the latest amendment regarding a one-instance annulment procedure is to be welcomed whole-heartedly.

One final remark needs to be made: in Austria, there is no differentiation in appeal proceedings regarding „domestic" and „international" arbitration.[20]) Whereas in other countries the possibility of appeals before civil courts can even be fully suspended for those arbitration cases which do not have a domestic nexus to the country of arbitration, in Austria it is not relevant whether an appeal concerns international or domestic arbitration. This once again underlines how significant the effects that come with the implementation of a one-stage appeal procedure are and how large the scope of the cases affected by the planned changes will be.

IV. The Vienna Rules: A short overview

Looking a little closer at the Vienna Rules as applied by the VIAC,[21]) as pointed out before, arbitration proceedings under the Vienna Rules are really good value. This is an important argument why it is worth choosing institutional arbitration in Austria, and Vienna as an arbitration venue.

A. Costs of Arbitration

For example, a EUR 500,000 dispute involving one arbitrator would, according to the VIAC's current schedule of fees, only amount to EUR 24,000. If, however, you have three arbitrators and we set a value in dispute of EUR 1,000,000, the total costs will be between EUR 77,250 and EUR 90,000. For bigger disputes of, say, EUR 20,000,000, the total costs range from EUR 257,750 up to EUR 305,000, and for a value in dispute of EUR 100,000,000, the total costs would range between EUR 465,750 and EUR 553,000. So, fees are definitely below those charged for arbitration proceedings brought before the London

[17]) *Burgstaller/Geroldinger,* 18/SN-351/ME XXIV. GP – Stellungnahme zu Entwurf 2.

[18]) *Rechberger,* ecolex 2011, 886, 3.

[19]) *Oberhammer,* ecolex 2011, 876, 2.

[20]) *Verschraegen,* Stellungnahme zum Entwurf des SchiedsRÄG 2012, 1 et seq.

[21]) http://www.viac.eu.

Court of International Arbitration and the ICC rates. Still, they are – luckily – in a range that is not so low that it would be unattractive for prominent arbitrators.

B. The Institution

The International Arbitral Centre of the Austrian Federal Economic Chamber is a permanent institution. Its structure is characterized by the Board *(„Präsidium")* and the Secretary General. According to the personal experience of the author, VIAC arbitration was extremely popular 10 to 20 years ago, then there was a slight decrease in the number of cases, but during the last few years, its popularity is on the rise again. For example, in 2009, there were 60 cases pending. The following year, the number rose slightly to 68 cases and in 2011 and 2012 the number of VIAC registered cases pending was 83 and 79 respectively. The total amount in dispute last year was approximately EUR 826,000,000, whereas in 2011 the total was EUR 683,000,000. Generally, about a third to a half of all cases are settled by an arbitral award.

C. The Proceedings

Basically, the arbitral tribunal is free to conduct the arbitration proceedings at its absolute discretion; however, the principle of equal treatment of the parties must be applied and, of course, the right to be heard must be ensured at every single stage of the proceedings. Unlike in ICC proceedings, there are no formal terms of reference and there is – unless the expedited procedure is chosen, where an award has to be rendered within six months after transmission of the file to the arbitral tribunal – no formal time limit for the award that would have to be prolonged by the court. Still, it must be said that the proceedings are usually quick.

The main point of contact during the proceedings is the Secretary General, who must be informed of all steps taken by the arbitral tribunal. Unlike in ICC proceedings, however, he does not interfere with the arbitral tribunal, and in practice, his main tasks are serving the claim, formally reviewing the award, fixing the costs and – in the end – serving the award.

The proceedings start with each party appointing one arbitrator, and both arbitrators must agree upon a chairman within 14 days. In case one party fails to appoint its arbitrator, the arbitrator is appointed by the VIAC Board. The same happens if both arbitrators fail to agree on a chairman or if the parties cannot agree on the person of a sole arbitrator.

If one party does not take part in the proceedings, the VIAC Board would appoint the arbitrator for this person but from that point onward, the case would be heard with the other party alone. Proceedings may be written or oral, even though there has been a recent decision of the Supreme Court[22]) annulling an award where one party explicitly requested a hearing and this demand was not met by the arbitral tribunal.

[22]) OGH 30. 6. 2010, 7 Ob 111/10i; see also *Neuber,* Neues zum rechtlichen Gehör im Schiedsverfahren, wbl 2013, 130.

Evidence-taking has reached international standards. Written witness statements in line with the IBA Rules on the Taking of Evidence are taken into account by most arbitral tribunals, and as clients from the English-speaking world will be glad to hear, even examination and cross-examination have found their way into Austrian arbitration proceedings.

D. The Award

As soon as the arbitral tribunal is of the opinion that all arguments have been presented, it formally closes the proceedings and issues the award. A copy of this award is then sent to the Secretary General for revision and for eventual suggestions or corrections, but it neither has to be affirmed by the Board of the VIAC nor is there any formal scrutiny. Then, the costs are fixed, the award is signed by all three arbitrators and then it is served by the Secretary General again. After the award has been rendered, a claim for annulment can be made under Section 611 ACCP (but such claims for annulment are only successful in very rare cases). The award forms a title of execution subject to all international standards, and is enforceable under the rules of the New York Convention.

V. Reformation of the VIAC Rules

Trends in international arbitration mainly aim at making arbitral proceedings more (time-) efficient, at improving their quality and at the same time at reducing their costs. Such incentives have been made especially under the UNCITRAL Model Law and the ICC Rules. In order to adapt to recent developments, the Vienna International Arbitral Centre (VIAC) has just recently adopted a complete revision of the VIAC Rules (Vienna Rules), applicable to all proceedings in which the statement of claim was filed after 30 June 2013. Besides some fundamental changes in content, a change in structure and order is a consequence of the ongoing reformation. To some extent, new terminology has also been used. Unsurprisingly, these amendments concern the same issues dealt with by the 2012 ICC Rules:

A. Definitions for more clarity

It is an essential requirement of any set of arbitration rules that there is clarity about the most important terms which are being used over and over again. Therefore, a short catalogue of definitions has been introduced in Article 6. Such a list of definitions aims to make interpretation easier. Definitions also help simplify the provisions themselves, which can be made shorter and more precise, instead of having to provide a long explanation of a certain term.

B. Joint proceedings, inclusion of third parties, multi-party arbitration

As time and cost efficiency in arbitral proceedings has grown more and more important over the years, so has the necessity of provisions for procedures dealing with multiple contracts. Whether, and under which circumstances, third

parties may be involved in proceedings and whether multi-party arbitration is admissible is a crucial question.[23])

In its new version, Articles 14 et seq. of the VIAC Rules provide for a set of provisions in which multi-party proceedings are regulated in detail. Requests for joinder become easier, and there is a detailed procedure to be followed.

The facilitation of joint proceedings can certainly contribute to the reduction of costs and to a shorter duration of arbitral proceedings. Therefore, in general, a trend towards deregulation can be noted and is likely to find its continuation also under the new VIAC Rules.

When it comes to multi-party proceedings requirements, a rather liberal approach has to be chosen to allow a preferably large number of joint proceedings.

It is, according to the new rules, up to the arbitral tribunal to decide whether the participation of a particular third party is permissible or not. The arbitral tribunal decides upon the request of one of the initial parties or the third party. Its decision depends on the role the concerned party has in the proceedings and there is no final list of determining factors.

Deregulation leads to more procedural flexibility and gives the arbitrators the opportunity to decide on a case-to-case basis whether a multi-party procedure is expedient or not. However, the new provisions definitely ensure that the right of all parties to be heard is being protected.

C. Consolidation of arbitral proceedings

The idea of consolidating arbitral proceedings takes the same line as the provisions for joint proceedings, inclusion of third parties and multi-party arbitration. The trend to make proceedings more efficient also suggests the parties should be given the opportunity to initiate the consolidation of two or even more than two proceedings. The board can comply with such a request if the other parties agree with consolidation or if the same arbitrators were nominated and appointed and if there is a common seat of the arbitral tribunal in all of the arbitration agreements. After consultation with the parties and the arbitrators, the board shall, according to the new Article 15, decide upon the request, taking into consideration all relevant factors of the specific case at hand.

D. Fast-track proceedings

The new VIAC Rules also contain legal provisions for an expedited procedure, known as fast-track proceedings.[24]) They provide for a legal framework

[23]) See *Voser/Meier,* Joinder of Parties or the Need to (Sometimes) Be Inefficient, in *Klausegger/Klein/Kremslehner/Petsche/Pitkowitz/Power/Welser/Zeiler,* Austrian Arbitration Yearbook 2008, 115 et seq.

[24]) See also *Welser/Klausegger,* Fast Track Arbitration – Just Fast or Something Different? in *Klausegger/Klein/Kremslehner/Petsche/Pitkowitz/Power/Welser/Zeiler,* Austrian Arbitration Yearbook 2009, 258; *Fiebinger/Gregorich,* Arbitration on Acid: Fast Track Arbitration in Austria from a Practical Perspective, in *Klausegger/Klein/Kremslehner/Petsche/Pitkowitz/Power/Welser/Zeiler,* Austrian Arbitration Yearbook 2008, 237.

which will be applied in cases where time turns out to be the most important factor for the parties. The provisions on the expedited procedure as laid down in Article 45 are only to be applied if the parties specifically include them in their arbitration agreement or if they agree on their application later. In such fast-track proceedings, the time limit for the payment of the advance on costs is shortened. Counterclaims and set-off-claims are admissible only until the time limit for submission of the answer to the statement of claim expires and proceedings shall, as a basic rule, be conducted by a sole arbitrator who has to be appointed jointly by both parties within 15 days, otherwise the board shall appoint the arbitrator. The final award shall be rendered within 6 months of transmission of the file, although the Secretary General may extend the time limit and its exceedance does not make the arbitration agreement invalid. The handling of documents should be tightly organised: after submission of the Statement of Claim and the Answer to it, only one further submission shall be exchanged. If requested by a party or if necessary, the arbitral tribunal shall hold a single oral hearing and there should be no post-hearing briefs.

E. The Appointment of arbitrators

Impartiality and independence of the arbitrators are basic principles of arbitration.[25])) Hence, it is self-explanatory that the VIAC Rules provide for clear norms that specify the appointment of arbitrators. The new Vienna Rules contain provisions as to the appointment of arbitrators in order to present an even more coherent system. The disclosure of any circumstances that might give rise to doubts concerning the impartiality and independence of an arbitrator is very central. Henceforth, the nominated arbitrators are going to be confirmed by the board – a measure that once again emphasizes the importance of the person of the arbitrator. Unlike before, VIAC board members can also be appointed as arbitrators (and not only chairmen), but, of course, cannot be appointed by the Board itself.

F. Award on the advanced payment

The refusal or inability of parties to pay their share of arbitration costs is a common issue in international, but also Austrian arbitration. Therefore, the Vienna International Arbitral Centre has clarified that a separate award on the advanced payment is permissible. Furthermore, the consequences of the inability or unwillingness of one or both of the parties to pay will be determined.

By accepting the Vienna Rules, the parties also accept to bear the advance on costs equally. If the advance on costs is not paid, the proceedings may be terminated. This, however, does not prevent the parties from raising the same claims in another procedure on a subsequent date.

If one party pays its share of the advance on costs to prevent the proceedings from failing, but the other party refuses to pay, there has always been the possibility that the party who is willing to pay also pays the share of the other party. This might amount to a significant financial burden, of course depending

[25])) IBA Guidelines on Conflicts of Interest in International Arbitration (2004).

on the liquidity of the paying party and the amount of costs. Therefore, the arbitral tribunal shall be given the opportunity to render an interim award on the advanced payment, so that the non-paying party has to reimburse the paying party immediately.

G. Institutional changes

In the course of the reformation of the VIAC Rules, some institutional changes have also been implemented, for instance, a "Deputy Secretary General" has been introduced.

H. Oral hearings

With regard to oral hearings in arbitral proceedings, the current situation is that oral hearings are to be held only if this is requested by the parties. The new VIAC Rules will change the existing system: under Article 30, the basic rule is that the tribunal will hold such an oral hearing upon any party's request, unless the parties have explicitly excluded oral hearings.

I. Costs

A list of elements constituting procedural costs is included in the new VIAC Rules. This should lead to further clarification. The costs for arbitrators will from now on be more flexible. Under the old rules, if a case was extremely complex, there was the possibility to raise the arbitrator's fee only if an arbitral tribunal has to decide upon it, but not, if a sole arbitrator has to deal with a complicated case. This has now been changed.

All in all, it is to be expected that the new Vienna Rules will, in combination with the new one-instance annulment procedures, have a terrific impact on international arbitration in Austria.

VI. Anti-corruption legislation

The subject of corruption in the public sector has – unfortunately for good reason – become more and more important. The "Act Amending the Anti-Corruption Legislation 2012" entered into force on 1 January 2013 and introduced profound changes to the Austrian Criminal Code. The need for new and stricter anti-corruption laws can be seen as a direct consequence of the increasing number of corruption cases.

One might ask why anti-corruption legislation is of importance when talking about recent trends in Austrian and international arbitration. The answer is rather simple. Although many people are not aware of the fact that arbitrators are subject to Austrian anti-corruption laws, this is the case and has been the case for years. As the scope of anti-corruption laws was widened by the above mentioned act, this is also relevant for arbitrators and generally for people dealing with or involved in arbitral proceedings.

An especially remarkable fact is that, under certain circumstances, even arbitrators of non-Austrian nationality are subject to Austrian anti-corruption criminal law. This shows, once again, the significance of arbitration in Austria. The importance of the arbitrators' absolute impartiality and independence from the parties is – as already mentioned above – a cornerstone of any arbitral procedure. Although it should go without saying that this means that corruption is not acceptable, the legislator decided to eliminate all possible doubts and to make a clear statement: anti-corruption laws also apply to arbitrators.

A. Which arbitrators are subject to Austrian anti-corruption law?

From the mere wording of the law, it is not particularly easy to tell which arbitrators are subject to Austrian anti-corruption provisions. It is especially hard to answer this question because the legal definition of the word "arbitrator", as provided for in Section 74 subsection 4c of the Austrian Criminal Code, seems to raise more questions than it answers.[26])

The complexity of the issue is understandable considering that Austrian anti-corruption legislation was originally introduced to sanction acts of corruption committed by public officials only and then, at a later stage, also extended to arbitrators. Therefore, the wording of the provisions is sometimes not completely suitable when applied to arbitrators.

Nevertheless, arbitrators clearly are subject to anti-corruption legislation. Anti-corruption laws apply as soon as the arbitral tribunal has been constituted, even if the seat of arbitration is still unclear. At the same time, anti-corruption laws are not yet applicable as long as no specific arbitration has been started. Being an arbitrator whose name appears, for example, on a list of official arbitrators of a specific arbitral institution does not yet mean that this person is an arbitrator within the meaning of the Austrian anti-corruption laws.

Generally, Austrian criminal law is applicable to any criminal offence committed on Austrian territory.[27]) The territorial principle can, however, not always be strictly applied. According to the recently introduced Section 64 subsection 1 lit 2 and lit 2a of the Austrian Criminal Code, sometimes even crimes which are not committed in Austria may be subject to prosecution in Austria.[28]) Austrian anti-corruption laws furthermore apply to any Austrian citizen who commits a corruption offence. A crime committed by an Austrian arbitrator or against an Austrian arbitrator is prosecutable under Austrian criminal law.[29])

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[26]) *Welser,* "Sweetening" or "Baiting" – A New Crime for Arbitrators, in *Klausegger/Klein/Kremslehner/Petsche/Pitkowitz/Power/Welser/Zeiler,* Austrian Yearbook on International Arbitration 2013, 153.

[27]) *See* Sec 62, Austrian Criminal Code: *"The Austrian criminal laws apply to all deeds that have been committed in the inland."*

[28]) *See* Sec 64, Austrian Criminal Code: *"The Austrian criminal laws apply regardless the criminal laws of the site of crime to the following crimes committed in a foreign country: (...) 2. prosecutable acts somebody commits against (...) an Austrian arbitrator (sec 74 sub sec 1 no. 4c) during or because of the execution of his duties and that somebody commits as (...) an Austrian arbitrator."*

[29]) See in more detail *Welser,* "Sweetening" or "Baiting" – A New Crime for Arbitrators? in *Klausegger/Klein/Kremslehner/Petsche/Pitkowitz/Power/Welser/Zeiler,* Austrian Yearbook on International Arbitration 2013, 154.

When it comes to distinguishing between an "Austrian arbitrator" and a "non-Austrian arbitrator", the relevant factor is the seat of the tribunal, not the arbitrator's nationality.

What the aforesaid amounts to is that if a crime is committed against any arbitrator in Austria (general rule) or against or by an Austrian arbitrator in another country (specific rule: regardless of the laws of the country in which the crime is committed), this offence is subject to Austrian anti-corruption law.

B. Which crimes are covered by the Austrian anti-corruption law?

The word "corruption" is often used as an umbrella term for different crimes which theoretically all apply to arbitrators. Nevertheless, not all of the norms are equally relevant in terms of arbitration.

Certainly the most serious crime is bribery, which means that somebody actively bribes an arbitrator by offering, promising or granting an advantage to a public official or an arbitrator for himself or a third person for the performance of official functions contrary to his duties.[30])

At the same time, an arbitrator's corruptibility is also a criminal offence. An arbitrator is not allowed to request, accept or agree to receive an advantage for himself or a third person for the performance of official functions contrary to his duties.[31])

Furthermore, the acceptance of an advantage or the granting of an advantage for dutiful performance of official functions of an arbitrator is also penalized.[32])

Arbitrators had been subject to the two crimes described above before the Act Amending the Anti-Corruption Legislation 2012. The recent developments relevant to Austrian arbitration are the newly introduced "baiting" and "illegal intervention".

Baiting is the preparation of bribery and aims at avoiding the establishment of certain dependencies between the person who grants and the person who receives a certain advantage.[33]) It is not relevant whether the respective person works in accordance with his duties or contrary to them. When it comes to arbitrators, however, it is rather unlikely that baiting will gain much relevance in practice, as it is hard to imagine that an interaction between a future party of arbitral proceedings which have not yet been initiated and an arbitrator of this future arbitral proceedings who has not yet been appointed might fall into the scope of the illegal trading in influence.

Another newly introduced criminal offence is "illegal intervention"[34]) which might be described as the unlawful lobbying of decision makers; in this case, arbitrators.

What is the conclusion to all this? As outlined above, the complex Austrian anti-corruption provisions that were originally only designated for "public officials" are not a perfect match for arbitrators. Some of them do not seem to apply at all because of the definition of an arbitrator as a person who has already been appointed in a specific arbitration.

[30]) *See* Sec 307, Austrian Criminal Code.
[31]) *See* Sec 304, Austrian Criminal Code.
[32]) *See* Sec 305, 307a, Austrian Criminal Code.
[33]) *See* Sec 306, 307b, Austrian Criminal Code.
[34]) See Sec 308, Austrian Criminal Code.

Furthermore, the new provisions are in many respects rather vague. Generally, of course, arbitrators are subject to Austrian laws on corruption and to the criminal offence of "baiting". However, the question of whether such laws on anti-corruption actually apply has to be carefully examined. It goes without saying that corruption is a serious and far-reaching offence. It is, however, hard to imagine that arbitrators that have not yet been appointed in a specific case may actually be subject to "sweetening", as already shown by the examples above. Once an arbitrator is appointed, however, the granting of advantages by one of the parties is certainly closer to real bribery than to "sweetening", as any potential influence on the arbitrator is exerted with respect to this specific case and regarding his specific duties. The area of application of the criminal offence of "sweetening" with regard to arbitrators therefore seems to be rather narrow.

When it comes to dealing with the definition of an "undue" advantage in the area of arbitration, due to the elevated level of "normal" expectations, this is certainly far less critical than with public officials. As already mentioned, advantages that are common in a certain area are normally not considered "undue".

Furthermore, disclosure duties also work in favour of the arbitrator. The declaration of any advantage received would immediately disprove any suspicion of *dolus eventualis* on the part of the arbitrator.

After all, the fact that arbitrators are covered by the scope of Austrian anti-corruption law and also by the new, very broad criminal offence of "baiting" is not something to be worried about. So long as arbitrators and parties follow their moral guidelines and adhere to the general principles that have existed in the area of arbitration for years, there is no need to fear prosecution.

VII. Conclusion

The aforementioned examples give a rough idea of the existing system and the ongoing changes in Austrian arbitration, which are primarily guided by international developments. They show the attempts of the Austrian legislator and the most important Austrian arbitral institution, VIAC, to further improve the quality of arbitration in Austria, which is already very high. The abandonment of the three-stage appeal procedure in particular and the introduction of a one-stage appeal procedure show a willingness to modernize the system. The various adaptations to the VIAC rules in order to provide for faster, cheaper and above all more efficient proceedings are the manifestation of the dynamics of (international) arbitration.

The recent changes in Austrian anti-corruption legislation and the inclusion of arbitrators also outline that arbitration in Austria is not considered a second-class alternative to conventional civil litigation, but a serious and well-controlled legal procedure with strict regulations which has to live up to very high standards.

Due to these developments, Vienna clearly has the potential to become an even more popular and well-respected place of arbitration in the future.