"Sweetening" or "Baiting" – A New Crime for Arbitrators?

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I. Arbitrators as New Addressees of Anti-Corruption Legislation

The amount and frequency of amendments made to the anti-corruption rules enshrined in the Austrian Criminal Code over the past few years is a clear indication of the political relevance of this topic. It is evident that even the slightest form of corruption, including the making of mere "donations" long before a specific favour is requested, is no longer considered a trivial offence, but a serious crime.

It is not widely known that these provisions also apply to arbitrators. The term "arbitrator" was explicitly mentioned in the Austrian Criminal Code for the first time in the amended version dated January 1, 2008. At this time, the Austrian legislator broadened the scope of the existing corruption laws to include arbitrators. This amendment was made in order to comply with the Criminal Law Convention of the Council of Europe. Therefore, the anti-corruption provisions in their 2008 amended version also forbid arbitrators from accepting unusual gifts, donations or other advantages that might influence them in favour of one party.

The scope of the latest Austrian anti-corruption legislation is even broader than one might think. As a reaction to a recommendation of the Group of States against Corruption (GRECO), the Austrian legislator has once again made profound changes to the Austrian Criminal Code in its "Act Amending the Anti-Corruption Legislation 2012" *("Korruptionsstrafrechtsänderungsgesetz 2012"),* which entered into force on January 1, 2013. Once again, these changes also relate to arbitrators and, in some cases, even extend the international applicability of the Austrian Criminal law to arbitrators of non-Austrian nationality and to crimes committed abroad.

Why was there a specific need to apply Austrian anti-corruption provisions to arbitrators at all? It should go without saying that absolute impartiality and independence from the parties to the arbitration are the most crucial requirements

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which arbitrators have to fulfill. This is common knowledge and has been duly taken into account by the wide duties of arbitrators to sign declarations of independence and to disclose any potential conflicts of interest or close relationships to one of the parties. As we all know, this issue was dealt with a long time ago by different associations and regulated in detail not only by legislation,[1]) but also by guidelines, for instance the IBA Guidelines on Conflicts of Interest in International Arbitration.

Furthermore, it is not surprising that the bribing of arbitrators is forbidden, but the provisions that have recently been introduced in the Austrian Criminal Code which codify the criminal relevance of the "preparatory" crime of "baiting" or "sweetening", *i.e.* where a person tries to influence the "goodwill" of the arbitrator through donations, gifts or invitations well in advance before the actual "favour" is asked by the influenced person, raises a number of issues. At first glance, it seems that they criminalize and therefore seriously put at risk the common practice of sending out invitations within the arbitral community. Should big arbitration conventions, which are often sponsored and include gala receptions at interesting venues, therefore be banned? Or are things not quite as strict as they seem?

This article deals with the scope of the criminal provisions, namely how and to what extent the recent amendments to national legislation are of relevance for Austria as a place of arbitration and for arbitrators. It also looks at the question of whether, from a legal perspective, it is possible to consider a person an "arbitrator" before he/she has actually accepted to serve as such in a specific arbitration. This is of particular relevance for the – newly-defined – criminal offence of "sweetening" or "baiting". Unlike judges or public officials, who are usually appointed for a long period of time and whose responsibilities are clearly defined, it is often completely unclear as to whether a person will act as an arbitrator or not unless this person has already been appointed as such. Is it therefore equally unlawful to give a merely "potential" arbitrator the same treats that would be unlawful for the building authority clerk with whom an application for a building permit will be filed some weeks later?

II. Which Arbitrators Are Subject to the Austrian Criminal Code?

Before examining in detail the newly introduced criminal offences and how they differ from previous offences regulated by statute, one must start with three simple questions. Firstly, do the Austrian provisions only apply to Austrian arbi-

[1]) *See, e.g.,* Sect 588 ACCP on the impartiality of arbitrators and the corresponding ground for annulment of the award as well as Article V New York Convention; *see also* Pitkowitz, Die Aufhebung von Schiedssprüchen, Sect 611, mn 296 *et seqq.* (2008); Hausmaninger, *Sect 611 mn 160, in* Kommentar zu den Zivilprozessgesetzen (Fasching & Konecny eds., 2nd ed., 2011).

trators? Or do they also apply to foreign arbitrators? At what point can someone – from a legal perspective – be considered an arbitrator? At first glance, these questions seem easy enough to answer, as the Criminal Code itself provides for a legal definition in Section 74 subsection 4c. By looking at this definition one might, however, soon discover that it raises more questions than it answers. To understand what the legislator means by the word "arbitrator" in this specific context, a certain willingness to solve brain-teasers is a basic requirement.

A. Getting Started: At which Point Can a Person Be Considered an Arbitrator?

As outlined above, it is due to the very nature of arbitration that the application of anti-corruption laws to arbitrators raises more questions than it does in the case of public officials. A public official is generally appointed for an indefinite, long period of time. He performs clearly defined public duties and the cases dealt with are, basically, pre-defined by their subject matter and the local competency of the authority for which he acts.

By contrast, even if we talk about people who have performed considerable arbitration work, who are members of arbitral institutions or on permanent arbitrators' lists, or who even have "independent arbitrator" printed on their business cards, it is completely unclear what will be their next arbitration case or whether they will have one at all. As we all know, even though there are some arbitral institutions which only allow those people to arbitrate who are on their official list, it is still unclear whether a person included in this list will be appointed as an arbitrator. Furthermore, according to most procedural or institutional rules, the most common process for appointing arbitrators is that each of the parties chooses one arbitrator and those two arbitrators appoint the presiding arbitrator, or that only the chairman is appointed by the arbitral institution.

Therefore, at what point can a person be deemed to be an arbitrator? Is any invitation of "potential" arbitrators by a "potential" party forbidden as such? Even weeks or months before a specific arbitration has started? Where should we draw the line? Must one at least speak of unlawful contacts if, in view of a specific, but *potential* mandate to act as an arbitrator, one party invites a candidate for a luxurious dinner? We have to bear in mind that a certain level of interaction between the parties and the arbitrators before they are appointed seems to be a natural thing. Can such contact, if accompanied by an invitation, already be forbidden under anti-corruption laws? Or is the law not yet applicable because the arbitrator has, so far, not formally been appointed? What about the relationship between the three arbitrators? If the arbitral tribunal has not yet been constituted, but two of them have already accepted their positions, is it possibly unlawful for *one of them* to invite a possible chairman out to a fancy restaurant? Could this be interpreted as attempting to influence the conduct of the (potential) third arbitrator?

These questions are not easy to answer, and looking for further clarification

by examining the law itself bears little fruit. On the basis of the definition of "arbitrator" given in Section 74 of the Criminal Code, it seems rather unlikely that persons not yet appointed as arbitrators are covered by the anti-corruption laws. The definition speaks of a *"decision-maker of an arbitral tribunal within the meaning of Section 577 et seq. of the Austrian Code of Civil Procedure with its seat in Austria or a seat not yet defined (Austrian arbitrator) or with its seat abroad"*. Strictly speaking, a decision-maker cannot be said to exist before this person has been appointed. Actually, one cannot even speak of a "decision-maker within an arbitral tribunal" unless such a tribunal has been formally constituted.

Another argument pointing in this direction is the fact that the law explicitly takes into consideration the seat of the arbitral tribunal. Obviously, arbitrators are members of an arbitral tribunal seated *anywhere* in the world, as the three alternatives "seat in Austria/seat abroad/seat not yet defined" do indeed include all conceivable possibilities. The assumption that *"decision-makers with a seat not yet defined"* are considered Austrian arbitrators – on which I will elaborate later – evidently presumes that they have, at least, already been appointed. Furthermore, one cannot really talk of a "decision-maker of an arbitral tribunal" if neither the arbitral tribunal has been constituted nor the person appointed. Therefore, it seems that at least the appointment in a specific case is a necessary prerequisite for being an arbitrator subject to anti-corruption laws.

The legislative materials are silent on the issue as well. It seems that the legislator only inserted the reference to Sections 577 of the ACCP in order to make it clear that, within the meaning of the Criminal Code, the German word *"Schiedsrichter"*, which covers arbitrators and referees alike, only refers to arbitrators, irrespective of where the seat of such arbitration may be.

We can therefore conclude that there is no doubt that the anti-corruption laws apply as soon as the arbitral tribunal has been constituted, even if the seat of arbitration is still unclear. They might, however, also apply as soon as an arbitrator has accepted his appointment, or if he is in talks about being appointed. We will come back to this issue later in the light of the specific anti-corruption provision of "sweetening". It is clear that these laws are not yet applicable as long as no specific arbitration has started, even if a party thinks of possibly nominating a certain person *in case* an arbitration case might occur.

B. Who Is an Austrian Arbitrator?

According to the general rule laid down in Section 62 of the Criminal Code, Austrian criminal law is applicable to any criminal offences committed in the Republic of Austria. Therefore, crimes committed on Austrian territory are subject to prosecution under Austrian criminal law.[2])

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

In this case, neither the nationality of the arbitrator nor the seat of arbitration is of any importance. Therefore, if an arbitral tribunal consisting of a Swiss, a Turkish and a British arbitrator that is seated in Paris holds hearings in Vienna, and they are "generously" invited by a non-Austrian party to spend a luxurious skiing weekend in the Austrian Alps at the expense of this party, all of the persons involved would be subject to Austrian anti-corruption law.

However, according to the newly introduced Section 64 subsection 1 lit 2 and lit 2a of the Criminal Code,[3]) even crimes which are not committed in Austria may be prosecuted here. That is to say, Austrian criminal law will, *regardless of the laws of the country in which the crime is committed,* apply to all criminal offences involving an *Austrian arbitrator* (see Section 74 of the Criminal Code) during or on account of the performance of his duties and to any criminal offences that an *Austrian arbitrator* commits. Furthermore, it also applies to all corruption offences committed by Austrian citizens (at the time when the crime is committed) or if such an offence has been committed in favour of an *Austrian arbitrator.* A crime committed by an Austrian arbitrator or against an Austrian arbitrator is prosecutable under Austrian criminal law. This amendment has been made in order to take into account a recommendation of GRECO[4]) that even raised the issue of preparatory corruption offences in its Criminal Law Convention of 1999.

As already mentioned above, in 2008 the legislator's intention was to clarify the term "arbitrator" and, for this purpose, to add a completely new definition to the Criminal Code.[5]) Furthermore, the legislator evidently also tried to define "Austrian arbitrator". Looking at the results, the final definition is unfortunately not clear at all. The final definition in Section 74 of the Criminal Code reads as follows:

> *"Arbitrator: any decision-maker of an arbitral tribunal within the meaning of Section 577 et seq. of the Austrian Code of Civil Procedure with a domestic seat or a seat not yet defined (Austrian arbitrator) or with a seat abroad."*

What is especially confusing is the term "Austrian arbitrator" put in parenthesis just after the phrase "seat not yet defined": Does this mean that, if the seat of the arbitral tribunal has not yet been defined, only arbitrators who hold Austrian citizenship are subject to Austrian criminal law? In other words, does Section 64 of the Criminal Code – when extending the punishability to crimes committed outside of Austria by, against or in favour of "Austrian arbitrators" – only apply to Austrian nationals if the seat of arbitration has yet to be defined? Is there a deeper meaning behind the term "Austrian arbitrator" or does "Austrian arbitrator" sim-

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[3]) *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.*"

[4]) *See* 1950/A XXIV. GP – Initiativantrag, 4.

[5]) *See* 92/ME XXIII. GP – Ministerialentwurf – Vorblatt und Erläuterungen, 7.

ply refer to the person's Austrian nationality? What at first glance seems a plausible solution turns out to be a wrong assumption.

As outlined above, criminal offences which relate to arbitrators and which are committed by an Austrian national anywhere else in the world are punishable without further requirements. If the person committing the crime is not an Austrian national and if the crime is committed abroad, only crimes by, against or in favour of "Austrian arbitrators" are subject to Austrian criminal law. If, on the contrary, the crime is committed in Austria, all "arbitrators" in general are covered.

What would be the reason for extended the scope of application of Austrian law to arbitrators of any nationality just for the (relatively short) period of time when the seat of arbitration has not yet been defined if the crime against them has been committed abroad? To be frank, it is hard to find a reason for this. However, if we limit such criminal liability to arbitrators of Austrian nationality, we face the problem that Section 64 of the Criminal Code explicitly refers to Section 74 subsection 1 lit 4c as regards the legal definition of "Austrian arbitrator". It is, however, completely absurd to assume that an "Austrian arbitrator" would *only* be an arbitrator within an arbitral tribunal whose seat has "not yet been defined".

Therefore, the only plausible solution is that the definition "Austrian arbitrator" is to be taken from the seat of arbitration being in Austria, and – astonishingly – also if the seat of the arbitration has not yet been defined so far. This solution is also in line with doctrine. According to the "Vienna Commentary on the Criminal Code",[6]) an arbitrator is considered "Austrian" if the seat of the arbitral tribunal is in Austria or not yet defined, even if foreign law is applicable on the merits. If the arbitral tribunal has its seat abroad, the arbitrator would not be considered Austrian.

Therefore, the seat of the arbitral tribunal is the only relevant factor for distinguishing between an Austrian arbitrator and a non-Austrian arbitrator. If the seat of the arbitral tribunal is Austria, or if the seat has not been yet decided upon, all of the arbitrators are considered Austrian arbitrators in terms of the Austrian Criminal Code, regardless of whether the arbitration case is subject to Austrian law or not. If the arbitral tribunal has its seat abroad, the decision-makers of the arbitral tribunal are considered non-Austrian arbitrators even if all of them hold Austrian citizenship.

Take, for instance, an arbitral tribunal consisting of three arbitrators – one arbitrator with Austrian nationality, one with Turkish nationality, and one with French nationality. If the tribunal has its seat in Austria, all three arbitrators are considered Austrian arbitrators for the purposes of the Austrian Criminal Code.

By contrast, none of the three falls within the definition of an Austrian arbitrator if the arbitral tribunal has its seat in, for example, Turkey! This must always be kept in mind when discussing the applicability of Austrian anti-corruption laws and their significance for arbitration.

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[6]) *See* Robert Jerabek, *Sect 74, mn 21, in* Wiener Kommentar zum StGB[2] (2010).

The differentiation between Austrian arbitrators and non-Austrian arbitrators is – of course – important in those cases where the law draws different legal consequences depending on those two terms.

It is quite remarkable that before the recent amendments to the Austrian Criminal Code, some rules on anti-corruption only applied to "Austrian arbitrators". Therefore, the differentiation used to be really important. An arbitrator with Austrian nationality was not prosecutable if the norm in question only referred to Austrian arbitrators, and the seat of the arbitral tribunal was in a foreign country, because he was – for the purposes of Austrian criminal law – not deemed to be an Austrian arbitrator.

This appears very confusing and a little odd, but only at first sight. Thinking through this constellation, the reason for not linking the prosecutability to a person's nationality is quite obvious. The consequence of such an approach would be that if a person bribed our three arbitrators of the arbitral tribunal which has its seat in Turkey, then the one with Turkish nationality and the one with French nationality would go unpunished (only taking into consideration Austrian legislation on corruption, of course). By contrast, the arbitrator with Austrian nationality could be prosecuted. This would be a rather unsatisfying and questionable result.

C. Getting the Result: Which Arbitrators Are Subject to Anti-Corruption Laws?

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.

An Austrian arbitrator is a member of an arbitral tribunal with its seat in Austria (or a yet undefined seat). In this respect, it is no relevance whatsoever whether the arbitrator holds Austrian citizenship or whether he is a national of another country.

What is certain is that a person is an arbitrator within the meaning of anti-corruption legislation if the arbitral tribunal has already been constituted. On the other hand, it is definitely not sufficient to be on an institutional "arbitrators' list" or to merely hope to be nominated in a possible future case. It may, however, be possible to consider somebody an arbitrator when entering into preparatory talks in view of a specific, pending case. We shall come back to this issue when discussing the specific "baiting" or "sweetening" provisions.

III. The Different Faces of Anti-Corruption Law

Until the recent amendments to the Austrian Criminal Code were made, the word "corruption" was used as a synonym for bribery, and certainly this is still the case. This, however, is somehow cutting a long story short and, in fact, does not take into consideration the fact that corruption is a multifaceted term. The elements of the different offences are rather complex and resemble one another quite strongly.

Just in order to understand what the difference between "sweetening" and bribery is, it is necessary to give a brief overview of the different offences concerned with corruption and to circumscribe one from another. In the context of this article, we shall concentrate on arbitrators only, even if these offences also apply to public officials.

A. Bribery: The Devil's Face

The criminal offence of "bribery" is certainly the most noted form of corruption. There is always an active and a passive element, a party P who bribes the arbitrator A, and arbitrator A who accepts what party P offers. The Austrian Criminal Code has split up those two sides of one offence. Arbitrators were covered by the scope of those two norms even before the recent amendments of the Austrian Criminal Code. There has not been any change with regard to active and passive bribery related to arbitrators.

Section 304 of the Austrian Criminal Code makes it a criminal offence for someone to be bribable, or, in other words, an arbitrator's corruptibility. It prohibits an arbitrator from *requesting or accepting or agreeing to receive an advantage* for himself or a third person for the performance of official functions *contrary to his duties.*

The corresponding criminal offence on the active side is codified in Section 307 of the Austrian Criminal Code. It states that it is a criminal offence to *offer, promise or grant* any advantage to a public official or an arbitrator for himself or a third person for the performance of an official function *contrary to his duties.* In other words, this provision criminalizes the act of bribing.

It goes without saying that this is the most severe case of corruption when dealing with arbitrators, and that there can hardly be any doubt whether or not such action is criminal. Accepting or offering an advantage (any advantage!) for a violation of duties is a serious offence for which there is no excuse.

B. Acceptance of an Advantage/Granting an Advantage for Dutiful Performance: The Angel's Face

Section 305 of the Austrian Criminal Code penalizes the acceptance of an advantage by an arbitrator. It prohibits an arbitrator from *requesting* an advantage or *accepting or agreeing to receive an undue advantage* for himself or a third person for the dutiful performance of official duties. Once again, there is a corresponding provision in Section 307a of the Austrian Criminal Code which penalizes the active part, the part that grants an advantage to the arbitrator. It is, of course, also prohibited to *offer, promise or grant any undue advantage* to an arbitrator for the dutiful performance of his official functions.

The difference to bribery lies in the nature of the performance of the official function. Whereas "bribery" relates to an arbitrator acting *contrary* to his duties, this criminal offence ensures criminal liability also for individuals acting *in accordance with* their duties under certain circumstances.

(Actively) demanding an advantage is always prohibited for an arbitrator, whereas accepting or agreeing to receive an advantage is only prohibited if the advantage in question is deemed to be an *undue advantage*. Of course, normal remuneration for performing the arbitral duties would not be considered such an advantage; the advantage must be an "additional" one. The key term "undue advantage" will be discussed in greater detail below. The law differentiates between the penalization of the active and the passive offence. The person who grants, promises or offers an advantage only and exclusively commits a crime if the advantage is an undue advantage.

At a first glance, it may not seem so terrible to be paid for acting "in accordance" with one's duties. Actually, if we think it over in detail, despite the fact that the provision explicitly states "arbitrators" as possible targets, there seems to be hardly any applicability in reality. Typical situations that might occur with public officials being offered advantages for dutiful behaviour include advantages for speeding up proceedings, giving helpful advice on how to structure petitions, etc. Such actions, however, may not be executed by arbitrators, as it would be unlawful to advise one party on how to draft submissions. Rather, this behaviour would already comply with the elements of the aforementioned offence of bribery. The arbitrators' duties are usually defined in such a way that there would not be any room to offer any advantage for "dutiful behaviour". Therefore, it seems that the offence of accepting an advantage for the performance of duties is actually "dead law" regarding arbitrators.

C. Baiting or Sweetening: The Poker Face

To put it frankly, the same is true for the newly defined "baiting" or "sweetening" offence, as will be shown. Until the recent amendments entered into force, the Austrian Criminal Code contained a rather impracticable provision on the "prep-

aration of bribery" and the "preparation of the acceptance of an advantage" which only applied to Austrian arbitrators and arbitrators from another member state of the European Union.

Generally, it was illegal to provide incentives to such arbitrators in the hope of influencing their decisions, and at the same time the arbitrator concerned was also prosecuted. The idea of penalizing all actions taken with a view to *preparing* an actual bribe is not new to the Austrian Criminal Code, as a similar provision was in force for the short period of time between the Act Amending the Criminal Code 2008 and the Act Amending Anti-Corruption Legislation 2009.[7])

Section 306 and Section 307b of the Criminal Code are the two newly introduced provisions. Contrary to the "popular" expression of "sweetening" or "baiting", they are named in a complicated way: "Acceptance of an advantage for the purpose of exerting an influence" *(Vorteilsannahme zur Beeinflussung)* and "Granting an advantage for the purpose of exerting an influence" *(Vorteilszuwendung zur Beeinflussung)*. Once again, one section applies to the active[8]) part and one to the passive[9]) part. The new provision stipulates that it is a criminal offence to "buy" the benevolence or the "goodwill" of an arbitrator even if initially nothing is being demanded in return.

The new provision aims at avoiding the establishment of certain dependencies which are likely to occur through the donation of certain gifts or benefits. What is especially new and also "tricky" about these two provisions, besides the fact that arbitrators are generally covered by their scope, is the significant role of the intention of the arbitrator at the moment when he accepts or receives the gift or benefit.

They apply to situations where an arbitrator agrees to receive or accepts an undue advantage or demands an advantage with the intention of allowing himself to be influenced in his capacity as an arbitrator. A strict intention of allowing himself to be influenced is not necessary. It is sufficient if the arbitrator considers it possible that he will be influenced. If he accepts this fact, the provision applies.

It is important to note that under the new law, it is no longer an absolute requirement that an advantage is granted or accepted with regard to a *specific act* to meet the criteria of a criminal offence. Furthermore, with regard to these provisions, there is no differentiation between the performance of the arbitrator's function *contrary* to the duties and his performance *in accordance with* the duties.

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[7]) Markus Höcher & Peter Kommenda, *Spezialfragen des KorrStrÄG 2012*, ecolex 2012, 688, 3.

[8]) *See* Sec 307b Austrian Criminal Code: *Granting an advantage in order to influence: "Who – except for the cases of sec 307 and 307a – offers, promises or grants an undue advantage to a public official or arbitrator for himself or a third person to influence him in his official duties, is to be punished by two years of prison sentence. (…)"*

[9]) *See* Sec 306 Austrian Criminal Code: *"Acceptance of an advantage: A public official or arbitrator who – except for the cases of sec 304 and 305 – demands an advantage or accepts or agrees to receive an undue advantage for himself or a third person with the intention of being influenced in his official functions is to be punished by two years of prison sentence. (…)"*

What matters is that there is the (realistic) possibility of a benevolent treatment of the active part in future[10]) and the step-by-step creation of dependencies.

Those amendments were the reaction of the legislator to numerous scandals. In fact, there have been a significant number of situations in the past couple of years where people in official functions have been offered certain benefits or accepted certain advantages, although it was almost considered obvious that those "gifts" were given for a reason and were tantamount to actual bribery. Such acts, however, were often not concrete enough to give rise to any legal sanctions. This was a rather unsatisfactory outcome, so the legislator had to react to the fact that in many cases it is not easy to say for certain whether bribes have been given. The intention was to create a corpus delicti that would be more practicable in cases where correlations between granting an advantage and the performance of an arbitrator's duty are not that visible or they are difficult to trace.

The intent of codifying such a rule is, in principle, comprehensible and the challenges of finding the right wording should not be underestimated. Such a task seems particularly complex when it comes to corruption laws. On the one hand, a preferably large number of critical or alarming actions must be covered. On the other hand, it cannot be the intention of the legislator to penalize each and every advantage granted, regardless of its significance, as this is simply not feasible. The question once again is: where to draw the line? And, again: can such a law be of practical relevance for arbitrators at all?

To answer these questions, we must bear in mind the definition outlined above. To be an arbitrator, a person must (at least) have been appointed in a specific arbitration. It is not enough if the arbitrator is just a potential arbitrator who might or might not be chosen in a future case. An arbitrator who has not yet been appointed in a specific arbitration simply does not fulfil the necessary legal requirements.

Nobody would ever suggest that the granting of certain advantages to a law student who might one day become a public official and possibly be in charge of deciding a case involving the giver of the gifts might be deemed to be preparation of bribery or a case of "baiting". Given that the granting of advantages happens frequently, this would never be considered an illegal granting of advantages in order to influence a public official, simply because the connection is too weak and because there is no concrete case at hand. Admittedly, this is a very clear example for something that is definitely *not* covered by the scope of the anti-corruption laws.

When it comes to arbitrators, it is, however, at least conceivable that an interaction between a future party of an arbitral tribunal and a not-yet appointed arbitrator of the same tribunal might, after all, fall within the scope of the illegal trading in influence. This can at least be discussed if the time frame between the "offering of the advantage" and the appointment of the arbitrator is very narrow.

[10]) Markus Höcher & Peter Kommenda, *supra* note 8, 3.

If a party which has not yet appointed an arbitrator for a specific case invites a well-known arbitrator to dinner to talk about the possibility of appointing him as arbitrator, this is certainly not really relevant to Austrian anti-corruption law. But if the party – always having a specific arbitration case in mind – invites this same arbitrator to the Vienna Opera Ball and also pays for his and his wife's evening attire, it is very unlikely that this happens out of general courtesy. Such an expense would, under normal circumstances, be alarming and certainly relevant in terms of Austrian corruption law. This is especially true if the person is, soon after, actually appointed as an arbitrator. On the other hand, there is a clear argument against such an argument. If the advantage is offered to a person who has not yet been appointed, this clearly exceeds the definition of an arbitrator as outlined above. Due to the fact that criminal offences may not be created by analogy, it seems, therefore, impossible that such a case is covered by the "baiting" or "sweetening" offence.

In fact, if we take a closer look at cases like this, it becomes apparent that it is practically impossible for an arbitrator to fulfil the elements of the offence of "baiting". If there is already a concrete case in which the arbitrator has been appointed, any granting, demanding or offering/accepting an advantage would most probably already be bribery, not only "sweetening", because it is given with a view to influencing the action to be taken by this arbitrator in a specific arbitration. On the other hand, as long as a person has not yet been appointed as an arbitrator, it is by definition not possible that this person falls within the scope of the provision. This shows, once again, how impracticable the preparatory offence of baiting is when it comes to arbitrators. Or, in other words: arbitrators have not much to fear.

D. Illegal Intervention: The Hidden Face

Another provision modified by the Act Amending Anti-Corruption Legislation 2012 was Section 308 of the Austrian Criminal Code, entitled "Illegal Intervention". Austria was actually one of the first countries to introduce a rule dealing with what is referred to as "Trading in influence",[11]) in order to comply with Article 12 of the Criminal Law Convention of the Council of Europe.[12])

[11]) *See* 1388 der Beilagen 24. GP – Ausschussbericht NR – Berichterstattung, 11.

[12]) *See* GRECO, Criminal Law Convention on Corruption, Chapter II, Article 12: *"Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person referred to in Articles 2, 4 to 6 and 9 to 11 in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result."*

According to Section 308, it is forbidden to demand, accept or agree to receive an advantage for himself or a third person in order to unduly influence the decision-making of an arbitrator. It is also illegal to offer, promise or grant an advantage to someone for the purposes of unduly influencing the decision-making of an arbitrator.[13]) The big difference to the offences discussed earlier is that this offence is addressed vis-à-vis the "other person" who tries to influence the arbitrator, and the arbitrator himself would not be punished.

What is important to note is that not all kinds of influence exerted on the decision-making process are illegal. Lawful "lobbying" – though it is hard to imagine this in arbitration cases – or the mere representation of interests are not liable to prosecution.[14]) This is stated in subsection 4 of the rule referred to. The influence is undue if it aims at the undutiful performance or neglect of official duties or if it relates to an undue advantage.[15])

IV. Due or "Undue" Advantage – That Is the Question

As indicated above, the rules on "sweetening" or "baiting" are particularly tricky. Setting aside the issue of whether or not they are applicable to arbitrators at all, there is one issue that needs to be discussed. A term that is particularly important: "undue advantage". This is a key word when it comes to drawing boundaries between a permissible courtesy and an illegally granted or accepted advantage.

The term "undue advantage" must not be mistaken with a "marginal" advantage, which is another term mentioned in this context. According to case-law, advantages that amount to a maximum of € 100,– are considered insignificant, marginal advantages and impunity is guaranteed. Any advantage above this threshold can be an indicator of a criminal offence.[16])

What should be noted, however, is that this benchmark of € 100,– is taken from court decisions mainly involving public officials. Given the fact that the environment in which arbitral proceedings often take place is far more sophisticated (and also expensive), this point of reference is certainly not as appropriate for arbitrators. It is quite common that arbitrations take place in luxury hotels, and both arbitrators and parties hardly ever live on canteen food.

There is, however, another way of approaching the issue. When it comes to the newly introduced provisions concerning the "acceptance of an advantage" and the "granting of an advantage for the purpose of exerting an influence", this privilege with regard to the value only exists for the passive part, or in other words, for the person who accepts or agrees to receive an advantage. The person who grants an undue advantage – even if it is a marginal one – in order to influence an arbitra-

[13]) *See* Sec 308 Austrian Criminal Code.
[14]) *See* 1388 der Beilagen 24. GP – Ausschussbericht NR – Berichterstattung, 11.
[15]) *See* Sec 308, para. 4 Austrian Criminal Code.
[16]) *See* 1950/A 24. GP – Initiativantrag, 11.

tor in the performance of his official duties is always liable to prosecution, whereas the person who accepts the marginal undue advantage remains unpunished.[17])

There are three general rules governing the interpretation of an undue advantage. The newly introduced Section 305 subsection 4 of the Criminal Code states that advantages which are permitted by law or that are being granted in the context of an event in which a person participates because of a public or factually justifiable interest are not undue advantages and therefore acceptable unless the person actively demands them. The same goes for advantages granted for charitable purposes or marginal gifts which only represent advantages that are commonly used in a certain region.[18])

This provision gives us a rough idea of what an "undue advantage" is, but the wording used is still rather vague and, what is more, it seems to focus on public officials as opposed to arbitrators. Some examples given in the preparatory materials of the Act Amending Anti-Corruption Legislation are, however, quite useful in helping us to understand the difference between an acceptable and an undue advantage.

Some examples may be given: if an arbitrator is invited to participate in an event to present, for instance, the recent developments in his field of practice, it is of course not only clear that he may be paid for this, but it is also absolutely justifiable to invite him for a meal and pay his hotel bill as well. This is not an undue advantage because the arbitrator does something in return.

In the field of arbitration, it is very common for a party to invite the arbitrators to dinner, or that the parties pay for the arbitrators' accommodation. This, however, is normally not a problem so long as the parties share the costs or take turns in paying such costs and so long as they are on an equal footing. In practice, if one party pays for one dinner, the other party usually pays for the next one. However, if this is not the case and one party absorbs all the costs, this might be a problem, especially if the other party is not aware of this.

It is furthermore also important to take into account the relationship between the person who offers and the person who accepts an advantage. What if arbitrator A is invited on a sailing trip or a hunting trip by person B who is an arbitration practitioner as well, and the one that is being invited has just been appointed as arbitrator in an important case and is – together with the second appointed arbitrator – just about to choose the presiding arbitrator? Is this invitation an act of granting an advantage in order to influence? Is it an act of "baiting" or "sweetening"? Should this be liable to prosecution? One might say yes. The inten-

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[17]) *See* Markus Höcher & Peter Kommenda, *supra* note 8, 3; Sec 306 para. 3 Austrian Criminal Code.

[18]) Sec 305 para. 4 Austrian Criminal Code: "*No undue advantages are: 1. advantages which are permitted by law or that are being granted in the context of an event in which a public official participates because of a public or factually justifiable interest; 2. advantages granted for charitable purposes if the public official or arbitrator has no determining influence on their use; 3. if there are no permissive rules (nr. 1): marginal gifts that are typical for a certain region or country, unless they occur on a commercial basis.*"

tion of the invitation might be to influence the appointed arbitrator in choosing the other person as the presiding arbitrator.

However, the situation is a totally different one if we consider that the two persons, the one that invites and the one that is being invited, have studied together and have been best friends for the last twenty years. This example – although extreme and certainly not very common – shows that identifying corruption is anything but straightforward, unless it is of a very obvious nature.

The practical question, of course, is whether there is any real evidence or proof for the intention of both, the active and the passive part. After all, a certain degree of intention to "sweeten" or to be influenced in carrying out a public duty must be clearly indicated for a criminal offence to be committed, even if only *dolus eventualis* is required.

If the abovementioned prestigious – potential – arbitrator invites the other arbitrator on his yacht, thinking that this might influence the other arbitrator so that he will suggest him as a candidate for the position of presiding arbitrator, he is possibly committing a crime. If the other arbitrator accepts the invitation he cannot be found guilty of accepting an advantage in order to be influenced if he thinks that the other person only invited him because of their long-standing friendship. This once again shows the legal uncertainty caused by the vague wording.

In addition, disclosure obligations have to be taken into account. We all know that before accepting a nomination as an arbitrator, a general declaration of independence needs to be signed. It would go beyond the scope of this article to discuss which "undue advantages" correspond to the red, yellow and green list in the IBA Rules on Conflicts of Interest, but it is clear that a "future" arbitrator would have to make public most sweetening or baiting attempts that have been made with him, and thus would probably, as a consequence, never be appointed or confirmed.

V. Conclusion: The Consequences for Arbitrators

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.

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 nominated, 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.