

The New Vienna Rules

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I. INTRODUCTION

INSTITUTIONAL ARBITRATION has a remarkable tradition in Austria.¹ The Vienna International Arbitral Centre of the Austrian Federal Chamber of Commerce (VIAC) commenced its activities on 1 January 1975² and the first Rules of Arbitration and Conciliation (Vienna Rules) of the VIAC were

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¹ Austrian arbitration law dates back to 1895. As regards institutional arbitration, the authority to introduce arbitral institutions initially fell within the exclusive competence of the different Regional Economic Chambers (REC) of the Austrian Federal States (*Bundesländer*). These institutions, following a model of the Arbitration Rules issued by the Austrian Federal Chamber of Commerce (AFCC) in 1949, established permanent arbitral institutions in each of the nine federal states. From 1949 to 1975 these Federate Arbitral Institutions had jurisdiction to handle both national and international arbitration cases. However, they could not match the need for effective dispute resolution. Arbitrators appointed by the board of the AFCC were unsalaried and commonly regarded as an unreliable alternative to the well-established commercial court system in Austria. Moreover, in the early 1960s, international companies increasingly began to use Austria as a neutral venue for their arbitration proceedings. The peculiar existence of nine different arbitral institutions in addition to the AFCC's own arbitral institution regularly caused confusion amongst international users, often resulting in pathological arbitration clauses with all the unintended effects. The Austrian legislator reacted to these difficulties in 1974, when the AFCC was legally empowered, for the first time, to establish a Permanent Arbitral Tribunal for the settlement of disputes in which at least one party had its place of business outside of Austria. In the same year, the board of AFCC agreed upon the first set of rules for Arbitration and Conciliation. ('Schieds- und Vergleichsordnungen des Schiedsgerichts der Bundeskammer der gewerblichen Wirtschaft') passed by the (former) Bundeskammer der gewerblichen Wirtschaft on 15 November 1974, according to s. 19 para. 3 Handelskammergesetz BGBl 1946/182, idF BGBl 1974/400. For the historical background of arbitration in Austria, see Schwarz and Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer Law International, forthcoming), art. 1; see also Liebscher and Schmid in Weigand, *Practitioner's Handbook on International Arbitration* (2002), p. 588.

² See Melis, 'Schiedsgerichtsbarkeit der Österreichischen Handelskammern seit 1946' in *Seidel-Hohenfeldten – FS* (1988), p. 367 with further ref.; Melis, 'Austria' in (1979) *IV Yearbook Comm. Arb.* 21; Liebscher in Schütze, *Institutionelle Schiedsgerichtsbarkeit*, (2006) p. 256.

introduced in the same year.³ Today, the VIAC is perhaps the most prominent institution in the region. Unsurprisingly in view of its location, it administers arbitrations predominantly connected, in some way, with Central and Eastern Europe.⁴ In 2005, 41 international cases were referred to the VIAC.

The Vienna Rules were adopted in their present form by the Board of the Austrian Federal Economic Chamber (AFEC) on 3 May 2006 (Austrian Code of Civil Procedure ('ZPO') Sec. 577 *et seq.*). The Vienna Rules took effect on 1 July 2006⁵ and apply to all proceedings initiated on or after that date.⁶ The most recent revision of the Vienna Rules has been substantial. It became necessary when the existing Austrian arbitration law (which had not been substantially amended since 1895) was replaced by a new Arbitration Act also entering into effect as of 1 July 2006. Thus, the present revision ensured that the Vienna Rules remain compatible with the statutory framework in which they typically operate.⁷

This article seeks to afford the international user an overview of the Vienna Rules.⁸ As one would expect, it places particular emphasis on those provisions that were introduced, or amended, by the latest revision. A full text of the Vienna Rules, in their present version, can be found at www.wk.or.at/arbitration.⁹

II. THE INSTITUTION

In principle, the VIAC operates through two executive entities, the Board and the Secretary-General. Both are assisted by an International Advisory Council. These entities, their roles and their responsibilities are addressed in articles 1, 3, 4 and 5.

³ From the beginning of the VIAC's activities in 1975 until today, the Vienna Rules have been amended five times. The original version was passed by the board of the AFCC on 15 November 1974 and became effective on 1 January 1975. This date was also the beginning of the operative activity of VIAC. The first amendment, which was actually a complete revision of the Rules, was passed on 17 June 1983. The second amendment was passed on 3 July 1991 and became effective on 1 September 1991. The third amendment was passed on 5 December 1996, taking effect on 1 January 1997. This amendment only revised the costs schedule, the substantive rules remained unchanged. The fourth amendment of the Vienna Rules was passed on 30 November 2000 and took effect on 1 January 2001. The changes in the fifth and most recent amendment are the subject of this article.

⁴ The VIAC solely administers international cases, that means cases in which not all (at least one of) the contracting parties that concluded the arbitration agreement had their place of business or their normal residence outside Austria at the time of the conclusion of the arbitration agreement. In addition, the Vienna Rules can be agreed for disputes of an international character, irrespective of the parties' place of business. For domestic arbitration, art. 1(3) contains a reference to the regional economic chambers.

⁵ The amendment on 3 July 1991 gave the former Rules of Arbitration and Conciliation its present name.

⁶ Vienna Rules, art. 37.

⁷ The vast majority of all arbitrations conducted under the Vienna Rules are sited in Austria.

⁸ For an in-depth commentary on the Vienna Rules and the new Austrian Arbitration Act, *see* Schwarz and Konrad, *supra* n. 1.

⁹ References to particular articles are always references to articles of the new Vienna Rules.

(a) The Board

VIAC Board members are appointed by the Board of the AFEC.¹⁰ By accepting their appointment, the members of the VIAC Board undertake to provide the functions set out in the Vienna Rules. Board membership is an unpaid honorary office. The office ends with expiry of the term of five years or voluntary withdrawal.

(i) Numbers of board members

Article 3(1) provides that the board 'shall have *at least* five members'. The number of Board members has steadily increased over the years. At present, the Board of VIAC consists of eight members, prominent in the field of arbitration in Austria and elected from various professions.¹¹

(ii) President of the Board

Whereas earlier versions of the Vienna Rules provided that the Board of the AFEC should appoint the President¹² of the VIAC Board, the authority to elect the President is now vested with the VIAC Board members. This approach seems more appropriate because it strengthens VIAC's independence from the AFEC.

(iii) Decision-making

The VIAC Board reaches its decisions by majority vote. In practice, the quorum requirements under article 3(3) have little relevance, as, according to article 3(4), it is possible to make the decision in written form by circular. Board meetings are not open to the public, and all matters discussed are treated as confidential, as are the minutes prepared by the Secretary-General. VIAC Board meetings are usually held every four to six weeks or on an ad hoc basis, if special circumstances so demand.

(iv) Tasks of the Board

Under the old Vienna Rules and continued in the VIAC's practice, the Board draws up a list of prospective arbitrators, decides upon the challenge and the termination of an arbitrator's mandate,¹³ determines the number of arbitrators¹⁴ and, where applicable, makes appointments on behalf of defaulting parties. The

¹⁰ This is consistent with *Wirtschaftskammergesetz 1998*, s. 139, according to which the extended Board of the Federal Chamber of Commerce must establish the Board of the VIAC. The VIAC is thus structurally (but, given the independence of VIAC's Board members, not functionally) integrated into AFEC.

¹¹ The Board currently consist of the following members: DDr. Werner Melis (President), Univ. Prof. Dr. Josef Aicher, Dr. Anton Baier, Hon. Prof. Dr. Gerhard Hopf, Dr. Günther Horvath, Gen. Sekr. Dr. Kurt Neuteufel, Univ. Prof. Dr. Walter H. Rechberger and Richter d. OLG Dr. Erich Schwarzenbacher. The next round of appointments is due in 2009.

¹² Formerly called 'the Chairman of the Board'.

¹³ Vienna Rules, art. 17(1)(d).

¹⁴ *Ibid.* art. 14.

Board also has the right to refuse to administer a particular case.¹⁵ In principle, no time limits apply to the Board's decision-making process. Typically, however, it will reach a decision within four weeks. Decisions of the Board are treated as confidential by the VIAC, and the Board's reasoning is seldom made public. Nevertheless, it is common practice for the Board to substantiate and explain its decisions to the extent possible to the parties and the arbitrators. In past practice, the Board has provided reasons, in particular, for its decisions under article 16 (challenge of arbitrators) and article 17(1)(d) (termination of the mandate of arbitrators). Where the Board is entitled to exercise discretion, it usually puts the parties on advance notice and affords them the opportunity to comment on the matter. Beyond that, however, there is no requirement that Board decisions be reasoned. This corresponds with the practice of other arbitral institutions.

(v) Independence

It is accepted that members of an arbitral institution should not participate in decisions wherein they might have a personal interest. Under article 3(4), Board members will be considered to have a conflict of interest if they are involved in the relevant arbitration in any capacity whatsoever (as party, arbitrator or, *e.g.*, as an expert witness.) Moreover, article 3(6) requires, *inter alia*, that Board members must act 'independently'. These provisions should be read broadly, any potential conflict of a Board member should be determined according to the same criteria used to assess the impartiality and independence of arbitrators.

These provisions also imply a duty that each Board member will carefully scrutinise and disclose any potentially relevant relationship to the arbitration and, in the case of conflict, decline of his or her own volition to participate in the decision-making process of the Board.

(b) The Secretary-General

The Secretary-General, although employed by the AFEC, is appointed by the VIAC Board and not subject to any directives from the AFEC.¹⁶ The office of the Secretary-General is a full time salaried position with a five-year term.

The main role of the Secretary-General is 'to direct the activities of the Secretariat' and 'to perform the administrative tasks of the Centre'. These include, in particular, the receipt of the parties' submissions and the arbitrators' contract, the administrative management of the case, the calculation of the deposit on costs, and, at the conclusion of the proceedings, the determination of the costs of the arbitration.

¹⁵ *Ibid.* art. 9(6).

¹⁶ Article 5(3): 'The Secretary-General must perform his duties to the best of his ability and is *not* subject to any directives in that respect. He is bound to secrecy on all matters coming to his notice in the course of his duties'.

It is also noteworthy that the Secretary-General performs a *prima facie* scrutiny of the arbitration agreement¹⁷ and the Statement of Claim and the Memorandum in Reply. This is important in particular with regard to article 9(6), which permits the Board to refuse the administration of a case in circumstances where the parties have made agreements that deviate from the Vienna Rules.

(c) *International Advisory Council*

With the new provision of article 4, the VIAC has now established an International Advisory Board.¹⁸ This council is not part of the institution's decision-making process as such, but will enable the VIAC to facilitate the exchange of expert opinions on a regular and formalised basis. Thus, the International Advisory Board is expected to hold regular meetings at the premises of the VIAC and invite experts from around the world to express their views on topical issues of arbitration law and practice.

III. THE 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.¹⁹ The appointment, challenge and removal of arbitrators form part of the core functions of any arbitral institution. These important issues are addressed in articles 7, 8, 14, and 16 to 18 of the Vienna Rules.

(a) *Party Autonomy*

The parties' right to select an arbitrator whom they deem most appropriate in the circumstances of their case is fundamental. This right reflects the inherently consensual nature of arbitration and underpins the importance of party autonomy as a guiding principle. Accordingly, it is fully recognised in article 7(1) of the Vienna Rules.²⁰

(b) *Legal Capacity*

As a matter of principle, Austrian law and the Vienna Rules merely require that the arbitrator has legal capacity (*Geschäftsfähigkeit*). Legal capacity in Austria is understood to mean, at a minimum, that the individual is permitted to enter, by his own will, into legally-binding commitments. Under Austrian law, this status is conferred on all persons over the age of 18 (absent mental deficiencies). For

¹⁷ Vienna Rules, art. 9(4).

¹⁸ *Ibid.* art. 4.

¹⁹ Born, *International Commercial Arbitration, Commentary and Materials* (2nd edn, 2001), pp. 620–629; Redfern and Hunter, *Law and Practice in International Commercial Arbitration* (4th edn, 2004), para. 4-46 *et seq.*

²⁰ Article 5 of the Vienna Rules 1990 had provided that 'arbitrators should have specific knowledge and experience in legal, commercial or other pertinent matter'.

non-Austrian arbitrators, legal capacity is determined by their own national law (*Personalstatut*). Commentators have argued that the arbitrator's legal capacity also implies the capacity to engage in proceedings (*Prozeßfähigkeit*)²¹ and to be capable of pleading (*Verhandlungsfähigkeit*).²²

(c) *Nationality of the Arbitrator*

While Article 11(5) of the UNCITRAL Model Law requires that 'in the case of a sole or a third arbitrator, the court shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties', no express reference to nationality was included in ZPO, section 587(8). Yet the nationality of arbitrators is sometimes considered an issue of neutrality.²³ The argument is made that an arbitrator having a different nationality than the parties will be more neutral or impartial than an arbitrator who shares the same passport with one of the parties.²⁴ However, modern laws and rules tend to reject that suggestion.²⁵ Article 7(1) expressly provides that service as an arbitrator is possible irrespective of nationality and thus appears to adopt the position that nationality is not a determinative factor in appointing arbitrators. Notwithstanding this, the VIAC Board has taken the nationality of a prospective arbitrator into account when making institutional appointments in order to strengthen the appearance of neutrality;²⁶ there is no reason to suggest that this practice will change. The parties remain free by way of agreement, of course, to require that individuals of a certain nationality act as arbitrators in their case, or, equally, to exclude them from acting.

(d) *Additional Requirements Imposed by Agreement*

Article 7(1) now expressly permits the parties to agree on the particular qualifications of an arbitrator. This may include particular professional training,

²¹ Fasching, *Schiedsgericht*, (1973) p. 57.

²² *Ibid.* p. 57.

²³ See also the discussion of impartiality, *infra*.

²⁴ Redfern and Hunter, *supra* n. 20 at para. 4-58.

²⁵ See e.g. UNCITRAL Model Law, Art. 11(1) which provides that 'no person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties'. Some major institutional rules require that the sole or presiding arbitrator must, under certain circumstances, be someone of a different nationality than those of the parties. See ICC Rules, art. 9(5): 'The sole arbitrator or the chairman of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that neither of the parties objects within the time limit fixed by the court, the sole arbitrator or the chairman of the arbitral tribunal may be chosen from a country of which any of the parties is a national', or the similar provision of LCIA Rules, art. 6, which includes the clarification that 'the nationality of the parties shall be understood to include that of controlling shareholders or interests'. 'For the purpose of this Article a person who is a citizen of two or more states shall be treated as a national of each state; and citizens of the European Union shall be treated as nationals of its different Member States and shall not be treated as having the same nationality.'

²⁶ In some cases, however, it may be appropriate to appoint an arbitrator who shares the same nationality with one of the parties. If e.g., the evidence to be taken or the applicable substantive law have a strong connection to a certain country, the appointment of an arbitrator from that country may enhance the efficiency of the arbitration and may save costs.

qualifications or experience, language skills or industry expertise. This reflects past practice, but is a welcome clarification, in particular when read in conjunction with article 16(1), which now allows parties to challenge an arbitrator not only for lack of impartiality and independence, but also for lack of agreed qualification requirements.²⁷

Practical experience shows that, when including such additional requirements in their arbitration agreement, parties should be careful not to limit unduly the pool of potentially available arbitrators at the outset, and to be specific about such qualifications in order to avoid debate. Where such additional requirements are specified, the (prospective) arbitrator has the duty to make necessary disclosures as to whether he meets these requirements, and indeed has a duty not to accept an appointment if he fails to do so. Thus, arbitrators should not accept an appointment without first consulting the particular arbitration agreement.

(e) Formal Requirements

Before an arbitrator is appointed, article 7(2) of the Vienna Rules now requires that he must provide a written statement as to his impartiality and independence in accordance with article 7(5) (which is discussed below in the context of disclosure). A copy of this written statement is provided to the parties.

Arbitrators must also sign a declaration that they submit to the Vienna Rules, including the provisions regarding the costs of the procedure and thus the regime governing their own remuneration. This was also previous practice.²⁸ Upon appointment, the VIAC also provides its arbitrators with a set of 'guidelines', that contain established recommendations from the VIAC.

(f) Nomination and Appointment

Article 14 addresses the nomination and appointment procedure. It is similar to article 9 of the former version of the Vienna Rules.

In principle, the parties are free to submit their dispute to a sole arbitrator or a panel of three arbitrators. Absent such agreement, the Board will determine whether a sole arbitrator or a tribunal is appropriate in the circumstances, taking into account the complexity of the case, the amount in dispute, and the interest of the parties to be handed a quick decision in a cost-effective manner, together with any other relevant factors which the parties are free to point out.

²⁷ See *infra*.

²⁸ Melis, 'Function and Responsibility of Arbitral Institutions' in (1991) XIII *Comparative Law Yearbook of International Business* 114. Under the approach adopted by VIAC, the relationship between the arbitrators and VIAC is of a contractual nature. By accepting their appointment on the basis of an arbitration agreement that incorporates the Vienna Rules by reference, arbitrators 'oblige themselves to fulfil their mandate in accordance with the rules. This implies that they accept the decision of the competent organs of the institution as binding upon them. The arbitral institution, on the other side, is obliged to give the arbitrators the necessary support and to determine and to pay the fees and expenses according to its rules and other directives.'

The parties are required to nominate their respective co-arbitrator in the Statement of Claim and in the Memorandum of Reply, respectively. The parties are bound by their nomination as soon as the identity of the arbitrator nominated has been made known to the other party.

If the dispute is submitted to a sole arbitrator, the parties can agree on that person; if the dispute is referred to a tribunal, the arbitrators nominated by the parties or appointed by the Board have to agree on a chairman. Typically, the parties (or the co-arbitrators) have 30 days to reach agreement. Absent such agreement, the VIAC Board will make the appointment.

(g) Board Members as Arbitrators

Article 7(3) provides that a member of the VIAC Board may act only as chairman of an arbitral tribunal or sole arbitrator. This provision mirrors article 5(3) of the previous version of the Vienna Rules. It follows the practice of a majority of arbitral institutions and aims at ensuring that no party-appointed arbitrator can have the – real or perceived – advantage of a direct and close connection with the institution. Article 7(3) must be read in conjunction with article 3(4), which expressly provides that members of the Board who are involved in a particular arbitration in any capacity whatsoever shall be excluded from decisions pertaining to those proceedings.²⁹ In practice, the VIAC Board has applied this provision broadly and beyond its literal scope; when it has been called to make an institutional appointment under article 14, it has only in exceptional cases appointed one of its own members as arbitrator.

Should the restriction of article 7(3) be violated by the VIAC, the possibility that a party might use this as a basis to challenge the award under ZPO, section 611(4) cannot be excluded.³⁰

(h) List of Arbitrators

The VIAC, like any other arbitral institution, strives to appoint arbitrators of quality. Naturally, where an unsuitable arbitrator is appointed this will reflect badly on the institution's reputation. Also similar to other arbitral institutions, the VIAC maintains a list of potential arbitrators that it recognises as suitable for arbitral practice. This list was maintained pursuant to former article 5(2), in order to afford some guidance in selecting an arbitrator to inexperienced parties or first-time users of arbitration. Thus, the VIAC list constitutes a recommendation only,³¹

²⁹ We note that art. 2 of Appendix II to the ICC Rules appears to take an even stricter approach: 'The Chairman and the members of the Secretariat of the Court may not act as arbitrators or as counsel in cases submitted to ICC arbitration. The Court shall not appoint Vice-Chairmen or members of the Court as arbitrators. They may, however, be proposed for such duties by one or more of the parties, or pursuant to any other procedure agreed upon by the parties, subject to confirmation.'

³⁰ See Schwarz and Konrad, *supra* n. 1 at art. 7.

³¹ Other institutions, such as the ICDR, use exclusive or compulsory lists. However, in some jurisdictions, compulsory appointment from the institutional list can lead to regular appointments of local 'cliques' to the detriment of international users.

and VIAC has regularly made institutional appointments of persons not currently included on its list.

Under the new article 7, there is no express reference to the VIAC's list of arbitrators. We understand, however, that VIAC intends to maintain its list as a matter of practice.³²

(i) *Duties of the Arbitrator*

Article 7(4) (in terms identical to article 5(4) of the former version) provides that the 'arbitrators must perform their duties in complete independence and impartiality, to the best of their ability, and are not subject to any directives in that respect. They are bound to secrecy in respect of all matters coming to their notice in the course of their duties'.

Article 7(4) does not contain an exclusive list of the arbitrators' duties. It is generally accepted that the arbitrators have 'primary duties' concerning the obligation to render a final award as a result of due process, as well as duties that are otherwise imposed by institutional rules or applicable law; (further) duties imposed by the arbitration agreement; and, conceivably, duties that arise from international practice. Each of these layers poses the additional question as to the consequences that attach to the breach of the arbitrators' duties: the arbitrator could be removed; the award could be challenged; or, conceivably, the arbitrators could be liable for damages.³³ A full analysis of this issue would therefore go far beyond the scope of this overview of the new Vienna Rules.³⁴

From article 7(4) itself, however, one can derive a duty of impartiality and independence (which is discussed separately below); a duty of diligence; and a duty to maintain full confidentiality. As to the latter, the Vienna Rules impose a far-reaching obligation of confidentiality on the arbitrators regarding *all* information they receive in the course of the arbitral proceedings, be it in the form of documents, witness testimony, submissions or otherwise.³⁵ The duty of secrecy under article 7(4) therefore goes further than the widely supported principle that not only the award, but also the deliberations of the arbitrators are confidential.³⁶ This obligation is ongoing and also applies after the arbitrators have rendered their final award and their mandate has expired.

³² The latest version of the list is dated 10 February 2004 and contains approximately 228 internationally and nationally renowned professionals in the field of commercial arbitration. In practice, VIAC includes potential arbitrators either on its own initiative or upon application which should reflect the arbitral experience of a candidate.

³³ Lew, Mistelis, Kröll, *Comparative International Commercial Arbitration* (2003), para. 12-31 *et seq.*

³⁴ See Schwarz and Konrad, *supra* n. 1 at art. 7.

³⁵ Lew, Mistelis, Kröll, *supra* n. 34 at para. 12-20.

³⁶ See Fouchard, Gaillard, Goldman, *On International Commercial Arbitration* (1999), para. 1374: 'Although, again, most laws do not explicitly require deliberations in international arbitrations to be secret, such secrecy is generally considered to be the rule. This means that views exchanged during the deliberations cannot be communicated to the parties'; see also Redfern, 'The 2003 Freshfields Lecture: Dissenting Opinions in International Commercial Arbitration – the Good, the Bad and the Ugly' in (2004) 20(3) *Arbitration International* 238, referring to De Boissésou, *Le Droit Français de l'Arbitrage National et International* (1998), p. 296: 'the rule that such a "deliberation" should be, and should remain secret, is a "fundamental principle, which constitutes one of the mainsprings of arbitration, as it does of all judicial decisions"'.

(j) *Independence, Impartiality, Disclosure and Challenge*

Article 7(4) expressly requires that arbitrators should be impartial and independent in the performance of their duties. It is indeed an undisputed premise of international arbitration that arbitrators³⁷ – whether they are party-appointed or presiding over the proceedings – must not be biased.³⁸ This requirement applies at the time of the appointment and continues throughout the proceedings until a final award is rendered.³⁹ In short, the arbitrators' impartiality is a necessary prerequisite of the arbitration, preserving both the integrity of the process and the trust of the parties⁴⁰ and ensuring that arbitration is indeed a reliable alternative to state court litigation.⁴¹ On the other hand, applying too stringent a standard for disqualification may diminish the parties' right to select arbitrators of their choosing.⁴² Thus, ensuring a non-partisan decision-making process has been called the 'crux of arbitration'.⁴³

Related to the duty of impartiality and independence is the arbitrator's duty to make the appropriate disclosures to allow the parties (and, as the case may be, the arbitral institution) adequately to assess his or her impartiality.⁴⁴ Similarly, the arbitrator should seek to avoid the *appearance* of impartiality, and should refrain from *ex parte* communications with any one party.⁴⁵

The arbitrator's impartiality is expressly prescribed, as a matter of Austrian law, by ZPO, section 588 and sanctioned by ZPO, section 611(2) no. 4.⁴⁶

(i) *Impartiality*

Neither Austrian law, nor the Vienna Rules (nor indeed any other institutional rules) give any guidance as to what either 'impartiality' or 'independence' mean,

³⁷ For a practical 'code of conduct' as to how to maintain independence as an arbitrator, see Aksent, 'The Tribunal's Appointment' in Newman and Hill, *The Leading Arbitrators Guide to International Arbitration* (2004), p. 31; Lowenfeld, 'The Party-Appointed Arbitrator: Further Reflections' in Newman and Hill, *The Leading Arbitrators Guide to International Arbitration* (2004), p. 41.

³⁸ Hausmaninger, 'Rights and Obligations of the Arbitrator with regard to the Parties and the Arbitral Institution' in ICC, *The Status of the Arbitrator*, ICC Pub. no. 537, p. 39; Philip, 'The Duties of an Arbitrator' in Newman and Hill, *supra* n. 38 at p. 68.

³⁹ Lew, Mistelis, Kröll, *supra* n. 34 at para. 12-17. See also, IBA Guidelines on Conflicts of Interest in International Arbitration (2003), General Standard 1. (The Second Draft of the IBA Guidelines recommended that arbitrators remain impartial and independent until the period for filing an application for *vacatur* has elapsed. This was abandoned; but, of course, the duty of impartiality is reborn if the award is set aside and the case referred back to the arbitrators.)

⁴⁰ *Ibid.*

⁴¹ See e.g. Art. 6 ECHR which requires a hearing by 'an independent and impartial tribunal'.

⁴² IBA Guidelines on Conflicts of Interest in International Arbitration, para. 2 at p. 1.

⁴³ Matscher, 'Schiedsgerichtsbarkeit und EMRK' in *FS Nagel* 1987, 236.

⁴⁴ Philip, 'The Duties of an Arbitrator' in Newman and Hill, *supra* n. 38 at p. 68.

⁴⁵ Lew, Mistelis, Kröll, *supra* n. 34 at para. 12-17.

⁴⁶ ZPO, art. 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 admissible agreement of the parties. However, this is considered to be the basis for the challenge of an award where the court confirmed the challenge of an arbitrator after the award was made or where an arbitrator who was successfully challenged in court continues to participate in the decision-making process relating to the award. See Oberhammer, *Entwurf*, s. 611; also Power, *The Austrian Arbitration Act* (2006), s. 589 Rz 7.

and whether these two terms refer to different concepts or whether they are interrelated.⁴⁷ This may seem mere semantics;⁴⁸ arguably, these terms refer ‘not so much to a rule of law as an internalized ethos that is an amalgam of impartiality and independence’.⁴⁹

Impartiality but describes the arbitrator’s ability to assume a neutral position with respect to the subject matter of the dispute. It is thus a state of mind,⁵⁰ in which the arbitrator does not adopt a position favourable to either of the parties until the case has been heard and argued in full.⁵¹ It enables the arbitrator to conduct a truly fair proceeding, to approach the case without bias and to give the parties an equal opportunity to present their case.⁵² In the case of the party-appointed arbitrator, impartiality implies the freedom of thought to decide against the nominating party in case the opposing party has a better case.⁵³ By nature, impartiality is not tangible; it can only be inferred by circumstantial evidence or a particular conduct of the decision-maker. In that regard, seen through the lens of Austrian civil procedure, impartiality is similar to the concept of *Befangenheit* under JN, section 19.⁵⁴

(ii) *Independence*

Independence, on the other hand, refers to the relationship between the arbitrator and the parties.⁵⁵ Independence has thus been described as the absence of a close, substantial, recent and proven relationship between a party and a prospective arbitrator.⁵⁶ Accordingly, the arbitrator’s relationships with the parties in personal, social and financial contexts are indicative of his or her independence. It appears to be in the nature of these descriptors, however, that they do not resolve the struggle of determining how close is too close a relationship.⁵⁷ As a minimum, arbitrators are prohibited from having any direct relationship with the parties where that would give rise to a financial, business or professional interest by the arbitrator.⁵⁸ Obviously, a close private relationship

⁴⁷ Bishop and Reed, ‘Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration’ in (1998) 14(4) *Arbitration International* 395.

⁴⁸ Born, *supra* n. 20 at p. 72.

⁴⁹ Aksen, ‘The Tribunal’s Appointment’ in Newman and Hill, *supra* n. 38 at p. 32.

⁵⁰ *Ibid.*

⁵¹ Bishop and Reed, ‘Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration’ in (1998) 14(4) *Arbitration International* 395 at p. 396.

⁵² Rogers, ‘Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration’ in (2002) *MIJL* 341 at p. 362.

⁵³ Smith, ‘Impartiality of the Party-Appointed Arbitrator’ in (1990) 6(4) *Arbitration International* 320 at p. 323.

⁵⁴ JN, s. 19 no. 2 provides: ‘In civil matters, a judge can be challenged ... if there is sufficient reason to doubt his impartiality’.

⁵⁵ Derains and Schwartz, *A Guide to the New ICC Rules of Arbitration* (2nd edn, 2005), p. 107 *et seq.* with further ref.

⁵⁶ Bond, ‘The Experience of the ICC in the Confirmation/Appointment Stage of an Arbitration’ in *The Arbitral Process and the Independence of Arbitrators* (ICC Publishing, 1991), pp. 9, 11.

⁵⁷ Derains and Schwartz, *supra* n. 56 at p. 110.

⁵⁸ Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (2nd edn, 2006), p. 72.

with one of the parties may also affect the arbitrator's freedom of judgment.⁵⁹ In practice, every case needs to be carefully evaluated on its own merits.⁶⁰

Viewed again from the perspective of Austrian civil procedure and doctrine, the concept of independence seems somewhat related to the grounds for excluding a judge under section 20 Jurisdictionsnorm and ZPO, section 537, essentially prohibiting the judge from acting in his or her own matters; if the judge is a party to the dispute in question; if the judge is related to one of the parties; if the judge is or has been the representative of one of the parties;⁶¹ or if the judge shared rights or obligations with one of the parties.⁶² These grounds are absolute, in that they do not require a further showing that they actually led to impartiality in the circumstances of the case.⁶³ In that, they appear comparable to the Non-Waivable Red List contained in the IBA Guidelines on Conflicts of Interest in International Arbitration.

(iii) Objective Standard of Impartiality and Independence

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'.

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.⁶⁴ 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.⁶⁵

Although the standard is objective, the appearance of impartiality may under Austrian law be sufficient in the interest of the integrity of the judiciary.⁶⁶

⁵⁹ Derains and Schwartz, *supra* n. 56 at p. 119. In this regard, it is irrelevant if the arbitrator is biased against or in favour of either party.

⁶⁰ *Ibid.* p. 123.

⁶¹ Fasching, *Schiedsgericht*, (1973) p. 63, with further ref.

⁶² *Ibid.*

⁶³ Liebscher, *Healthy Award*, (2003) p. 274 with further ref.

⁶⁴ Mayr in Rechberger, *ZPO Kommentar*, (3rd edn, 2006) s. 19 JN, para. 4, with further ref.

⁶⁵ 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'.

⁶⁶ Mayr, *supra* n. 65.

(iv) Disclosure

The duty to disclose is a necessary corollary of the duty to be impartial and independent; one cannot exist without the other.⁶⁷ Only proper disclosure enables the VIAC and the parties to make an informed decision as to whether the appointment of a particular arbitrator is appropriate or, indeed, whether an arbitrator must be disqualified.

Surprisingly perhaps, the Vienna Rules did not contain a provision dealing with disclosure until their present revision, although Austrian law has for some time recognised such a duty.⁶⁸ As a matter of practice, arbitrators were always required to declare their independence on a form provided by the VIAC prior to their appointment. Now, new ZPO, section 588(1) and article 7(5) provide, in unison, that a prospective arbitrator:

shall disclose any circumstances likely to give rise to doubts as to his impartiality or independence or that are in conflict with the agreement of the parties. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by the arbitrator.

ZPO, section 588(1) is based on Article 12 of the Model Law. There has been some debate as to the scope and standard of discovery, as opposed to the test for disqualification. With the introduction of ZPO, section 588, this debate has now reached Austria. Zeiler, for example, argues that the standard of disclosure should be an *objective* one: an arbitrator needs to disclose circumstances that, from the objective perspective of an informed and neutral observer – the perspective of that impressive figure the reasonable man – give rise to justifiable doubts as to the arbitrator's impartiality and independence. As a result, Zeiler argues that the same criteria should be applied to determine both whether an arbitrator has to disclose a particular fact and whether he must be disqualified.⁶⁹

In our view, that goes too far; we understand article 7(5) and ZPO, section 588(1) to contain a subjective element as well.

If there are, from an objective perspective, justifiable doubts of bias, the arbitrator should not serve. However, if one were to require disclosure under the same criteria that apply to disqualification, any disclosure by an arbitrator would necessarily lead to disqualification. This is a highly unattractive proposition. There ought to be many instances where arbitrators, as a matter of caution, choose to disclose a fact even though that fact should not, and does not,

⁶⁷ In Switzerland, the Bundesgericht has held that the duty to disclose is an implied contractual duty of the arbitrator. Witt Wijnen, Voser and Rao, 'Background Information on the IBA Guidelines on Conflict of Interest in International Arbitration' in (2004) 5(3) *Business Law Int'l* 447 n. 13. The same is true in Austria.

⁶⁸ OGH 28.4.1998, 1 Ob 253/97f.

⁶⁹ Zeiler, *Schiedsverfahren* (NWV, 2006), p. 153.

lead to disqualification.⁷⁰ This, then, calls for some distinction in the applicable standard.

Indeed, some rules have for that reason expressly adopted a subjective standard. Article 17 of the ICC Rules, for example, requires disclosure of facts ‘which might be of such a nature as to call into question that arbitrator’s independence in the eyes of the parties’. After some discussion, the IBA Working Group on Conflicts of Interest in International Arbitration has adopted a subjective standard as well.⁷¹ While it is true that article 7(5) and ZPO, section 588(1) do not refer to facts relevant ‘in the eyes of the parties’, there are some important distinctions in the text. Based on Article 12 of the Model Law, article 7(5) and ZPO, section 588(1) require *disclosure* of any circumstances that *likely* give rise to *doubts*, whereas an arbitrator will be *disqualified* if the circumstances *actually* give rise to *justifiable* doubts.⁷² If one assumes that this difference in wording is intentional, one ought to give meaning to the difference. Thus, the assessment as to whether certain facts are likely to give rise to doubts is broader, and more subjective, than the assessment as to whether certain facts actually do give rise to justifiable (*i.e.* reasonable) doubts. In that sense, the threshold for a successful challenge is higher than the test for requiring disclosure.

This subjective standard also makes the most of the consensual nature of arbitration. The prospective arbitrator, if he intends to accept the appointment,⁷³ should therefore disclose all circumstances that ‘are likely to’ (rather than those that *actually will*) justify doubts as to the arbitrator’s impartiality. Only if the parties know of those circumstances which, from their perspective, give rise to doubts as to the arbitrator’s impartiality and independence can they determine if, in their eyes, such circumstances warrant a challenge to the arbitrator, regardless of whether or not that challenge will ultimately be successful.⁷⁴ In short, arbitrators are well advised to err on the side of caution and to make a disclosure in cases of doubt.⁷⁵ A failure to make an appropriate disclosure may be interpreted as a strong indicator that the arbitrator sought to ‘hide’ disqualifying circumstances. This, in itself, may constitute evidence of bias.

⁷⁰ See IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 3(a) which clarifies: ‘If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and to the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns about them’.

⁷¹ The IBA Guidelines of Conflicts of Interest in International Arbitration provide in General Standard 3(b): ‘It follows from General Standards 1 and 2(a) that an arbitrator who has made a disclosure considers himself or herself to be impartial and independent of the parties despite the disclosed facts and therefore capable of performing his or her duties as arbitrator. Otherwise, he or she would have declined the nomination or appointment at the outset or resigned’.

⁷² For a detailed discussion of various standards in different jurisdictions, see Witt Wijnen, Voser and Rao, *supra* n. 68 at p. 448.

⁷³ The arbitrator obviously can decline the appointment without giving any reasons, and thus, without disclosing potentially disqualifying circumstances. Oberhammer, *Entwurf*, p. 69.

⁷⁴ Alvarez, ‘The Challenge of Arbitrators’ in (1990) 6(3) *Arbitration International* 203 at p. 217. See also General Standard (2) of the IBA Guidelines on Conflicts of Interest in International Arbitration.

⁷⁵ See *ibid.* General Standard 3(c).

(v) Challenge

As discussed, both ZPO, section 588(2) and article 16 now provide that '[a]n arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or that are in conflict with the agreement of the parties'.

Previously, article 11(3) had provided that a party is precluded from challenging an arbitrator if that party argued on the merits of the case without raising an objection even though it knew – or should have known – of the grounds for the challenge. Also, a party wishing to challenge an arbitrator had to file an application 'without delay' with the Secretary-General. By contrast, article 16(1) now provides, in line with ZPO, section 588(2) that the party participating in the appointment of the challenged arbitrator may bring the challenge only for reasons that become known to them after the nomination has been made. ZPO, section 589(2) further provides that a challenge must be brought within four weeks.⁷⁶ However, there may be cases where the grounds for challenge so massively conflict with the integrity of the arbitral process, that they are indeed non-waivable. At least in such cases, setting aside the award may then still be possible irrespective of whether a timely challenge of the biased arbitrator was made during the arbitration,⁷⁷ perhaps insofar as the extent of bias violates the procedural *ordre public* in Austria.⁷⁸

If the challenged arbitrator does not withdraw, the Secretary-General will obtain comments from the other party and from the arbitrator, and then will submit the application, along with any evidence and the comments of those concerned, to the Board for a decision.⁷⁹ The Board will not disclose its reasons. Under ZPO, section 589(3), an unsuccessful challenge can be brought before the Austrian courts for reconsideration.

The challenged arbitrator can proceed with the arbitration, but cannot issue an award (or participate in the issuing of an award by a tribunal) before the Board has made its decision.⁸⁰ The use of the word 'can' in article 16 removes an unfortunate ambiguity in the previous version of the Vienna Rules, which provided in former article 11(5) that the tribunal 'had to' continue the proceedings,

⁷⁶ According to ZPO, art. 588(1), art. 589(2) is not a mandatory provision of law; it is derogated by the parties' reference to the Vienna Rules. Article 589(2) provides in full: 'Failing such agreement, a party who challenges an arbitrator shall, within four weeks of becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstance referred to in Article 588, paragraph 2 of this law, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from office or the other party agrees to the challenge, the arbitral tribunal, including the challenged arbitrator, shall decide on the challenge'.

⁷⁷ See Liebscher in Schütze, *Institutionelle Schiedsgerichtsbarkeit*, p. 284. See also IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 4(b).

⁷⁸ See ZPO, art. 611(2) no. 5 which provides 'An award shall be set aside if ... 5. The arbitral procedure was not carried out in accordance with the basic values of the Austrian legal system (*ordre public*)'. This introduces a 'procedural *ordre public*' as a ground for challenging the award.

⁷⁹ The Board can also, in its discretion, ask third parties to provide comments on the challenge at bar (Vienna Rules, art. 16(3)).

⁸⁰ However, where the Board's decision is referred to the Austrian courts for reconsideration under ZPO, art. 589(3), the challenged arbitrator can proceed to issue an award while the court challenge is pending.

whereas it should be (and now clearly is) left to the discretion of the tribunal to determine under the specific circumstances of a case whether or not it is appropriate to proceed.⁸¹

(k) *Termination of Mandate*

An arbitrator's mandate typically expires upon issuing the final award. However, there are cases where an arbitrator is removed, or withdraws, from his or her office before rendering an award. This premature termination, as well as its consequences, is the subject of the revised provisions of article 17 and article 18.⁸²

(i) *Grounds for Termination*

Pursuant to article 17, the mandate of an arbitrator terminates if the parties so agree; if the arbitrator withdraws from his office; if a challenging motion is granted; or if the arbitrator is removed from office by the Board. According to article 17(2), a party may also apply to the VIAC and request the termination of the arbitrators' mandate if the arbitrator appears permanently incapacitated or if he otherwise fails to perform his duties or unduly delays the proceedings.

The request to remove an arbitrator must be submitted to the Secretariat; the decision is for the Board to make after hearing the arbitrator. If it is clear that the arbitrator will not be able to fulfill his mandate for an unreasonable period of time, the Board may terminate the arbitrator's mandate *sua sponte*.

(ii) *Consequences*

If an arbitrator has been removed from office, or withdraws, a new arbitrator needs to be appointed. In that instance, the regular appointment procedure is followed. Accordingly, it is for the parties to agree again on a sole arbitrator; for the co-arbitrators to agree on a new presiding arbitrator; and for a party to nominate its new co-arbitrator. If no such appointment is made within 30 days, the Board will make an institutional appointment. Article 18 also provides that, if a new arbitrator so nominated is also successfully challenged, any appointment right is lost; the vacant seat will be filled by appointment of the Board.

The new sole arbitrator, or the newly constituted arbitral tribunal, can then determine, after hearing the parties, whether and, if so, to what extent, they will repeat previous phases of the proceedings.

IV. MULTI-PARTY ARBITRATION

The Vienna Rules contain one of the more complex regimes for multi-party proceedings. With the changes introduced by article 15, this regime has not become any easier to apply.

⁸¹ See Reiner, 'The 2001 Version of the Vienna Rules' in (2001) 18(6) *J Int'l Arb.* 661 at p. 668.

⁸² Formerly arts 12 and 13, respectively.

(a) Prerequisites for Multi-party Arbitration

At the outset, a claim against two or more respondents is admissible only if, in the case of proceedings before an arbitral tribunal, all claimants have nominated the same arbitrator. Further, the VIAC must have jurisdiction for all of the respondents. In addition, article 15 requires that one of the following conditions must be met:

- the applicable law provides that the claim must be directed against several persons; or
- the admissibility of multi-party proceedings has been agreed upon; or
- all respondents submit to multi-party proceedings and, in the case of proceedings before an arbitral tribunal, all respondents nominate the same arbitrator; or
- one or more of the respondents on whom the claim was served fails to nominate an arbitrator (or to state particulars regarding the number of arbitrators) within 30 days of having been served with a Statement of Claims.

These four alternative conditions remained unchanged from the former version of the Vienna Rules. However, the condition in former article 10 that the respondents are bound by the same arbitration agreement is no longer required. Instead, article 15(1)(b) allows for multi-party arbitration if the respondents are, under the applicable law, tied in a legal relationship or are being held liable for the same factual grounds or are jointly and severally liable.

(b) Service Not Possible

Article 15(2) proceeds to address, in a somewhat modified manner, the situation that the Statement of Claim cannot be served on all respondents. In such a case, the arbitration can proceed, upon request of the claimant, against those respondents on whom the Statement of Claim was successfully served. Claims against the respondent on whom the Statement of Claim could not be served will be referred to a separate proceeding.

Previously, the entire claim against all respondents was to be stricken from the list of pending cases if attempts to serve were unsuccessful for a year, or if the claimant party failed to declare that it wanted to pursue its claims against the parties that were duly served. The sanction of deleting a case from the VIAC's docket in case of inactivity does not exist under the new Vienna Rules. Now, if a claimant fails to request that the case proceed against the duly served respondents, no further action will be taken. This revision of the Vienna Rules is certainly sensible, as it leaves the claimant in control of the proceedings, making it the claimant's responsibility to proceed against only a number of the original respondents should it so wish.

(c) Appointment of Arbitrators

Where multi-party proceedings are admissible pursuant to article 15(1), article 15(3)–(7) addresses the joint nomination of an arbitrator by the respondents. The

issue of joint appointment of arbitrators by parties ‘on the same side’ goes, some argue, to the core of arbitration: since arbitration is by definition consensual, all parties must be given the same opportunity to make their case and to influence the proceedings.⁸³ Others stress that parties should be treated equally concerning the appointment of the arbitrators.⁸⁴ The famous case of *Siemens AG/BKMI Industrieanlagen GmbH v. Dutco Construction Co.* illustrates the problem.⁸⁵

Under article 15, if the respondents fail to agree on whether they want a sole arbitrator or a tribunal to decide their dispute, the VIAC will make that determination.⁸⁶ Similarly, if the respondents cannot agree on jointly nominating an arbitrator, the VIAC will make the appointment for them. Unlike other rules,⁸⁷ the VIAC will therefore appoint the respondents’ co-arbitrator (and not the entire tribunal); this will not affect the claimant’s nomination. This is argued to preserve equality between the parties; if multiple claimants fail to jointly nominate a co-arbitrator, the case will not go forward in the first place.⁸⁸ Applying the test of *Dutco*, this may still cause some inequalities in cases where a single claimant (who can always nominate an arbitrator of their choice) opposes multiple respondents. According to Aschauer, the single claimant should in such a case waive its right to nominate a co-arbitrator.⁸⁹

(d) Consolidation

There is an increasing demand for consolidation mechanisms in arbitration, as commercial arrangements often involve multiple parties entering into a number of different contracts all providing for arbitration.⁹⁰ Under the Vienna Rules, separate proceedings (which do not meet the prerequisites of article 15(1)) can only be consolidated before one tribunal (and under one case reference) if the same arbitrators are appointed in all the disputes that are to be consolidated and if all parties and the tribunal agree. Neither the forced joinder of a third party nor the intervention of a third party against the will of the parties appears to be possible in the circumstances.

Parties to separate agreements can give their advance consent to consolidation in an arbitration agreement (which may refer to other arbitration agreements in other contracts between other parties). However, since under article 15(9) the arbitrators need to consent to consolidation as well, this seems to limit drafting

⁸³ Tackaberry and Marriott, *Bernstein’s Handbook of Arbitration and Dispute Resolution Practice* (4th edn, 2003), paras 2-645, 9-164.

⁸⁴ Greenblatt and Griffin, ‘Towards the Harmonization of International Arbitration Rules: Comparative Analysis of the Rules of the ICC, AAA, LCIA and CIET’ in (2001) 17(1) *Arbitration International* 101 at p. 102.

⁸⁵ *Siemens AG/BKMI Industrieanlagen GmbH v. Dutco Construction Co.*, Cour de Cassation (Supreme Court), 7 January 1002. In Austria, see OGH 17.3.2005, 2ob 41/042.

⁸⁶ Although art. 15 does not expressly say so, this will obviously only be the case where this is not addressed in the arbitration agreement.

⁸⁷ See e.g. ICC Rules, art. 10(2).

⁸⁸ See Vienna Rules, art. 15(1) as discussed *supra*.

⁸⁹ Aschauer, ‘Arbitral Proceedings and the Enforcement of the Award, particularly in relation to Austrian Law and the Rules of the SCC, the ICC and the Austrian Federal Economic Chamber’ in (2001) 2 *SAR* 41.

⁹⁰ Lew, Mistelis, Kröll, *supra* n. 34 at para. 16-5.

options. In many cases, it may be inappropriate that arbitrators should be able to prevent consolidation even where this reflects the express will of the parties.

(e) *Decision on Admissibility*

Article 15(9) is an entirely new provision. It stipulates that, upon application by one of the respondents, it is for the arbitrators to decide whether or not multi-party arbitration is admissible within the meaning of article 15(1) and in the circumstances of the case. Thus, the VIAC must not unduly prevent the case from reaching the arbitrators who will then make a decision on admissibility. Indeed, it would unduly interfere with the arbitrators' judicial authority if the VIAC were to refuse to administer a multi-party arbitration, *e.g.* on the basis of article 15(1)(b), since this involves a determination of the merits of the case reserved for the arbitrators to decide upon.

If the arbitrators deny the admissibility of multi-party proceedings, 'the arbitral proceedings return to the stage they were in for the respondents before the sole arbitrator (the arbitral tribunal) was appointed'.

V. LIABILITY OF ARBITRATORS AND THE VIAC

Article 8 (which mirrors former article 5(5)) provides that the '[l]iability of the arbitrators, the Secretary-General, the Board and its members and of the Austrian Federal Economic Chamber and its employees for any act or omission related to the arbitration proceedings, insofar as such liability may be admissible by law, shall be excluded'.⁹¹

(a) *Arbitrator's Liability under Austrian Law*

ZPO, section 594(4) incorporates (without changes) former ZPO, section 584(2) and states: '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.⁹² ZPO, section 594(4) is a provision of mandatory law from which the parties cannot derogate by agreement.⁹³

Traditionally, Austrian doctrine has taken the position that procedural errors and erroneous awards (which fell outside the narrow literal ambit of (former) ZPO, section 584(2)) are subject to the general law of damage.⁹⁴ In that regard, Austrian doctrine, in line with most civil law jurisdictions, has adopted primarily

⁹¹ The various approaches adopted by arbitral institutions differ. Exemption clauses range from complete unconditional exclusion, *e.g.* ICC Rules, art. 34, Polish Rules, s. 8, Hungarian Rules, art. 56, to the typical reservations of 'intentional or grossly negligent breach of duty', as in s. 44 DIS, or 'the consequences of conscious and deliberate wrongdoing', as can be found in ICDR, art. 35 or LCIA Rules, art. 31.

⁹² OGH ZBI 1919/222.

⁹³ Power, *The Austrian Arbitration Act* (2006), s. 594 Rz 7.

⁹⁴ Liebscher in Schütze, *Institutionelle Schiedsgerichtsbarkeit*, p. 271.

a contractual viewpoint,⁹⁵ in that ‘a fault committed in conducting the arbitral proceedings constitutes a breach of contract, and as remunerated providers of services the arbitrators are accountable for such breaches under the ordinary law of contract’.⁹⁶ However, the doctrine of judicial immunity, enshrined in Austria in the law on public liability,⁹⁷ applies by analogy to arbitrators, in order to restrict significantly the exposure of arbitrators to cases of gross negligence.⁹⁸

More recent case law indicates that (former) ZPO, section 584 presented a statutory limitation for arbitrator liability in that only cases covered by that provision (*i.e.* 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 Austrian Supreme Court held that an arbitrator can as a matter of principle only be held liable if the award has been set aside for a reason for which the arbitrator is at fault:⁹⁹ apparently, only the annulment of an award could then conceivably constitute non-performance under the law. As a result, the Austrian legislature incorporated former ZPO, section 584(2) (now ZPO,

⁹⁵ In that regard, two concepts exist, the contractual approach and the functional approach. The first concentrates on the contractual relationship between the arbitrator and the parties, and assesses liability according to the applicable rules of contract law. The functional approach postulates, based on the quasi-judicial function of the arbitrator, that arbitrators, save for exceptional circumstances, must be similar to state court judges immune from personal liability. This approach is found mostly in common law jurisdiction and frequently referred to as the concept of judicial immunity of arbitrators. This doctrine views arbitrators as functionally comparable to judges; the fact that arbitrators are contractually chosen substitutes for state or federal judges does not alter their essential function of finally resolving disputes between parties. Arbitrators ‘act as judges, but as private judges. They assume a judicial function, but are generally paid, under contract, to perform that function. As a result, they provide services to the parties and to the arbitral institution’ and ‘should benefit from protection similar to that enjoyed by judges, both during and after the proceedings’. Fouchard, Gaillard and Goldman, *On International Commercial Arbitration* (1999), pp. 1017, 1074. In other words, arbitrators should, just like judges, not in principle be exposed to civil liability arising from erroneous dispute resolution. ‘Arbitral immunity’ is thus seen to support and uphold the integrity of the arbitral process.

⁹⁶ Fasching, *Kommentar zur ZPO*, art. 579 at para. 6; *see also* Fouchard, Gaillard, Goldman, *supra* n. 96 at p. 1144. *Amtshaftungsgesetz*.

⁹⁷ Hausmaninger, ‘Civil Liability of Arbitrators: Comparative Analysis and Proposals for Reform’ in (1990) 7(4) *J Int’l Arb.* 7 at p. 19. Note, however, that a Supreme Court decision from 1929 extended arbitrator liability to all forms of negligence. OGH ZB1 1929/79.

⁹⁹ OGH in 9 Ob 126/04a, 6 June 2005. The case dealt with a liability dispute that arose between the claimant, a bank institute, in arbitration proceedings against two members (one of them the chairman) of an arbitral tribunal that decided in favour of the defendant in the preceding arbitration proceeding concerning payment of a contractual penalty in the amount of 472,373.42 euros. The claimant subsequently claimed the amount of 619,465.24 euros, containing the contractual penalty, the arbitrators’ fees, the costs paid to the defendant for the arbitral proceedings and its own costs as damages, arguing that the two arbitrators had committed fundamental procedural errors, especially by disregarding the claimant’s requests for taking evidence, and had interpreted the applicable law in an unacceptable and unjustifiable way. By doing so, the claimant argued, the arbitrators had violated their contractual obligations and had to be held liable for any damages resulting out of this violation. Due to ‘hopelessness’ the claimant had not tried to set aside the arbitral award. The Austrian Supreme Court ruled, *inter alia*, that an arbitrator, apart from cases of fault-based denial or delay of performance, *e.g.* not rendering an award at all or rendering an award about a subject matter lacking arbitrability (‘non-award’), can only be held liable if the award has been successfully challenged before a state court in accordance with ZPO, art. 595.

section 594(4)) in the new Arbitration Act precisely and expressly to ensure that courts would not interpret its absence as an incentive to expand arbitrators' liability.¹⁰⁰

(b) *Contractual Exclusion of Liability*

Naturally, exclusions of liability are permitted only within the framework of the applicable law. In this regard, the Austrian Supreme Court has held that:

the agreement with the arbitrators, which determines the legal relationship between the arbitrators and the parties is, in any case, one of private law; hence, it is subject to the rules of private international law rather than to the *lex fori* principle of procedural law. As the agreement with the arbitrators is of a contractual nature, the international rules regarding the law of obligations apply.¹⁰¹

The Austrian Supreme Court has also suggested that the arbitrator's contract is subject to the provisions of the law applicable to the arbitration contract.¹⁰²

Under Austrian law, parties in a commercial setting are at liberty to limit liability, save that liability for intentional wrongdoing cannot be excluded in advance; the exclusion of liability for grossly negligent conduct is disputed.¹⁰³

(c) *Liability of the Institution*

VIAC renders its services to the parties on a contractual basis.¹⁰⁴ However, as arbitral institutions in general perform services which are, in the absence of an arbitration agreement, in the exclusive domain of the state courts, it has been argued that the institution itself, depending on the type of service rendered, should also be granted the liability privileges enjoyed by the state courts.¹⁰⁵ It has also been argued, however, that the VIAC could be liable for the appointment of arbitrators who are wholly unsuitable to decide the dispute; and for delay in functions undertaken by the VIAC under the Vienna Rules.¹⁰⁶

¹⁰⁰ Erläuternde Bemerkungen to ZPO, art. 594(4).

¹⁰¹ OGH 28.4.1998, 1 Ob 253/97 f with reference to Rechberger and Simotta, *Zivilprozessrecht* (4th edn), n. 961; Fasching, *Schiedsgericht*, p. 69; Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit* (2nd edn 1990), nn. 7 and 491; von Hoffmann, 'Der Internationale Schiedsvertrag – Eine kollisionsrechtliche Skizze' in *FS Glossner* (1994) p. 146, Fasching, *Schiedsgericht*, p. 69; Fasching, *Lehrbuch des österreichischen Zivilprozessrechts* (2nd edn, 1990), n. 2198 referring to Baumbach and Schwab, *Schiedsgerichtsbarkeit* (2nd edn, 1960) p. 90 that, according to private international law, the law applicable to the arbitration agreement applies to the agreement with the arbitrators.

¹⁰² Fasching, *Schiedsgericht*, p. 69; Chiwitt-Oberhammer, *Der fehlerhafte Schiedsspruch*, p. 62 with reference to the position under German law.

¹⁰³ Fasching, *Schiedsgericht*, p. 72. In some cases, even this can be possible, see also Liebscher and Schmid in Weigand, *Practitioners's Handbook on International Arbitration* (2002), Pt 4A.

¹⁰⁴ According to Austrian scholars, VIAC and its users conclude an agency agreement (*Geschäftsbesorgungsvertrag* according to ABGB, art. 1004). Fasching, 'Kostenvorschüsse zur Einleitung schiedsgerichtlicher Verfahren' in *JBl* 1993, 550; Heller, 'Die Rechtsstellung des internationalen Schiedsgerichtes der Wirtschaftskammer Österreich' in *WBl* 1994, 105, also Liebscher in Schütze, *Institutionelle Schiedsgerichtsbarkeit*, p. 262.

¹⁰⁵ Melis, 'Immunity of Arbitrators under Austrian Law' in Lew, *The Immunity of Arbitrators* (1990), p. 16 n. 2; see also Melis, 'Function and Responsibility of Arbitral Institutions' in (1991) *XIII Comparative Law Yearbook of International Business* 112.

¹⁰⁶ Heller, 'Die Rechtsstellung des internationalen Schiedsgerichtes der Wirtschaftskammer Österreich' in *WBl* 1994, 115.

VI. COMMENCING THE PROCEEDINGS

In principle, commencing the arbitration follows the same regime as under the previous version of the Vienna Rules. The most important changes relate to counterclaims and to jurisdictional objections.

(a) Statement of Claim

The arbitral proceedings formally commence with the service of the Statement of Claim by the claimant. Receipt by the Secretary-General of a Statement of Claim results in a new case being added to the VIAC's docket. The case is then pending with the VIAC.¹⁰⁷

The Vienna Rules expressly provide that the Statement of Claim be addressed to the Secretariat of the VIAC. This requirement to file the claim first with the institution, rather than serving the Statement of Claim first or simultaneously on the respondent, is designed to afford the VIAC an instant opportunity to examine, at the time of receipt, the claim's compliance with the minimum standards set out in article 9(2)–(6). The claim must contain (a) the designation of the parties; (b) a specific statement of claims and the particulars and evidence requested; (c) the amount in dispute at the time of the submission (unless the claims are not related exclusively to a specific sum); (d) particulars regarding the numbers of arbitrators; and (e) the nomination of an arbitrator (where the decision of an arbitral tribunal is sought).

It is established practice that the Secretary-General accepts the forms of communication set out in article 13. Thus, a Statement of Claim can be submitted in writing by registered letter, fax or courier service and (this form of communication has been inserted with the last amendment of the Vienna Rules) through electronic means of communication.¹⁰⁸

(b) Refusal of Administration

The VIAC, like most arbitral institutions, is occasionally confronted with arbitration agreements that deviate markedly from the type of standard agreements that the institution recommends. While the parties are, in principle, free to modify the arbitration agreement to fit their particular requirements,

¹⁰⁷ A dispute, once pending, forms a concrete procedural relation (between the court and plaintiff) and interrupts the statute of limitation according to ABGB, art. 1497. See Fasching, *Zivilprozessrecht* (1990) Rz 1173 *et seq.*; Rechberger and Simotta, *Zivilprozessrecht* (2000) Rz 516 *et seq.*; Schubert in Rummel, *ABGB*, s. 1497 para. 6. It is considered amongst Austrian commentators that the submission of the statement of claims with an arbitration institution will also interrupt the statute of limitation. See Rechberger and Melis in Rechberger, *ZPO*, art. 577, Rz 18 (with reference to OGH 31.3.1966, 5 Ob 30/66 in Sz 39/63, which, however, concerned an ad hoc tribunal); also Liebscher in Schütze, *Institutionelle Schiedsgerichtsbarkeit*, p. 262.

¹⁰⁸ See *infra*.

institutions typically reserve the right not to administer an arbitration where the arbitration agreement conflicts too sharply with the institutional rules.¹⁰⁹

The parties' desire to alter a standard arbitration agreement may well be legitimate in order to take some particularities in their relationship or certain procedural expectations into account. Too often, however, such amendments appear not to be the result of conscious choice, much less diligent consideration. Depending on the measure of individualisation, an agreement might thus be considered contrary to the fundamental framework of the institutional rules, and hence, not administrable. Article 9(6) grants the Board the authority to 'refuse to carry out proceedings if the parties have designated the International Arbitral Centre of the Austrian Federal Economic Chamber in the arbitration agreement but have made agreements that deviate from the Vienna Rules'.

Although a similar authority was conferred upon the Board through article 6(6) of the previous version of the Vienna Rules, the wording now chosen is more direct, arguably vesting the Board with broader powers not only to refuse the administration of disputes under agreements that conflict with the Vienna Rules, but even those that merely 'deviate' from the Vienna Rules.¹¹⁰ As a matter of past practice, the Board has applied this provision to agreements that were 'legally unclear or curtailing the Board's jurisdiction' under the Vienna Rules.¹¹¹ The Board will permit the parties to comment, and provide them with the opportunity to bring the deviating provision back in line with the framework of the Vienna Rules.

(c) Registration Fee

The VIAC charges an initial registration fee, currently amounting to 2,000 euros, which is deducted from the claimant's share of the deposit against the costs of arbitration.¹¹² Although payment of the registration fee is not mentioned as a prerequisite under article 9(3), the fee is due upon filing the Statement of Claim.¹¹³ If payment is not effected, the Statement of Claim will not be processed.¹¹⁴

¹⁰⁹ See Derains and Schwartz who consider it 'essential to ensure that the language being added does not conflict with the arbitration rules being selected'. The ICC Court may then refuse to accept an arbitration when the amendments might be found 'incompatible' with the Rules, see Derains and Schwarz, *A Guide to the New ICC Rules of Arbitration* (2nd edn, 2005), p. 388.

¹¹⁰ Vienna Rules, art. 6(6) (former version) provided that: 'The Board can return the statement of claims to the Claimant as not suitable for further action if the parties have designated the International Arbitral Centre of the Austrian Federal Economic Chamber in the arbitration agreement but have made agreements that conflict with the Vienna Rules'. By contrast, Vienna Rules, art. 9(6) allows the Board to refuse administration under agreements that 'deviate from the Vienna Rules'.

¹¹¹ Heller, 'Die Rechtsstellung des Schiedsgerichtes der WKÖ' in *WBI* 1994, 110. The Board's authority under art. 9(6) may be seen in conflict with VIAC's legal duty to contract (*Kontrahierungszwang*) with all parties that submit to VIAC's jurisdiction. Melis argues, therefore, that VIAC can only refuse to administer the case if deviation from the rules is such that it would endanger the proper administration of the case within the *spirit of the Vienna Rules*. See Melis, 'Function and Responsibility of Arbitral Institutions' in (1991) *XIII Comparative Law Yearbook of International Business* 112.

¹¹² If there are more than two parties to the proceedings, the registration will be increased by 10 per cent for each additional party.

¹¹³ Vienna Rules, art. 33.

¹¹⁴ The unpleasant sanction of former art. 22(4) 'deletion from the list of pending cases' has been abandoned with the last amendment of the Vienna Rules.

(d) Memorandum in Reply

The Secretary-General serves the Statement of Claim on the respondent(s) and invites them to submit a Memorandum in Reply within 30 days. This invitation clearly indicates that the Secretariat is satisfied that the Statement of Claim meets the minimum requirements of article 9(3)–(4) and is willing to administer the arbitration under article 9(6).

The 30-day period to produce a Memorandum in Reply corresponds with international standards and other arbitration rules. Extensions are possible. Before transmission of the files to the arbitral tribunal this falls within the Secretary-General's jurisdiction.¹¹⁵

Article 10(2) requires the Memorandum in Reply to include a reply to the pleadings in the statement of claims; particulars regarding the number of arbitrators; and an indication of the name and address of an arbitrator, if a decision by an arbitral tribunal is requested or if a decision by three arbitrators has been agreed upon in the arbitration agreement. In light of these limited requirements, it is left to the discretion and strategic considerations of the respondent to decide how detailed its submission will be.

The Vienna Rules do not explicitly provide for sanctions in case of delay or failure to submit the Memorandum in Reply. However, a defaulting respondent will forego the opportunity to nominate a co-arbitrator, although the Board will usually grant the defaulting party another possibility to make its nomination.

After receipt of the Memorandum in Reply, the Secretary-General will require payment of the advance of costs and will set the constitution of the tribunal in motion.

(e) Jurisdiction

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. Some arbitration rules therefore provide that the respondent must raise any objections as to jurisdiction at the first opportunity in the arbitration proceedings – in general, when the respondent submits its first submission.¹¹⁶ This is now, for the first time, expressly so under the Vienna Rules, as well as Austrian law, which, also for the first time, affords the parties the right to challenge a preliminary award on jurisdiction in the courts.

¹¹⁵ It is the practice of the present Secretary-General to grant time extensions in steps of 30 days, unless special circumstances require otherwise. An extension is usually granted at its first application, which is commonly not forwarded to the claimant for further comment.

¹¹⁶ See e.g., LCIA Rules, art. 23(2): 'A plea by a Respondent that the Arbitral Tribunal does not have jurisdiction shall be treated as having been irrevocably waived unless it is raised not later than the Statement of Defence'. Other arbitration rules extend the obligation to make a plea as soon as possible to further objections, e.g. ICDR, art. 15(3) requires that not only the jurisdiction of the tribunal has to be objected to at the time of the statement of defence, but also the 'arbitrability of a claim or counterclaim no later than the filing of the statement of defence' and in art. 19(2) of the SCCI Arbitration Rules the tribunal is allowed to permit such objections 'only until the first act of procedure is taken on the merits of the case'.

(i) Objecting to Jurisdiction

Article 16 of the UNCITRAL Model Law was the model for ZPO, section 592 in the new Austrian Arbitration Act. This, in turn, led to the adoption of the new provision of article 19 of the Vienna Rules. This provision now 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', which will typically (but not necessarily) be the Memorandum in Reply. In order to prevent an impasse in 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'.

Article 19, in line with ZPO, section 592(2), additionally introduces an express obligation to raise an objection to 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'. From the authentic German version of the Vienna Rules and the pertinent provision in the Austrian Arbitration Law, it can be inferred that 'raised during the arbitral proceedings' means that the matter potentially exceeding the tribunal's authority is made the subject of an application on the merits ('zum Gegenstand eines Sachantrages erhoben'), by amending a claim or introducing new claims.¹¹⁷

In both cases (*i.e.* lack of jurisdiction and/or excess of authority), the Vienna Rules provide that a party failing to raise a timely objection is deprived of the right to assert it at a later stage. Thus, a 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.¹¹⁸ Given this, article 19 (and ZPO, section 592(2)) vests the tribunal with discretionary authority to admit a belated objection, in circumstances where the defaulting party can show good cause for the delay. In our view, a strict test will have to be applied in this context, in order not to frustrate the purpose of article 19 and open the door to dilatory tactics by obstructive parties. Moreover, an objection to formal defects of the arbitration agreement must, pursuant to ZPO, section 583(3), always be raised with the first submission on the merits, failing which the formal defect is cured.¹¹⁹ Given this express statutory provision, the tribunal has arguably no authority to admit objections to the form of the arbitration agreement at a later stage.¹²⁰

(ii) Decision on Jurisdiction

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. Article 19(2) now provides expressly that the decision on jurisdiction be made either jointly with the

¹¹⁷ Reiner, *Das neue österreichische Schiedsrecht*, p. 25.

¹¹⁸ See also Power, *The Austrian Arbitration Act (2006)*, s. 592 Rz 9.

¹¹⁹ ZPO, art. 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'.

¹²⁰ Reiner, *Das neue österreichische Schiedsrecht*, p. 25.

ruling on the merits or by a separate arbitral award (but not an order). This is intended to encourage an arbitral tribunal to decide on its own jurisdiction early in the proceedings. However, it has deliberately been left to the discretion of the arbitral tribunal whether to render an award during the proceedings or in 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 611.¹²¹ While the challenge is pending, the tribunal may, if it deems it appropriate, continue the proceedings and even render an award.¹²²

(f) *Language*

The VIAC administers proceedings with parties of diverse nationality and background. Article 6 of the Vienna Rules provides that '[c]orrespondence by the Parties with the Board and the Secretary-General shall be conducted in German or English'.

Importantly, article 6 *only* applies to correspondence between the parties and the VIAC, *i.e.* the Board and the Secretary-General. Thus, article 6 does not address what is commonly referred to as the 'language of the arbitration', being correspondence between the parties and the tribunal. Article 6 also does not apply to correspondence between the arbitrators and the VIAC, or to correspondence amongst the arbitrators themselves. This distinction is important as the parties are, as a matter of course, free under the Vienna Rules to agree on any language they deem appropriate to govern their arbitration. Absent such agreement, the arbitrators will determine the language of the arbitration pursuant to article 20(2).

(g) *Time limits, Service and Means of Communication*

Article 13 acknowledges the importance of allowing for reliable, and at the same time, verifiable means of communication. Relevant time limits are deemed observed if the submission is dispatched on the last day of the relevant period. The methods of dispatch include registered letter, courier service or telefax or 'by other means of communication that guarantee evidence of transmission'.¹²³

¹²¹ Under the former Austrian arbitration law, decisions dealing solely with the tribunal's jurisdiction were not considered to be final awards on the merits and therefore not challengeable. In contrast, ZPO, art. 611 now provides for a uniform procedure for challenging awards on jurisdiction, irrespective of whether the tribunal declines or accepts its jurisdiction. Power, *supra* n. 119 at s. 611 Rz 7 with further annots.

¹²² ZPO, art. 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'.

¹²³ This new form of communication seems to mirror ZPO, art. 583, which extended the methods of validly concluding an arbitration agreement, *inter alia*, to 'other forms of communication exchanged between them that provide proof of the existence of the agreement'. See discussion in Hahnkamper, 'Neue Regeln für Schiedsvereinbarungen – Liberalisierung der Schriftform- und Vollmachterfordernisse' in *SchiedsVZ* 2006, 2.

Time limits can be extended by the Secretary-General if sufficient grounds are shown to exist; after the transmission of the files to the arbitral tribunal, it is the arbitrators' responsibility to set and extend time limits.

In order to facilitate an efficient delivery process, the Vienna Rules contain an assumption of valid delivery in that service to the 'most recently indicated address' is considered to be valid without further proof.¹²⁴

The Vienna Rules additionally reduce the opportunity for dilatory tactics in the serving process, providing that '[a]s soon as a party has appointed a representative, service to the most recently indicated address of that representative shall be considered as having been made to the party represented'.¹²⁵

The Vienna Rules, unlike other arbitration rules, still do not contain any indication as to when a time limit will be deemed to commence, or when it effectively commences. As the VIAC and the arbitration tribunal must be able to establish the exact date of the commencement of a time limit, it can be assumed from the VIAC's former practice that a time limit under the Vienna Rules commences on the day following the day when the document was received or ought to have been received by the recipient. Similar, for example, to the ICC Rules, if the last day of the time limit is an official holiday or non-business day, the time limit will expire at the end of the first business day thereafter.

(h) Counterclaims

Article 11(1) of the Vienna Rules (which replaces former article 7a) contains a significant change to the VIAC's jurisdictional authority to administer counterclaims. Previously, counterclaims were only admissible if they fell within the *same* arbitration agreement. Now, they are admissible if they are based 'on an arbitration agreement which constitutes the jurisdiction of [the VIAC]'. Thus, claims arising from or in relation to different agreements, as long as they provide for arbitration under the Vienna Rules, can be heard as counterclaims in a single proceeding.¹²⁶ Article 11(3), however, contains further conditions for a counterclaim to be admissible. The counterclaim must also be raised between the same parties between which the claim is pending; and its introduction must not delay the proceedings.¹²⁷

¹²⁴ Whereas this is, as a matter of course, open to counter-proof. It also does not prevent a party 'demonstrably transmitting' the document to the other party.

¹²⁵ Vienna Rules, art. 13 do not contain any indication whether one party is (as UNCITRAL Model Law, Art. 3(1)(a) provides) obliged to make a *reasonable inquiry* of the other party's delivery address. This could well be in the other party's interest as such information would become relevant at the enforcement stage at the latest. While there is no such obligation under the Vienna Rules, ZPO, art. 580 now does require that reasonable investigations are made before the assumption of delivery can take effect. For a detailed discussion, see Schwarz and Konrad, *supra* n. 1 at art. 13.

¹²⁶ See also Vienna Rules, art. 15 on multi-party arbitration.

¹²⁷ The tribunal's judgment could be guided, *e.g.* by considering (i) whether the counterclaim is specifically aimed at delaying the arbitral proceeding; (ii) whether there is reasonable justification for why the counterclaim has not been raised earlier; (iii) if there is overlap between the main claim and the counterclaim regarding the issues and evidence at hand; (iv) to what procedural stage the proceedings have progressed (including the extent to which evidence has been taken); as well as (v) the extent to which further submissions need to be made and further evidence needs to be taken as a result of the counterclaim. See Schwarz and Konrad, *supra* n. 1 at art. 11.

If one of these criteria is not met, the arbitrators ‘must’ return the claim to the Secretary-General to be dealt with in separate proceedings, suggesting that the arbitrators have an obligation to do so, and cannot exercise discretion in the matter. Of course, the counterclaim will only reach the arbitrator after an additional deposit on costs has been paid.

Counterclaims can be raised until the end of the evidentiary proceedings (although arbitrators and parties often determine different cut-off points for counterclaims). If the counterclaim is admissible, the tribunal must give the counter-respondent the opportunity to submit a Memorandum in Reply.

VII. CONDUCTING THE ARBITRATION

The reform of the Austrian arbitration law and of the Vienna Rules has introduced in both significant changes to how arbitral proceedings are to be conducted in Austria.

(a) *Seat of the Arbitration*

Choosing the seat of the arbitration is often considered as one of the most important decisions when resorting to arbitration. This is because of the potential impact of the law of the *situs* at various levels. The *lex loci arbitri* may provide the law applicable to the arbitration agreement and determine its validity; it may provide for certain standards that the arbitrators and the parties need to comply with; and it typically regulates the intervention of local courts in the arbitral process.¹²⁸ Most importantly, perhaps, it provides the conditions in which an award may be set aside.¹²⁹ Some commentators therefore regard the seat of the arbitration as the *vital territorial link* attaching international arbitration proceedings to a specific legal order, thus establishing the ‘formal legal domicile’ of the arbitration.¹³⁰

The new Austrian Arbitration Act has adopted this concept of territoriality in section 577 by stating that the provisions on arbitration shall apply ‘if the seat of

¹²⁸ See ZPO, art. 578, which provides specifically that the courts may only act in matters relating to arbitration where this is expressly permitted by the arbitration law. This provision confirms the position under current law; it can be understood as a clarification, in line with the modern approach of denationalisation, to limit the interference of the national courts to a minimum.

¹²⁹ The law of the situs may also, through conflicts of law rules or through certain mandatory provisions and *ordre public*, impact on the substantive law governing the parties’ dispute. Finally, the place of arbitration provides the law for setting aside the award and plays a vital role in enforcement proceedings under Art. 5(1)(a), (d) and (e) of the New York Convention. See Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (4th edn, 2004), para. 2-14.

¹³⁰ Lionnet, *Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit*, p. 95. Traditionally, commentators have argued that there is no such thing as ‘international arbitration’, since by virtue of its seat, the arbitration is part of a national legal regime. See e.g. famously Mann, ‘Schiedsrichter und Recht’ in *FS für Flume* (1978); ‘Lex Facit Arbitrum’ in Sanders (ed.), *International Arbitration, Liber Amicorum for Martin Domke* (1967). However, in more recent times, there is an effort to detach – and thus delocalise – international arbitration as much as possible from the seat of the arbitration. See e.g. Paulsson, ‘Arbitration Unbound: Award Detached from the Law of its Country of Origin’ in (1985) 30 *ICLQ* 363.

the arbitral tribunal is in Austria'.¹³¹ Nonetheless, only a limited number of the provisions of the new Austrian arbitration law are mandatory and much is left for the parties to agree freely as they deem appropriate.¹³²

Article 2 of the Vienna Rules provides that the arbitration proceedings will be seated in Vienna unless the parties have agreed otherwise.¹³³ By providing a 'situs by default', article 2 gives arbitrators no authority to determine the seat of the arbitration to be elsewhere. For an international institution, this approach is perhaps too narrow.¹³⁴ However, article 2 now clarifies what has been the practice under the Vienna and most other institutional rules – that, unless the parties have agreed otherwise, the arbitrators, in line with article 20(1), may conduct procedural acts at any place they deem appropriate.

(b) *Arbitral Proceedings*

Article 20 is almost identical to article 14 of the former version of the Vienna Rules. Noteworthy are, perhaps, two clarifications that were introduced. First, it has now been clarified that where a party fails to object to a procedural irregularity, it cannot invoke that alleged irregularity at a later stage.¹³⁵ It has also been clarified that even though the arbitrators have declared the proceeding closed, the arbitrators retain the authority to re-open the proceedings at any time.¹³⁶

(c) *Basic Principles of Due Process*

In the context of the Vienna Rules and the agreements between the parties, the tribunal may conduct the arbitration proceedings at its discretion. In other words, the arbitrators' discretion in establishing a procedure for the arbitration must be exercised within the confines of the parties' agreement and mandatory law.

¹³¹ Note, however, that Austrian law may be applicable in certain cases even where the seat of the arbitration is not Austria or has not yet been determined. Specifically, the provisions concerning the extent of court intervention, the receipt of written communications, the form and the effect of the arbitration agreement in particular in state court proceedings, concerning the enforcement of interim and protective measures, the assistance of Austrian courts in arbitration proceedings, the declaration of (non-) existence of an award and the recognition and enforcement of foreign arbitral awards, will also be applicable if the seat of the arbitration is not Austria or has not yet been determined. *See also* Oberhammer, *Entwurf*, s. 577.

¹³² *See* Erläuternde Bemerkungen to ZPO, art. 577. *See* the discussion in Schwarz and Konrad, *supra* n. 1 at art. 2.

¹³³ Indeed, most of the arbitrations under the Vienna Rules are sited in Vienna in any event. This provision is also in line with all major rules in giving the parties the freedom to choose the arbitral situs.

¹³⁴ There may well be cases where the parties failed to choose a seat for the arbitration but where Vienna is in fact not the most appropriate situs for the proceedings. *See e.g.* ICC Rules, art. 14, under which the place of the arbitration will be fixed by the court, unless agreed upon by the parties. *See* in detail Derains and Schwartz, *supra* n. 110 at p. 213. A similar approach is taken by ICDR, art. 13 and DIS Rules, s. 21 which leave it to the tribunal to determine the place of the arbitration in the absence of an agreement between the parties.

¹³⁵ Vienna Rules, art. 20(7).

¹³⁶ *Ibid.* art. 20(8).

The foremost procedural principle recognised under Austrian law is the principle of equal and fair treatment of the parties.¹³⁷ Although article 20(1) refers only to equal treatment, procedural fairness is an implied term of Austrian mandatory law. The meaning of the term 'fair' is informed by Article 6 EHRC.¹³⁸

Article 20(1) also expressly refers to the parties' right to be heard. The parties must therefore be given sufficient opportunity to present their case and to participate in, and comment on, the taking of evidence.¹³⁹ The award must not be based on facts or evidence on which the parties were not given the opportunity to comment.¹⁴⁰ However, the Austrian Supreme Court has also established important limits to the parties' right to be heard. In particular, arbitrators are free to dismiss evidentiary applications (and thus, not hear every witness a party offers).¹⁴¹ Previously, the Austrian Supreme Court has also upheld awards in which the tribunal simply disregarded a party's factual or legal arguments.¹⁴² Article 20(1) provides in this regard that, subject to advance notice, the tribunal can impose a cut-off date after which pleadings and the presentation of evidence is no longer admissible.

(d) Language of the Proceedings

ZPO, section 596 permits the parties to agree on the language of the arbitration, failing which, the language of the arbitration is determined by the arbitrators. Article 20(2) provides that in such cases, the arbitrators' determination is informed by the circumstances of the case and, in particular, the language of the parties' contract. The determination of the language of the arbitration has to occur immediately after the tribunal's constitution, when the file is transmitted to the arbitrators.

The arbitrators can order a party to submit translations of all documents that are not drafted in the language of the arbitration. Indeed, they may have to do so in order to give meaning to the parties' right to be heard.

(e) Oral Hearings

Arbitral proceedings must not necessarily be conducted by way of oral hearings.¹⁴³ However, if one party so requests, or if the arbitrators deem it necessary, an oral hearing must be conducted. If hearings take place, they are held in private. Article 20(3) also requires that a record of 'at least the results of the hearings' shall be made. In practice, verbatim transcripts are much

¹³⁷ ZPO, art. 594(2).

¹³⁸ Oberhammer, *Entwurf*, p. 92; Reiner, 'Schiedsverfahren und rechtliches Gehör' in *ZfRV* 2003, 52.

¹³⁹ OGH 6.9.1990, RdW 1991, 327.

¹⁴⁰ OGH 27.11.1991, RZ 1991/65.

¹⁴¹ OGH 31.3.2005, 3 Ob 35/05a.

¹⁴² OGH 27.11.1991, RZ 1991/65. This approach has recently been quite heavily criticised. See Schwarz and Konrad, *supra* n. 1 at art. 20; Reiner, 'Schiedsverfahren und rechtliches Gehör' in *ZfRV* 2003, 52; Zeiler, *Schiedsverfahren*, p. 199.

¹⁴³ See ZPO, art. 598.

preferable, as they provide a truly accurate record of the testimony and the oral pleadings.

(f) *Taking of Evidence*

The taking of evidence is a subject of much debate in the world of international arbitration, where the procedural expectations of parties may differ widely with regard to instruments such as written witness statements, disclosure (or discovery) and styles of cross-examination. The Vienna Rules, and Austrian arbitration law, leave it up to the parties and the arbitrators to agree on a procedural framework that meets the specific demands of their case. The Vienna Rules merely provide in this regard that the arbitrators may also collect evidence on their own initiative, including questioning parties or witnesses, requesting the parties to submit additional documents and evidence, and appointing expert witnesses of their own.

(g) *No Default Decision*

Article 20(6) requires the arbitrators to hear a party's case in full even if the other party fails to participate in the proceedings. This provision excludes decisions by default.¹⁴⁴ The tribunal is not allowed to assume that a party's factual or legal position is wrong merely because that party refuses to take part in the proceedings. Rather, the tribunal must assess, and reach its decision on the basis of, the evidence before it. However, it may be admissible for a tribunal to draw adverse inferences from a party's failure to proffer evidence on a particular point.¹⁴⁵

(h) *Objecting to Procedural Irregularities*

Parties must object to procedural irregularities without delay, failing which they are estopped from relying on that procedural error at a later stage (including proceedings regarding the annulment of the award). This follows from both article 20(7) and ZPO, section 579.¹⁴⁶ However, the obligation to enter an immediate objection applies only to procedural rules on which the parties have agreed or provisions of applicable statute from which the parties are free to

¹⁴⁴ See ZPO, art. 600(2): 'If the respondent fails to respond in accordance with article 597, paragraph 1 of this law during the agreed or determined period of time, the arbitral tribunal shall, unless the parties have agreed otherwise, continue the proceedings without treating such failure in itself as an admission of the claimant's allegations. The same shall apply where a party has failed to perform any other procedural act.'

¹⁴⁵ Oberhammer, *Entwurf*, p. 104.

¹⁴⁶ ZPO, art. 579 provides: 'If the arbitral tribunal has not complied with a procedural provision of this section from which the parties may derogate, or with an agreed procedural requirement of the arbitral proceedings, a party shall be deemed to have waived its right to object if it does not object without undue delay after learning of the defect, or within the designated time limit.'

deviate – it does not apply to provisions of mandatory law.¹⁴⁷ The procedural irregularity must also be known to give rise to an obligation to object.¹⁴⁸

(i) Closing of the Proceedings

Article 20(8) requires the arbitrators, as soon as they are convinced that the parties have an adequate opportunity to present their case, to ‘declare the proceedings closed’. This express declaration is intended to put the parties on notice that the tribunal will now proceed to issue an award. In that regard, it is an additional procedural safeguard to prevent surprise decisions. As article 20(8) in its newly-adopted form clarifies, the tribunal retains the power to re-open the proceedings should it deem this necessary.

(j) Expert Witnesses

The entirely new provision of article 16 was adopted as a consequence of ZPO, section 601.¹⁴⁹ It provides that expert witnesses appointed by the tribunal can be challenged under the same circumstances, *mutatis mutandis*, as arbitrators pursuant to ZPO, sections 588 and 589. Experts appointed by the tribunal must therefore be impartial and independent of the parties, and must meet any additional requirements agreed by the parties, or else face disqualification. The arbitrators will decide on any such challenge.

Expert witnesses offered by the parties do not fall within the scope of article 16. However, any party-nominated expert whose expertise is ostensibly partial, or who has an inappropriate relationship with the party, will undermine the credibility of the party who appointed that expert. Such cases can be sufficiently addressed by the arbitrators’ authority freely to weigh the evidence before them.

(k) Party Representatives

New article 23 adopts, with only slight changes, former article 15. The parties now have the right not only to be represented, but also to be advised, by persons of their choice. Whatever the semantic meaning of this distinction, it is clear that the parties are free to appoint representatives of their choosing without regard to specific qualifications. As a result, non-lawyers can be appointed as party representatives as well.

(l) Applicable Law

Article 24 addresses the issue of the law governing the substantive issues in dispute.¹⁵⁰ The determination of the applicable substantive law is important;

¹⁴⁷ Otherwise, the mandatory nature of such provisions could be frustrated by a failure to object (or a concerted effort not to object).

¹⁴⁸ See Zeiler, *Schiedsverfahren*, p. 37.

¹⁴⁹ ZPO, art. 601(3) provides: ‘Articles 588 and 589, paragraphs 1 and 2 of this law shall apply accordingly to the expert appointed by the arbitral tribunal’.

¹⁵⁰ Redfern and Hunter, *supra* n. 130 at para. 2-04.

arbitrators, absent agreement by the parties, are in principle not entitled under article 24(3) (nor under ZPO, section 603(3)) to base their decision on equity, but must base it in law.

(m) *Choice of Law*

In most international commercial contracts, parties will make an express choice as to the law governing their agreement,¹⁵¹ thereby resorting to the law that they (or their lawyers) are familiar with; that is accessible; that is sophisticated and reliable in the relevant field; that is suitable to govern international contracts;¹⁵² and that will likely remain stable over time.¹⁵³ Such a choice of law is uniformly recognised by major international conventions, most notably, the Rome Convention within the European Union. National laws (including Austrian law), as well as all major institutional arbitration rules,¹⁵⁴ also typically allow for the parties' choice of law as a fundamental expression of party autonomy.¹⁵⁵

Today, this autonomy is recognised to the extent by which the parties can modify their choice, or introduce a new chosen law, after they have entered into their original agreement, including when their dispute arises.¹⁵⁶ The choice of a law incorporates all rules of law 'with the hierarchy of sources as valid in that system [including] references to statutes, case law, scholarly writings and customs, with the authority they are vested with in that legal system'.¹⁵⁷ However, a choice of law is usually construed to refer to a substantive law without *renvoi*, so that the conflicts of law rules of the chosen law are excluded.¹⁵⁸ This is now expressly confirmed by article 24 and ZPO, section 603(1).

¹⁵¹ Arbitrators need to be aware that, under Art. 3(1) of the Rome Convention, the parties' choice of law need not be express – such choice can also be implied if the parties have 'demonstrated with reasonable certainty' that a certain law was chosen by them. On the other hand, arbitrators should not infer an implied choice of law where the parties were lacking a clear intention to make such a choice. See Givliano and Lagande, 'Report on the Convention on the Law Applicable to Contractual Obligations' in [1980] OJ C282/1, no. 5, p. 1, 17. Arbitrators seem to have implied a choice of law, e.g. when parties argued their case on the basis of the same law. See Lew, Mistelis, Kröll, *supra* n. 34 at para. 17-16.

¹⁵² Laws that, by way of currency and trade regulations and restrictions, do not permit the free exchange of goods across borders may, e.g. not be the best laws for international contracts. See *supra* n.130 at para. 2-42.

¹⁵³ This is a particular concern in contracts with states or state parties, where the state legislature can change a law that turns out to be unfavorable to it. Parties try to pre-empt such adverse changes by 'freezing clauses' (which agree on the law as of a given date) or 'stabilisation clauses' (by which the state undertakes not to make adverse changes without the consent of the other party). For a discussion of such clauses, and their problems, see Gaillard, 'The Role of the Arbitrator in Determining the Applicable Law' in Newman and Hill, *supra* n. 38 at p. 185; Redfern and Hunter, *supra* n. 130 at para. 2-44, with further ref., and at para. 2-48 *et seq.*

¹⁵⁴ See Lew, *Applicable Law in International Commercial Arbitration*, p. 75.

¹⁵⁵ Lew, Mistelis, Kröll, *supra* n. 34 at para. 17-8 with further ref. Of course, the parties' autonomy finds its limitations in the applicable *ordre public* and certain overriding provisions of mandatory law ('*Eingriffsnormen*').

¹⁵⁶ See Convention on the Law Applicable to Contractual Obligations (Rome 1980), Art. 3; apparently confirming this position: Oberhammer, *Entwurf*, p. 111. Austria, which is a signatory to the Rome Convention, recognises the parties' autonomy to choose an applicable substantive law under arts 11, 19 and 35 of the International Private Law Act (Internationales Privatrechtsgesetz, IPRG).

¹⁵⁷ Lew, Mistelis and Kröll, *supra* n. 34 at para. 18-24.

¹⁵⁸ See e.g. UNCITRAL Model Law, Art. 28(1). See also Austrian IPRG, art. 11(1).

(n) *Choice of Rules of Law*

Parties sometimes choose legal sources other than national laws, such as ‘general principles’ of law, transnational law, *lex mercatoria* or trade usages. It is widely accepted that parties can in principle do so,¹⁵⁹ and indeed, article 24(1) and ZPO, section 603(1) now, for the first time in Austrian law, expressly confirm this. The term ‘rules of law’ was added specifically to allow the parties greater flexibility to choose a normative framework other than a precisely-delineated national law, including the UNIDROIT principles,¹⁶⁰ and to ‘leave the door wide open for party autonomy’.¹⁶¹

(o) *Determination of the Applicable Law by the Arbitrators*

If the parties have not agreed on an applicable law, or if the parties’ choice fails to cover all relevant aspects of the dispute, the arbitrators shall, under article 24(2), apply the law they deem appropriate. This is a marked change from the *voie indirecte* of former article 16(1) that instructed the arbitrators to apply ‘the law that is designated by the choice of law rules that [they] consider to be applicable’.

Under article 24(2), the applicable law may be the law with which the subject matter of the proceedings is most closely connected, but that is not necessarily so. In fact, the approach of unrestricted *voie directe* leaves the arbitrators with the greatest possible discretion.¹⁶² Thus, arbitrators can freely, ‘look for the common intentions of the parties, and use the connecting factors generally used in doctrine and in case law, [to] disregard national peculiarities’.¹⁶³ The drafters of the ZPO also wanted to open the possibility for arbitrators not to apply a proper set of conflict rules taken from a national law, but to apply instead more freely internationally-accepted conflict principles.¹⁶⁴ While critics note that *voie directe* lacks the predictability and legal certainty that conflict of laws rules offer,¹⁶⁵ it does enhance the flexibility of the arbitral process and is, on balance, desirable.

Whereas the parties may (as discussed above) agree freely on either the applicable law or, more liberally, on the rules of law, the arbitrators on the other hand may only apply the appropriate law. This is a consequence of the mandatory provision of ZPO, section 603(2);¹⁶⁶ it appears to be a deliberate (if in

¹⁵⁹ Lew, Mistelis and Kröll, *supra* n. 34 at para. 17-18.

¹⁶⁰ Oberhammer, *Entwurf*, p. 109.

¹⁶¹ *Ibid.*

¹⁶² Note that *e.g.* German ZPO, art. 1051(2) requires arbitrators to apply the national law with the strongest connection to the subject matter of the dispute. This is also a direct application of the law without a preceding conflict of law analysis; a restricted *voie directe*.

¹⁶³ Redfern and Hunter, *supra* n. 130 at para. 2-80.

¹⁶⁴ Indeed, in having to determine the *appropriate* law, arbitrators will typically be guided by general principles of conflict rules. Oberhammer, *Entwurf*, pp. 109–110.

¹⁶⁵ Born, *supra* n. 20 at p. 531.

¹⁶⁶ ZPO, art. 603(2): ‘Failing any designation by the parties, the arbitral tribunal shall apply the law that it considers appropriate’.

our view unfortunate) choice of the Austrian legislature to limit the arbitrators' discretion in this respect.

(p) Equity-based Decisions

Article 24(3) restricts the tribunal's power to decide on the basis of equity; the tribunal can do so only if it is authorised by the parties, which requirement follows both ZPO, section 603(3) and international practice. However, article 24(3) and section 603(3) appear to be particularly strict in that they require that the authorisation must be 'express'.

(q) Termination of the Proceedings

Article 25 sets out, in revised form, the conditions for terminating the proceedings. This list is exclusive and provides for termination when a (final) award is rendered; a (full) settlement is concluded; or the tribunal so orders. The tribunal's order, in turn, can be based on three alternative conditions.

First, the tribunal can order the termination of the arbitration if the claimant withdraws the claims without prejudice, either with the consent of the respondent or upon authorisation by the tribunal. The tribunal will withhold such authorisation where it finds that the respondent has, at that stage of the proceedings and in the circumstances of the case, a legitimate interest in having the dispute decided.

The arbitration is further terminated by order of the tribunal if the parties so agree; or if the tribunal deems it impossible to continue the proceedings, in particular because the parties have ceased any activity. In such cases, the tribunal has to put the parties on notice that it intends to terminate the proceedings, giving them the opportunity properly to continue with the arbitration.

VIII. INTERIM RELIEF

Interim measures are an important instrument to protect the parties' interests not only in state court litigation, but also in international arbitration. Indeed, contemporary international arbitration law and practice both recognise the broad power of international arbitrators to order interim or protective measures.

ZPO, section 593(1) adopted Article 17 of the UNCITRAL Model Law, putting an end to the debate in Austrian doctrine whether the granting of interim relief falls within the exclusive jurisdiction of the state courts.¹⁶⁷

Article 22, through an amendment of (former) article 14a, expressly grants the arbitrators the authority to order interim measures of protection in the course of the arbitral proceedings. This authority applies by default 'unless otherwise agreed by the parties'.

¹⁶⁷ Fasching, *Schiedsgericht*, p. 22 und Lehrbuch, at paras 2177, 2181; Fasching, *Probleme*, p. 455 and also OGH, SZ 50/83. For an overview of modern doctrine, see Liebscher, *Wiener Regeln*, p. 292.

Interim measures of protection can only be granted at the request of a party. Hence, the arbitrators lack the jurisdiction to grant interim relief on their own initiative.¹⁶⁸ The arbitrators can ‘take such interim measures of protection [that they] may consider necessary’. The Vienna Rules, therefore, do not limit the arbitrators as to the kind of interim relief they are permitted to grant. However, interim relief requires that ‘otherwise the enforcement of the claim would be frustrated or considerably impeded or there is a danger of irreparable harm’; and it must be taken ‘in respect of the subject matter of the dispute’.

The Vienna Rules did not, in line with most arbitration rules, adopt an *ex parte* approach, therefore, the other party needs to be heard prior to any interim order granted by the tribunal.¹⁶⁹

Similar to the requirements attaching to awards, interim measures need to be in writing, reasoned, include the date of issuance, the place of arbitration and be signed by the presiding arbitrator.¹⁷⁰ Additionally, the arbitrator must, upon request, confirm that the measure is not subject to appeal and enforceable.

Despite the effort legislatures¹⁷¹ and practitioners have invested into developing standards for interim measures in arbitration that allow for fast and effective relief, there may well be cases where the state courts may be yet more effective, and more expedient, in providing the relief the parties require. Recognising this, major arbitration rules typically permit the parties to apply to the state courts for interim measures in spite of the parties’ existing arbitration agreement.¹⁷² The Vienna Rules at article 22(6) similarly introduce a truly concurrent jurisdiction between state courts and arbitral tribunals in this regard, as an application for an interim measure with an arbitral tribunal ‘does not

¹⁶⁸ This approach is the prevailing one in modern arbitration, and has also been adopted in dZPO, art. 1041, on the basis of UNCITRAL Model Law, Art. 17. See also ICC Rules, art. 23; LCIA Rules, art. 25; ICDR, art. 21; DIS Rules, s. 20. By contrast, under the ICSID Rules, art. 39(3), arbitrators can recommend provisional measures on their own initiative or recommend measures other than those specified in a request.

¹⁶⁹ Traditionally, international arbitrators have been overall hostile to granting interim relief *ex parte*. It is argued that *ex parte* relief violates the consensual nature of arbitration and the party’s unalterable right to be heard. *Ex parte* relief, where it is necessary, is for the state courts to grant. It has also been pointed out that the different, more restrictive treatment in arbitration is justified because parties lack the right to appeal in arbitration that they enjoy before the state courts. See C. Goldman, ‘Provisional Measures in International Arbitration’ in (1993) 3 *International Business LJ* 6; see in general, Redfern and Hunter, *supra* n. 130 at para. 7-17; for a commentator supporting the possibility of arbitrators granting *ex parte* interim measures of protection see K.P. Berger, *International Economic Arbitration* (1993), p. 337.

¹⁷⁰ In case of the chairman’s being prevented, signing can be effected by any other member of the tribunal.

¹⁷¹ ZPO, art. 593 adopts an ‘arbitration friendly’ statutory regime that allows the enforcement of interim measures granted by arbitrators in domestic and international proceedings through the Austrian state courts. It also addresses the issue of how an Austrian court is to enforce a measure granted by a foreign tribunal that is conceptually alien to Austrian law. This problem is a real one in practice, as non-Austrian arbitrators will typically not be able to concern themselves with the details of all national enforcements laws potentially relevant to the enforcement of their interim orders. Thus, ZPO, art. 593 provides that, where measures are unknown to Austrian law, the court of enforcement can, upon application by a party, ‘execute the measure of protection of Austrian law that comes closest to the measure of the arbitral tribunal. In this case, the court, upon request, can also modify the measure of the arbitral tribunal in order to safeguard the realization of its purpose.’

¹⁷² The Secretariat and the sole arbitrator (arbitral tribunal) must be immediately informed of any such application as well as of all measures ordered by the state organ.

prevent the parties from applying to any competent State organ for interim measures of protection'.¹⁷³ To avoid conflicting decisions, however, the parties are required to inform both the Secretary-General and the arbitrators of any pertinent request for interim measures filed with state courts, and of any measures granted as a result of such requests.¹⁷⁴

IX. THE AWARD

The provisions regarding the making of an award have been amended significantly, in order to bring them in line with the new Austrian Arbitration Act.

(a) *Formal Requirements*

Not surprisingly, the Vienna Rules require an award to be drawn up in writing and to provide the reasons upon which the award is based.¹⁷⁵ As a matter of course, the award must 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 will 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.

It is noteworthy that under the Vienna Rules there is no formal process of official scrutiny or approval of the award by the institution. However, the VIAC certifies the award through the signature of the Secretary-General and by affixing the stamp of the Centre on each award. This confirms that it is in fact an award of the VIAC and that it was made and signed by (an) arbitrator(s) chosen or appointed in accordance with its Rules of Arbitration.

(b) *Quorum*

Previously, the Vienna Rules had not contained an express quorum requirement regarding the decision-making of the arbitral tribunal.¹⁷⁶ Now, article 26 (which

¹⁷³ Other rules seem to prefer that, once the arbitral tribunal is constituted, a party should primarily approach the arbitral tribunal for interim measures, and only 'in appropriate circumstances', as *e.g.* under art. 23(2) of the ICC Rules, or 'in exceptional cases', as *e.g.* under art. 25(3) of the LCIA Rules, resort to the state courts.

¹⁷⁴ Vienna Rules, art. 22(6).

¹⁷⁵ The parties can agree, however, either in the arbitration agreement or in the proceedings, that no grounds are to be stated.

¹⁷⁶ Former art. 18(2) gave an indirect indication that majority votes were admissible by stating that '[t]he signatures of the majority of the arbitrators shall suffice if the award contains a statement that one arbitrator refuses to sign or that his signature is prevented by an obstacle which cannot be overcome within a reasonable period of time. If the award is made by a majority decision, mention thereof shall be made in the award at the request of the arbitrator who is in a minority.'

follows ZPO(new), section 604)¹⁷⁷ provides for a majority quorum in the decision-making process. If no majority of votes is obtained, the presiding arbitrator's vote will decide. As far as questions of procedure are concerned, the presiding arbitrator will, nevertheless, require an authorisation by the other members of the tribunal. This concept is widely accepted by other prominent arbitral institutions.¹⁷⁸ This gives the chairman independence and discourages partisan conduct as the co-arbitrators know that the chairman does not have to agree.¹⁷⁹

(c) *Dissenting Opinions*

If a unanimous decision cannot be reached, some arbitrators may feel the desire to submit a dissenting opinion. Article 27(3) only 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. It certainly does not exclude the possibility of dissenting opinions, although some authors have voiced concerns.¹⁸⁰

(d) *Award by Consent*

Parties may wish to record their settlement agreement in the form of an award. Most importantly, it is easier to enforce the terms of the settlement through an award under the New York Convention, particularly when the settlement requires some future performance or payment.¹⁸¹

The Vienna Rules at article 28 leave it to the discretion of the parties 'to request that a record is drawn up of a settlement they have concluded or that an award (on agreed terms) be made thereof'. Arguably the Vienna Rules do not allow the arbitrators any choice in the matter. While generally the tribunal will accommodate the parties' request to obtain a consent award, however, there

¹⁷⁷ ZPO, art. 604(1) first sentence is almost identical to art. 26(1). However, the new Arbitration Act does not contain a subsidiary authority of the chairman in deciding the dispute. The introductory clause to ZPO, art. 694 ('unless otherwise agreed by the parties') makes clear that this is a non-mandatory provision. The parties are entitled to make deviating arrangements, e.g. by resorting to the Vienna Rules, insofar as the parties may stipulate stricter requirements as to the quorum of the arbitral tribunal. See Power, *supra* n. 119 at s. 604 Rz 3.

¹⁷⁸ ICC Rules, art. 25(1) and LCIA Rules, art. 26(3).

¹⁷⁹ Derains and Schwartz, *supra* n. 110 at p. 306: '[T]he ICC approach permits the chairman to maintain a completely independent position and discourages partisan conduct on the part of the co-arbitrators, who know that the chairman is not required to agree with either of them in order to issue an Award.' Redfern and Hunter, *supra* n. 130 at para. 8-33: 'The [ICC] rules provide that where three arbitrators have been appointed the award, if not unanimous, may be made by a majority of the tribunal and that if there is no majority, the chairman of the arbitral tribunal makes the decision alone. The same approach is adopted in the Swiss 1987 Act, the English 1996 Act and the LCIA Rules'. It is notable that this happens very infrequently. In fact, in 2004 only one award under the ICC regime was rendered by the chairman alone. Derains and Schwartz, *supra* n. 110 at p. 307 n. 8.

¹⁸⁰ Derains and Schwartz, *supra* n. 110 at p. 308. For further discussion on dissenting opinions in international arbitration, see ICC Commission Working Party, *Final Report on Dissenting and Separate Opinions* (M. Hunter, Chairman) in (1990) 2(1) *ICC Ct Bull.* 32. See also Redfern, *supra* n. 37 at p. 223.

¹⁸¹ Lew, Mistelis and Kröll, *supra* n. 34 at para. 24-31. (See e.g. *United States v. Sperry Corp. and others*, 493 U.S. 52, 110 S. Ct. 387, 107 L. Ed. 2d 290 (28 November 1989)).

might be circumstances where the tribunal may be reluctant to do so.¹⁸² Awards by consent still have to comply with the formal requirements of awards.¹⁸³

(e) *Partial and Interim Awards*

The Vienna Rules, like most arbitration rules, explicitly give the tribunal the power to make partial and interim awards.¹⁸⁴ Indeed, the new Austrian Arbitration Act has increased the importance of interim or partial awards as those decisions will now, by statute, be treated as final decisions. Hence, they are in principle challengeable under the regime of ZPO, section 611.¹⁸⁵

(f) *Correction and Interpretation of Award; Additional Award*

Article 29 expands the former version of article 18(8).¹⁸⁶ It was newly inserted as a consequence of ZPO, section 610 and 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.

Errors in computation and any clerical or typographical errors (or errors of similar nature) can be corrected by the arbitral tribunal *ex officio* within 30 days after the date of the award; the interpretation or an additional award can only be issued upon request. Such request must be made within 30 days from the receipt of the award; and the other party must be heard.

The Vienna Rules do not contain a time limit for the arbitral tribunal to make a decision. ZPO, section 610(3) provides, however, that the arbitral tribunal must decide upon the correction or interpretation of the award within four weeks and upon an additional award within eight weeks.

¹⁸² For instance, if the proposed award was illegal or fraudulent, or contrary to relevant laws, see Derains and Schwartz, *supra* n. 110 at p. 311: 'Although the Arbitral Tribunal should normally seek to accommodate the parties if they wish to obtain a consent Award, there are surely reasonable limitations on its possible obligations in this regard'. Different arbitration institutions have differing rules on the issuance of consent awards. UNCITRAL Model Law, Art. 30(1) allows for the settlement to be recorded by an order or an award if the parties request, while the ICC Rules demand that the settlement 'shall be recorded', which seems to imply that the parties are obligated to obtain a consent award. Redfern and Hunter, *supra* n. 130 at para. 8-49; ICC Rules, art. 26; AAA ICDR Rules, art. 29(1); LCIA Rules, art. 26(8) and UNCITRAL Model Law, Art. 34(1), however, do require the arbitrators to agree to the consent award.

¹⁸³ 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.

¹⁸⁴ Vienna Rules, Art. 27(7).

¹⁸⁵ Under the old Austrian arbitration laws the Austrian Supreme Court held that an interim award (*Zwischenschiedsspruch*) could not be challenged separately from the final award, because it does not finally determine an issue. Lew, Mistelis and Kröll, *supra* n. 34 at para. 24-28 (citing OGH, 25 June 1992, (1997) XXII *YBCA* 619).

¹⁸⁶ Vienna Rules, Art. 18(8) (former version) read: 'The sole arbitrator (arbitral tribunal) shall at any time, either on request or on his (its) own initiative, correct clerical, typographical or computation errors as well as other obvious inaccuracies in the award or in the copies thereof'.

It is noteworthy that the additional work rendered by the arbitral tribunal under this provision is in principle not subject to additional remuneration.¹⁸⁷ However, an addendum to the initial award should be considered as a separate award with all the legal consequences attaching to it.¹⁸⁸

(g) VIAC's Further Responsibilities

VIAC will serve the award on the parties, which becomes effective upon service.¹⁸⁹ Additionally, one copy of the award is deposited with the Secretariat of the Centre and, as has been the VIAC's previous practice, so are records of the service.

Article 30 entitles the Board 'to publish an award in legal journals or in its own publications, in anonymous form, unless publication is objected to by at least one party, within thirty days after service of the copy of the award on it'. The VIAC has in the past rarely made use of this possibility.¹⁹⁰

X. COSTS OF THE ARBITRATION

The Vienna Rules, like most arbitration rules, draw a distinction between the costs of arbitration and the costs of the parties. The former consists of the outlay of the Centre (administrative costs), the arbitrators' fees plus potential VAT and cash reimbursements (such as travel and subsistence expenses of arbitrators, costs of service of documents, costs of court reporting, etc.). The parties' costs include the legal fees and cost of their representation and other expenses relating to the proceedings. These costs, and their determination, are addressed in articles 31 to 36.

(a) Costs of the Proceedings

The administrative costs of the VIAC are fixed on the basis of the amount in dispute, according to the VIAC's schedule of arbitration costs. If the arbitral proceedings are terminated before an award is rendered, the Secretary-General has the discretion to determine the administrative costs according to the state of the proceeding. The former version of the Vienna Rules¹⁹¹ contained the possibility for the Secretary-General to determine the administrative costs and the arbitrators' fees at the *appropriate levels* in case the proceedings were terminated by other means than by award or settlement. Under the new article 36(1), this

¹⁸⁷ Vienna Rules, Art. 29(4) clarifies that the interpretation or correction made by the arbitral tribunal is a part of the (initial) award. Hence, this will be covered by the initial payment for the arbitrator's fees. This is in line with UNCITRAL Rules, art. 40(4): 'No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award'.

¹⁸⁸ This can be of particular importance for the time limits for setting aside claims which will, as this additional award is considered to be a separate award, recommence on the day of its delivery, *see* Erläuternde Bemerkungen to ZPO, art. 610.

¹⁸⁹ Vienna Rules, Art. 27(8) provides: 'By their agreement to the Vienna Rules, the parties undertake to implement the award'.

¹⁹⁰ A similar approach can be found in ICDR, art. 27(8).

¹⁹¹ Vienna Rules, art. 24(1) (former version).

authority remains with the Secretary-General who now executes this power in his *equitable discretion* (*nach billigem Ermessen*). It is likely that the Secretary-General, when determining the stage of the proceedings, will maintain the previous practice that distinguished between three phases. Under that approach, the first third of the costs was due after the constitution of the arbitral tribunal, the second third after the hearing(s), whereas the final third, in principle, became due only after an award had been rendered.

The arbitrator's fees follow the same approach. In general terms, these fees are fixed on the basis of the amount in dispute, according to the schedule of fees. The rates quoted in the schedule are the fees for a sole arbitrator. In case of an arbitral tribunal, they are raised to two-and-a-half times that amount (or even up to three times in particularly difficult cases). Both the administrative costs of the VIAC and the arbitrators' fees will be increased by 10 per cent for each additional party in the proceeding.

(b) *Deposit of Costs*

Right at the outset of the proceeding, the Secretary-General fixes the amount of the deposit against the expected costs of arbitration. This calculation is based on the amount in dispute as provided by claimant in the Statement of Claims pursuant to article 9(3)(c). If the parties have made only a partial claim or if a request by the parties whose purpose was not the payment of sums of money was obviously undervalued, the Secretary-General has, according to article 36(5), the discretion to fix the appropriate amount in dispute.

In principle, the deposit is allocated in equal shares between the parties and falls due within 30 days after service of the payment request (and in any case before transmission of the files to the arbitral tribunal). If the share of the claimant (counter-claimant) is not received within the time limit, the claim will simply not be administered.¹⁹²

If the respondent fails to pay its share of the cost deposit, the claimant will have to pay the respondent's share on a preliminary basis as well. If, in the course of the proceedings, it should be necessary to increase the deposit against costs because of an increase in the amount in dispute, a similar procedure applies. Until payment of the additional deposit, the additional claim causing the increase of the amount in dispute will not be considered by the arbitral tribunal.

An important amendment has been made with respect to set-off defences. Whereas it was clear from the former version of the Vienna Rules that counterclaims were, in terms of the cost deposit, treated like 'principal claims', it was unclear whether a set-off defence raised in the arbitration proceeding should,

¹⁹² This sanction of non-administration has been inserted with the present amendment of the Vienna Rules. Vienna Rules, art. 23(3) (former version) had provided for the 'delet[ion] ... from the list of pending cases' which, to a certain degree, would contravene the new Austrian Arbitration law. See Schwarz and Konrad, *supra* n. 1 at art. 25.

and if so to what extent, raise the amount in dispute and thereby, the calculation basis for the costs of the arbitration.¹⁹³

Article 36(3) now provides that a set-off defence lacking a legal or factual connection with the (principal) claim will be treated as a counterclaim; hence, it will increase the amount in dispute and, therefore, result in a separate request for a deposit on costs. Until the additional deposit has been fully paid, the arbitral tribunal must not take this defence into consideration.¹⁹⁴

(c) *VAT on the Arbitrators' Fee*

The Vienna Rules now take an express position in a long-lasting discussion that, due to jurisprudence from the ECJ,¹⁹⁵ arose in connection with the VAT taxation on arbitrators' fees. Article 36(10) makes clear that the amounts reflected in the costs appendix do not include potential VAT. Rather, potential VAT on the arbitrator's fee is considered to be a further cost of the arbitration proceedings. As a consequence, the Secretary-General will now include the potential VAT, which needs to be notified by each arbitrator separately at the outset of the proceeding, in the deposit of costs.¹⁹⁶

(d) *Determination of the Costs of the Parties*

Upon application, the arbitrators will also determine the costs of the parties and will allocate these costs between them. This can be done either in an award on the merits or, under ZPO, section 609, in a separate award (equally challengeable under the regime of ZPO, section 611).¹⁹⁷ The Vienna Rules at article 32(b) provide that the costs of the parties can include 'appropriate expenses of the parties for their representation' and 'other outlay related to the proceedings'. In determining whether a certain expense was reasonable and which party should

¹⁹³ A set-off defence was usually considered to fall under the Vienna Rules, art. 24(4) (former version) which gave the Secretary-General the authority to deviate from the statement of the parties in fixing the amount in dispute.

¹⁹⁴ For further analysis, see Schwarz and Konrad, *supra* n. 1 at art. 36.

¹⁹⁵ The ECJ ruled on 16 September 1997, Rs C-145/96, Bernd von Hofmann, that services rendered as arbitrators are, with respect to VAT issues, not services usually or mainly rendered in the course of a lawyer's profession. These services fall, with respect to their place of performance, within the general provision of Art. 9(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes; common system of value added tax: uniform basis of assessment. Under Austrian law, following the ECJ jurisprudence, services as arbitrator are not to be considered under s. 3a Abs 10 Z 3 UStG 1994 (corresponding to art. 9 Abs 2 lit e 6. ECD), rather s. 3a Abs 12 UStG 1994 (corresponding to art. 9 Abs 1 6. ECD), see Kolacny and Mayr, *USIG*², s. 3a Anm 33; Scheiner, Kolacny and Caganeck, *Kommentar zum MWSiG* (1994), s. 3a Abs 9 and 10 Anm 191.

¹⁹⁶ Compare this with App. III to the Stockholm Rules (Regulations for Arbitration Costs): the deposit on costs is to 'cover the estimated Arbitration Costs pursuant to Article 39 of the Rules and, if required, value added tax'. DIS Rules, s. 25 provides 'Als Vorschuss kann das volle Schiedsrichterhonorar und voraussichtliche Auslagen zuzüglich gesetzlicher Mehrwertsteuer angesetzt werden'. ICC Rules, art. 2(9), App. III provide that '[a]mounts paid to the arbitrator do not include any possible value added taxes (VAT) or other taxes or charges and imposts applicable to the arbitrator's fees. Parties have a duty to pay any such taxes or charges; however, the recovery of any such charges or taxes is a matter solely between the arbitrator and the parties.'

¹⁹⁷ Erläuternde Bemerkung to ZPO, art. 609.

ultimately bear those costs, ZPO, section 609 provides that the arbitrator is free to make this determination 'at its discretion, taking into consideration the circumstances of the individual case, in particular the outcome of the proceedings'. Whereas this approach seems well established in international commercial arbitration, it is noteworthy that this provision is not considered to be mandatory. Therefore, the parties can agree on the specific cost allocation mechanism they consider appropriate.¹⁹⁸

¹⁹⁸ Power, *supra* n. 119 at art. 609 Rz 2.

