THE INTERNATIONAL ARBITRATION REVIEW

Eleventh Edition

Editor
James H Carter

THE LAWREVIEWS

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PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another.

The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world often debates whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
Wilmer Cutler Pickering Hale and Dorr LLP
New York
June 2020

Chapter 6

AUSTRIA

Venus Valentina Wong and Alexander Zollner[1]

I INTRODUCTION

i The Austrian Arbitration Act: history, scope and application

Austria has a long-standing history of arbitration; the first legal provisions in the Austrian Code of Civil Procedure (ACCP) on arbitral proceedings date back to 1895. In 2006, the legislator adopted the Arbitration Amendment Act 2006,[2] thereby modernising the arbitration provisions mostly based upon the UNCITRAL Model Law on International Commercial Arbitration (Model Law). Although the legislator also maintained certain provisions of the old law (e.g., Section 594(4) on the liability of arbitrators), it is fair to state that Austria considers itself to be a Model Law country. The Arbitration Amendment Act 2013[3] introduced a major revision to the court system with respect to arbitration-related matters (see subsection v). Despite the term 'Arbitration Act', the Austrian arbitration law is contained in Sections 577 to 618 ACCP.

Pursuant to Section 577 ACCP, the Arbitration Act is not only applicable if the seat of arbitration is in Austria (Section 577(1) ACCP), but also in certain instances where the seat is not in Austria or has not yet been determined (Section 577(2) ACCP). Thereby, Austrian courts assume jurisdiction in arbitration matters even when the seat is not (yet) determined to be in Austria. This is the case in particular where a claim is brought despite an existing arbitration agreement (Section 584 ACCP), where interim measures are sought (granting or enforcement, or both, by Austrian state courts: see Sections 585 and 593 ACCP) and in other cases of judicial assistance (Section 602 ACCP).

ii Arbitration agreements

The definition of arbitration agreement under Austrian law (Section 581(1) ACCP) resembles that of Article 7 Model Law. Thus, an arbitration agreement may be a separate agreement or a clause contained in a main contract. Both contractual and non-contractual disputes may be subject to arbitration. The jurisprudence (which is confirmed by legal literature) derives from this provision that the following three requirements must be fulfilled for an agreement to qualify as an arbitration agreement under the law: the determination of the parties to the

1 Venus Valentina Wong is counsel and Alexander Zollner is a senior associate at Wolf Theiss Attorneys-at-Law.

2 Federal Law Gazette I 2006/7.

3 Federal Law Gazette I 2013/118.

dispute, the subject matter of the dispute that is submitted to arbitration (which can be a certain dispute or all disputes arising out of a certain legal relationship) and an agreement to arbitrate.

Furthermore, Subsection (2) of Section 581 ACCP provides that an arbitration agreement may also be included in statutes – that is, the articles of association of legal entities such as companies or associations – as well as in a testament.

Regarding the form of an arbitration agreement, Austrian law still requires the written form (Section 583(1) ACCP). However, this does not necessarily mean that the arbitration agreement must be signed by both parties: an 'exchange of letters, telefaxes, emails or other means of communications which provide a record of the agreement' also suffices. Apart from the provision in the ACCP, it is generally accepted that Article II of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) is a uniform substantive provision in an international context. Thus, the fulfilment of this uniform standard takes precedence over any stricter requirements under national law.[4]

iii Arbitrability

Section 582(1) ACCP defines the arbitrability *ratione materiae* of claims as follows: claims of an economic or financial interest that fall within the jurisdiction of the ordinary civil courts; and claims without any economic or financial interest, but for which parties may conclude a settlement agreement. Pursuant to Subsection (2), the following claims may not be subject to arbitration: claims in family law matters and certain claims related to housing law.

Although this is not a question of arbitrability in the narrow sense of the law, matters of employment law (Section 618 ACCP) or concerning consumers (Section 617 ACCP) are subject to very strict limitations and are thus dealt with under this heading. The requirements are essentially the same for both kinds of persons (consumers and employees), and can be summarised as follows:

a an arbitration agreement with a consumer or employee can only be validly concluded after a dispute has arisen;

b the arbitration agreement must be contained in a separate document signed by the consumer or employee in person. Such document may not contain any agreements other than those relating to the arbitration proceedings;

c prior to the conclusion of the arbitration agreement, the consumer or employee shall receive a written instruction on the major differences between arbitration and litigation before state courts;

d determination of the seat of arbitration and other requirements as to the venue of the hearing;

e the seat of arbitration must be at the place of the domicile of the consumer or employee unless it is the consumer or employee who relies on a seat outside of his or her place of domicile;

f further grounds for setting aside; and

g a three-instance system for setting aside claims.

In conclusion, it is very unlikely that an arbitration agreement with a consumer or an employee is validly concluded in compliance with the above-indicated requirements.

4 See Reiner, 'The New Austrian Arbitration Act', *Journal of International Arbitration*, Section 583, footnote 38.

Moreover, it should be noted that in arbitration proceedings where individuals are involved, one side might invoke the objection that the individual must be considered as a consumer under the Arbitration Act, and that the arbitral award thus runs the risk of being set aside for this reason.

iv Appointment and challenge of arbitrators

Sections 586 and 587 ACCP stipulate that the parties are free to determine the number of arbitrators and the procedure for appointing them. Absent any agreement of the parties (in particular any agreement on institutional rules) or if the parties agree on an even number, the number of arbitrators shall be three.

Section 587 ACCP stipulates the default procedure for appointing arbitrators if the parties have not reached agreement on their own procedure. Where a party fails to appoint an arbitrator, or the parties fail to jointly nominate a sole arbitrator or a chairperson, it is the Austrian Supreme Court that acts as appointing authority (see Section 615 ACCP). It is noteworthy that in multiparty proceedings, where several parties on one side, despite an obligation to do so, fail to jointly appoint their arbitrator, either party may ask the Court to step in for the failing side, but not for the side that has timely appointed its arbitrator (see Subsection (5)). Section 587(6) ACCP is a catchall provision that applies if, for any reason whatsoever, an arbitrator is not appointed within a reasonable period of time.

Sections 588 and 589 ACCP govern the challenge of arbitrators in accordance with Articles 12 and 13 of the Model Law. Thus, a prospective arbitrator has a duty to disclose any circumstances giving rise to doubts as to his or her impartiality or independence. The arbitrator also has the duty to remain impartial and independent throughout the proceedings. Unless the parties have agreed on a certain procedure of challenging arbitrators (in particular by agreement on a set of arbitration rules), Section 589(2) ACCP provides for a default procedure. Irrespective of whether there is an agreed procedure of challenge or the default procedure applies, the challenging party may request the Supreme Court to decide on the challenge if it was not successful.

In numerous recent decisions of the Supreme Court, the question of whether a violation of the arbitrator's duty to disclose may constitute a ground for successful challenge has arisen. The Court has confirmed this question in cases where the arbitrator has failed to disclose in a culpable way (very extreme cases). In those decisions, the Supreme Court also explicitly referred to the IBA Guidelines on Conflicts of Interest in International Arbitration as the common international standard.[5]

v The court system

Since the revision of the Arbitration Act in 2013, Section 615 ACCP provides that the first and final court instance to rule on setting aside claims (Section 611 ACCP) and for claims on the declaration of the existence or non-existence of an arbitral award (Section 612 ACCP) is the Austrian Supreme Court (except for matters involving consumers and matters of employment law). Previously, setting aside proceedings would have undergone three instance

5 Austrian Supreme Court, 17 June 2013, docket number 2 Ob 112/12b, Austrian Supreme Court, 5 August 2014, docket numbers 18 ONc 1/14 p and 18 ONc 2/14 k, see Wong, Schifferl, 'Decisions of the Austrian Supreme Court in 2013 and 2014', in Klausegger et al., *Austrian Yearbook on International Arbitration* 2015, 338 et seq; Austrian Supreme Court, 19 April 2016, docket number 18 ONc 3/15h; Austrian Supreme Court, 15 May 2019, docket number 18 ONc 1/19w.

proceedings, like any other ordinary civil proceedings. Furthermore, the Supreme Court is also the exclusive instance on all issues regarding the formation of the tribunal and the challenge of arbitrators (i.e., the Third Title of the Arbitration Act). This 2013 revision of the Arbitration Act was preceded by controversial debates among practitioners, scholars and the judiciary. The reason is that the single instance concept is quite exceptional in the Austrian court system, as in ordinary civil proceedings there is generally not only a monetary threshold to be exceeded (€30,000), but the case to be tried before the Supreme Court must also touch upon a question of substantive or procedural law that is considered to be essential for legal unity, legal certainty or legal development. However, under Section 615 ACCP, any arbitral award rendered in Austria may be challenged before the Supreme Court. Another reason why the 2013 revision is considered to be a slight revolution in the court system is the fact that the Supreme Court itself must conduct evidentiary proceedings where necessary, including the examination of witnesses.

Although not required under the law, the revision of 2013 prompted the internal organisation of the Supreme Court to establish a specialised chamber (consisting of five Supreme Court judges) that is competent for all arbitration-related matters. This concentration on a limited number of judges should further enhance the reliability and consistency of the jurisprudence in the field of arbitration.

The introduction of this single instance jurisdiction and the establishment of a specialised chamber within the Supreme Court demonstrate both the Austrian legislators' and judicature's awareness that the legal infrastructure is essential to foster arbitration proceedings seated in Austria.

Apart from the Supreme Court, the other courts dealing with arbitration matters are the district courts, which rule on requests for interim measures, the enforcement of interim measures, and the enforcement of international and domestic awards.

vi Interim measures and judicial assistance

Section 585 ACCP mirrors Article 9 of the Model Law, and stipulates that it is not incompatible with an arbitration agreement for a party to request an interim measure from a state court. An Austrian district court has international jurisdiction to issue an interim measure during or prior to arbitral proceedings if the debtor has its seat or habitual residence, or if the assets to be seized are located in, the court's district (see subsection v). Thus, it is not necessary that the seat of arbitration is also in Austria. Conversely, the fact that the seat of arbitration is in Austria does not necessarily mean that an Austrian district court is competent to issue an interim measure.

Furthermore, Section 593(1) and (2) ACCP contain the requirements for an arbitral tribunal having its seat in Austria to issue interim or protective measures. Subsections (3) to (6) further govern the enforcement of such measures issued by any tribunal. It is noteworthy that these provisions on enforcement apply to measures issued by tribunals irrespective of whether a tribunal has its seat in Austria (see Section 577(2) ACCP). Thus, the Austrian arbitration law enables the enforcement of interim or protective measures issued by foreign arbitral tribunals without any requirement for exequatur proceedings. In addition, if a measure ordered by the tribunal (whether foreign or domestic) is unknown to Austrian law, the competent enforcement court shall, upon request and after having heard the other side, apply such measure that is most similar to the one ordered by the tribunal.

Under Section 602 ACCP, an arbitral tribunal may ask an Austrian court to perform certain acts for which the tribunal has no authority. Again, Austrian arbitration law enables

both foreign and domestic tribunals to make use of such requests, and also includes requests for judicial assistance by other courts, including foreign courts' authorities. Therefore, Section 602 ACCP allows, for instance, a foreign arbitral tribunal to make a request to an Austrian court that the Austrian court ask a court in a third country to perform an act of judicial assistance. The most common acts that a tribunal would request relate to measures of interim or protective measures or measures in the taking of evidence (e.g., summoning witnesses and taking oaths from them).

vii Setting aside of arbitral awards

Under the Arbitration Act of 2006 (as revised most recently in 2013), any kind of arbitral award may be challenged under Section 611 ACCP. This therefore includes interim awards, partial awards and awards on jurisdiction. The provision distinguishes between legal grounds that must be revoked by the claimant seeking to set aside the award and legal grounds that are to be reviewed *ex officio* (see Section 611(3) ACCP). The reasons for setting aside are contained in Section 611(2) ACCP and may be summarised as follows:

a lack of an arbitration agreement and lack of arbitrability *ratione personae*;
b violation of a party's right to be heard;
c *ultra petita*;
d deficiency in the constitution of the tribunal;
e violation of the procedural public policy;
f grounds for reopening civil proceedings;
g lack of arbitrability *ratione materiae*; and
h violation of the substantive public order.

The last two grounds are those that the court must review *ex officio*.

The time limit to file a setting aside claim is three months starting from the date of notification of the award (Section 611(4) ACCP). The competent court is, except for matters involving consumers and matters of employment law, the Austrian Supreme Court as first and final instance (Section 615 ACCP).

viii Recognition and enforcement of arbitral awards

A domestic arbitral award (i.e., an award rendered in Austria) has the same legal effect as a final and binding court judgment (Section 607 ACCP). This means that such award can be enforced under the Austrian Execution Act (AEA) like any other civil judgment (see Section 1 No. 16 AEA). Once the chairperson of a tribunal (or, in his or her absence, any other member of the tribunal) has declared an award as final, binding and enforceable, the award creditor can make a request for execution under the AEA. The competent court is usually the district court in the district in which the debtor has its seat, domicile or habitual residence, or where the assets to be attached are located.

A foreign award (i.e., an award rendered outside of Austria) may be recognised and enforced under the AEA subject to international treaties and acts of the European Union (see Section 614 ACCP), in particular the NYC and the European Convention on International Commercial Arbitration of 1961 (European Convention). Both Conventions are applicable in parallel. Therefore, a creditor can simultaneously rely on either Convention or on both, while a debtor must invoke grounds under both Conventions to be successful. Under the European Convention, the enforcement of a foreign award may be refused if the award was set aside on certain legal grounds. A violation of public policy is, for instance, not a ground

recognised under Article IX of the European Convention. Thus, an arbitral award that was set aside for reasons of public policy at the seat of arbitration can, nevertheless, be recognised and enforced in Austria.

There are currently no acts of the EU applicable to the enforcement of foreign arbitral awards.

A request for exequatur and a request for execution can be jointly filed in the same proceedings under the AEA. The Supreme Court has repeatedly held that in institutional arbitral proceedings, a certified copy of the arbitral award indicating the body or person that has certified the award (including the signatures of the arbitrators) and the reference to the applicable provision under the arbitration rules usually suffice to fulfil the formal requirement. In other words, in institutional arbitration, it is not necessary to have the signatures of the arbitrators certified by a local notary and legalised by the local authority (The Hague Apostille). Furthermore, pursuant to Section 614(2) ACCP, it is not necessary to submit the original arbitration agreement or a certified copy thereof as required under Article IV(1)b of the NYC. Both this legal provision and the Supreme Court's jurisprudence are a clear indication that the recognition and enforcement of foreign arbitral awards in Austria shall not be subject to excessive formal requirements.

ix Arbitral institution

The Vienna International Arbitral Centre (VIAC) attached to the Austrian Chamber of Commerce is the most renowned arbitral institution in Austria. Its recognition and casework are not limited to its geographic region: it has a strong focus on arbitrations involving parties from central, eastern and south-eastern Europe, and is, as of July 2019, the second foreign (and first European) arbitral institution recognised as a permanent arbitration institution in Russia, thus having received a Russian government permit. Parties from (east) Asia as well as from the Americas and Africa have appeared in VIAC arbitrations in recent years.[6]

As of 1 January 2018, VIAC has revised both its arbitration rules (Vienna Rules) and mediation rules (Vienna Mediation Rules). Under the previous version of the Vienna Rules, VIAC could only accept cases where one of the parties had its place of business or usual residence outside Austria or, if both parties were from Austria, where the dispute was of an international character. Now, VIAC may also administer domestic cases. The other major revision is the introduction of an explicit provision on the tribunal's competence to order security for costs (Article 33(6) and (7) Vienna Rules 2018). Furthermore, VIAC has also adapted its fee schedule whereby the fees of the institution and for the arbitrators have been decreased for lower amounts in dispute and increased at the higher end of the spectrum. In this context, the new rules emphasise the principle of efficiency in conducting arbitration. Thus, not only the tribunal should take this principle into account when allocating the costs between the parties, but also VIAC when determining the costs of an arbitration. As a last resort, VIAC may even increase or decrease the arbitrators' fees by 40 per cent in particular circumstances.

As regards the revision of the Vienna Mediation Rules 2018, they not only provide for a modern procedural framework for mediation proceedings, but also for a combination of arbitration and mediation administered by VIAC and corresponding cost provisions in

6 See www.viac.eu/en/service/statistics.

such a case. All in all, the revision of the Vienna Rules has not changed the nature of VIAC arbitration: it is known throughout the region for its cost-efficient manner of handling arbitration matters to an international standard.

VIAC has published a new (second) edition of its VIAC Handbook Rules of Arbitration and Mediation, which is an article-by-article commentary written by arbitration practitioners (available both in German and in English). On the occasion of its 40th anniversary in 2015, VIAC also published Volume 1 of 'Selected Arbitral Awards'. This work includes 60 arbitral awards rendered by arbitral tribunals under the Vienna Rules, and is a valuable contribution in response to the demand of both practitioners and the public for more transparency in international arbitration in general and of the work of arbitral institutions in particular.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

The most important reform under the 2013 revision of the Arbitration Act was the determination of the Austrian Supreme Court as single instance for certain arbitration-related matters (see Section 615 ACCP). It entered into force on 1 January 2014, and applies to all proceedings initiated on or after that date. Simultaneously, the Supreme Court has established a specialised chamber that deals with the matters under Section 615 ACCP (the docket numbers of these decisions start with '18'). As demonstrated below, apart from the matters referred to in Section 615 ACCP (in most instances, setting aside proceedings, and proceedings relating to the constitution and challenge of arbitral tribunals), there are a number of other civil matters that involve issues of arbitration and that may be tried before first and second instance courts with the Supreme Court as final instance. Finally, proceedings on the recognition and enforcement of foreign arbitral awards are usually initiated with district courts, the decisions of which may be appealed and finally also brought before the Supreme Court. Enforcement matters are usually submitted to the chamber specialised in such matters and not to the arbitration chamber. In conclusion, parties can expect that under the Austrian court system relating to arbitration-related matters, in particular those with a foreign or international context, the Supreme Court will have the final say on certain legal issues of essential importance to the Austrian legal order.

ii Arbitration developments in local courts

In a widely acclaimed decision,[7] the Supreme Court ruled on the issue of a conflict of interest of an arbitrator for working with a co-counsel in another arbitration: A co-arbitrator (in an already pending arbitration A) informed the other arbitrators that his law firm had been appointed as co-counsel in another arbitration B (which was unrelated to the pending arbitration A). In arbitration B, the law firm of two of the respondents of arbitration A was his co-counsel. Thus, one party in the (unrelated) arbitration B had appointed the co-arbitrator's law firm and the counsel for two respondents (of arbitration A) in the (unrelated) arbitration B. The two law firms were assigned independently of each other and without consultation among them. When disclosing these circumstances, the co-arbitrator indicated that he did not consider himself to be in any conflict of interest.

7 Austrian Supreme Court, 15 May 2019, 18 ONc 1/19w.

The claimants (in arbitration A) challenged the co-arbitrator, referring to the IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines), pursuant to which the cooperation between an arbitrator and representatives of the parties – also in a completely unrelated case – qualifies as a circumstance that gives rise to justified doubts as to the independence or impartiality of the arbitrator. The arbitral tribunal dismissed the challenge, basically arguing that due to the limited size of the arbitration community in Austria, a scenario such as the present one would occur quite frequently and – absent any other grounds – does not give rise to justified doubts. Following such decision, the claimants requested the Supreme Court to remove the arbitrator on the basis of the arguments already submitted before the arbitral tribunal.

The Supreme Court applied both the standards applicable to state court judges and the IBA Guidelines. According to the Supreme Court, the former must also be considered when assessing the impartiality and independence of arbitrators since the acceptance of arbitration presupposes not only professional competence but also the confidence of the parties seeking justice from independent, impartial arbitrators who act in a manner that is free of conflicts of interest. As to the IBA Guidelines, the Supreme Court confirmed its established case law[8] and noted that while the IBA Guidelines do not have a normative character and require the agreement of the parties to be directly effective, they may serve as guidance in the assessment of an arbitrator's impartiality.

Based on the aforesaid, the Supreme Court noted that certain relations between arbitrators and party representatives to an arbitration could give rise to circumstances that raise legitimate doubts as to the impartiality or independence of an arbitrator. In particular, cases of representation of one party by different legal representatives appointed simultaneously as co-counsel generally require intensive contact and may give rise to legitimate doubts as to the impartiality or independence of an arbitrator as, in such cases, the relationship of an arbitrator with a party representative is not only peripheral in nature and does generally go beyond a factual relationship of a professional nature. Against this background, the challenge was upheld.

In another decision,[9] the Supreme Court dealt with the question of whether the fact that an active member of the judiciary acted as arbitrator and potential bias may form reasons for setting aside an arbitral award. With respect to the former, the Supreme Court held that while active members of the judiciary are, due to the Austrian Law on Employment of State Court Judges and Prosecutors, not allowed to accept an appointment as arbitrators (and may face disciplinary consequences due to accepting such appointment), the violation of such provision does not justify the setting aside of an arbitral award. With respect to the latter, the Supreme Court changed its prior approach and concluded that not only severe cases of bias of an arbitrator may serve as basis for a challenge of an arbitral award, but that generally a lack of impartiality and independence of an arbitrator may allow for a successful challenge of an arbitral award, if the challenging party was prevented from challenging the arbitrator before the arbitral award was rendered.

In two cases,[10] the Supreme Court confirmed its case law that in setting aside proceedings, it may apply a provision of the ACCP on ordinary civil proceedings by analogy

8 See footnote 5.

9 Austrian Supreme Court, 1 October 2019, 18 OCg 5/19p.

10 Austrian Supreme Court, 15 January 2020, 18 OCg 12/19t; Austrian Supreme Court, 6 March 2020, 18 OCg 11/19w.

and reject a legal remedy after a preliminary review and without hearing the defendant or conducting an oral hearing, or both. In these cases, the Supreme Court found that the setting aside claims did not raise any relevant setting aside ground in a conclusive manner so that the setting aside claims were rejected. In one of the cases,[11] the Supreme Court held – on the basis of Article 38(5) ICC Rules and Section 609(5) ACCP – that an arbitrator has wide discretion in rendering a cost decision and is not bound by the strict rules regarding cost decisions in state court litigation. A similar approach was taken by the Supreme Court in another decision[12] in which it had to decide on whether to grant legal aid to a setting aside claimant: in this case, the Supreme Court had to decide whether the legal action of the setting aside plaintiff had no prospect of success, and thereby applied a similar approach as in the aforementioned cases by assessing whether the plaintiff conclusively presented setting aside grounds. As this was not the case, the application to grant legal aid was dismissed.

In a setting aside matter[13] between three setting aside plaintiffs (among five respondents in the arbitration) and one defendant, the Supreme Court had to rule on the question of what law is applicable to the substantive issues of the arbitration clause contained in a main agreement. The choice-of-law clause in the main agreement provided for German law subject to mandatory Romanian law, while the arbitration clause itself provided for Austria as the place of arbitration. The Supreme Court concluded that by selecting German law to be applicable to the main contract, the parties implicitly also selected German law to be applicable to the arbitration clause while dismissing the application of Romanian law. What might have also played a role in the decision of the Supreme Court was the fact that none of the parties had pleaded that Austrian law should be applicable to the substantive issues of the arbitration clause. By applying German law to the questions on the substantive validity and on the scope of the *ratione personae* of the arbitration clause, the Supreme Court eventually held that the setting aside plaintiffs were bound by the arbitration agreement. The setting aside claimants argued in vain that (only) two of them had entered into the main contract in their capacity as executive directors of a future limited liability company, which was the actual party to the main contract that was yet to be established under Romanian law but that was eventually never established. Further, the Supreme Court also dismissed the setting aside claim on the other setting aside grounds as it held that the right to be heard was not violated by the sole arbitrator's decision not to obtain an expert report on the quantum of the damages in spite of a request by the setting aside plaintiffs. Related to the issue of quantum was the Supreme Court's finding that the substantive public order was not affected in particular since the sole arbitrator did not award punitive damages.

In the same matter (thus, it has the same docket number[14]), the setting aside defendant, who obtained a favourable judgement on costs as the setting aside claim was entirely dismissed, applied for a certificate under Article 53 of the Brussels Ia Regulation. This certificate is necessary for enforcement of judgments in another Member State. The Supreme Court rejected this application as being inadmissible. It held that under the arbitration exception of Article 1 Paragraph 2 Letter d), setting aside proceedings do not fall within the scope of application of the *ratione materiae* of the Brussels Ia Regulation.

11 Austrian Supreme Court, 15 January 2020, 18 OCg 12/19t.

12 Austrian Supreme Court, 6 March 2020, 18 OCg 7/19g.

13 Austrian Supreme Court, 15 May 2019, 18 OCg 6/18h.

14 Austrian Supreme Court, 15 May 2019, 18 OCg 6/18h.

In a another setting aside matter[15] where the underlying arbitration was governed by the UNCITRAL Rules 1976, the plaintiff argued that due to the lack of sufficient reasoning of the arbitral award, the arbitral tribunal violated the procedural public order (Section 611(2) 5 ACCP). The Supreme Court rejected this setting aside ground on the basis that the plaintiff could and should have applied for an interpretation of the award in accordance with Article 35 UNCITRAL Rules and Section 610(1) 2 ACCP. The plaintiff further argued that the right to be heard was violated as the arbitral tribunal allegedly did not conduct evidentiary proceedings at all, particularly by not appointing an expert. The Supreme Court elaborated that the earlier jurisprudence on this legal ground had been rather restrictive, but that the more recent jurisprudence allows a substantive review in cases where the evidence-taking is so flawed that it amounts to a violation of the right to be heard. However, in the present case, the Supreme Court did not find such violation. The plaintiff also raised the allegation that the defendant obtained the award by fraudulent behaviour (by alleging wrong facts in the arbitration), and that the award was thus violating the substantive public order under Section 611(2) 8 ACCP. The Supreme Court held that the mere allegation of fraud does not justify the setting aside of an arbitral award: only if the result of the award is in breach of the Austrian legal order may this setting aside ground be fulfilled. In any event, the Supreme Court stated again that it may not reconsider whether a tribunal has correctly assessed the factual and legal questions. Finally, the Supreme Court also dismissed the setting aside ground of *ultra petita* under Section 611(2) 3 ACCP.

In one of few enforcement matters,[16] the Supreme Court was called to rule as third and final instance. The applicant filed for recognition and enforcement of an arbitral award that was rendered by an arbitral tribunal of the Belarusian Chamber of Industry and Trade. The first and second instance court had already rejected the application, thus the applicant filed a extraordinary legal remedy for revision. The facts of the enforcement matter, which the Supreme Court may not review, were as follows: the co-arbitrator nominated by the award debtor was confronted with a final version of the arbitral award, which had already been signed by the other co-arbitrator and the presiding arbitrator although the deliberations were not yet completed. The first and second instance courts had concluded that this was a factual preclusion of the third arbitrator from the decision-making process of the arbitral tribunal, and the Supreme Court did not find an issue with such conclusion. Further, the Supreme Court held that contrary to the applicant's argument, the Austrian courts do not interfere with any setting aside proceedings at the place of arbitration but merely assess whether the enforcement of the arbitral award would be in violation of the Austrian (substantive) public order. The Supreme Court thus rejected the applicant's extraordinary legal remedy and enforcement was finally refused.

iii Investor–state disputes

Under the ICSID regime, there are currently 12 cases pending in which an Austrian investor has brought a claim against a state (the respondent states are Germany, Tajikistan, Romania, Libya, Argentina, Italy, Serbia, Montenegro and Croatia). The most recent claims were filed in the second half of 2019 against Romania and Germany. In June 2018, several investors from various countries, one of which is Austrian, jointly filed a claim against Romania with ICSID. According to news reports, the matter relates to changes in Romania's legal regime on

15 Austrian Supreme Court, 15 May 2019, 18 OCg 1/19z.

16 Austrian Supreme Court, 19 November 2019, 3 Ob 13/19m.

renewable energy. The timing is of particular interest, since the claim was filed after the Court of Justice of the European Union (CJEU) rendered its famous *Achmea* decision, according to which the arbitration clause in a particular bilateral investment treaty between two EU Member States was found to be incompatible with EU law. It is further worth noting that in 2017, four Austrian banks each filed claims against Croatia because of the mandatory conversion of loans in Swiss francs into loans denominated in euros. One of the four banks has further filed a claim against Montenegro for similar reasons. In the four banking cases against Croatia, the banks are represented by three different law firms, while the state has retained one firm for all four matters. On the other side, Austria was sued by a Dutch company under the bilateral investment treaty between Austria and Malta in 2015. This case has received media particular attention not only because it is the first investment case against Austria, but also because the claimant company belongs to the Anglo Austrian AAB (formerly Meinl Bank) group, which was an Austrian bank. In 2017, the arbitral tribunal declared the proceedings closed. Media reports say that the claim was rejected. Due to an interpellation in the Austrian parliament, it became public that the same claimant – that is, the affiliate of Anglo Austrian AAB – has filed a new claim against Austria, this time before the ICC in Paris.

To date, no other cases under arbitration rules other than those mentioned above are publicly known.

III OUTLOOK AND CONCLUSIONS

The amendment of the Arbitration Act in 2013 and the revision of the Vienna Rules in 2018 demonstrate that Austria and its arbitration community constantly observe trends in international arbitration and improve the legal framework where necessary. These efforts are supported by the jurisprudence, particularly since the Supreme Court has established a special chamber that rules on all matters relating to setting aside claims and the composition of arbitral tribunals. The Supreme Court also regularly makes reference to international arbitration standards such as, for instance, the IBA Guidelines on Conflicts of Interest in International Arbitration. These overall developments should enable cost and time-efficient arbitral proceedings and related state court proceedings, both in compliance with international standards and the requirements under the rules of law. Austria (and in particular Vienna) is thus considered to be a regional arbitration hub with a strong focus on countries in the CEE and SEE regions.

As regards investor–state arbitrations, developments in recent years have shown that Austrian investors are more and more willing to make use of their rights under investment treaties. Despite the *Achmea* judgment of the CJEU and political developments within the EU aiming at the termination of all intra-EU BITs, this trend might continue.

Appendix 1

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Dr Venus Valentina Wong, *bakk phil*, attorney-at-law, has been counsel at Wolf Theiss Attorneys-at-Law since 2016, and specialises in international arbitration and international litigation with a focus on China-related, CEE and SEE matters. She has served as counsel, arbitrator and administrative secretary in more than 70 cases in institutional and ad hoc arbitral proceedings (ICC, VIAC, LCIA, DIS, Swiss rules, CCIR, CAS, UNCITRAL).

Valentina Wong studied law and sinology in Vienna, Amsterdam and Taipei. Before joining Wolf Theiss, she was a university assistant at the Vienna University of Economics and Business and worked for two arbitration boutique law firms in Vienna.

Valentina Wong completed internships with CIETAC in Beijing and with the ICC International Court of Arbitration in Paris. She is a regular speaker at international conferences and the author of numerous publications on various topics of international arbitration, as well as an official translator of several institutional arbitration rules (VIAC, CIETAC, LAC). She was the Young International Arbitration Group regional representative for CEE in 2010 and 2011, and also a member of the Young Austrian Arbitration Practitioners advisory board from 2008 to 2017, serving as co-chair in 2016 and 2017. Her working languages are German, English, Chinese (Mandarin and Cantonese) and French.

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Alexander Zollner is a senior associate in the dispute resolution team in Vienna. He focuses on commercial disputes and is particularly experienced in advising clients in corporate, post M&A and banking disputes. Alexander Zollner has handled disputes under the ICC, VIAC, DIS and Swiss Rules, and represented clients before ad hoc tribunals. He also assists in disputes regarding arbitration-related matters before Austrian courts. Prior to joining Wolf Theiss, Alexander Zollner worked at the Vienna office of a global law firm. He obtained his law degree from the University of Vienna and gained international experience during his studies in Denmark (University of Copenhagen), focusing on international and European law. Alexander Zollner is a member of the Young Austrian Arbitration Practitioners, CEPANI40, DIS40 and ICC YAF, as well as being the author of several articles on arbitration.

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