

ARBITRATION IN AUSTRIA

DDr. Werner Melis^[1]

including

ANNEX I: Code of Civil Procedure, Part Six, Chapter Four, Arbitration Procedure (in effect 1 July 2006)

ANNEX II: Law on Mediation in Civil Matters (in effect 1 May 2004)

Chapter I. Introduction

1. Introduction^[2]

The first general statutory regulation of arbitration was contained in Chapter Four, entitled "Arbitral Procedure", comprising Arts. 577-599 of the CCP of 1 August 1895 (RGBl. Nr. 113). These provisions were very modern for their time. They gave arbitral tribunals practically the same status as civil courts, and arbitral awards were treated as civil court judgments. Therefore, no *exequatur* proceedings for arbitral awards were necessary. These provisions were updated by the Federal Law of 2 February 1983, concerning provisions on civil procedure (BGBl. Nr. 135/1983) as in force since 1 May 1983. Due to Austria, as a neutral country, having become a venue for East-West arbitrations, it was necessary to adapt the existing provisions to the new requirements. As in the preceding regulation, no distinction was made between domestic and international arbitration.

Since then, the 1985 UNCITRAL Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law, has become the reference standard for international commercial arbitration worldwide. It was, therefore, felt necessary to review the Austrian arbitration statute and to bring it in line with the provisions of the UNCITRAL Model Law, last but not least in order to maintain the position of Austria as a venue for international arbitrations. A draft of a possible new Austrian Arbitration Law was drawn up by a working group on the reform of the Austrian Arbitration Law in the framework of a scientific institute^[3] which completed its work in 2002. The proposals of this working group were published^[4] and together with comments from the Austrian Bar and the suggestions contained in a thesis^[5] served the Federal Ministry of Justice as a basis for the draft of a new Austrian Arbitration Law 2005.^[6] In 2006, the new Austrian Arbitration Law (*Schiedsrechts-Änderungsgesetz 2006 – SchiedsRÄG 2006*) was adopted by the Austrian Parliament (BGBl. I 2006/7) and it came into effect on 1 July 2006 (see Annex I). Austria has, thus, joined the club of UNCITRAL Model Law countries.

In addition, in 2003, the Austrian Law on Mediation in Civil Matters was adopted, in force 1 May 2004 (see below Chap. VIII, Conciliation and Annex II).

2. Practice of arbitration

There are no statistics available about the use of *domestic* arbitration in Austria. As almost every year Austrian courts render several decisions concerning domestic arbitration, one can conclude that arbitration is also used as a means for the settlement of domestic disputes. It seems, however, that the majority of domestic commercial disputes is decided by the courts. The reason for this is probably that Austria has specialized commercial courts which apparently meet the expectations of the users, as only a small percentage of first instance decisions is appealed. As the majority of decisions of the commercial courts of first instance are rendered within one year and the court fees are comparatively low for smaller and medium sized disputes, there is apparently no particular incentive to refer to arbitration for domestic commercial disputes.

According to the Law on Chambers of Commerce (*Handelskammergesetz* – HKG 1946 (BGBl. No. 182/1946), all nine Austrian Regional Chambers of Commerce^[7] were entitled to establish a permanent court of arbitration for the settlement of commercial disputes. All of them were required to apply the same set of rules of arbitration which was adopted in 1949. Also in these arbitration rules, no distinction was made between domestic and international arbitration. In an amendment of the Chambers of Commerce Law 1974 (BGBl. No. 400/1974), the jurisdiction of these arbitration courts was restricted to domestic disputes only and the Austrian Federal Economic Chamber (see below) became entitled to establish a court of arbitration exclusively for the settlement of international disputes.

International commercial arbitration has played a role in Austria since the early seventies and, since 1975 principally under the auspices of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (VIAC) within the framework of the Chamber of Commerce system.

As regards domestic cases, it can be said that in practice only the Arbitration Court at the Vienna Economic Chamber has pending cases on a regular basis.

As regards international arbitration, Austria came into the picture in the early seventies as the venue for East-West commercial arbitrations as a neutral country along with Switzerland and Sweden. For this reason, the Austrian Federal Economic Chamber, which is the umbrella organization of the nine Regional Economic Chambers, established the VIAC in 1975 particularly for the settlement of East-West commercial disputes. Consequently in the first year of operation, the bulk of cases concerned East-West cases in the sense that one party had its place of business in a CMEA^[8] country, while the other party came from a western country. Since the fall of the Iron Curtain, VIAC has operated on worldwide basis. It administers only international cases in the sense that at least one of the parties had its place of business or normal residence outside of Austria at the time of the conclusion of the arbitration agreement, or cases involving parties having their place of business or normal residence in Austria but where the dispute has an international character (Art. 1(1) of the Rules of Arbitration and Conciliation). By the end of 2006, fifty-one international arbitration cases were pending before the VIAC with a total amount in dispute of approximately one billion Euros.

As a result of the entry into force of the new Arbitration Law, VIAC's Rules of Arbitration and Conciliation (Vienna Rules) were amended in order to adapt them to the language of the new law and to accommodate its new mandatory procedural provisions. The new Vienna Rules are in force since 1 July 2006.^[9] They are presently available in German, English, Russian and Czech.

The new Vienna Rules have not changed the basic characteristics which were already incorporated in their first version of 1975. The parties are free to agree to have the dispute decided by a sole arbitrator or by three arbitrators. If no agreement can be reached, the Board of VIAC will decide whether the case will be settled by one or by three arbitrators. The Board of VIAC makes only default appointments of arbitrators. The parties are free to agree upon the nationality of arbitrators, specific qualifications of the arbitrators, any place of arbitration, any substantive law and any language or languages for the arbitration. The parties are also free to represent themselves or to be represented by any person or law firm of their choice. Once an arbitral tribunal has been constituted and the requested deposit for the costs of arbitration has been paid, the file is handed over to the arbitrator(s) who enjoy a great liberty in tailoring the proceedings to the particular requirements of the respective case. There is no time limit for the making of an award, and awards are not reviewed by an organ of VIAC. However, they are served on the parties by the Secretary General who confirms by his signature that the award is an award made under the VIAC Rules and by the arbitrator(s) appointed in accordance with its Rules. The administrative charges of VIAC and the fees for arbitrators are calculated according to a schedule of arbitration costs on the basis of the respective sums in dispute. Value added tax (VAT), if payable by an arbitrator, is now considered as part of the arbitration costs (see below Chap. V.8, Fees and Costs).

UNCITRAL has been notified that the Board of VIAC or its President are prepared to act as appointing authority under the UNCITRAL Arbitration Rules and they have been called upon to do so on a number of occasions. In addition, UNCITRAL has also been notified that VIAC is prepared to render administrative services in connection with arbitrations under the UNCITRAL Arbitration Rules. The nature of these services for a particular case will have to be agreed between VIAC and the parties or arbitrators for the particular reference.

The contact data of VIAC are the following:

International Arbitral Centre of the Austrian Federal Economic Chamber
Wiedner Hauptstraße 63
PO Box 319
1045 Vienna
Tel.: +43 (0)5 90 900 4397, 4398, 4399
Fax: +43 (0)5 90 900 216
E-mail: arb@wko.at
Website: <<http://wko.at/arbitration>>

3. Bibliography

As the new Arbitration Law 2006 is an entirely new law and not simply an amendment of the former arbitration statute, only publications in connection with the preparation of this law and with the law itself are mentioned in order to avoid possible misunderstandings.

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Chapter II. Arbitration Agreement^[10]

1. Form and contents of the agreement

a. The law follows closely the language of Art. 7(1) of the UNCITRAL Model Law for the definition of an arbitration agreement. The parties may, therefore, agree "... to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not". This agreement may be a separate agreement or a clause within a contract (Art. 581(1)).^[11] The provisions of this law apply also to arbitral tribunals that are, in a manner admitted by the law, not based on agreements of the parties, for example, in testamentary dispositions or as provided by articles of incorporation (Art. 581(2)).

b. The provisions concerning the form of an arbitration agreement are an update of Art. 7(2) of the UNCITRAL Model Law. An arbitration agreement must, therefore, be contained either in a document signed by the parties or in letters, telefaxes, E-mails or other forms of communication exchanged between the parties which provide the evidence of a contract (Art. 583(1)). It follows from this that there are types of arbitration agreements which do not need to be signed by the parties and a safe electronic signature is not required for E-mails. The new provisions cover all the kinds of arbitration agreements on which parties have so far based their claims in cases submitted to VIAC. The law expressly provides that a reference to a document which contains an arbitration agreement constitutes an arbitration agreement if the reference is such that it deems the arbitration agreement to be part of the contract and if the form requirements for arbitration agreements are met (Art. 583(2)). In addition, there is a provision that defects of form of the arbitration agreement are cured if they have not been raised at the latest together with the defence plea (*Einlassung in die Sache*) on the merits of claimant's claim (Art. 583(3)).

According to Art. 1008 ABGB, a special power of attorney in writing is necessary for the conclusion of an arbitration agreement. According to the old Austrian Commercial Code, this provision did not, however, apply to persons vested with general commercial power of representation (*Prokura*). On 1 January 2007 a new Entrepreneurial Code (UGB) succeeded the former Commercial Code. According to Art. 54 UGB, any authorization given orally or in writing by an entrepreneur which is subject to this Code includes also the right to conclude arbitration agreements. Art. 1008 ABGB is, therefore, no longer applicable in commercial arbitration, whether domestic or international. For arbitration agreements concluded by other persons or entities and for arbitration agreements between entrepreneurs which have been concluded before 1 January 2007, however, Art. 1008 ABGB is still valid.

The new law contains special provisions for arbitration agreements between entrepreneurs and consumers. Such agreements can only validly be concluded for already existing disputes (Art. 617(1)). In addition, the arbitration agreement must be a separate agreement personally signed by the consumer and must not contain any other agreements (Art. 617(2)); the consumer must prior to the conclusion of the arbitration agreement receive a written legal advice on the significant differences between arbitration proceedings and proceedings before state courts (Art. 617(3)); and the place of arbitration must be stipulated in such arbitration agreement (Art. 617(4)). If the agreed place of arbitration is in a state where the consumer did not have his domicile, usual place of residence or place of employment at the time of the conclusion of the arbitration agreement or when the claim was filed, the arbitration agreement is only of relevance if the consumer relies on it (Art. 617(5)). These provisions apply accordingly to arbitration proceedings in labour law cases (Art. 618).^[12]

c. In practice, there are numerous types of arbitration clauses to which parties frequently agree in Austria. The minimum arbitration clause for an *ad hoc* arbitration would simply be a provision that disputes arising out of a contract between the parties or an existing dispute should be settled by arbitration in Austria in one of the forms admitted by the law as mentioned above. In institutional arbitration, the arbitral institutions usually propose standard arbitration clauses which the parties copy in their contracts.

VIAC recommends the following standard arbitration clause:

"All disputes arising out of this contract or related to its violation, termination or nullity shall be finally settled under the Rules of Arbitration and Conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (Vienna Rules) by one or more arbitrators appointed in accordance with these rules."^[13]

Appropriate supplementary provisions:

- a) the number of arbitrators shall be ... (one or three);
- b) the substantive law of ... shall be applicable; ^[14]
- c) the language to be used in the arbitral proceedings shall be"

2. Parties to the agreement

a. There are no restrictions in the law as to persons, physical or legal, who may resort to arbitration with the exceptions mentioned for consumers (Art. 617) and for labour cases (Art. 618).

b. There is no provision in the law prohibiting the state or state agencies to resort to arbitration. In fact, the Austrian state and state agencies have in the past resorted to arbitration in domestic and in international cases.

c. In practice, there are often arbitration cases with more than one party on each side. Art. 15 of the VIAC Rules contains special provisions for multiparty proceedings. According to Art. 587(5) several claimants or respondents are treated as one entity. If such claimants or respondents have not agreed upon an arbitrator within four weeks of receipt of a respective notification, the arbitrator is to be appointed by the court upon application of the other party, on the condition that the agreed appointment procedure does not provide otherwise for securing the appointment. The approach developed by the French *Cour de cassation* in the so-called *Dutco* case^[15] which leads to the result that the claimant loses in such case its right to appoint an arbitrator and that all arbitrators are appointed by a competent court or by an agreed arbitral institution, has not been followed.

3. Domain of arbitration

a. Under the new Arbitration Law the domain of arbitration is very broad: Any pecuniary claim that lies within the jurisdiction of the courts of law as well as non-pecuniary claims in matters regarding which the parties are capable of concluding a settlement upon the matter in dispute is arbitrable and can be subject to an arbitration agreement (Art. 582(1)). Expressly excluded from arbitration are claims involving family law as well as all claims based on contracts which are even only partly subject to the Austrian Landlord and Tenant Act (*Mietrechtsgesetz*) or to the Austrian Non-profit Housing Act (*Wohnungsgemeinnützigkeitsgesetz*) and all claims resulting from or in connection with co-operative apartment ownership. As in Art. 1(5) of the UNCITRAL Model Law, there is an additional provision that statutory provisions which are not dealt with in this Chapter according to which disputes may not, or may only under circumstances be made subject to arbitral proceedings, shall not be affected (Art. 582(2)).

b. – c. According to Art. 603(1), the arbitral tribunal shall decide a dispute in accordance with such provisions or rules of law (for example, the UNIDROIT Principles of International Commercial Contracts) of international commercial contracts as are chosen by the parties as applicable. If the agreed substantive law or the agreed rules of law allow the parties to *fill gaps in a contract*, or to *adapt a contract* to fundamentally changed circumstances, or if the parties expressly authorize the arbitrators to take such decisions, they may certainly do so.

4. Separability of arbitration clause

The new law copied the first part of the first sentence of Art. 16(1) of the UNCITRAL Model Law. According to Art. 592(1), the arbitral tribunal shall itself rule on its jurisdiction (*Kompetenz-Kompetenz*). This implies that the arbitral tribunal has to decide, if such arbitration agreement is embedded in a contract, whether this arbitration clause meets the form requirements for an arbitration agreement according to Art. 583(1). It follows that an arbitral tribunal can decide that the arbitration agreement in the contract is invalid and that consequently it lacks jurisdiction to decide claims arising out of this contract, even if it considers that the contract is valid.

This obligation of the arbitral tribunal to decide on its jurisdiction also covers the case where a party alleges that the main contract which allegedly contains the arbitration clause is invalid or non-existent. The arbitral tribunal has to decide on its jurisdiction by an arbitral award, either by a separate award, or in the award on the merits (Art. 592(1)) (see below Chap. V.4).

The additional provisions of Art. 16(1) of the UNCITRAL Model Law containing the so-called "separability doctrine" have not been included in the new law. It was felt that Austrian courts have in the past consistently taken the position that defects of the main contract do not automatically imply defectiveness of an arbitration clause contained in such contract. There was, therefore, no particular need to adopt these provisions of the UNCITRAL Model Law.

5. Effect of the agreement

If a party brings an action before a court in a matter which is the subject of an arbitration agreement, the court shall dismiss the claim provided that the respondent does not submit a pleading in the matter or does not orally plead before a court without invoking the arbitration agreement. The court will not dismiss the claim if it establishes that the arbitration agreement does not exist or is incapable of being performed.^[16] If such court proceedings are still pending, arbitration proceedings may nevertheless be commenced or continued and an award may be made (Art. 584(1)). These provisions comply in substance with Art. 8(2) of the UNCITRAL Model Law.

The new Arbitration Law goes even further: If an arbitral tribunal has denied its jurisdiction on the grounds that there is no arbitration agreement or that the arbitration agreement is incapable of being performed, a court may not dismiss an action on the matter in dispute on the grounds that an arbitral tribunal has jurisdiction over the case. The commencement of a court action deprives the claimant of the right to introduce an action according to Art. 611 for the setting aside of the decision by which the arbitral tribunal denied its jurisdiction (Art. 584(2)). If arbitral proceedings are pending, no other proceedings on the asserted claim are admissible before another court or arbitral tribunal. A request based on identical issues shall be rejected unless the lack of jurisdiction of the arbitral tribunal has been raised to the arbitral tribunal, at the latest together with a plea to the merits of the claim and if a decision of the arbitral tribunal cannot be obtained within a reasonable time (Art. 584(3)).

A problem in the past was that an action before a court or arbitral tribunal not having jurisdiction did not interrupt the running of the period of limitation. The new Arbitration Law provides now that in cases where a court or arbitral tribunal has held that it does not have jurisdiction over the case, the proceeding shall be deemed to be properly continued if the action is immediately brought to the competent court of law or arbitral tribunal (Art. 584(4)). Art. 584(5) contains another pro-arbitration provision, namely, that the party which has at an earlier stage in a proceeding relied on the existence of an arbitration agreement cannot claim later that this agreement does not exist, unless there has been an essential change in circumstances in the meantime.

Chapter III. Arbitrators

1. Qualifications

Austrian Law does not require any particular qualifications for arbitrators. Any person – Austrian or non-Austrian – with contractual capacity can be appointed as an arbitrator. The parties are, however, free, to agree upon specific qualifications of arbitrators who will be appointed in a case within the framework of their arbitration agreement. Such qualifications may be, and sometimes are in practice, specific professional qualifications (attorney-at-law; university professor; technician, etc.), nationality (for instance, that a sole arbitrator or the chairman of an arbitral tribunal shall be of a nationality different from the nationality of the parties), knowledge of languages, etc. This liberal attitude of the law is also reflected in the Vienna Rules which provide “The parties shall be free to appoint the arbitrators. Any person having legal capacity – irrespective of nationality – may be an arbitrator, provided the parties have not agreed upon any special additional qualification requirements.” (Art. 7(1)). It can be said that parties to arbitration before VIAC make full use of these possibilities.

Judicial officers may not accept appointment as arbitrators during their tenure of judicial office. This provision in former Art. 578 has now been moved into Art. 63(5) of the Act on Professional Rights and Duties of Judicial Officers as amended (BGBl. I no. 7/2006). The reason is to make it clear that a judicial officer who acts as an arbitrator commits a disciplinary offence, but that this fact is not a ground for setting aside an award which has been made in arbitral proceedings where he has acted as arbitrator.

According to Austrian Law, arbitral proceedings are considered to be at the same level as civil proceedings before the courts. For this reason, an arbitral award has the same rank as the judgment of a state court and, unlike many other jurisdictions, no *exequatur* proceedings are necessary. It follows from this also that arbitrators have to be impartial and independent of the parties as do judicial officers. While judicial officers are excluded by the law from acting in civil cases where they have relationships with the parties expressly mentioned in the law, persons in the same situation may act as arbitrators, provided that these facts are disclosed to all parties and all parties expressly agree. Failing such agreement, an arbitrator who refuses to withdraw, may be challenged.

There is now a provision in the new Arbitration Law which follows Art. 12(1) of the UNCITRAL Model Law, namely that a person who is approached in connection with his possible appointment as an 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 him.” (Art. 588(1)).

This provision, which reflects in fact actual practice in the past, has been fully copied in the new VIAC Arbitration Rules (Art. 7(5)). This duty of arbitrators has been fully confirmed in a recent decision of the Austrian Supreme Court holding that it is the duty of an arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. If an arbitrator fails to do so and if he is successfully challenged as a result of this by the competent organization, he also loses any right for compensation for services rendered prior to the termination of his office as an arbitrator.^[17]

2. Challenge of arbitrators

The new Arbitration Law has copied the provisions of Art. 12(2) of the UNCITRAL Model Law. According to this,

“an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made or after his participation in the making of such appointment.” (Art. 588(2)).

According to Austrian Law, the parties are free to agree on a procedure for challenging an arbitrator (Art. 589(1)). According to the Vienna Rules, the decision on a challenge under these Rules is taken by the Board of VIAC. The provisions of Art. 588(2) have fully been copied in the VIAC Rules (Art. 16(1)). If the challenged arbitrator does not withdraw from his office, the Board shall decide upon the challenge on the basis of the particulars in the challenging motion and the evidence attached thereto. The Board decides only after having received the comments of the challenged arbitrator and the other parties. The Board can also request comments from other persons (Art. 16(3)).

There are no statistics about challenge procedures and, so far, no decisions have been published, even in anonymized form. It can be said, however, that challenges do happen under the VIAC Rules. In addition the Board of VIAC and the President of the Austrian Federal Economic Chamber have been appointed several times in the past as appointing authorities under the UNCITRAL Arbitration Rules and other arbitration rules and they have also been seized with applications for the challenge of arbitrators.

Failing an agreement on a procedure for challenging an arbitrator, which is mostly done by parties by agreeing upon institutional arbitration rules containing such challenging procedure, the party who challenges an arbitrator shall within four weeks after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in Art. 588(2) "... send a written statement of the reasons for the challenge to the arbitral tribunal". The arbitral tribunal including the challenged arbitrator shall then decide on the challenge if the challenged arbitrator does not withdraw from his office or the other party does not agree to the challenge (Art. 589(2)). It follows that, even if a challenged arbitrator refuses to withdraw from his office, his office is terminated when the other party agrees to the challenge. A sole arbitrator will simply inform the parties that he does not intend to withdraw from his office.

If the mandate of an arbitrator is not terminated under the agreed challenge procedure or under the provisions of Art. 589(2), the challenging party has the possibility to request the competent court, as specified in Art. 615 within four weeks after having received the decision rejecting the challenge to decide on the challenge. The court's decision is not subject to appeal. According to the new Arbitration Law, the arbitral tribunal including the challenged arbitrator may continue the arbitral proceedings and make an award while such a request is pending (Art. 589(3)). It is, therefore, entirely in the discretion of the arbitral tribunal to decide whether it makes sense to continue and even complete the arbitral proceedings or whether it is more reasonable to stay the proceedings until the court has taken its final and binding decision.

3. Number of arbitrators

As in Art. 10 of the UNCITRAL Model Law, also the Austrian Law provides that the parties are free to determine the number of arbitrators and that, failing such agreement, three arbitrators are to be appointed (Art. 586). This provision complies with general practice in Austria in the past. New is the provision that, if the parties have determined an even number of arbitrators, "... then the arbitrators shall determine a further person as presiding arbitrator" (Art. 586(1)). Arbitral tribunals composed of an even number of arbitrators are, therefore, not allowed. The reason for this mandatory provision is to avoid problems in cases where an even number of arbitrators is unable to find a majority.

4. Appointment of arbitrators

The provisions on the appointment of arbitrators follow closely the provisions of Art. 11(2)-(5) of the UNCITRAL Model Law. Thus, the parties are free to agree on a procedure of appointing the arbitrator or arbitrators (Art. 587(1)). Failing such agreement, a sole arbitrator or arbitrators to be appointed by a party are appointed upon request of a party by the competent court as specified in Art. 615, if the parties cannot agree upon the person of the sole arbitrator, or a party fails to appoint its arbitrator(s) within four weeks of the receipt of a request to do so from the other party, or if the parties do not receive the notification of the third arbitrator to be appointed by the party-appointed arbitrators within four weeks of their appointment (Art. 587(2) numbers 1-4). A party is bound by its appointment of an arbitrator as soon as the other party has received the written notice of the appointment (Art. 587(2) number 5). A party may also request the court to appoint the arbitrator when the parties have agreed on an appointment procedure and the parties fail to act according to this procedure, or they or the arbitrators are unable to reach an agreement according to this procedure, or a third party fails to perform any function entrusted to it under such

procedure within three months of receipt of a respective written notification (Art. 587 (3) numbers 1-3). The latter is in practice the case when an agreed appointing authority refuses to act or fails to act upon request of a party. The decision with which an arbitrator is appointed by a court shall be subject to no appeal (Art. 587 (9)).

There are no statistics available about default appointments of arbitrators by the courts, although it is known that such default appointments are actually made. Under the VIAC Rules, the Board of VIAC makes default appointments for parties who cannot agree upon a sole arbitrator, for parties who fail to appoint "their" arbitrator, for a tribunal composed of three arbitrators and for party-appointed arbitrators who are unable to agree upon a third arbitrator. While under the Arbitration Law in *ad hoc* arbitrations, the number of arbitrators will be three unless the parties agree otherwise, under the Vienna Rules the Board of VIAC decides upon the number of arbitrators (one or three) "if the parties fail to agree on the number of arbitrators". In that context, the Board shall take into consideration in particular the difficulty of the case, the magnitude of the amount of dispute and the interest of the parties in a rapid and cost-effective decision (Art. 14(2) of the Vienna Rules).

5. Liability of arbitrators

According to Austrian Law, the arbitrators' agreement with the parties is considered to be an agreement *sui generis* with essential elements of a works contract. It follows from this that an "... arbitrator who does not fulfil his obligations resulting from the acceptance of his appointment or do so in a timely fashion, shall be liable to the parties for all damages caused by his culpable refusal or delay" (Art. 594(4)). Accordingly only ordinary negligence, but not gross negligence and intent can be excluded in the agreement between the arbitrators and the parties. For this reason, the Vienna Rules correctly provide that the liability of the arbitrators, the organs of VIAC and the Austrian Federal Economic Chamber for any act or omission in relation to arbitration proceedings shall be excluded "... insofar as such liability may be admissible by law..." (Art. 8). In the only recent decision of the Austrian Supreme Court on the issue of liability of arbitrators it was held that compensation of damages can only be an issue when an award has successfully been challenged and set aside.^[18]

Chapter IV. Arbitral Procedure

1. Place of arbitration

The new Arbitration Law has practically copied the provisions of Art. 20 of the UNCITRAL Model Law. The parties are, therefore, free to agree on the place of arbitration or to delegate an arbitral institution to take this decision. Failing such agreement between the parties, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case including the convenience of the parties (Art. 595(1)). The place of arbitration as determined above is the legal seat of arbitration in the sense that the procedural law applicable at this place applies to the arbitration proceedings. If the parties agree upon a place of arbitration in Austria, the Austrian Arbitration Law is thus applicable (Art. 577(1)). Unless otherwise agreed by the parties, the arbitral tribunal may meet at any place it considers appropriate for conducting the proceedings (Art. 595(2)). This is especially important for international arbitrations where parties or arbitrators may have their place of business or residence outside the agreed or determined (legal) place of arbitration. It is, therefore, possible that no procedural step in a specific arbitration takes place at the agreed or determined seat of arbitration. The Vienna Rules have adopted identical provision. They provide, however, that unless the parties have agreed otherwise, the place of arbitration shall be Vienna (Art. 2(a)).

2. Arbitral proceedings in general

Subject to the mandatory provisions of the law, i.e., to treat the parties with equality and give each party a full opportunity of presenting his case, the parties are free to determine the rules of procedure. They may refer to other rules of procedure such as arbitration rules of arbitral institutions or the UNCITRAL Arbitration Rules for *ad hoc* arbitrations. Failing such agreement between the parties, the arbitral tribunal sitting in the case shall conduct the arbitration in such manner as it considers appropriate, subject to the mandatory provisions of this law (Art. 594(1)). The parties shall be treated fairly and be given full opportunity of presenting their case (Art.

594(2)) and they may be represented or counselled by persons of their choice (Art. 594(3)). Arbitrators who do not perform their obligations resulting from the acceptance of their appointment in a timely fashion shall be liable to the parties for all damages caused by their culpable refusal or delay (Art. 594(4), see above Chap. III.5).

In the new Arbitration Law, a series of non-mandatory procedural provisions have been literally taken or largely copied from Arts. 19, 22, 23, 24, 25 and 26 of the UNCITRAL Model Law which, in turn, have largely their origin in the UNCITRAL Arbitration Rules. Although these provisions did not introduce new elements to the past practice in conducting arbitral proceedings, it was felt useful to introduce them into the new Arbitration Law, last but not least in order to demonstrate to potential foreign users of arbitration in Austria that they would not be faced with unpleasant surprises when conducting an arbitration in Austria. For the same reasons, these procedural provisions have largely been copied in the new Vienna Rules.

As in Art. 22(1) of the UNCITRAL Model Law, the parties are free to agree on the language or languages to be used in the arbitral proceedings; failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings (Art. 596).

The provisions on statements of claim and defence correspond with Art. 23 of the UNCITRAL Model Law. According to this, the claimant shall submit within the period of time agreed by the parties or determined by the arbitral tribunal the points at issue and the facts supporting its claim, and the respondent shall respond thereto. The parties may attach to their statements all documents they consider to be relevant or may merely refer to the documents or other evidence they will submit (Art. 597(1)). Unless otherwise agreed by the parties, the parties are entitled to amend or supplement their claim or pleadings during the arbitral proceedings unless the arbitral tribunal considered it inappropriate due to delay (Art. 597(2)).

The provisions on hearings and proceedings conducted in writing are taken from Art. 24(1) of the UNCITRAL Model Law. Subject to any contrary agreement by the parties, the arbitral tribunal has the power to decide whether to hold oral hearings or whether the proceedings shall be conducted in writing. Where the parties have not expressly excluded an oral hearing, the arbitral tribunal shall upon motion of a party hold such oral hearing at an appropriate stage of the proceedings (Art. 598). These provisions reflect actual practice in arbitration in Austria: Arbitrators who think that they are able to render an award on the basis of the submissions and documents which have been submitted will inform the parties accordingly and will give them a time limit for the submission of a request to the contrary.

3. Evidence

As in Art. 19(2) second sentence of the UNCITRAL Model Law, the arbitral tribunal is authorized to decide upon the admissibility of a taking of evidence and to conduct such taking of evidence and freely evaluate the result of such evidence (Art. 599 (1)). As in Art. 24(2) and (3) of the UNCITRAL Model Law, the parties are to be given notice in a timely fashion of every hearing and of every meeting of the arbitral tribunal for the purpose of taking evidence (Art. 599(2)), and all written documents or other communications are to be brought to the notice of both parties (Art. 599 (3)).

There are no particular rules of evidence which arbitrators have to respect in arbitration proceedings in Austria. It is also up to the arbitrators how they want to hear the witnesses. While in local arbitrations they may in practice follow the practice of civil court proceedings where witnesses are basically questioned by the judge and where then also counsel for the parties will be given the right to ask questions, one can say that in international arbitrations in Austria increasingly the Anglo-American practice of questioning witnesses is used. Cross- and counter-examinations of witnesses are, therefore, possible. According to Austrian Law, witnesses may not be sworn in by the arbitrators. There exists, however, the possibility to have a witness sworn in by a state judge, if this should be considered necessary by the arbitrators or by the parties. The author of this Report is, however, not aware of a case in the past where this has happened. Arbitrators may ask a court to hear a witness domiciled in Austria who refuses to appear before the arbitral tribunal. Judicial assistance may also be requested from a court to hear a witness who is domiciled outside of Austria before a court in his country (Art. 602). Such requests have in the past successfully been made.

4. Experts

The provisions on experts are new. They have been copied from Art. 26 of the UNCITRAL Model Law. They confirm current arbitration practice before the entry into force of the new law. Unless the parties have agreed otherwise, an arbitral tribunal can, therefore, appoint an expert to report to it on specific issues to be determined by the arbitral tribunal and require the parties to give the expert any relevant information and to assist the expert (Art. 601(1)). An arbitral tribunal can, therefore, also appoint an expert if one of the parties objects. An oral hearing with the parties and the expert can be ordered if a party so requests or if the arbitral tribunal considers it necessary, unless the parties have agreed otherwise (Art. 601(2)). An expert appointed by an arbitral tribunal may be challenged on the same grounds on which arbitrators may be challenged according to Arts. 588 and 589(1) and (2) (Art. 601(3)).

According to Art. 21 of the Vienna Rules, the decision on a challenge of an expert appointed by the arbitral tribunal is taken by the arbitral tribunal. Its decision is not subject to appeal before a court. In addition, unless otherwise agreed by the parties, each party has the right to produce reports of own experts who may also be asked to participate in an oral hearing (Art. 601(4)). These party-appointed experts may not be challenged as experts who have been appointed by the arbitral tribunal.

5. Interim measures of protection

Until the entry into force of the new Arbitration Law, interim measures of protection issued by arbitrators were not enforceable in Austria. This does not mean that arbitrators were not allowed to order parties by means of a procedural order or otherwise to do or to omit to do something in the arbitration and to reserve the right to assess non-compliance of a party with such order in the award. An arbitral tribunal could, therefore, order a party to sell perishable goods and advise the party that it would qualify non-compliance with this instruction as non-compliance with the obligation of this party to minimize losses. For this reason, a provision on interim measures in accordance with Art. 9 and Art. 17 of the UNCITRAL Model Law had already been copied in the previous Vienna Rules with effect from 1 January 2001. According to this, arbitrators were entitled to order interim measures of protection that they considered to be appropriate on application by a party. It is specifically stipulated that the "... parties are obliged to comply with such orders, whether or not they are enforceable by state courts". The arbitrators could also make such measures conditional on the provision of appropriate security by the requesting party (Art. 14a(1) Vienna Rules 2001). It does not seem, however, that arbitrators have often made use of this possibility.

According to the new Arbitration Law, arbitrators are not only entitled to render interim measures of protection between the parties to the arbitration agreement, but such interim measures rendered by arbitrators are now enforceable in Austria by the state courts in the same way as interim measures rendered by the courts. As there is now a "competition" between arbitral tribunals and state courts, the provision of Art. 9 UNCITRAL Model Law that it is not incompatible with an arbitration agreement for a party to request before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure, has also been copied into the law (Art. 585).

Art. 593(1) provides: "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party after hearing such party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute ..." and it is further provided that the arbitral tribunal is entitled to request appropriate security from any party in connection with such measure. It follows that the parties can exclude the power of an arbitral tribunal to grant interim measures of protection by agreement. In addition, the arbitral tribunal *may* take an interim measure of protection requested by a party. It follows from this language that an arbitral tribunal is also entitled to refuse to take an interim measure of protection requested by a party. In addition, there is a mandatory provision that an arbitral tribunal can only take an interim measure of protection *after hearing such party*. It follows that *ex parte* interim measures are excluded from the jurisdiction of arbitral tribunals.

As interim measures of protection are now enforceable in the same way as interim measures of protection rendered by courts, it is necessary to make clear that the decision of an arbitral tribunal is not simply a procedural order (which is not enforceable) but an enforceable interim measure of protection. The law contains, therefore, specific form requirements. Interim measures are to be ordered in writing and a signed copy is to be served on each party; in cases with more than one

arbitrator the signature of the presiding arbitrator or in the case of him being prevented, the signature of another arbitrator shall suffice, provided that the presiding arbitrator or another arbitrator records on the order the reason preventing the signature. Unless agreed otherwise by the parties, the order shall state the reasons upon which it is based, it shall be dated and state the place of arbitration. The arbitral tribunal shall discuss with the parties a possible safe-keeping of the order and the documentation of its service and upon request of a party the presiding arbitrator, or in the case of his disability another arbitrator, shall confirm the *res judicata* and enforceability of the order on a copy of the order (Art. 593(2)). Furthermore, as interim measures ordered by an arbitral tribunal are now enforceable, the law contains detailed provisions concerning the proceedings before the competent district court (Art. 593(3)-(6)).

6. Representation and legal assistance

According to the new law: "The parties may be represented or counselled by persons of their own choice. This right cannot be precluded." (Art. 594(3)) This provision is mandatory. It has also been copied in the new Vienna Rules (Art. 23). It follows that parties to an arbitration may be represented by any person of their choice, irrespective of that person's nationality and professional qualification. The parties may also be assisted by legal counsel or any person of their choice at oral hearings. There is no provision in the law that a formal power of attorney (in writing) is required. As a precaution, arbitrators and also arbitral institutions will in practice request a formal power of attorney in writing of persons who appear before them. This is especially the case in international arbitrations as the actual power of representation of attorneys varies from country to country.

7. Default

According to the new law, an arbitral award be set aside if "a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was for other reasons unable to present his case" (Art. 611(2)). It follows that if a party after due notice fails to appear before the arbitral tribunal, the proceedings may nevertheless go ahead and the arbitrators may render a binding award. It is, therefore, in practice, necessary that arbitral institutions and arbitrators carefully collect return receipts of all their communications with the parties.

Chapter V. Arbitral Award

1. Types of award

The new law has copied the basic provisions of Art. 31 of the UNCITRAL Model Law concerning the form and contents of the award and of Art. 30 concerning the recording of a settlement in the form of an arbitral award on agreed terms. However, the law does not contain any detailed definition of the word "award". As generally understood in Austria, the term "award" refers to decisions concerning the merits of a case. Such decisions may be rendered under the heading of final award, partial award or interim award. New is the provision that a decision on the jurisdiction of an arbitral tribunal can be made as a ruling together with a ruling on the case "... or by separate arbitral award" (Art. 592(1)). If the latter is done, the ruling on jurisdiction now ranks as an arbitral award.

2. Making of the award

There exists no time limit in the new law for the making of an award in Austria. This does not exclude that parties may agree upon such time limit or that an arbitral tribunal having its seat in Austria has to apply arbitration rules providing for a time limit for the making of an award.^[19] If arbitrators, having their place of arbitration in Austria, need an extension of the time limit set by the parties or the applicable rules, they have either to ask the parties to agree upon the requested extension of time or to follow the procedure provided for this case in the applicable arbitration rules. As the new Arbitration Law does not provide for a time limit for the making of an award, no court would have the jurisdiction to extend a time limit agreed by the parties.

Unless the parties have agreed otherwise, any decision shall be made by a majority of all members of an arbitral tribunal. If so authorized by the parties or by all members of the arbitral tribunal, the presiding arbitrator may decide questions of procedure alone (Art. 604(1)). This is in line with Art. 29 of the UNCITRAL Model Law.

The new law deals also with truncated arbitral tribunals: Where one or more arbitrators do not participate in a taking of votes without justified reasons, the other arbitrators may decide without them. In such case, the required majority of votes has to be calculated on the basis of the total number of arbitrators. If such a situation occurs, the parties must be notified ahead of time of the intention of the participating majority to proceed in this manner (Art. 604(2)).

A dissenting opinion is in any case not part of an award in the new Arbitration Law. If an arbitrator sends the Secretary General of VIAC a dissenting opinion, he serves it on the parties with the remark that it is not a part of the award.

3. Form of the award

According to the new law, the award shall be made in writing and shall be signed by the arbitrator or arbitrators (Art. 606(1)). Unless agreed otherwise by the parties, the award shall state reasons (Art. 606(2)). It shall state the date on which it was made and the place of arbitration. It shall be deemed to have been made on that day and at that place (Art. 606(3)).

The law deals, therefore, expressly, with the situation which happens often in international arbitrations that the parties have agreed upon a place of arbitration in Austria, but that the actual arbitral proceedings have taken place totally or partly outside of Austria, or that in any case the award has been made physically outside of Austria and has been signed by circulation by the arbitrators.

If there is more than one arbitrator, the new law provides that "... the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated on the arbitral award by the presiding or another arbitrator" (Art. 606(1)).

4. Pleas as to the arbitrators' jurisdiction

The new law follows in essence the language of Art. 16 of the UNCITRAL Model Law. Accordingly, the arbitral tribunal shall rule on its own jurisdiction either together with the ruling on the case, i.e., the arbitral award on the substance of the case, or by a separate arbitral award (Art. 592(1)). Under the old law, a separate decision on jurisdiction rendered by an arbitral tribunal was not considered to be an arbitral award. A positive decision could, therefore, only be challenged in setting aside proceedings against the award which had been rendered by the arbitral tribunal. Under the new law, this decision ranks as an arbitral award and a positive and negative decision of the arbitral tribunal on its jurisdiction can now separately be challenged in setting aside proceedings as an award. If a request for the setting aside of an arbitral award on jurisdiction by which the arbitral tribunal has decided to have jurisdiction is still pending, the arbitral tribunal may continue the arbitral proceedings and make an award (Art. 592(3)). It is, therefore, entirely up to the arbitral tribunal to decide whether to continue the arbitral proceedings or to stay the arbitral proceedings until a final and binding decision on its award on jurisdiction has been rendered by the competent court as specified in Art. 615.

In addition, the new law provides that a plea that an arbitral tribunal has no jurisdiction shall not be raised later than the first pleading in the matter. It is expressly stated that a party which cooperates in the constitution of an arbitral tribunal is not precluded from raising such a plea. In addition, the new law provides that a plea that an arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. In either case a later plea shall not be permitted. There is, however, a provision permitting an arbitral tribunal to accept a later plea if it considers the delay justified (Art. 592(2)).

5. Applicable law

The new law does not distinguish between domestic and international arbitration. It applies to all arbitrations in Austria. An arbitral tribunal has to decide a dispute in accordance with the provisions (*Rechtsvorschriften*) or rules of law (*Rechtsregeln*) which the parties have chosen as applicable. Any designation of the law or legal system of a given state shall be construed unless otherwise expressed as directly referring to the substantive law of that state and not to its conflict-of-laws rules (Art. 603(1)). Failing any designation by the parties, "... the arbitral tribunal shall apply the provisions of law considered by it as appropriate" (Art. 603(2)). In making their decision, the

arbitrators are not bound by any conflict-of-laws rules; they are, however, only entitled in such case to determine the applicable law but not rules of law, such as the UNIDROIT Principles of International Commercial Contracts. It is difficult to say how a specific international arbitral tribunal will determine the applicable law to a dispute. One consideration will certainly be to find the law with the closest connection to the case, if possible.

Decisions *ex aequo et bono* or as *amiable compositeur* are only permitted if the parties have expressly authorized an arbitral tribunal to do so (Art. 603(3)). This provision is identical with the provision of Art. 28(3) of the UNCITRAL Model Law.

6. Settlement

If parties have settled a dispute during the arbitral proceedings, they have according to Austrian Law two possibilities: They can ask the arbitral tribunal to draw up a record of the settlement provided that the contents of the settlement are not in conflict with Austrian public policy (Art. 605 number 1). According to Art. 1(16) of the Austrian Enforcement Act, such a settlement is an enforceable title in Austria and in several countries with which Austria has concluded bilateral enforcement treaties.

The second possibility is to request the arbitral tribunal to record the settlement in the form of an arbitral award on agreed terms provided that the contents of the settlement is not in conflict with Austrian public policy. Such award has to meet the form requirements of arbitral awards according to Art. 606 and has the same status and effects as any other award on the merits of the case (Art. 605 number 2). It shall, therefore, also state the reasons upon which it is based (the contents of the settlement between the parties) unless the parties have agreed otherwise. This provision conforms in substance with Art. 30(2) of the UNCITRAL Model Law.

7. Correction and interpretation of the award; additional award

The new law follows closely the provisions of Art. 33 of the UNCITRAL Model Law concerning the correction and interpretation of an award and an additional award. Unless the parties have agreed upon another period of time, each party may within four weeks of receipt of the award request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature; to make an additional award as to claims presented in the arbitral proceedings, but not dealt with in the award (Art. 610(1) numbers 1 and 3); and *only* if so agreed by the parties, to interpret certain parts of the award (Art. 610(1) number 2).

Such applications shall be delivered to the other party, which is to be heard by the arbitral tribunal prior to making a decision upon such application (Art. 610(2)). The arbitral tribunal shall decide upon the correction or interpretation of the award within four weeks and upon an additional award within eight weeks (Art. 610(3)) and it is entitled to correct any error in computation, any clerical or typographical errors or errors of similar nature on its own initiative within four weeks of the date of the award (Art. 610(4)). The form requirements for awards according to Art. 606 apply to the correction, interpretation or making of an additional award. The interpretation or correction is part of the arbitral award (Art. 610(5)).

8. Fees and costs

While the UNCITRAL Model Law (and the old Austrian arbitration law) is silent in this matter, the new law contains detailed provisions concerning the decisions on the costs of arbitration. As a basic principle it is stated that, where the arbitral proceedings are terminated either by "... the final award, an arbitral settlement or by an order of the arbitral tribunal in accordance with paragraph 2 of this Article" (Art. 608(1)), the arbitral tribunal shall decide upon the obligation to reimburse the costs of the proceedings provided that the parties have not agreed otherwise. The obligation to reimburse may include any and all reasonable costs appropriate for bringing the action or defence. If the parties have agreed on the termination of proceedings and have communicated this to the arbitral tribunal, the parties may request a decision on costs together with the notification of the agreement to terminate the proceedings (Art. 609(1)).

Of practical interest is the provision that an arbitral tribunal may also decide upon application of the respondent to reimburse its costs of the proceedings if the tribunal has decided it does not have jurisdiction on the grounds that there is no arbitration agreement (Art. 609(2)). By this provision, an arbitral tribunal not having jurisdiction over the case now has the same standing as a

state court in Austria which is also entitled to award the respondent its costs of the proceedings even in cases where it decides not to have jurisdiction over the case.

Together with the decision on the liability to pay the costs of arbitration, the arbitral tribunal shall also as far as possible and as far as the costs are not set off against each other, determine the amount of costs to be reimbursed (Art. 609(3)). The costs of arbitration usually comprise the fees and expenses of the arbitrators, including the rent of hearing rooms; translation and recording costs, etc.; administrative costs of arbitral institutions if an institution has been agreed between the parties; and costs for the parties' legal assistance.

The arbitrators are free to determine the costs of arbitration and to apportion these among the parties as they deem justified. In Austrian practice, arbitrators always decide the amounts which they accept as the costs of arbitration and the distribution of these costs between the parties.

a. Deposit

In institutional arbitration, for example, according to the Vienna Rules, the institution fixes the amount of a deposit against the expected costs of arbitration and asks the parties to pay it in equal shares before the transmission of the files to the arbitrators (Art. 34(2)). If the respondent refuses to pay, the claimant will be asked to advance also the respondent's share. If the full amount of the requested deposit is not paid, the claim (counterclaim) will not be dealt with further (Art. 34(3)). The institution determines also the total costs of the arbitration which the arbitrators may distribute between the parties in their award. The practice in *ad hoc* arbitration is the same. The arbitrators have to agree with the parties on their fees, the deposit for the fees and the consequences of non-payment of the full deposit. They will in practice request the parties to pay the agreed deposit for their fees and expected expenses and they will refuse to administer the case if the full deposit has not been paid.

b. Fees of Arbitrators

In *ad hoc* arbitration, the arbitrators will normally conclude with the parties an arbitrators' agreement which will also contain provisions concerning their fees. As already stated, arbitrators will normally not conduct arbitral proceedings before a deposit for the agreed fees and expected expenses has been paid. When they render the award, they will determine their fees and expenses according to the agreement with the parties and state in the award which party or in which portion the parties will have to pay the costs of arbitration which they have determined.

In institutional arbitration, the institution will determine the costs of arbitration according to its schedules for administrative charges and fees of arbitrators and the actual expenses and will inform the arbitrators of the total amount of arbitration costs which it has determined. The arbitrators will then have to decide in their award how the total amount of costs of arbitration as determined by the institution has to be borne by the parties to the arbitration.

The Vienna Rules contain the following schedule of arbitration costs:

Registration Fee: EUR 2,000*

Administrative Charges**

Amount in dispute in Euros		Rate in Euros		
from	to			
0	100,000			3,000
100,001	200,000	3,000	+ 1.5%	of excess over 100,000
200,001	500,000	4,500	+ 1 %	of excess over 200,000
500,001	1,000,000	7,500	+ 0.7%	of excess over 500,000
1,000,001	2,000,000	11,000	+ 0.4%	of excess over 1,000,000
2,000,001	5,000,000	15,000	+ 0.1%	of excess over 2,000,000
5,000,001	10,000,000	18,000	+ 0.05%	of excess over 5,000,000
over	10,000,000	20,500	+ 0.01%	of excess over 10,000,000

Fees for Sole Arbitrators***

Amount in dispute in Euros		Rate in Euros			
from	to				
0	100,000		6 %	minimum fee:	1,000
100,001	200,000	6,000	+ 3 %	of excess over	100,000
200,001	500,000	9,000	+ 2.5%	of excess over	200,000
500,001	1,000,000	16,500	+ 2 %	of excess over	500,000
1,000,001	2,000,000	26,500	+ 1 %	of excess over	1,000,000
2,000,001	5,000,000	36,500	+ 0.6%	of excess over	2,000,000
5,000,001	10,000,000	54,500	+ 0.4%	of excess over	5,000,000
10,000,001	20,000,000	74,500	+ 0.2%	of excess over	10,000,000
20,000,001	100,000,000	94,500	+ 0.1%	of excess over	20,000,000
over	100,000,000	174,500	+ 0.01%	of excess over	100,000,000

* See Art. 33(1) ["On filing the claim (counter-claim), the Claimant (Counter-claimant) shall pay into the account of the Centre, free of charges, a registration fee in the amount stated. That fee is intended to cover the costs up to the submission of the files to the sole arbitrator (arbitral tribunal). If higher outlay is incurred, an additional sum may be prescribed."]

** See Art. 36(1) ["The administrative costs of the Centre and the arbitrator's fees shall be fixed on the basis of the amount in dispute, according to the schedule of arbitration costs attached to these Rules (Annex I). Where the proceedings are terminated early, the Secretary General may reduce the arbitrator's fees as it appears just corresponding to the stage reaching in the proceedings."]

*** See Art. 36(6) ["The rates quoted in the schedule of arbitrator's fees are the fees for sole arbitrators. In any case they shall be raised to two-and-a-half times the amounts quoted if an arbitral tribunal is appointed and to up to three times the rates stated in the event of the particular difficulty of a case."]

c. Costs of Legal Assistance

In Austria, the costs of legal assistance are considered as costs of arbitration and it is in the discretion of an arbitral tribunal to determine these costs in exercise of its discretion to take into consideration the circumstances of the individual case and the outcome of the proceedings. All awards rendered in Austria will normally deal with the costs of legal assistance. As a rule the losing party is ordered to pay the total amount of the arbitrators' fees and the costs of the arbitration, including reasonable expenses for legal representation.

9. Delivery of the award and registration

According to Art. 606(4), after the award is made, a copy signed by the arbitrators in accordance with Art. 606(1), shall be delivered to each party. This will usually be done in domestic cases by registered mail with return receipt and in international cases also by international courier services. Art. 606(5) states that the award and the documentation of its service are joint documents of the parties and the arbitrators. The arbitral tribunal shall discuss with the parties a possible safekeeping of the award and the documentation of its service. It is, therefore, up to the parties and the arbitrators to determine whether and, in the affirmative, how an original of the award and the documentation of its service shall be registered. According to the Vienna Rules, one copy of the award and the records of the service shall be deposited with the Secretariat at the Centre (Art. 27(5)).

10. Enforcement of the award

According to Austrian Law, an arbitral award rendered in Austria has the same rank as a judgment of a state court. Therefore, no *exequatur* by a state court is necessary. The arbitral award as such is an enforceable title (Art. 1(16) of the Austrian Enforcement Act). The presiding arbitrator, or in the case of his disability another arbitrator, shall upon request of a party confirm the *res judicata* and enforce ability of the award on a copy of the award (Art. 606(6)). As regards recognition and order of enforcement of foreign awards, see Chap. VII.1) .

11. Publication of the award

Arbitral awards are considered in Austria to be confidential documents which are owned by the parties to the arbitration. Publication would, therefore, require the consent of the parties. For this reason, arbitral awards are rarely published. The Vienna Rules have a provision entitling the Board of VIAC 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 (Art. 30). The Board has, however, so far never made use of this possibility.

Chapter VI. Means of Recourse

1. Appeal from an arbitral award

a. Appeal to a Second Arbitral Instance

There are no provisions in the new law for an appeal from an arbitral award to a second arbitral instance for review on the merits. This does not exclude the possibility to agree upon such two-tier system, if the parties so wish.

b. Appeal to a Court

According to Austrian Law, an arbitral award has the status of a final and binding last instance judgment of a civil court. It follows from that that an appeal to a court on the merits of the award is not possible.

2. Remedies against decision on leave for enforcement

As already mentioned, according to Austrian Law, an arbitral award has the status of a final and binding decision of the civil courts. It follows that an arbitral award is enforceable as such. An *exequatur* by a state court is, therefore, not necessary and does not exist under Austrian Law. According to Art. 606(6) of the law, "The presiding arbitrator, in the case of his disability another arbitrator, shall upon request of a party confirm the *res judicata* and enforce ability of the award on a copy of the award."

3. Setting aside of the arbitral award (action for annulment)

a. Grounds for Setting Aside

The grounds for setting aside of an award largely follow Art. 34 of the UNCITRAL Model Law and Art. V of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. They are exclusive and they apply also for awards by which an arbitral tribunal has ruled on its jurisdiction.

Upon application of a party, an arbitral award shall be set aside if

- there is no valid arbitration agreement, or if an arbitral tribunal denies its jurisdiction despite the existence of a valid arbitration agreement, or if a party was under some incapacity to conclude a valid arbitration agreement under the law applicable to it (Art. 611(2) number 1);
- a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was for other reasons unable to present its case (Art. 611(2) number 2);
- the award concerns a dispute not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration or beyond the plea of the parties for legal protection, provided that if the default concerns only a part that can be separated from the award, only that part of the award shall be set aside (Art. 611(2) number 3);
- the formation or composition of the arbitral tribunal was not in accordance with the provisions of Arts. 586-587 of the CCP or with an admissible agreement of the parties (Art. 611(2) number 4);
- the arbitral procedure was not carried out in accordance with the fundamentals of the Austrian legal system (public policy) (Art. 611(2) number 5);

– the requirements have been met according to which a judgment of a court can be appealed by an action for revision under Art. 530(1) numbers 1 to 5^[20] (Art. 611(2) number 6).

An arbitral award shall be set aside upon application of a party or by the court *ex officio*

– when the subject matter of the dispute is not arbitrable under Austrian Law (Art. 611(2) number 7);
– if the award is in conflict with the fundamentals of the Austrian legal system (public order) (Art. 611(2) number 8).

According to the special provisions for consumers (Art. 617), which apply also to labour law cases (Art. 618), an arbitral award shall also be set aside if in arbitral proceedings in which a consumer is involved

– mandatory provisions of the law have been violated and these provisions of the law could not have been waived by the parties by choice of law even in a case with international relevance (Art. 617(6) number 1), or
– the requirements are fulfilled according to which per Art. 530(1) numbers 6 and 7,^[21] a judgment of a court of law could be appealed by means of an application for revision; in this case the time period for the filing of an action for setting aside shall be judged under respective provisions regarding the application for revision (Art. 617(6) number 2);
– where the arbitration proceedings took place between an entrepreneur and a consumer, the arbitral award is also to be set aside if the consumer did not receive written legal advice on the significant differences between arbitration and court proceedings prior to concluding the arbitration agreement as stipulated in paragraph 3 (Art. 617(7)).

The setting aside of an arbitral award has no effect on the validity of the underlying arbitration agreement. It follows that after the setting aside of an award, new arbitration proceedings can be commenced within the framework of the arbitration agreement. However, when an arbitral award on the same subject matter has already been finally set aside twice and when a further arbitral award on the same subject matter is to be set aside, upon application of a party, the court shall concurrently declare invalid the arbitration agreement with respect to that matter (Art. 611(5)).

According to Art. 612, an applicant who has a legal interest can apply to the competent court as specified in Art. 615 for a declaration of the existence or non-existence of an arbitral award.

b. Procedure

The action for setting aside must be brought to the competent court as specified in Art. 615 within three months, beginning with the day on which the claimant has received the award or the additional award (Art. 611(4)). An application to correct in the award any errors or to give an interpretation of certain parts of the award (Art. 610(1) numbers 1 and 2) shall not extend this time period.

In the case of setting aside proceedings on the grounds according to which a judgment of a court of law can be appealed by an action for revision under Art. 530(1) numbers 1-7,^[22] the time period for the action for setting aside shall be judged by the respective provisions regarding the action for revision.

Art. 611(2) number 6 mentions the criminal cases dealt with in Art. 530(1) numbers 1-5 CCP.^[23] The filing period for setting aside an award on these grounds ends four weeks after the relevant criminal judgment has become final (Art. 534(1) number 3 CCP), but at the latest ten years after the relevant award has become final and binding (Art. 534(3) CCP). Art. 617(6) number 2 concerns the cases of Art. 530(1) numbers 6 and 7 CCP.^[24] Here the filing period for setting aside an award ends four weeks from the date on which the applicant party was able to use the final decision or to submit to the court facts or evidence which it had discovered (Art. 534(2) number 4 CCP), but at the latest ten years after the award has become final and binding (Art. 534(3) CCP).

c. Waivers

The grounds for setting aside an arbitral award under Art. 611(2) numbers 1-6 entitle a party to request a court to set aside an award on these grounds. It follows that a party to an arbitration has the choice to request an award to be set aside by the competent courts on these grounds or to accept the award as it is. However, an advance exclusion of these grounds for setting aside by a contract between the parties, for example, in the arbitration agreement, would be considered as

being *contra bono mores* and, therefore, invalid. This is expressly the case in the two cases which are to be examined by the court *ex officio*, namely if the subject matter of the dispute is not capable of settlement by arbitration under Austrian Law, or if the award is in conflict with Austrian public policy (Art. 611(2) numbers 7 and 8).

4. Other means of recourse

There are no other means of recourse with the exception of the means mentioned above.

Chapter VII. Foreign Arbitral Awards

1. Conventions and treaties

Austria has ratified the following multilateral conventions:

- Protocol on Arbitration Clauses, Geneva, 24 September 1924 (ratification 25 January 1928);
- Convention on the Execution of Foreign Arbitral Awards, Geneva, 26 September 1927 (ratification 18 July 1930);
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958 (ratification 2 May 1961; on 25 February 1988, Austria withdrew the reciprocity reservation to the New York Convention (published in BGBl. 161/1988));
- European Convention on International Commercial Arbitration, Geneva, 1 April 1961 (ratification 6 March 1964);
- Convention on the Settlement of Investment Disputes between States and Nationals of other States, Washington, 18 March 1965 (ratification 25 May 1971).

In addition, Austria is a party to several other multilateral conventions which contain provisions concerning arbitration.

Austria has concluded the following bilateral treaties containing provisions on the recognition and enforcement of arbitral awards which contain more than a mere reference to the provisions of multilateral conventions with:

Belgium (BGBl. 1961/287), British Columbia (BGBl. 1970/314), Germany (BGBl. 1960/105), Liechtenstein (BGBl. 1975/114), Russia (BGBl. 1956/193), Slovenia (BGBl. 1961/115; 1993/714), Switzerland (BGBl. 1962/125).

2. Convention or treaty applies

Pursuant to Art. 577(1), an award is a domestic award when the place of arbitration was in Austria. When the place of arbitration was not in Austria, an award is a foreign award.

The new Arbitration Law has a specific provision for the recognition and enforcement of foreign arbitral awards. According to Art. 614(1): "The recognition and order for enforcement of foreign awards shall be made in accordance with the provision of the Enforcement Act (*Exekutionsordnung*), unless otherwise provided in international law or in legal instruments of the European Union." As there are so far no other provisions in international law or legal instruments of the European Union, Arts. 79-86 of the Enforcement Act apply.

Art. 614(1) deals also with the form requirements for arbitration agreements on which foreign awards are based:

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"The form requirements for the arbitration agreement shall also be regarded as fulfilled if the arbitration agreement complies both with the provisions of Art. 583 of this law and with the form requirements of the law applicable to the arbitration agreement."

It follows from this that the form requirements of Art. 583 set the minimum standard for enforcement of a foreign award in Austria. However, if the foreign law applicable upon the arbitration agreement sets requirements in addition to Art. 583, these requirements are applicable and the foreign award will only be enforced in Austria if the arbitration agreement complies with these requirements.

As regards the formal requirements for the request for recognition and enforcement of a foreign arbitral award, Art. 614(2) sets a lower standard than Art. IV(1)(b) of the New York Convention. The presentation of the original arbitration agreement or a certified copy thereof under Art. IV((1)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards shall only constitute a requirement if requested by the court (Art. 614(2)).

In all cases of recognition and enforcement of foreign arbitral awards in Austria, the provisions of the Enforcement Act, Arts. 79-86 apply. If a multilateral convention and a bilateral treaty would be applicable, the more favourable provisions will be applied. There is no time limit for the application for recognition and enforcement of an arbitral award after this award has become final and binding upon the parties.

The competent court for proceedings for leave for enforcement is the district court (*Bezirksgericht*) where the respondent has its seat or domicile or the competent district court for the place where the object of enforcement is placed. The respondent does not participate in the proceedings for leave for enforcement. The competent court will only request the necessary documents as under Art. IV of the New York Convention in the mitigated form under Art. 614(2). The court will submit its decision (*Beschluss*) to the respondent which has the possibility to lodge an appeal (*Rekurs*) against this decision within four weeks. Also the claimant may appeal against the decision, if the court has dismissed its application within the same time limit. If the respondent has its place of business outside of Austria and if it has been faced with the reference only by acceptance of the decision, the time limit for its appeal is two months.

3. Procedure if no treaty applies

According to Art. 79(2) of the Enforcement Act, leave for enforcement will only be granted to documents which are enforceable under the laws of the state where they have been made and if reciprocity is guaranteed under state treaties (*Staatsverträge*) or decrees (*Verordnungen*). Austria has ratified the New York Convention on the Recognition and Enforcement of Arbitral Awards 1958 (BGBl 1961/200). It has withdrawn its former reservation under Art. I(3) of this Convention that it will apply the Convention only in the territory of another Contracting State (reciprocity reservation). As a consequence, also awards made in countries which have not ratified the New York Convention (or any other multilateral convention which Austria has ratified) will be recognized and enforced in Austria.

4. Rules of public policy

In Austria, violation of rules of public policy is always a ground for refusal of enforcement of an award and for setting aside an award (Art. 611(8)). Austrian Law does not make a distinction between international public policy or local public policy. Also in international arbitration, only the criteria of Austrian public policy will be applied. It must be added that the notion public policy is interpreted very restrictively by Austrian courts.

Chapter VIII. Conciliation

1. General

Mediation as "competitor" to civil court proceedings is relatively new in Austria. It must be said that judges in civil proceedings have always tried, also in the past, to explore the possibility of a settlement of a case at the beginning of court proceedings, and there are also several legal provisions providing for compulsory mediation, for instance, prior to divorce proceedings. Apart from that it seems that mediation has been rather rarely used as means to settle disputes at the local level. In any case there are no statistics available. One of the reasons for this might be that civil courts in Austria have always functioned relatively quickly and at relatively low cost. This is still the case, but the international trend in favour of mediation techniques has also reached Austria. This trend is also supported by the Austrian judiciary as they see it as a possibility to relieve civil courts which are over-burdened with cases. There are also mediation facilities within the framework of the Austrian Economic Chambers for the settlement of disputes between members of the Economic Chambers and consumers.

Mediation techniques have also been used in connection with the enlargement of the Vienna airport between the airport company and affected neighbours and in connection with the establishment of a Vienna Waste Management plan.

At the international arbitration level, VIAC has promoted conciliation for over thirty years and offers conciliation proceedings as part of the Vienna Rules. It must be said, however, that these services have been rarely used in the past and, in addition, that the few mediation procedures which have taken place were all unsuccessful.

In June 2003 the Austrian Mediation Act^[25] received Parliamentary approval and came into force on 1 May 2004 (see Annex II). The existence of this law has stimulated enormously the developments in this area.

The following institutions offer services in mediation:

Österreichischer Bundesverband für Mediation (ÖBM)
Österreichischer Bundesverband der MediatorInnen
Lerchenfelderstr. 36/3)
A-1080 Vienna
Tel.: +43(0)1 403 27 61
Fax: +43(0)1 403 27 6112
E-mail: office@oebm.at
Website: <www.oebm.at>

ICBM Internationaler Dachverband für Wirtschaftsmediation und Konfliktbearbeitung / International Council for Business Mediation & Conflict Management
Aredstraße 11 / Top 9
A-2544 Leobersdorf
Tel.: +43 2256 65800
Fax: 043 2256 65810
E-mail: office@icbm.at
Website: < www.icbm.at >

According to Art. 8 of the Austrian Mediation Act, the Federal Minister of Justice shall maintain a list of mediators which shall be published electronically in an appropriate way. This list of mediators is available on the website <www.mediatorenliste.justiz.gv.at.>

2. Legal provisions

According to Art. 1 of the Austrian Mediation Act:

“(1) Mediation is an activity voluntarily entered into by the Parties, whereby a professionally trained neutral facilitator using recognized methods systematically encourages communication between the Parties, with the aim of enabling the Parties to themselves reach a solution of their dispute.

(2) Mediation concerning civil law matters is mediation to resolve conflicts for which decisions the civil courts would have jurisdiction.”

One of the main achievements of the Austrian Mediation Act is to organize and to control all professional mediators under the supervision of the Austrian Minister of Justice in one list of registered mediators which the Ministry maintains and reviews and which it is required to publish electronically (Art. 8). For this purpose several entities, an Advisory Council (Arts. 4-6) and a Board for Mediation (Art. 7) have been established. The Mediation Act sets standards for the registration of persons in the list of mediators, who are, when registered, entitled to the designation “registered mediator”. It also sets the standards for and registers training institutions and courses in the area of mediation in civil matters. The Mediation Act regulates in general terms the rights and obligations of “registered mediators” but it does not contain rules for the conduct of conciliation, as in the UNCITRAL Conciliation Rules.

An important provision for the acceptance of mediation in practice is found in Art. 22(1):

“The beginning and the proper continuation of the mediation by a registered mediator suspends the application of the start and running of the statute of limitations as well as other time limits concerning rights and claims which are affected by the mediation.”

This new provision will certainly be an incentive to make use of mediation in Austria.

[1]. Honorary President of the International Arbitral Centre of the Austrian Federal Economic Chamber; Honorary Vice-President of ICCA.

[2]. The following abbreviations are used:

ABGB: Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*)

BGBl: *Bundesgesetzblatt* (Federal Official Gazette)

CCP: Code of Civil Procedure (*Zivilprozessordnung*)

RGBl: *Reichsgesetzblatt* (Imperial Gazette)

UGB: *Unternehmensgesetzbuch* (Entrepreneurial Code)

VIAC: Vienna International Arbitral Centre.

[3]. Ludwig Boltzmann Institut für Rechtsvorsorge und Urkundenwesen.

[4]. "*Entwurf eines neuen Schiedsverfahrensrechts mit Erläuterungen von Paul Oberhammer*", *Veröffentlichungen des Ludwig Boltzmann-Instituts für Rechtsvorsorge und Urkundenwesen*, Walter H. Rechberger, editor, Vol. XXVII (Manz'sche Verlags- und Universitätsbuchhandlung, Vienna 2002).

[5]. Dr. Alexander V. Saucken, *Die Reform des Österreichischen Schiedsverfahrensrechts auf der Basis des UNCITRAL Modellgesetzes über die Internationale Handelsschiedsgerichtsbarkeit* (2004).

[6]. *Bundesministerium für Justiz, Entwurf eines Schiedsrechts-Änderungsgesetzes 2005, Texterläuterungen.*

[7]. Austria consists of nine counties including Vienna (*Bundesländer*).

[8]. Council for Mutual Economic Assistance (Warsaw Pact).

[9]. The text is reproduced in *Yearbook Commercial Arbitration*, Vol. XXI (2006) pp. 341-371.

[10]. The new law came into effect on 1 July 2006. The provisions of the old law apply only to arbitration proceedings which were commenced prior to that date (Clause VII(2)) with one exception, namely, that the effectiveness of arbitration agreements which have been concluded before 1 July 2006 shall be governed by the old provisions (Clause VII(3)). For these reasons, a comparison between the old and the new provisions is only made where appropriate.

[11]. Hereinafter, only the article numbers of the new Arbitration Law will be cited.

[12]. The provisions of Art. 617(6) and (7) concerning the setting aside of awards rendered in arbitration proceedings including a consumer and in labour law cases (Art. 618) are dealt with in Chap. VI.1.

[13]. Translation from the authentic German text.

[14]. In this context, consideration should be given to the possible application of the United Nations Convention on Contracts for the International Sale of Goods, 1980.

[15]. *Cour de cassation*, 7 January 1992.

[16]. Therefore, a separate declaratory action that an arbitration agreement does not exist or is incapable of being performed is no longer necessary.

[17]. OG 30 November 2006, 6 Ob 207/06v.

[18]. OG 6 June 2005, 9 Ob 126/04a.

[19]. As in Art. 24 of the ICC Rules of Arbitration in force as from 1 January 1998.

[20]. Art. 530 CCP "Application to Re-open a Case" reads:

- (1) A case concluded by a judgment can be re-opened on application of a party,
1. if a document on which the judgment was based was completely or partially forged;
 2. if a witness or expert of the opposing party has given false testimony during his examination and the judgment is based on this testimony;
 3. if the judgment was given as a result of an act punishable at law, whether as wilful misrepresentation (Art. 108 of the Penal Code (PC)), embezzlement (Art. 134 PC), fraud (Art. 146 PC), forgery of documents (Art. 223 PC), forgery of documents especially protected by the law (as defined in Art. 224 PC), forgery of public seals (Art. 225 PC), indirect false recording or certification (Art. 228 PC), suppression of documents (Art. 229 PC), or of displacement of boundary marks (Art. 230 PC), on the part of the representative of the party, or of the opposing party or its representative;
 4. if the judge has been guilty of criminal negligence of his official duties to the prejudice of the applicant in giving judgment or in a previous decision relating to the case on which the judgment is based;
 5. if a decision by a criminal court on which the judgment is based has been set aside by a subsequent final judgment;
 6. if the applicant discovers the existence of, or is placed in a position to use a previous judgment concerning the same claim or the same legal relationship which is already final and which determines the rights of and between the parties of the case to be re-opened;
 7. if the applicant has discovered or is placed in a position to use new facts or evidence which would have resulted in a more favourable decision for the applicant on the merits if they had been presented in the previous hearing.
- (2) The re-opening of the case under numbers 6 and 7 is only permissible if the applicant was unable without fault on his part to assert the finality of the judgment or the new facts or evidence before the end of the oral hearing after which the judgment in First Instance was given.

[21]. See footnote 19.

[22]. *Ibid.*

[23]. *Ibid.*

[24]. *Ibid.*

[25]. *Zivilrechts- Mediations- Gesetz - ZivMediatG sowie Änderungen des Ehegesetzes, der Zivilprozessordnung, der Strafprozessordnung, des Gerichtsgebührengesetzes und des Kindschafts-Änderungsgesetzes 2001, BGBl. 29/2003.*