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Vienna Perspective – 2014

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Commentary

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Introduction

The following article comments on recent arbitration-related developments in Austria and is the fifth of an annual contribution that provides readers with a "Vienna Perspective" on issues relevant for international arbitration practitioners.

This year we focus on a decision of the Austrian Supreme Court on the challenge of an arbitrator, a topic currently again in the center of attention due to the recently revised IBA Guidelines on Conflicts of Interest in International Arbitration. Other decisions reported in the overview section of this commentary cover the enforceability of an award under appeal before a 2nd instance arbitral tribunal, the effects of an arbitration clause agreed in parallel to state court jurisdiction, the effects of invalid parts of an arbitration clause and the scope of consumer protection in arbitration.

Focus: Challenge of Arbitrator after Award Rendered • Arbitrator *defunctus officii* • Set-aside Proceedings • IBA Guidelines on Conflict of Interest • *Ordre Public*

In case No. 2 Ob 112/12b[1] the Supreme Court dealt with set-aside proceedings in the context of unsuccessful challenges on grounds of bias of the arbitrators raised by the claimant after the award had been rendered. The dispute before the (*ad hoc*) arbitral panel resulted from a contract for delivery, installation and commissioning of three cleaning plants between claimant as the supplier and defendant as the customer. In total, claimant started four arbitral proceedings against defendant, all of them with the same three arbitrators. Claimant challenged both the co-arbitrator nominated by defendant ("R.R.") and the chairman of the panel ("C.C."); both were Austrian attorneys-at-law.

The challenges were made: (i) by way of a law suit before the Austrian state court seeking declaratory relief that co-arbitrator R.R. was excluded from office or at least biased; (ii) by challenging, in parallel, R.R. before the arbitral tribunal (which declared to be *functus officio* after having rendered the award); and ultimately (iii) by initiating the set-aside proceedings at hand.

Claimant based its challenges on the following grounds, which it only became aware of after the award was rendered:

- R.R. has been a member of the supervisory board of defendant's grandparent company.
- The law firm of C.C. drafted the contract, entered into between defendant and defendant's minority

shareholder, on the use of the plot of land where the cleaning plant was erected.

Thus, R.R. and C.C. should have been excluded from serving as an arbitrator or, at least, were biased to decide on the matter.

In essence, the Supreme Court had to decide whether a party, as defendant argued in the set-aside proceedings, can invoke issues of impartiality and independence after the award had been handed down and, in the affirmative, whether the grounds for a challenge were given.

After claimant was unsuccessful before the Court of First and Second Instance, claimant appealed a third time (*Revision*) and the Supreme Court ultimately dismissed the set-aside claim.

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The Supreme Court had to review a number of interesting issues:

Whether impartiality/independence can be invoked after the award was rendered?

Although the Arbitration Amendment Act 2006 (*Schiedsrechtsänderungsgetz 2006*)[2] applied to the case, the Supreme Court started out by reviewing its challenge-related case law under the old Austrian Code on Civil Procedure ("old ACCP").[3] According to the old ACCP an arbitrator could be challenged on the same terms as a state court judge. The reasons for challenging a court judge were (and continue to be) divided between bias (*Befangenheit* pursuant to section 19 of the Austrian Law on Jurisdiction – "ALJ") and exclusion (*Ausschluss;* section 20 ALJ). Whereas bias of a professional judge presupposes that a party has lodged a complaint, exclusion applies as a matter of law, e.g., where the judge or his/her close relatives are parties to the proceedings or where the judge was involved in the decision of a lower court. The reasons for exclusion under 20 ALJ are certainly much graver than those for bias under section 19 ALJ.

Although the old ACCP did not specify the proceedings to challenge an arbitrator, it was generally accepted that, at first, it was the arbitral tribunal that would decide on the challenge. That decision, however, could not be directly contested before the state court and only be reasserted in proceedings for setting aside the award. Pursuant to section 595(1) No 5 old ACCP, the award can be set aside "if the tribunal had rejected the challenge for unjustified reasons."

When a party only became aware of the grounds for a challenge after the award had been rendered, the Supreme Court's established jurisprudence under the old CCP was that the arbitral tribunal was already *officio defunctus* at that time so that a challenge could not take place within the setting of arbitral proceedings. Moreover, the grounds for a challenge could not, in principle, be invoked in set-aside proceedings unless they turned out to be extreme ("crass") and manifest or when they had influenced the proceedings in a manner that would be in conflict with fundamental values of the Austrian legal system (*ordre public*). This would be mostly the case when an arbitrator was excluded from his office pursuant to section 20 ALJ. Other reasons of bias (section 19 ALJ), however, would not be sufficient grounds to set aside the award.[4]

The Arbitration Amendment Act 2006 - which amended the old ACCP and came into force on 1st July 2006 and which was patterned on the UNCITRAL Model Law ("new ACCP") - does not distinguish between grounds for exclusion and grounds for bias of arbitrators anymore. Under section 588(2) new ACCP a lack of impartiality or independence are grounds for challenging an arbitrator; whereby the decision of the tribunal can be reviewed during the ongoing arbitral proceeding by the state court.[5]

Yet the Supreme Court found in the present decision that this would not incur a substantial change of the legal effect. In the view of the Supreme Court, the distinction, which continues to apply to professional judges under sections 19 and 20 ALJ, should serve as a guideline for challenging an arbitrator. Moreover, the Supreme Court referred to the IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines) which – albeit not binding the parties unless so agreed - shall render assistance to arbitrators, arbitral institutions and even state courts when addressing issues of independence/impartiality, disclosure and challenges and to eventually establish an international standard.

In a situation where a party became aware of grounds for a challenge only after the award was rendered, the Supreme Court observed that also the new ACCP

remained silent. The Supreme Court then reviewed the numerous opinions voiced in the learned literature addressing this issue and arrived at the conclusion that a party may raise a challenge, in principle, even after the award was handed down by way of set-aside proceedings, but that only "crass" cases would be justified. This standard is very similar to the reasons for exclusion of an arbitrator under the old ACCP. As it had already found in an earlier decision,[6] the Supreme Court made reference to German law,[7] because the relevant statutory provisions on disclosure of bias and challenge of an arbitrator are almost identical and also based on article 12 UNCITRAL Model Law. Following the German jurisprudence, grounds of bias becoming known only after the award was rendered cannot be asserted because of the principles of legal certainty (*Rechtssicherheit*) and peace of the law (*Rechtsfrieden*), unless extremely serious and obvious reasons or a violation of the *ordre public* would justify to set aside the award.

In such an extreme ("crass") situation, a party may base its set-aside claim on section 611(2) No. 4 new ACCP (if the composition or constitution of the arbitral tribunal conflicts with the ACCP) or also on section 611(2) No. 5 new ACCP (if the arbitral proceedings were conducted in a manner that is contrary to the fundamental values of the Austrian legal system). It should be noted that the latter provision is a specific provision (the so-called procedural *ordre public*), which the UNCITRAL Model Law and the German procedural law do not contain.

Whether co-arbitrator R.R. was disqualified because he has been a member of the Supervisory Board of defendant's grand-parent company?

The Supreme Court found that R.R's. position did not meet the standard in section 20 ALJ (exclusion). Under that provision one cannot decide one's own matters. First, defendant's company and its grandparent company remain legally independent as separate corporate entities. Second, the supervisory board of the grandparent company is not a legal agent (*Organ*) of defendant's company and is committed to the interests of its own company only. Thus, R.R. did not act in "his own matter."

By the same token, the Supreme Court continued, the grandparent had a controlling economic interest in its affiliate (the defendant), which would cause "justified doubts" as to the impartiality/independence of R.R. Therefore, the co-arbitrator R.R. should have disclosed the relationship and could have been successfully challenged for bias in the case at hand. The Supreme Court did not turn to the interesting question whether the non-disclosure *per se* would constitute a valid ground for a challenge. Yet the Supreme Court did not deem the relationship 'crass' enough to justify setting aside the award.

Whether chairman C.C. was disqualified because his law firm had drafted the contract between defendant and defendant's minority shareholder?

The Supreme Court found that, first, the contract did not touch upon the legal relationship addressed in the arbitral proceedings and, therefore, does not concern "the same case." Second, the mandate of C.C's. law firm had already been terminated when the arbitral proceeding commenced and no further activities of R.R.'s law firm for defendant had been revealed. R.R. might have been well advised, the Supreme Court noted, to disclose the relationship but the latter would not constitute a basis for a challenge under section 588 new ACCP. The Supreme Court made also reference to the IBA Guidelines and concluded that such a relationship would only fall under the "Orange List." Moreover, such a relationship could not reach the extreme ("crass") standard that would justify setting the award aside.

2014 Amendment of the IBA Guidelines

On 23 October 2014 the IBA Council adopted an amended version of the IBA Guidelines on Conflicts of Interest in International Arbitration ("new IBA Guidelines"). Would the reflections of the Supreme Court on the IBA Guidelines have been different if they had already been in force?

In respect of co-arbitrator R.R., sub-section 1.2. of the Non-Waivable Red List is now more specific by adding to the old version

> *The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties*

the words

> *or an entity that has a direct economic interest in the award to be rendered in the arbitration.*

In the case at hand, R.R., although not having a controlling influence on defendant (old version of IBA Guidelines), has a controlling influence on defendant's grandparent, which, one can assume, has a direct economic interest in the award as the outcome of the proceedings will have an impact on the value of its sub-subsidiary.

For the chairman C.C., the assessment would not have changed under sub-section 3.1.4 of the Orange List which, disregarding minor stylistic changes, continues to state:

> *The arbitrator's law firm has, within the past three years, acted for or against one of the parties, or an affiliate of one of the parties, in an unrelated matter without the involvement of the arbitrator.*

If one assumes that the minority shareholder - e.g. on the basis of a shareholder agreement - had no controlling interest in defendant, then defendant, by definition, was not an 'affiliate' of the minority shareholder so that the relationship was irrelevant under the IBA Guidelines (old and new version).

No Enforcement of Not Binding Award • Art. V(1)(e) of the New York Convention • Appeal Before 2nd Instance Arbitral Tribunal

In case No. 3 Ob 39/13a[8] the Austrian Supreme Court dealt with the request of a Liechtenstein company to declare enforceable and enforce a Czech ad hoc award against the Czech Republic. The Court of First Instance declared the arbitral award enforceable in Austria and granted enforcement against moveable property generally and three objects of art owned by the Czech Republic that were on display in a museum in Vienna specifically. The Czech Republic appealed against the declaration of enforceability and the approval of the enforcement.[9] The Czech Republic - *inter alia* - argued that the award was not enforceable, because the Czech Republic had timely initiated appellate proceedings before a 2nd instance arbitral tribunal, as permitted by arbitration agreement between the parties, and that these proceedings was still pending.

The Court of Appeal repealed the decision of the Court of First Instance and rejected the application of Plaintiff. It argued that, due to the timely appeal to the 2nd instance arbitral tribunal, the award had not yet become binding and that enforcement should be denied pursuant to Art. V(1)(e) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").

Plaintiff appealed this decision to the Supreme Court. Plaintiff argued that the requirements of Art. V(1)(e) of the New York Convention were not met because the Czech Republic had not validly filed an appeal against the award as the appeal was not signed by authorized representatives of the Czech Republic.

The Austrian Supreme Court upheld the decision of the Court of Appeal for the following reasons:

Art. V(1)(e) of the New York Convention applies when the defendant proves that the award is not yet binding. The binding character of an award does not require a declaration of enforceability in the meaning of a double exequatur but that it cannot be revised in the substance of the matter by a state court or a 2nd arbitral instance. In this context, the Supreme Court pointed out that academic literature debates the question of when an award is binding in the meaning of Art. V(1)(e) of the New York Convention. The majority opinion is that the binding effect of an arbitral award must be assessed on the basis of the law applicable to the proceedings. Thus, an award is only binding if it satisfies all requirements for being declared enforceable pursuant to the law at the place of arbitration. The minority view argues in favor of an autonomous interpretation of the word "binding" and that an award would only be not binding if a full appeal remains an option, i.e., not just an application to set aside the award would still be permitted. However, in the present case both views lead to the result that the ad hoc award was not binding: The arbitration agreement of the parties provided for a full appeal against an award to a 2nd instance arbitral tribunal and the arbitration law of the Czech Republic explicitly provides[10] that in case the parties agreed on the possibility of 2nd instance arbitral proceedings the award becomes only final and binding when it can no longer be appealed.

Regarding the counterargument of the Plaintiff that the appeal to the 2nd instance arbitral tribunal was not signed by authorized representatives of the Czech Republic, the Supreme Court concluded that this was

a question for the 2nd instance arbitral tribunal and not for the Austrian Supreme Court.

Commentators have questioned this latter conclusion.[11] It has been argued that an appeal signed and filed by the wrong person could be null and void and, thus, the award could be already binding. Furthermore, it was emphasized that it would be incomprehensible, why compliance with time-limits should be relevant for Austrian courts whereas compliance with form requirements should not. However, in the opinion of the authors the better view is the one followed by the Austrian Supreme Court. The other solution could theoretically result in contradicting decisions on the compliance of form requirements and, in the worst case, to an award being enforced under the New York Convention in another contracting state, whilst it would not be binding in the country of origin.

Jurisdiction and Arbitration Clause in one Agreement • Competence of Arbitral Tribunal Confirmed

The parties to the dispute concluded an agreement, which provided in clause 7 for disputes arising out of or in connection with this agreement for the jurisdiction of a specific state court in Austria. However, in clause 18 of the same agreement, they agreed that all disputes shall be decided by an arbitral tribunal to the exclusion of proceedings before state courts.

A dispute concerning payments under the agreement arose and Plaintiff filed a claim before the state court as agreed in clause 7 of the agreement. Both, the Court of First Instance and the Court of Appeal rejected the claim due to lack of jurisdiction.

The Austrian Supreme Court in case No. 2 Ob 65/13t[12] confirmed the lower courts' rulings for the following reasons:

When the wording of an unclear declaration allows two equally permissible interpretations, the one favoring arbitration needs to be preferred. The principle of *favor validitatis* is well established in Austrian case law[13] and was correctly applied in the case at hand. The Court of Appeal emphasized that an arbitration agreement is not revoked or made meaningless by a jurisdiction clause contained in the same agreement. This would be in particular correct in those cases, like the case at hand, where in addition to an arbitration clause a non-exclusive jurisdiction of a specific state court would be agreed. There is indeed a place for the state court jurisdiction clause, as state courts could be competent despite an arbitration clause, in particular for applications for interim relief and for declarations on the existence or non-existence of an arbitration clause. Furthermore, in this the Austrian court agreed to by the parties was not the court *ex lege* competent for all claims arising out of the agreement.

The reference of the Court of Appeal and the Austrian Supreme Court to the courts' competence to declare the existence or non-existence of an arbitration clause reanimated the discussion of whether Austrian courts indeed are competent to determine the admissibility of arbitration. The German Code of Civil Procedure, for example, explicitly permits in sec. 1032(2) that prior to the constitution of an arbitral tribunal, an application may be made to the court to determine whether or not arbitration is admissible. Austrian arbitration law does not contain such provision. In line with sec. 578 of the ACCP, which provides that no court shall intervene except as provided in the Arbitration Law, the majority of commentators are of the opinion that Austrian courts lack such competence. However, the authors consider it unlikely that the Court of Appeal and the Supreme Court wished to settle the aforementioned debate. It seems that the Courts referred to sec. 584(1) of the Austrian Code of Civil Procedure, which authorizes the court, in cases where a substantive claim is brought before it, to establish that an arbitration agreement does not exist or is incapable of being performed.[14]

Arbitration Clause in Articles of a Cooperative Society • Changes and Scope of Arbitration Clause • Effects of Invalid Parts or Arbitration Clause

The plaintiff, a cooperative society (*Genossenschaft*) under Austrian Law, is a member of the defendant cooperative society and claimed access to the minutes of a general meeting.

The plaintiff was (in its position as member of the defendant) a legal successor to another cooperative society, which had declared at the time of its accession that it accedes to the provisions of the current articles of the cooperative society as well as to any later changes thereof and any decisions of the members meeting.

At the time of accession of the predecessor of the plaintiff, the articles contained an arbitration clause providing for "all disputes of a member with the cooperative society or of the members among each other that have its origins in this cooperative society." However, arbitration proceedings were explicitly excluded for all private law disputes as well as decisions by the management board, the supervisory board or the members meeting. As regards the mode of appointment, the arbitration clause stated that each party elects one arbitrator from the members of the cooperative society and these two should then elect an independent chairman.

The arbitration clause of the cooperative society was later (in 1949) amended as follows: "Any dispute arising out of the cooperative legal relationship shall be decided by an arbitral tribunal. Each party shall elect one arbitrator, they shall elect one chairman."

In 1993, the arbitration clause was again amended so that it read: "Any dispute arising out of the cooperative legal relationship as well as out of joint banking transactions shall be decided by an arbitral tribunal. Each party shall elect one arbitrator, they shall elect one chairman. . . . Members can submit themselves to the jurisdiction of this arbitral tribunal also for disputes between each other."

The plaintiff filed its claim for access to the minutes of a general meeting with a state court, arguing that it never submitted itself to the arbitration clause of the articles and that the dispute at stake neither arose out of the cooperative legal relationship nor out of joint banking transactions. The defendant challenged the jurisdiction of the state court by invoking the arbitration clause contained in the articles. Based on the latter argument, the Court of First Instance rejected the claim of the Plaintiff.

The plaintiff appealed and argued that a correct interpretation of the arbitration clause would result in the state court being competent to decide on the requested access to the minutes of the members meeting. Furthermore, necessary form requirements were not complied with when adopting the changes to the arbitration clause in 1949 and 1993. The Court of Appeal rejected the plaintiff's arguments.

The Austrian Supreme Court confirmed the lower courts' decisions and argued as follows:[15]

The mandatory contents of an arbitration clause are the names of the parties, a defined legal relationship and the submission to arbitration. The original arbitration clause already met these requirements. Whether the later amendments of the arbitration clause were validly made or not were not relevant because that could only invalidate the amendments but not the initial arbitration clause. In addition, the changed parts of the arbitration clauses only concerned additional elements and not mandatory elements. This meant that Austrian arbitration law could supplement their invalidity as far as the initial arbitration clause did not cover relevant aspects thereof.

With regard to the subject matter of the claim, the Austrian Supreme Court referred to the principle of *favor validitatis* and advocated an extensive interpretation of the substantive scope of the arbitration clause. Although a claim for access to minutes of members meetings is based on a specific statutory provision in the Austrian Act on Cooperative Societies, the Austrian Supreme Court clarified that this does not result in an insufficient connection to the cooperative legal relationship. To the contrary, this dispute also has its roots in the cooperative legal relationship and not in another legal relationship, which is not a necessary condition for the existence of the cooperative legal relationship, such as, for example, a loan relationship. Thus, the Supreme Court correctly rejected plaintiff's claim.

Arbitration Clause in Corporate Joint Venture • Consumer Protection

In case No. 6 Ob 43/13m[16] the Austrian Supreme Court dealt with the scope of sec. 617 of the Austrian Code of Civil Procedure, which provides for several restrictions with regard to consumer-related arbitrations. Most importantly, sec. 617(1) provides that arbitration agreements may be only concluded for disputes that have already arisen, a restriction also found in several other arbitration laws.[17]

The dispute arose out of a corporate joint venture agreement concluded between a Bulgarian businessman, a Liechtenstein institution (*Anstalt*), an English private equity fund and a Cyprian company. The agreement regulated the operations of a Bulgarian company. The agreement contained an arbitration clause providing for ICC arbitration in Vienna. Consequently, the English private equity fund initiated arbitration against its three joint venture partners. The Bulgarian businessman and

the Liechtenstein institution objected to the jurisdiction of the arbitral tribunal and argued that the arbitration agreement in the joint venture contract was not validly concluded because they were consumers. Sec. 617(1) requires that the arbitration agreement be concluded after the dispute arose, which was not the case.

The arbitral tribunal confirmed its jurisdiction with a partial award and awarded in a second partial award damages. The Bulgarian businessman and the Liechtenstein institution sought to have these awards set aside on the basis of sec. 611(2)(1) of the ACCP, because the arbitration agreement was invalid under sec. 617(1). The Court of First Instance rejected the application on the basis that both plaintiffs were not consumers in the meaning of sec. 617. The Court of Appeal concurred with the Court of First Instance.

The Austrian Supreme Court confirmed the decisions of lower courts and argued as follows:

Sec. 617 also applies to international arbitration. However, it confirmed the indication given in a previous decision[18] that the restriction to permit arbitration agreements only for disputes that have already arisen is not a restriction of objective arbitrability but merely another requirement for the validity of the arbitration clause.

Against the overwhelming majority of commentators,[19] it held sec. 617 also applies to corporate disputes. It, thereby, *inter alia* rejected the argument that among shareholders there is no such disparity of bargaining power as to require the protection of a consumer from an entrepreneur.

The Austrian Supreme Court further clarified that the consumer-status of a foreign person must be assessed on the basis of Austrian law. This can, of course, result in unpleasant surprises to foreign parties, who might receive "protection" from Austrian consumer provisions they never wanted to be protected by.

However, the Austrian Supreme Court still concluded that both plaintiffs were not consumers. Regarding the Bulgarian business person, the Court found that he had significant influence over the Bulgarian company and, therefore, cannot be regarded as a consumer. With regard to the Liechtenstein institution, the Austrian Supreme Court applied sec. 2 of the Austrian Business Code by analogy because a Liechtenstein institution would, in its essence, correspond to the corporate forms referred to in this provision.

Although the Austrian Supreme Court correctly rejected the application to set-aside and confirmed the arbitral awards, parts of the legal reasoning are problematic for arbitration clauses in articles of associations and corporate joint venture agreements. However, since January 1, 2014, the Austrian Supreme Court is the only instance for setting aside proceedings and formed its own fixed senate to deal with arbitration-related claims.[20] The authors hope that this new senate will adopt a more corporate arbitration friendly approach.

Endnotes

1. Oberster Gerichtshof [OGH] [Supreme Court] 17 June 2013, docket No. 2 Ob 112/12b in 2013 JBl 523.

2. BGBl I 2006/7.

3. In force until 30 June 2006.

4. Oberster Gerichtshof [OGH] [Supreme Court] 26 Jan 2005, docket No. 7 Ob 314/04h, later confirmed in 17 Dec 2010, docket No. 6 Ob 228/10p.

5. It should be noted that it is now exclusively the Supreme Court who decides, as a one-stop instance, on all arbitral matters; *see* Christian Dorda & Veit Öhlberger, *Vienna Perspective - 2013*, 28/7 Mealey's International Arbitration Report 25, 29 (2013).

6. Oberster Gerichtshof [OGH] [Supreme Court] 17 Dec 2010, docket No. 6 Ob 228/10p.

7. Section 1036 German Code on Civil Procedure corresponding to Section 588 ACCP.

8. Oberster Gerichtshof [OGH] [Supreme Court] April 16, 2013, docket No. 3 Ob 39/13a in 2013 ecolex 882.

9. Another argument in this appeal was that the three objects of art were objects of cultural heritage of the

Czech Republic used for sovereign purposes. Therefore, the art was immune from enforcement. The Austrian Supreme Court had rejected this argument in an earlier decision (docket No 3 Ob 18/12m), which was discussed in Christian Dorda & Veit Öhlberger, *Vienna Perspective - 2013*, 28/7 Mealey's International Arbitration Report 25, 29 (2013).

10. Sec. 28(2) and sec. 27 of the Czech Arbitration Law.

11. Rainer Lukits & Birgit Julia Wirth, *Vollstreckung eines ausländischen Schiedsspruchs erster Instanz gegen einen Staat und Immunität staatlicher Kunstleihgaben*, 2013 wbl 621, 622.

12. Oberster Gerichtshof [OGH] [Supreme Court] May 7, 2013, docket No. 2 Ob 65/13t in 2014 RdW 471.

13. *See* Christian Hausmaninger in KOMMENTAR ZU DEN ZIVILPROZESSGESETZEN § 581 ¶ 193 (Hans W. Fasching und Andreas Konecny eds., 2nd ed. 2007).

14. *See also* Hahnkamper, Case Comment, *Kollision von Schieds- und Gerichtsstandsvereinbarung*, 2014 ecolex 145, 146.

15. Oberster Gerichtshof [OGH] [Supreme Court] September 9, 2013, docket No. 6 Ob 158/13y in 2014 RdW 71.

16. Oberster Gerichtshof [OGH] [Supreme Court] December 12, 2013, docket No. 6 Ob 43/13m in 2014 ÖJZ 381.

17. *E.g.* sec. 6 of the Swedish Arbitration Act, sec. 7 of the Danish Arbitration Act, sec. 31 of the Irish Arbitration Act and sec. 11 of the New Zealand Arbitration Act.

18. Oberster Gerichtshof [OGH] [Supreme Court] Jul. 22, 2009, docket No. 3 Ob 144/09m, in 2010 RdW 20; *see* Christian Dorda & Veit Öhlberger, *Vienna Perspective – 2010*, 25 Mealey's International Arbitration Report 43 (2010); for further details *see* Veit Öhlberger, Case Comment, *Zur (Nicht-) Anwendung schiedsrechtlicher Verbraucherschutznormen in ausländischen Schiedsverfahren*, 65 ÖJZ 188 (2010).

19. *See* Veit Öhlberger, Sind Schiedsklauseln in GbmH-Gesellschaftsverträgen noch möglich? 2008 ecolex 51; Markus Schifferl & Sixtus Kraus, *§ 617 ZPO und Schiedsklauseln in Gesellschaftsverträgen*, 2011 GesRZ 341; Christoph Stippl in SCHIEDSVERFAHRENSRECHT I 4/109 (Liebscher, Oberhammer & Rechberger eds., 2012).

20. For further details *see* Christian Dorda & Veit Öhlberger, *Vienna Perspective - 2013*, 28/7 Mealey's International Arbitration Report 25 (2013). ■

[docket No.:] **2 Ob 112/12b**

Republic of Austria
Supreme Court

[Decision of 17 June 2013]

The Supreme Court confirmed the decision of the Higher Regional Court of Graz (23 March 2012, GZ 2 R 48/12i-3). Plaintiff had sought review of the Higher Regional Court decision, which was an appeal of a decision of the Regional Court for Civil law matters of Graz (27 December 2009, GZ 16 Cg 233/09h-26). The Defendant had appealed the regional court decision on legal grounds. Justices Dr. Baumann (president of this Chamber), Dr. Veith, Dr. E. Solè, Dr. Schwarzenbacher and Dr. Nowotny presided over the case. The case was an enforcement matter regarding the setting aside of an arbitral award. The arbitration was between the Plaintiff K***** GmbH, ******, represented by Dr. Michael Kropiuinig, lawyer in Leoben, against the Defendant (as of now) S***** GmbH, *****, represented by Mat. Karl Peter Resch, lawyer in Knittelfeld, and the Intervener siding the Respondent Mag. M***** M*****. The Supreme Court decided the matter in a closed session.

Decision

Holding

I. [. . .]
II. The Appeal is rejected. [. . .]

Facts and Procedural History:

I. [. . .]

II. The shareholders of B. GmbH owned 95% of the S. GmbH and 5% of another GmbH. The E. AG held 99.996% of the shares of owned by the primary shareholder. The defendants hired Plaintiff in 2004 to deliver, assembly and commission in Leoben three purification plants for furnaces and exhaust gas. The Parties agreed that all disputes would be decided through arbitration. After the delivery of the plant on August 4, 2005, the Plaintiff presented a final invoice. A dispute broke out over a defect and this led to four different arbitrations in Austria. The Defendant, as intervener, was represented by legal counsel. The plaintiff named Dr. A.P. as arbitrator in all of the arbitrations, while defendant named Dr. K.K. Dr. G.Z. was the chairman of the various tribunals. All three arbitrators were lawyers.

The arbitration commenced on June 30, 2009 (the arbitration relevant to the appeal) and ended on October 28, 2010 with an arbitral award of 76 paragraphs. The award rejected the relief sought, in the alternative, of EUR 482,508.85. The Tribunal at one of the "final arbitration hearings" rejected a request to increase the relief sought to EUR 688,853. The Plaintiff had sought the payment of the agreed retention money (*Haftungsrücklass*), which the Defendant objected to because of the defect. With regard to the "flame retardant bricks of the three fireproof boxes," the award found in para 41 that the cost of the repair of the flame retardant bricks was EUR 515,409.59 gross. The Arbitral Tribunal rejected the requested relief for this reason.

On November 11, 2011 the Plaintiff filed an application with the court of first instance for a declaration that the arbitrator Dr. K. K. (nominated by the defendant) was biased, in the alternative that he was legally excluded from office. The Plaintiff challenged the arbitrator under section 589 of the Austrian Code of Civil Procedure (ACCP). An arbitrator can be challenged under section 589 if, when looking at the relevant circumstances, an issue arose that could give rise to justifiable doubt as to the impartiality of the arbitrator after the arbitral award had been rendered. The Plaintiff challenged the arbitrator in the arbitration proceedings. The former arbitrators consequently informed the Plaintiff that their mandate as arbitrators had already terminated. For this reason a decision concerning the request for a challenge was not made. The application to the courts for a declaratory finding was ultimately rejected. (see also 6 Ob 228/10p)

In the action filed on December 9, 2009, the Plaintiff sought to set aside the arbitral award of October 10, 2009 or, in the alternative, the awards paragraph 41.

The Plaintiff based his application on multiple grounds. The primary reason being that the composition of the arbitration tribunal was incorrect because the arbitrator Dr. K. K. was to be legally considered "excluded from office," or at least otherwise biased. In addition to the other – fully described - reasons for challenging the arbitrator, the knowledge about a close relation between the arbitrator and the (arbitration) Defendant

came to their attention only after the arbitral award was rendered. The arbitrator is a member of the supervisory board of the E AG.

Only during the first instance proceedings did the applicant submits/claims that the chairman of the arbitral tribunal Dr. G.Z. should be considered "excluded" or at least declared biased. The law firm he is partner of had had drafted a contract on "superaedificates" between the Defendant and the Defendant's minority shareholder concerning the plants that are the subject matter of the underlying dispute.

The Defendant argued that the grounds for challenging the arbitrator asserted by Plaintiff were insufficient to exclude the arbitrator or find him biased. Furthermore, these grounds for challenging the arbitrator cannot be taken into account when seeking to set aside the award after it had already been rendered.

The Court of First Instance dismissed the action/claim.

The court believed that the grounds for challenging an arbitrator that come to a party's attention after the award has been rendered can, in principle, not provide a basis to set aside an award. Only very extreme and clear cases of (lack of impartiality) bias can, under certain circumstances, constitute a breach of procedural *odre public* (section 611 para 2 No 5 ACCP) and, consequently, a basis to set aside the arbitral award after the arbitral proceedings have ended.

The Court of Appeal confirmed the decision. The court found that the value of the decision exceeded EUR 30,000 and that a second appeal was permitted.

The Court of Appeal essentially shared the legal reasoning the Court of First Instance and added that the arbitral award has the same effect between the parties of the arbitral proceedings as a final and binding court judgment under section 607 ACCP. If the Parties had chosen court proceedings instead of arbitration, no judge would have been excluded from the proceedings due to the stated reasons for challenge under section 20 JN. In the event a judge is merely biased, even if in a 'severe and clear' manner, a legally binding judgment cannot be set aside, neither by action for resumption nor by action for annulment. There is no reason to differentiate between arbitral awards of biased arbitrators and final and legally binding judgments of biased judges. If it were possible to assert, via an action for annulment, "very serious and clear cases of bias," it would give an incentive to an aggrieved party to search, after a non-favorable arbitral award was rendered, after grounds to challenge arbitrators or to claim reasons which they (and the concerned arbitrator) already knew during the proceedings.

The appeal to the Supreme Court is permitted because in the decision 6 Ob 228/10p the question, whether an arbitral award can be revoked/set aside with an action for annulment due to reasons for challenge that came to knowledge after it was rendered, remained unanswered.

The judgment of the Court of Appeal is now appealed by Plaintiff by reason of incorrect legal evaluation. Plaintiff requests to reverse the challenged judgment or, in the alternative, to lift it.

The Defendant requests (in its answer to the appeal) the Supreme Court to reject the appeal as inadmissible, in the alternative, that the appeal should not be granted. The intervening party did not take part in the appeal proceedings.

The appeal is admissible for the reason outlined by the appellant court. However, the appeal is rejected.

The applicant party argues that the status of an arbitrator cannot be equated with the status of a judge because of inherent differences. The independence and impartiality of an arbitrator is an essential principle and a supporting pillar of arbitration. The appellant court neither assessed the relevant jurisprudence and the doctrine of the law, nor has it dealt with the decision 7 Ob 314/04h. The reasons for the challenge, which came up after the rendering of the arbitration award, – namely concerning the membership in the supervisory board of the E. AG of arbitrator Dr. K. K. and the (allegedly) biased chairman Dr. G.Z. – need to be qualified, according to the Plaintiff, as 'very serious and clear' cases (*'besonders schwerwiegende und eindeutige' Fälle*). Pursuant to the IBA-Guidelines on Conflicts of Interests in International Arbitration, even if not expressly agreed upon by the parties, are particularly important with regard to the interpretation of the Austrian Code of Civil Procedures [ACCP]. Under the guidelines, a party's supervisory board membership would lead to the unconditional exclusion of an arbitrator.

Legal Reasoning

1. Preliminary remark:

The Austrian Arbitration Act 2006 (*Schiedsrechtsänderungsgesetz 2006* – AA06), which entered into force on July 1, 2006, applies to the question of whether the grounds to challenge an arbitrator, which came up after the arbitral award has been rendered, can be enforced with an action for annulment. The jurisprudence and doctrine on the former arbitration act, however, provide a starting point for considering the question. On those grounds it has to be considered if the new regulations in AA06 lead to a different analysis in this case.

2. Legal position before the AA06:

2.1 Section 586 Para. 1 ACCP provided that an arbitrator can be challenged for the same reasons as a judge (sections 19 and 20 JN). These comprised grounds for exclusion as well as lack for impartiality, which had to be enforced with an action for annulment (*Rechberger/Melis* in Rechberger, ACCP[2] section 586 ¶ 2). For the evaluation of the arbitrator's lack of impartiality the regulation in section 19 no 2 JN was decisive (9ObA 94/09w; Rechberger/Melis op. cit. section 586 ¶ 2).

2.2 A challenge to an arbitrator was not regulated by law. In accordance with prevailing opinion the arbitral tribunal had to decide on the challenge of an arbitrator. The challenged arbitrator as allowed to be present and to vote, unless no differing regulation was laid down in the arbitral agreement (7 Ob 236/05i mwN; RIS-Justiz RS0117293). A court would review such a decision. According to section 595 Para. 1 No. 4 ACCP, it was possible to vacate the arbitral award only if the arbitrator's challenge was 'unjustly' rejected by the arbitral tribunal (7 Ob 236/05i; *Rechberger/Melis* op. cit. section 586 ¶ 3). Yet, an interlocutory decision could not be contested with the public court. Legal literature strongly criticized this conclusion (*Rechberger/Rami*, Die Ablehnung von Schiedsrichtern durch die Parteien, wbl 1999, 103 [105 (FN 25)]).

2.3 According to the Austrian Supreme Court (decision 7 Ob 314/04h (=ecolex 2005/131, 288 [Klausegger/Hanusch])), the supposed lack of impartiality of a judge, which only emerged after the arbitral award had been rendered, cannot be enforced by an action of annulment (see also 6 Ob228/10p). In doing so, the Supreme Court followed *Fasching*'s doctrine (Komm IV 881 ua) which states that in post-award situations only a reason for "exclusion from office" can justify an action for annulment according to section 595 Para. 1 No. 4 ACCP, while a mere lack of impartiality cannot justify one (need not be addressed here the legal views which oppose such a differentiation, with the exception that one must not decide its own matter; see *Matscher*, Probleme der Schiedsgerichtsbarkeit im österreichischen Recht, JBl 1975, 412, 452 [465]; *Backhausen*, Schiedsgerichtsbarkeit unter besonderer Berücksichtigung des Schiedsvertragsrechts [1990] 177 seq). The seventh senate also referred to the German concept that in a similar legal position (sections 1036, 1037, 1059 German CCP) grounds for challenging an arbitrator, which emerge after the rendering of the award, can basically not be enforced because of the need to guarantee legal peace and certainty. The only exceptions to the principle are when an extreme and clear case of lack of impartiality exists or extreme violations against *ordre public* have taken place. This standard was not met in the case in question.

3. Current legal position

3.1 Under section 588 para. 1 ACCP, after being changed in accordance with Art 12 UNCITRAL-Model Law and section 1036 GCCP (German Code of Civil Procedure), arbitrators are legally obligated to disclose any possible grounds for challenge. According to section 588 para. 2 first sentence ACCP an arbitrator may only be challenged when circumstances exist that give rise to justified doubts about his or her impartiality or independence, or when the arbitrator does not possess the qualifications agreed upon by the parties.

3.1.1 Contrary to section 586 ACCP (old version) the legislative text does not refer to the regulations concerning the exclusion and lack of impartiality of judges (section 19seq JN). The party's view in the appeal notwithstanding this new phrasing does not change the previous legal position (see ErläutRV 1158 BlgNR XXII. GP 13; *Rechberger/Melis* in *Rechberger*, ACCP[3] section 588 ¶ 1; *Hausmaninger* in *Fasching/Konecny*[2] IV/2 section 588 ¶ 80; different view *Koller*, Das neue österreichische Schiedsrecht, JAP 2005/2006/30, 182 [185],

who advocates that the new provision would embrace a larger range of possible grounds of challenge). The grounds for challenging a judge still apply to arbitration (*Riegler/Petsche*, Die Bildung des Schiedsgerichts, in *Liebscher/Oberhammer/Rechberger*, Schiedsverfahrensrecht I [2012] mn 5/186; *Hausmaninger* op. cit. section 588 mn 86; in that sense the prevailing German view: compare *Kröll*, Die Ablehnung eines Schiedsrichters nach deutschem Recht, ZZP 116 [2003], 206 f; *Münch* in MünchKomm ACCP[3] [2008] section 1036 mn. 30 mwN; contrary, favouring an autonomous definition of grounds of a challenge *Matusche-Beckmann/Spohnheimer* in FS von Hoffmann [2011], Überlegungen zu den Rechtsbehelfen gegen den [Nicht-]Ausschluss befangener Schiedsrichter, 1033).

3.1.2 The IBA-Guidelines on Conflict of Interest in International Arbitration 2004 (short: IBA-Guidelines) that were mentioned in the appeal do not have normative value and are only legally relevant if agreed upon by the parties (*Riegler/Petsche* op. cit. ¶ 5/156; *Hausmaninger* op. cit. section 588 ¶ 30). The scope/objective of these guidelines is to help parties, their counsels, arbitrators, arbitral institutions and national courts with questions concerning the independence and impartiality, disclosure and challenge to arbitrator by creating long lasting, internationally accepted standards (*Riegler/Petsche* op. cit. ¶ 5/156). The IBA-Guidelines offer in their first part, seven general standards; while the second part contains practical guidance in the form of concrete examples. The IBA-Guidelines use a traffic light system, structured in a *Green list*, *Orange List* and *Red List* of arbitrator conflicts. The *Red List* contains circumstances that constitute either absolute grounds to challenge an arbitrator (*Non-Waivable List*) or serious reasons for challenge (*Waivable Red List*). The *Orange List* names the circumstances in which a specific case gives rise to a justifiable doubt about to the impartiality of the arbitrator. Circumstances that do not indicate any appearance of bias are listed in the *Green List* (see for detailed info *Riegler/Petsche* op. cit. ¶ 5/165 ff; *Hausmaninger* op. cit. section 588 ¶ 38; *Zeiler*, Schiedsverfahren [2006] section 588 ¶ 12seq and ¶ 22; also compare with *Münch* op. cit. section 1036 ¶ 13). *Riegler/Petsche* (op. cit. ¶ 5/156) and *Zeiler* (op. cit. section 588 ¶ 5) recommend using the IBA-Guidelines in the interpretation of section 588 para. 1 und 2 ACCP.

3.2 In accordance with Art 13 UNCITRAL-Model Law and section 1037 GCCP, the procedure for challenging an arbitrator is contained in section 589 ACCP (see 6 Ob 228/10p). According to section 589 para. 2, the challenging party has to notify the arbitral tribunal in writing within four weeks after the ground for challenging the arbitrator has come to its attention, unless the parties agreed on an alternative procedure. Within four more weeks the challenging party has the right to apply for a rejection against a negative decision. No appeal against this decision is permitted.

Criticism about the previous legal position (see para 2.2) was addressed by creating a way to clarify, with the help of the civil court, the question of challenging an arbitrator while the arbitration remains pending (see *Koller* op. cit. 186). The regulation's principles still correspond to the prevailing opinion before the reform. Therefore, the existing jurisprudence can still be used for interpretation (*Riegler/Petsche* op. cit. ¶ 5/206; *Hausmaninger* op. cit. section 589 ¶ 13).

A party only has four week to raise an arbitrator challenge with the arbitration court or to file challenge with the civil court, the assertion of the grounds for challenge. After four weeks the claim becomes inadmissible (see ErläutRV 1158 BlgNR XXII. GP 13seq and ¶ 27; *Riegler/Petsche* op. cit. ¶ 5/220 und ¶ 5/223 [with the exception of reasons of exclusion from office shown in the *Non-Waivable Red List*]; *Hausmaninger* op. cit. section 589 ¶ 40 und ¶ 64 as well as section 611 ¶ 160; *Koller* op. cit. 186). Once an arbitral award has been rendered the arbitration proceedings terminate and the arbitrators' mandate ends, which means that a party can no longer raise a challenge to an arbitrator (6 Ob 228/10p).

3.3 Case 7 Ob 314/04h decided the issue of whether the Austrian Arbitration Act 2006 (for the previous legal position see point 2.2) now allowed a challenge via an action for annulment to an arbitrator after an arbitral award was ernedered (Section 611 ACCP). The issue remains controversial, as the Austrian Supreme Court

already referred to in its decision 6 Ob 228/10p, which refers to the underlying case. It is generally agreed that an arbitrator will be excluded from his mandate if the principle that someone must never judge their own case is violated. Such a violation would exist if a party appointed as an arbitrator itself, a legal representative or a proxy (*Hausmaninger* op. cit. section 588 ¶ 152; *Rechberger/Melis* op. cit. section 588 ¶ 2; *Riegler/Petsche* op. cit. ¶ 5/188).

3.3.1 Proponents of a right to (unrestricted) appeal:

- *Rechberger/Melis* (op. cit. sec 611 ¶ 7) advocate for the unrestricted possibility to raise an arbitrator challenge via an action of annulment based on grounds that arise after the rendering of the arbitral award. To justify this position they argue that grounds for challenging an arbitrator that arise after the award meet the conditions of section 589 ACCP. Therefore, the distinction between reasons for challenge and reasons for exclusion is irrelevant.
- According to *Reiner* (Das neue österreichische Schiedsrecht [2006] ¶ 199; *idem*, SchiedsRÄG 2006: Wissenwertes zum neuen österreichischen Schiedsrecht, ecolex 2006, 468; *idem*, Gerichte und Schiedsgerichte, ÖJZ 2009/32, 302 [304]) a lack of independence that comes to Parties attention after the rendering of the arbitral award can be subsumed either under the ground for annulment under section 611 para. 2 No. 4 (Deficiencies concerning the constitution or composition of the arbitral tribunal) or under the ground for annulment under Section 611 para. 2 No. 5 (breach of procedural *odre public*).
- *Torggler* (Praxishandbuch Schiedsgerichtsbarkeit [2007] 231 ¶ 38) is also convinced that the ground for annulment under Section 611 para. 2 No. 4 ACCP is 'mainly applicable' when the grounds for a challenge become only after the arbitral award was rendered.
- *Riegler/Petsche* (op. cit. ¶ 5/244) support this view. Because of the fundamental importance of the impartiality of the decision making body, an action to annul an arbitral should be available to both exclusion and challenge proceedings.

3.3.2 Opponents of an (unrestricted) appeal:

- *Hausmanninger* (op. cit. Section 589 ¶ 42 and 85, Section 611 ¶ 160) considers the principles of legal security and peace contained in decision 7 Ob 314/04h relevant and does not address the exceptions contained in the German doctrine and jurisprudence regarding extreme and clear cases of lack of impartiality. He believes that only cases of partiality rising to the level of a violation *ordre public* constitute a basis to exclude an arbitrator (Section 611 para. 2 No. 8 ACCP).
- *Klausegger/Hanusch* (ecolex 2005, 289) commented on decision 7 Ob 314/04h and were of the opinion that under the current legal position an arbitral award cannot be annulled due to an subsequently discovered case of bias of an arbitrator. According to them, one must fear that parties would have an incentive to look for a ground to challenge an arbitrator, after an unfavourable arbitral award was rendered in order to obtain judicial review of the substance of the award and, consequently, expand the narrow basis to annul an award.
- *Zeiler* (op. cit. section 589 ¶ 14 und section 611 ¶ 27) stresses that, in accordance with the decision 7 Ob 314/04h, a challenge to an arbitrator is only possible before the award has been rendered and if the grounds to challenge arise at a later point in time that the award in principle cannot be annulled. In the event that very severe and clear case of bias emerge, a party can seek annulment based on procedural *ordre public* (Section 611 para. 2 No. 5 ACCP).
- *Pitkowitz* (Die Aufhebung von Schiedssprüchen [2008] ¶ 294 und ¶ 297) adheres to the jurisprudence under previous legislation on Section 611 para. 2 No. 4 ACCP and interprets it to indicate that only a ground for exclusion arising at a later point and not a ground for challenge may lead to the setting aside of the arbitral award.

4. Interim evaluation:

4.1 The Supreme Court in this case will not diverge from established jurisprudence, which it does not find to be inconsistent as implied by *Reiner* (ecolex 2006, 468 [fn 4]). The cited decision 9 ObA 94/04w explicitly stresses that the second instance court's conclusion that the lack of impartiality of an arbitrator presented a ground for setting-aside the award was not doubted by the appellate court and, therefore, has not been reviewed.

Therefore, the principles laid down in the decision 7 Ob 314/04h remain valid under the Austrian Arbitration Act 2006.

4.2 *Kröll* (op. cit. 211 f) explains very convincingly that the necessary independence and impartiality

of the arbitrators seems to support the possibility of an unrestricted right to challenge an arbitrator in the set-aside proceedings. However, such an unrestricted right goes against other significant principles like legal security and peace. These principles have to be weighed against each other as the German Supreme Court has done in its jurisprudence (see BGHZ 141, 90 = NJW 1999, 2370). In that situation the national legislator has already outlined the procedure of evaluating conflicting principles before the civil courts. For the sake of legal security and peace, the time to raise an arbitrator challenge must be substantially limited but without suspending them totally so that the principle of impartiality of the arbitrator is reasonably accommodated for (compare auch *Geimer* in *Zöller*, ACCP29 section 1037 ¶ 7; *Münch* op. cit. section 1037 ¶ 34 f).

4.3 These German legal findings are relevant for the new Austrian legal position and have already applied in case 7 Ob 314/04h. The Austrian legislator, who sought convergence with the German law, constructed clear procedures under section 589 ACCP to raise a challenge to an arbitrator. Section 589 ACCP did not provide any rules for the case that a party becomes aware of a basis to challenge an arbitrator after the arbitral award has been rendered. When a case is before the civil courts, the ground for annulment under section 477 para. 1 No. 1 ACCP is not even appealable as soon as the decision has reached formal legal force; a later challenge does not come into question (1 Ob 18/02g mwN; 3 Ob 5/13a; RIS-Justiz RS0041974, RS0046032). Solely the exclusion from office of a judge could be raised by way of a claim for nullity pursuant to section 529 para. 1 No. 1 ACCP and, thus, result in the cassation of an enforceable decision. Since section 588 ACCP only knows reasons of a challenge and does no distinguish between reasons of bias and reasons of exclusion, the differentiation by *Fasching*, which the Supreme Court did not have to address in its decision 7 Ob 314/04h (as mentioned above in 2.1), has actually become obsolete (*Rechberger/Melis* o.p. cit. section 611 ¶ 7; the same meaning also taken by *Oberhammer*, Entwurf eines neuen Schiedsverfahrensrechts [2002] 69).

4.4 Hence, the grounds to challenge an arbitrator that come to a party's attention at a later point can generally not be enforced via a proceeding to set aside the arbitral award. However, in extreme cases exceptions could be made. The required considerations have to be accounted for during an annulment proceeding under section 611 para. 2 No. 4 ACCP (compare BGHZ 140, 90 [95]). Whether such an extreme case of bias exists must be evaluated based on the facts of the individual case. An award will certainly be set aside if a case of bias exists that rises to the level of exclusion under section 20 of the Law on Jurisdiction. The IBA-Guidelines can provide guidance even if not expressly agreed upon by the parties.

4.5 In addition, the legislator created a new ground to challenge an arbitrator under section 611 para. 2 No. 5 ACCP, which was not based on the UNICITRAL Model Law or section 1059 German CCP (compare *Rechberger/Melis* op. cit. section 611 ¶ 8; *Hausmaninger* op. cit. section 611 ¶ 166). Pursuant to this provision, a court will set aside an arbitral award when the arbitral proceedings contradicted fundamental values of the Austrian legal system (*ordre public*). These are such extreme procedural errors that they cannot be accepted by the legal system (*Hausmaninger* op. cit. section 611 ¶ 170 mwN; *Zeiler* op. cit. section 611 ¶ 29; *Pitkowitz* op. cit. ¶ 320). Examples of such violations include the right to be heard, the capacity to be a party to legal proceedings, the representative power, ignoring the legal validity, or rendering an arbitral award without collecting evidence (compare *Hausmaninger* op. cit. section 611 ¶ 172 ff; *Pitkowitz* op. cit. ¶ 322; *Torggler* op. cit. 234 f ¶ 54), and disregarding the principle of independence and impartiality of the arbitrator (*Hausmaninger* op. cit. section 611 ¶ 173 mwN; compare also *Kröll* op. cit. 214).

As a result, an action for annulment can be based on section 611 para. 2 No. 5 in extreme cases of bias.

5. Evaluation of the underlying case

5.1 The applicant party's discussion in the second appeal with regard to the possibility of setting aside an arbitral award due to exclusion or a lack of impartiality of an arbitrator are limited to two grounds for challenge. The Supreme

Court subsequently discusses in detail these two grounds but did not review the other grounds for challenge (compare RIS-Justiz RS0043338 [T15, T20], RS0043352 [T35]).

5.2 Arbitrator Dr. K. K.'s position on the supervisory board or the grandparent company of the defendant party:

5.2.1 The parties do not contest the fact that the arbitrator is one of the eight members of the supervisory board of the defendant's grandparent company (at the time) and the fact that the companies constitute a group (see section 15 Joint Stock Corporations Act - *Aktiengesetz*). (In the meantime the sub-subsidiary and the parent company have merged; see I). Despite the uniform managerial control of the group, the companies remain legally independent. The supervisory board of the controlling company is not the supervisory board of the group. It is only a body of the parent company and, thus, serves their interests and not the interests of the subsidiaries or the group (see *Eckert/Gassauer-Fleissner* Überwachungspflichten des Aufsichtsrats im Konzern, GeS 2004, 416 [419]; *Kalss* in *Kalss/Nowotny/Schauer*, Gesellschaftsrecht [2008] ¶ 3/933; *eadem* in *Doralt/Nowotny/Kalss*, AktG^2 [2012] section 95 ¶ 33).

Taking into account this legal position, the arbitrator, contrary to view of the defendant, was not acting as a judge in his own case and did not create a basis to challenge an arbitrator corresponding to section 20 para 1 No. 1 JN nor a breach of procedural *ordre public* (see *Riegler/Petsche* op. cit. ¶ 5/238; according to *Hausmaninger* op. cit. section 589 ¶ 152 and section 611 ¶ 222 a conflict with the substantive *ordre public* has occurred in this case). As the parent company is not involved in the dispute, a conflict falling under the *Non-Waivable Red List* of the IBA-Guidelines does not exist (especially criteria 1.2: '*The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence in one of the parties.*'), which in this case only works as an interpretation aid, got fulfilled (see *Hausmaninger* op. cit. section 588 ¶ 98; *Zeiler* op. cit. section 588 ¶ 12).

5.2.2 The supervisory board is only responsible for monitoring the performance of the executive board of the controlling company and not the performance of the executive board of the subsidiaries (*Kalss* in *Doralt* ua op. cit. section 95 ¶ 34). The benchmark for all operational measures is the circumstances of the parent company and not those of the subsidiaries (*Eckert/Gassauer-Fleissner* op. cit. 419). One task of the supervisory board is to supervise and consult the executive board of the parent company concerning the group management (if effectively executed), because this represents a management duty under section 95 para. 1 Aktiengesetz (*Kalss* in *Doralt* ua op. cit. section 95 ¶ 35; *Eckert/Gassauer-Fleissner* op. cit. 422). The supervisory board must monitor the developments of the subsidiaries when it comes to their economic activities that are important for the parent company or has to evaluate situations where it is necessary that the parent company has to exercise control over the subsidiary (*Kalss* in *Doralt* ua op. cit. section 95 ¶ 37). This means the supervisory board is also responsible for monitoring the group (compare 6 Ob 34/08f = Ges¶ 2008, 225 [*Kalss*]). To comply with these duties the supervisory board can use its right to obtain information as well as its right to reserve its right of approval (*Eckert/Gassauer-Fleissner* op. cit. 423 ff).

5.2.3 Based on this briefly outlined legal position, it has to be examined whether the arbitrator had an obligation to disclose his membership on the supervisory board of the controlling company. If so, then it must be examined whether a basis to challenge him as an arbitrator existed. Both facts would be true if this indirect relationship with the defendant gave reason not only for doubt (section 588 para. 1 ACCP), but for reasonable doubt (section 588 para. 2 ACCP), as to the independence or lack of impartiality of the arbitrator. The applicable standard is that of a reasonable third-person who knows all relevant facts (*Hausmaninger* op. cit. section 588 ¶ 83; *Riegler/Petsche* op. cit. ¶ 5/190).

5.2.4 Members of the supervisory board have certain rights and obligations vis-à-vis the company. They are entitled to claim payment, reimbursement of their expenses, and are liable for mistakes (compare *Kalss* in *Kalss ua* op. cit.

¶ 3/493 f and ¶ 3/575). As the monitoring duties in a group of companies also extend to the subsidiaries, even if only held indirectly and in a limited way, an economic interest of the defendant implicitly exists. This interest should not be overrated (if it was essential, an action of the *Non-Waivable List* would have been fulfilled), still it should have compelled the arbitrator to disclose his membership, even in the case of doubt. The Supreme Court in this case concludes that the economic interest of a member of the supervisory board of the Group gives rise to a reasonable doubt (for a reasonable third person) as to the lack of impartiality of an arbitrator in an arbitration where a subsidiary is a party of the procedure. Hence a ground for challenge existed.

5.2.5 The applicant obtained no advantage from this. Due to the only indirect relation between the arbitrator and the defendant party, the basis for the challenge is not of essential significance and does not constitute an extreme case of lack of impartiality (as requested under part 4 (see above)). The weighing of the conflicting principles favours protecting legal peace and security. The applicant cannot set aside the award on a ground for challenge under section 611 para 2 No. 4 and No. 5 ACCP as there has been no violation of the *procedural ordre* public as well.

5.3 Contract on superaedificates between the defendant and its minority shareholder, drafted by the law firm the chairman of the arbitral tribunal Dr. G.Z.

5.3.1 Under section 611 para. 4 first and second phrase ACCP, an action to set aside has to be filed within three months. The deadline starts from the day the applicant receives the arbitral award. In this case this took place in 2009.

The applicant claimed that the grounds for challenging the chairman of the arbitral tribunal only came to its attention in its written submission of November 7, 2010 (appeal against a resolution for interruption - *Unterbrechungsbeschluss*), whereby the applicant claimed this to be his 'today's submission' during the hearing on September 30, 2011.

The Supreme Court examined the timeliness in case 6 Ob 186 / 97i of the date of actual knowledge of the ground for annulment. This, however, happened on the legal basis of section 596 para 2 ACCP, the second sentence of which states: This period begins on the day on which the award is delivered, but if the ground of annulment was not known until later, then it begins with the day on which the party learns of the ground for annulment. The second sentence of this provision was amended by the Austrian Arbitration Act 2006 (*Schiedsrechtsänderungsgesetz 2006*), which did not incorporate the legal materials that provide information about the motive for this one restriction (compare ErläutRV 1158 BlgNR XXII. GP 28). However, for the following reasons the question of whether the ground for annulment was made within the time allowed is not relevant and, therefore, not further discussed.

5.3.2 The applicant based its arguments on the Contract on Supereaedificates (*Superädifikats- und Bestandsvertrag*) of Mai 2, 2005 (Supplement./V), which they submitted as an exhibit. This contract was for plants delivered by the applicant and was drafted by the law firm (based in Vienna) of the chairman of the arbitral tribunal at that point of time. With regard to the planned takeover of shares by the minority shareholders, both contracting parties had a meaningful economic interest in the favorable outcome of the arbitration. Therefore, it was not relevant whose interests were represented by this law firm.

5.3.3 When evaluating representative activities of a law firm for an party to an arbitration or a company of a group, a distinction should be drawn between activities concerning the same affair or a different one, as well as if it concerned a current or previous (already terminated) activity. It is not relevant whether the arbitrator was engaged himself or the law firm of which he was part of (compare *Lachmann* in FS Geimer [2002], Gedanken zur Schiedsrichterablehnung aufgrund Sozietätszugehörigkeit 518seq; *Hausmaninger* op. cit. section 588 ¶ 107; *Riegler/Petsche* op. cit. ¶ 5/170seq [einschränkend in ¶ 5/192 FN 413]). According to Riegler/Petsche (op. cit. ¶ 5/192), examples that give rise to a reasonable doubt (section 588 para. 2 ACCP) include: regular and for

the arbitrator or his law firm economically relevant consultations with the nominating arbitration party (or an affiliated company); prior involvement by the arbitrator or his law firm in the same case; current representation or other activity for (as well as against) an arbitration party or any affiliated companies; longstanding representation of an arbitration party or an affiliated company by a lawyer.

The IBA-Guidelines mention in their Standard 6 ('Relationships') that current and prior legal representation of a law firm for an arbitration party does not automatically justify a challenge to an arbitrator. It depends on whether such a service takes place currently or previously, and if the arbitrator was engaged (compare *Hausmaninger* op. cit. section 588 ¶ 36; *Riegler/Petsche* op. cit. ¶ 5/163).

5.3.4 The Supreme Court's jurisprudence did not see a reason for challenge in decision 5 Ob 208/71. In this case an arbitration party had been previously represented by legal counsel in a tax case. Furthermore, the prior representation of an arbitration party in a different arbitration procedure was not enough to represent a special relationship between the arbitrator and the party (7 Ob 96/03y). On the other hand, such a relationship has been confirmed in the case of a lawyer representing an arbitrator for many years in other disputes (9 ObA 94/04w).

5.3.5 The 'Superädifikats- und Bestandsvertrag' contract was concluded between the defendant and its minority shareholders according to the submissions of the applicant (no findings are available). It did not affect the legal relationship of the disputing parties and is, therefore, not the subject matter of the arbitration between the parties at issue. From the applicant's submission it is not clear that there have been any other relationships or representative activities beyond the presented contract between the law firm and the defending party or their affiliated companies. The applicant party, thus, asserts that a onetime activity of the law firm in the defending party or their affiliate companies prior to the arbitration in question provides a basis to challenge the arbitrator.

5.3.6 According to *Lachmann* (op. cit. 522), in such a case the arbitrator had an obligation to disclose the relationship. Nevertheless, this would not provide a ground to challenge the arbitrator (see also *Hausmaninger* op. cit. section 588 ¶ 107 und *Riegler/Petsche* op. cit. ¶ 5/192). The IBA-Guidelines would (at the most) classify the conflict of interest as an *Orange List* item (see *Riegler/Petsche* ¶ 5/168).

5.3.7 The Supreme Court concludes that the arbitrator had to disclose the circumstances in the case of doubt. However, it was not sufficient to give rise to a reasonable doubt about the lack of impartiality and independence of the arbitrator from the perspective of an informed, reasonable third-person. No basis to challenge the arbitrator under section 588 para. 2 no 2 ACCP exists.

6. Result and costs

6.1 For the reasons set out above, the main claims are not justified.

The alternative claim to set the arbitral award aside only with regard to paragraph 41, which was originally based on section 611 para 2 No. 3 by the applicant, was not raised in the present appeal and the court, therefore, did not review it.

6.2 The appeal was, therefore, not granted.

The decision on costs is based on sections 41 and 50 ACCP. ■

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