Austrian Yearbook on International Arbitration 2017

The Editors

Christian Klausegger, Peter Klein, Florian Kremslehner, Alexander Petsche, Nikolaus Pitkowitz, Jenny Power, Irene Welser, Gerold Zeiler

The Authors

Lisa Beisteiner, Klaus Peter Berger, Tobias Birsak, Stavros Brekoulakis, Katharina Bruckner, Yuliya Chernykh, Giuditta Cordero-Moss, Dietmar Czernich, Chloe Edworthy, Eliane Fischer, Ulrike Gantenberg, Jonas von Goeler, Diego Brian Gosis, Wolfgang Hahnkamper, Heidrun Halbartschlager, Christoph Hauser, Michael Hofstatter, Emmanuel E. Kaufman, Judith Knieper, Christopher Koch, Ulrich Kopetzki, Wolfgang Kiihn, Innhwa Kwon, Michael Mcllwrath, Reza Mohtashami, Corinne Montinieri, Helmut Ortner, Vladimir Pavic, Silvia Petruzzino, Gunnar Pickl, Sylwester Pieckowski, Jarred Pinkston, Nikolaus Pitkowitz, Roman Prekop, Katharina Riedl, Markus Schifferl, Dorothee Schramm, Yoanna Schuch, Alfred Siwy, Alexandra Stoffl, Selma Tiric, Ezequiel H. Vetulli, Michael Walbert, Irene Welser, Stephan Wilske, Mathias Wittinghofer, Venus Valentina Wong, Rabab M.K. Yasseen



Wien 2017

MANZ'sche Verlags- und Universitatsbuchhandlung Verlag C.H. Beck, Miinchen Stampfli Verlag, Bern

Introduction	III
Overview	V
The Editors and Authors	XVII
Chapter I The Arbitration Agreement and Arbitrability	1
Stavros Brekoulakis/Jonas von Goeler	
It's All About The Money: The Impact Of Third-Party Funding On Costs Awards	
And Security For Costs In International Arbitration	3
I. Introduction	3
II. Awarding Of Costs	4
A. Should A Prevailing Funded Party Be Able To Recover Party Costs	
At All Where These Costs Have Been Funded By A Third Party?	6
B. What Amount And Type Of Recoverable Can A Prevailing Funded Party	
Recover?	7
C. Can Arbitral Tribunals Render Costs Orders Directly Against Third-Party	
Funders?	8
III. Security For Costs	9
A. Financial Situation Of The Claimant	10
B. Investment Arbitration	10
1. Additional Criteria	10
2. Third-Party Funding As Abuse Or Bad Faith?	12
C. Commercial Arbitration	14
1. Additional Criteria	14
2. Application To Third-Party Funding Scenarios	15
a) Conclusion Of Funding Agreement As Material Change	
Of Circumstances?	15
b) Broader Fairness Concerns	16
IV. Outlook: Increasing Interest For Regulation	17
Eliane Fischer/Michael Walbert	
Efficient And Expeditious Dispute Resolution In M&A Transactions	21
I. Introduction	21
II. Pre-Signing Disputes	22
A. Typical Disputes	22
B. Dispute Resolution Methods	23
1. Litigation v. Arbitration	23
2. Fast-Track Arbitration	24
a) A Need For Speed?	24
b) What Is Fast-Track Arbitration?	24
c) Too Much Speed May Kill The Process	25
d) Institutional Rules For Fast-Track Arbitration	26

	•3. Emergency Arbitrator	27
	a) Urgency v. Speed	27
	b) Interim Relief In International Arbitration	27
	c) Institutional Emergency Arbitrator Rules	28
	d) ICC Rules	28
	C. Drafting Considerations	29
	1. Fast-Track Arbitration	29
	2. Emergency Arbitrator Proceedings	30
III.	Pre-Closing Disputes	30
	A. Typical Disputes	30
	B. Dispute Resolution Methods	33
	1. Fast-Track Arbitration	33
	2. Dispute Boards	33
	3. Emergency Arbitrator	36
	C. Drafting Considerations	36
	1. Fast-Track Arbitration	36
	2. Dispute Boards	38
IV.	Post-Closing Disputes	38
	A. Typical Disputes	38
	1. Validity And Rescission Of The Transaction Documentation	39
	2. Purchase Price Adjustments	39
	3. Representations, Warranties & Indemnities	40
	B. Dispute Resolution Methods	40
	1. Expert Determination	40
	a) Distinction Between Arbitration And Expert Determination	40
	b) Expert Determination Procedure	42
	c) Binding Nature And Enforceability Of Expert Determinations	43
	2. Fast-Track Arbitration	44
	3. Arbitration	45
	C. Drafting Considerations	45
	1. Fast-Track Arbitration	45
	2. Expert Determination	45
	3. Arbitration	46
V.	Conclusion	47
	etmar Czernich	
The	e Theory Of Seperability In Austrian Arbitration Law– Is It On Stable Pillars? .	49
I.	Introduction	49
II.	The Theory Of Seperability In International Arbitration Law	50
	A. Notion and Concept	50
	B. The Rule In The Uncitral Model Law	51
III.	The Theory Of Seperability In Austrian Arbitration Law	51
	A. Rejection Of Art 16 Of The Uncitral Model Law	51
	B. Jurisprudence Of The Austrian Supreme Court	53
	C. Drawbacks On Relying On The Parties Intentions	55
IV.	Practical Concerns	56
V.	Conclusion	57

V. Conclusion

Ezequiel H. Vetulli/Emmanuel E. Kaufman Deciding Who Decides: Issues Arising Out Of The Failure To Fulfill Pre-Arbitration	
Requirements	59
I. Introduction	59
II. The Questions Before The Arbitrators	60
A. What Is The Nature Of Pre-Arbitration Requirements?	60
1. The Difference Between "Admissibility" And "Jurisdiction"	60
2. In Which Category Do Pre-Arbitration Requirements Fall?	62
3. How Should The Parties' Consent Be Interpreted?	63
4. Is There Any Solution When The Parties' Intention Remains Unclear?	65
B. May Pre-Arbitration Requirements Be Bypassed?	65
1. Does The Nature Of Pre-Arbitration Requirements Impact The Possibility	
To Bypass Them?	65
2. When May Pre-Arbitration Requirements Be Bypassed?	66
3. What Have Arbitral Tribunals Ruled So Far?	67
III. Are The Arbitrators' Decisions "final"?	68
IV. Questions Before The State Courts	69
A. What Is The Standard Of Court Review?	70
B. Should The Arbitrators' Categorization Of Pre-Arbitration Requirements	
Be Reviewed?	72
V. Concluding Remarks	73
Chapter II The Arbitrator and the Arbitration Procedure	75
Stephan Wilske/Chloe Edworthy	
The Predictable Arbitrator: A Blessing Or A Curse?	77
I. Introduction	77
II. The Dangers Of Arbitrators' Predispositions	79
A. No Doctrine Of Binding Precedents	80
B. Varying Levels Of Adherence To (Outdated) Substantive Law In Issue	81
C. Does The Outcome Follow The Legal Reasoning Or Vice Versa?	82
D. The Chemistry And Exercise Of Influence Within The Arbitral Tribunal	83
E. When A Beneficial Predisposition Is Not Beneficial Anymore	83
III. The "Auto-Pilot" Arbitrator v. The "Tailor-Made" Arbitrator	84
A. The Arbitrator's Predictable Ability To Be Case-Specific:	
Not Necessarily A Contradiction In Itself	85
B. The Arbitrator's Unprecedented, But Tailor-Made Approach To	
The Specifics Of A New Case	86
IV. Predictably Good Not Predictably Bad	86
A. Predictable Honesty	87
B. Predictable Diligence And Transparency	88

- C. Predicable Exercise Of Time And Cost Consciousness
- V. Conclusion And Outlook

89

90

<i>Wolfgang Hahnkamper</i> Bias, Conflict and Challenge Of Arbitrators, And Their Duty To Disclose: Austrian Supreme Court Decisions In The Period 2006-2016	91
I. Update – Procedural Aspects	93
II. Update – Deadlines And Other Aspects Of Time	94
III. Cases	95
IV. When Must Arbitrators Disclose Potential Grounds For Challenge,	
And How Long Can Circumstances Be Used As Grounds For Challenge?	100
V. Overview And Summary	101
VI. Resume And Outlook	103
Reza Mohtashami	
Towards Procedural Predictability In International Arbitration:	
Confronting Guerrilla Tactics	105
I. Introduction	105
II. Adducing New Evidence Or Pleading A New Case Late In The Game	107
III. Tactical Or Deliberate Unavailability	110
IV. The Burden Of Unnecessarily Lengthy Submissions	111
V. Conclusion	113
Nikolaus Pitkowitz and the 26 contributors The Vienna Predictability Propositions: Paving TheRoad To Predictability	
In International Arbitration	115
I. Introduction	115
II. The Seven Predictability Propositions	116
III. World Cafe Reports	120
A. Arbitration Agreement	120
B. Applicable Law	122
1. The Chosen Approach	122
2. Discussion Summary	122
a) Importance Of The Applicable Law	122
b) Application Of The Law	123
c) How To Identify The Applicable Law?	123
d) The Importance Of The Applicable Law For Construing	
The Contract	123
e) Limitations to The Parties' Choice	124
3. Conclusion	124
C. Arbitrator Information And Expectation	124
1. Factual Findings	125
a) Participants predominantly rely on personal experience and	
hear-say as sources of arbitrator information	125
b) Participants disagree on the relative importance of specific items	1.6.5
of information	125
c) Participants disagree on how arbitrators should deal with parties'	10.5
expectations	125
2. Recommendations	126
a) If parties have specific expectations, they should communicate them to the arbitrator(a) as early in the arbitration as pessible.	100
them to the arbitrator(s) as early in the arbitration as possible	126

	 b) Arbitral institutions, counsel and parties should encourage arbit to disclose information about their procedural preferences, <i>e.g.</i> In the standardized O stationaria. 	by way
	of a standardized Questionnaire c) Parties should consider giving feedback to arbitrators, although	126
	when and how to do this may be challenging in the absence of fo	ormal
	procedures	127
	3. Idea: Arbitrator Debriefing Of Post-awards	128
D.	On The Road To Predictability, What Becomes Of Flexibility?	128
	1. Introduction	128
	2. What Is Predictability?	129
	3. What Is Flexibility?	130
	4. How Do "Predictability" And "Flexibility" Influence The Drafting C	Of
	Arbitration Agreements?	132
	5. Do "Predictability" And "Flexibility" Play A Role In The Constitution	on
	Of Arbitral Tribunals?	133
	6. Conclusion	133
E.	Procedural Order No. 1	134
	1. Cut-Off Dates	135
	2. Decision On Costs	137
	3. Conclusions	138
F.	Guidelines And Protocols	138
	1. Objective	138
	2. Discussion	139
_	3. Outcome/Recommendation	139
	Case Management Conference	140
н.	Streamlining Of The Proceedings And Early Evaluation	141
	1. Core Policy Considerations	142
	a) Transparency	142
	b) Proactivity	143 145
	c) Interactivity	
	d) Proportionality2. Recommendations	146 146
L	Settlement	146
1.	1. Interests And Roles Of The "Stakeholders" In The Proceedings	140
	a) Parties	147
	b) Arbitrators	147
	c) Counsel	147
	2. Suggestions	147
T	Time And Cost Management	147
	Secretaries	140
к.	1. Proposition: Arbitral institutions should take a proactive role with	101
	respect to the use of administrative secretaries and encourage	
	transparency.	151
	 Proposition: Arbitral tribunals should adopt a transparent approach 	
	towards assistance they receive by others	152
	3. Proposition: Administrative secretaries should be mindful about the	
	responsibilities and act within the limits of their role	153
L.	Experts	153
	1. Focus	153
	2. Propositions	154
	a) Know your parties and your tribunal	154

b) Encourage the tribunal to appoint one or more experts itself or to get	
involved with party-appointed experts at an early stage	155
M. Ethics And Guerilla Tactics/Cross-Examination	156
1. Late Filing Of Submissions And/Or New Evidence	157
2. Unavailability Of Parties/Counsel	158
3. Extensive Submissions	158
4. Cross-Examination	159
5. Conclusion	159
Irene Welser/Alexandra Stoffl	
The Use And Usefulness Of Scott Schedules In International Arbitration	161
I. Introduction	161
II. Scott Schedule – What To Expect	162
A. "Spreadsheets" In Arbitration	162
B. What Is A Scott Schedule?	163
C. Formal Requirements	163
D. The Basic Idea Behind The Scott Schedule	164
1. Presentation Of Key Issues/Quantum Issues By The Parties	165
2. Presentation Of Corresponding/Deviating Opinions Of	
Party-Appointed Experts	167
III. The Strengths And Weaknesses Of Scott Schedules – All That Glitters Is	
(Not) Gold	168
A. Advantages Of Scott Schedules	168
B. Disadvantages Of Scott Schedules	170
IV. Conclusion	172
Silvia Petruzzino	
Relevance And Applicability Of Trade Usages In International Arbitration	175
I. Introduction	175
II. The Categories And Sources Of Trade Usages	176
A. Uniform Law And Codified Principles	177
B. Trade Practices	179
C. General Principles Of Laws	179
D. The Lex Mercatoria	179
III. Trade Usages As Implicit Or Implied Parts Of International Agreements	181
A. Trade Usages Applied Via Lex Causae	181
B. Trade Usages Applied Via Arbitration Rules	182
IV. Trade Usages As The Lex Causae Of International Agreements	184
A. Trade Usages As The Lex Causae In International Commercial Arbitration	
In Light Of The PrincipleOn Party Autonomy	184
B. The Applicability Of Trade Usages In Arbitration Proceedings When There	
Is No Parties' Choice Of Applicable Law	187
V. Conclusions	190
Wolfgang Ktihn	40-
Procedural Tools In Support Of Predictability In International Arbitration	191
I. Predictability In International Arbitration	191
II. The Importance Of Predictability In Practice	191
III. Procedural Predictability Is At Stake	192

	A. Establishing The Case	192
	B. Adverse Documents	193
	C. Consequences For Predictability	193
	D. The IBA Rules On The Taking Of Evidence In International Arbitration	194
IV.	The Loss Of Predictability In International Arbitration	194
V.	The Necessity To Take Action In Support Of Predictability	195
Ch	apter III The Award and the Courts	197
	lmut Ortner/Yoanna Schuch w To ApplyThe Applicable Law In International Arbitration	199
	Introduction	199
П.	Arbitral Awards: Wrong But Bulletproof?	200
	A. Violations Of (International) Public Policy	201
	B. Excess Of Authority	202
	C. Manifest Disregard Of Law	202 204
ш.	A Blessing Or A Curse?A. Empowering The Arbitrator: The Goal To Render The "Best" Decision	204
	B. Reining In The Arbitrator: The Goal Of Strictly Applying The Law	203
w	The Guiding Star For The "Good Arbitrator": Extreme Caution	208
	Grabbing The Steering Wheel	211
	Conclusion	213
Ма	thias Wittinghofer	
Th	e Race Towards Predictability: Does It Threaten The Effectiveness	
Of	Modern Arbitration?	219
I.	Users Of Arbitration Look For Flexibility	219
II.	Flexibility And Predictability Are Mutually Exclusive	220
III.	Users Still Also Want Predictability	220
IV.	Arbitrators Today Offer Neither Predictability Nor Flexibility	221
V.	Arbitrators Curtail Party Autonomy	222
VI.	How To Solve The Dilemma: Concentrate On The Strengths Of Arbitration -	
	Flexibility, Not Predictability	223
Ма	rkus Schifferl/Venus Valentina Wong	
De	cisions Of The Austrian Supreme Court On Arbitration In 2015 And 2016	225
I.	Form Of the Arbitration Agreement	226
	A. Facts Of The Case	226
	B. Decision Of The Supreme Court	226
	C. Additional Remarks	227
II.	Right to Be Heard	228
	A. Facts of the Case	228
	B. Decision of the Supreme Court	229
	C. Additional Remarks	230
III.	Right To Be Heard	231
	A. Facts Of The Case	231
	B. Decision Of The Supreme Court	232
	C. Additional Remarks	232

XIII

IV. Enforcement Of A Foreign Arbitral Award	233
A. Facts Of The Case	233
B. Decision Of The Supreme Court	233
C. Additional Remarks	235
V. Arbitrator's Liability	235
A. The Facts Of The Case	235
B. Decision Of The Supreme Court	237
C. Additional Remarks	238
VI. Challenge Of An Arbitrator	239
A. The Facts Of The Case	239
B. Decision Of The Supreme Court	240
C. Additional Remarks	242
Chapter IV Investment Arbitration	245
Diego Brian Gosis	
Remedies In Investment Arbitration: How To Redress Expropriation Claims	247
I. Introduction	247
II. The Treaty Standard	248
III. Lawful and Unlawful Wrongful Expropriation?	250
IV. The Issue Under Treaty Interpretation Rules	252
V. Conclusion	254
Index 2007-2017	255

Index 2007-2017

XIV