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# OBJECTIONS TO CONFIRMATION AND CHALLENGES OF ARBITRATORS UNDER THE VIAC RULES

## REFUZUL NUMIRII ȘI RECUZAREA ARBITRILOR POTRIVIT REGULILOR VIAC

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### ABSTRACT

*The possibility for the parties to nominate the arbitrators constitutes one of the main advantages of arbitration. This party autonomy is limited, however, to the extent that the impartiality and independence of the arbitrators must be ensured. The national legal systems therefore grant the parties to arbitral proceedings the right to challenge arbitrators if there are doubts as to their impartiality or independence.*

*The present paper is to be understood as an update and continuation to the 2014 publication of the former Secretary General of VIAC, Dr. Manfred Heider, on challenge proceedings at VIAC. It describes the cornerstones of the current legal framework, as provided by the Austrian arbitration law and the VIAC Rules of Arbitration 2018. Furthermore, it examines several cases under the VIAC Rules, where parties filed a challenge of an arbitrator or objected to the confirmation*

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*of an arbitrator. These case descriptions are provided in anonymized form and elaborate upon the essential arguments.*

*The overview of individual cases, including its groups and sub-groups, offers a detailed insight as to which sets of facts have been at issue in VIAC proceedings, and how such requests and decisions have been reasoned in recent years.*

**KEYWORDS:** international arbitration, VIAC Rules, arbitrators, challenges, impartiality and independence of arbitrators

## REZUMAT

*Posibilitatea părților de a-și numi arbitri reprezintă unul dintre principalele avantaje ale arbitrajului. Această autonomie a părților este, cu toate acestea, limitată de faptul că trebuie să se asigure imparțialitatea și independența arbitrilor. Așadar, legile naționale acordă părților în arbitraj posibilitatea recuzării arbitrilor atunci când există dubii privind imparțialitatea sau independența acestora.*

*Prezentul articol conține o actualizare și continuare a publicației din 2014 scrise de fostul Secretar General al VIAC, Dr. Manfred Heider, pe tema procedurii recuzării la VIAC. Descrie principiile cheie ale dispozițiilor legale în vigoare prevăzute de legea arbitrajului din Austria și de către Regulile VIAC 2018. Totodată, analizează numeroase cazuri sub Regulile VIAC, în care părțile au recuzat un arbitru sau s-au opus confirmării unui arbitru. Descrierea cazurilor s-a făcut prin anomizare și s-a insistat pe argumentația esențială. Ansamblul cazurilor individuale organizate tematic oferă detalii asupra categoriilor de circumstanțe care s-au pus în discuție în procedurile arbitrale desfășurate sub Regulile VIAC și cum au fost argumentate recent deciziile asupra acestor circumstanțe.*

**CUVINTE CHEIE:** arbitraj internațional, Regulile VIAC, arbitri, recuzare, imparțialitate și independența arbitri

## Preface

The possibility for the parties to nominate the arbitrators constitutes one of the main advantages of arbitration. This party autonomy is limited, however, to the extent that the impartiality and independence of the arbitrators must be ensured. The national legal systems therefore grant the parties to arbitral proceedings the right to challenge arbitrators if there are doubts as to their impartiality or independence. The fact that the right to nominate an arbitrator of one's choosing and the right to a fair trial, in which the arbitrators are independent and impartial, are to some extent in conflict with each other, often makes such challenge decisions difficult.

The Vienna International Arbitral Centre (“**VIAC**”) does not usually publish statistics on the challenges of arbitrators and the respective proceedings. Although the Board of the VIAC always gives (more or less extensive) reasons for its decisions to the participants of the case, the decisions themselves and the reasons on which they are based do not get published on a regular basis.

In 2014, the former Secretary General of VIAC, Dr. Manfred Heider, published an article in German language on challenge proceedings at VIAC,<sup>3</sup> providing the relevant legal framework as well as anonymized summaries of challenge decisions. The present paper is to be understood as an update and continuation to the cited 2014 publication. It describes the cornerstones of the current legal framework, as provided by the Austrian arbitration law and the VIAC Rules of Arbitration 2018 (“**Vienna Rules**” or “**VR**”). It further examines several cases involving objections to confirmation or challenges of arbitrators under the VIAC Rules as of 1 January 2014. Obviously, the case descriptions are provided in anonymized form and can only elaborate upon the essential arguments and principles discussed.<sup>4</sup>

## Framework under Austrian Arbitration Law

Pursuant to Art. 25 para. 1 VR, the parties are free to agree on the place of arbitration, but – absent party agreement – the place of arbitration shall be Vienna. Experience has shown that it is extremely rare that parties choose a different place of arbitration and consequently a different *lex arbitri*, which is why this paper focuses on the legal framework in Austria.

Under Austrian arbitration law, the grounds for a challenge are contained in Sec. 588 Austrian Code of Civil Procedure (“**ACCP**”), and the challenge procedure is stipulated in Sec. 589 ACCP.

Section 588 para. 1 ACCP enshrines the obligation of arbitrators to disclose, at any stage of the proceedings, any circumstances likely to give rise to doubts as to their impartiality or independence, or that are in conflict with the agreement of the parties. A person intending to accept a mandate as an arbitrator has to disclose such circumstances. However, there is no express obligation to decline the proposed office of arbitrator if such circumstances exist, even though it can be regarded as a (pre-)contractual accessory obligation to the arbitrator’s contract<sup>5</sup>. Considering that sometimes arbitrators do not voluntarily withdraw

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<sup>3</sup> Heider M. (2014) ‘Die Ablehnung von Schiedsrichtern in Verfahren vor dem Internationalen Schiedsgericht der Wirtschaftskammer Österreich – VIAC’ in *Festschrift für Rolf. A. Schütze*. München: Verlag C. H. Beck. pp. 181-194. As far as the law and practice have remained the same since then, this article is partly based on the explanations by Manfred Heider.

<sup>4</sup> For the purpose of simplicity and anonymization, only the male form was used for references to arbitrators in this article (see also Art. 6 para. 2 VR).

<sup>5</sup> Hausmaninger C. (2016) ‘§ 588 ZPO’ in Fasching H. and Konecny A. (ed.) *Zivilprozessgesetze*. IV/23 Wien: Manz’sche Verlags- und Universitätsbuchhandlung, pp. 338-380, mn. 41.

their mandate or do not disclose relevant circumstances in the first place, it is important that Sec. 588 para. 2 ACCP in conjunction with Sec. 589 ACCP provides the possibility to challenge arbitrators.

According to Austrian law, 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 fulfil the conditions agreed to by the parties. A party may challenge an arbitrator nominated by itself only for reasons of which it becomes aware after (its participation in) the appointment (Sec. 588 para. 2 ACCP).

Challenges shall be filed by the parties to the arbitration. Reasons for exclusion to be exercised *ex officio* are generally not provided for due to the principle of party disposition dominating the arbitral proceedings<sup>6</sup>.

Section 589 ACCP states that the parties may freely agree on a procedure for challenging an arbitrator. By agreeing on the administration under the Vienna Rules 2018, for instance, the parties accept the application of their provisions regarding the challenge of arbitrators. If there is no such agreement, the challenging party shall, within four weeks, submit the challenge to the arbitral tribunal. Following Art. 13 of the UNCITRAL Model Law on International Commercial Arbitration, Sec. 589 ACCP provides for the possibility of the challenged arbitrator to voluntarily withdraw from office or the possibility of the other party to agree to the challenge. Otherwise, the arbitral tribunal, including the challenged arbitrator, shall decide on the challenge. In institutional arbitration, by contrast, usually a neutral body is competent, such as the Board in case of VIAC.

Ultimately, Sec. 589 para. 3 ACCP provides for the possibility to request a decision on the challenge by the state court within four weeks from receiving the decision rejecting the challenge under a procedure agreed upon by the parties or under the procedure set forth under the ACCP. According to Sec. 615 ACCP, the Austrian Supreme Court shall have immediate jurisdiction and its decision shall not be subject to any appeal. If this period elapses without the party making use of it or if the arbitrator does not get rejected by the state court, it is predominantly argued that the party forfeits its right to object to the nomination of that particular arbitrator and cannot raise this as a challenge ground in annulment proceedings or enforcement proceedings pursuant to the New York Convention<sup>7</sup>.

Whereas Sec. 589 para. 3 ACCP allows the arbitral tribunal, including the challenged arbitrator, to continue the arbitral proceedings and even to render an award while such request is pending (with the court), Art. 20 para. 4 VR also allows the continuation of the arbitration while the challenge is pending, but the arbitral tribunal may not issue an award until after the Board has ruled on

<sup>6</sup> Hausmaninger C. (2016) '§ 588 ZPO' in Fasching H. and Konecny A. (ed.) *Zivilprozessgesetze*. IV/23 Wien: Manz'sche Verlags- und Universitätsbuchhandlung, pp. 338-380, mn. 2.

<sup>7</sup> Riegler S. and Petsche A. (2012) 'Die Bildung des Schiedsgerichts' in Liebscher C., Oberhammer P., Rechberger W. *Schiedsverfahrensrecht*. I. Wien: Springer-Verlag, pp. 401-495, mn. 5/227.

the challenge. The participation of a successfully challenged arbitrator in the rendering of an award constitutes a ground for an application for setting aside pursuant to Sec. 611 para. 2 no. 4 ACCP. Besides that, the successful challenge of an arbitrator does not have retroactive effect. All actions prior to the arbitrator's challenge remain in principle effective<sup>8</sup>.

## Vienna Rules 2018

The Vienna Rules 2018 differentiate between the non-confirmation of an arbitrator according to Art. 19 para. 2 and the challenge of arbitrators according to Art. 20. This differentiation was already introduced by the Vienna Rules 2013. Whereas Art. 19 para. 2 VR provides the possibility for the Secretary General or Board not to confirm a party-nominated arbitrator in the first place, Art. 20 states that an arbitrator may be challenged after his appointment. To be precise, Art. 20 is applicable (only) once the Secretary General or Board has confirmed the nomination of the respective arbitrator or after the formal appointment in case the arbitrator was appointed by the VIAC Board. This was clarified by the 2018 Rules, which now explicitly provide that an arbitrator can only be challenged *after his appointment*. Under the 2013 Rules, such a clear time reference was missing, but in practice it was handled the same way<sup>9</sup>.

### Article 16 – declaration of impartiality and independence

The parties shall be free to designate the persons they wish to nominate as arbitrators. If a person intends to accept an appointment as an arbitrator, he shall submit a declaration confirming his impartiality and independence, availability, qualification, acceptance of office and submission to the Vienna Rules (Art. 16 para. 3 VR). This not only applies to nominated arbitrators, but also to arbitrators appointed by the Board.

Pursuant to Art. 16 para. 4 VR an arbitrator shall, at any stage of the proceedings, disclose in writing all circumstances that could give rise to doubts as to his impartiality, independence or availability or that conflict with the agreement of the parties.

The parties are bound by their nomination of an arbitrator once the nominated arbitrator has been confirmed (Art. 17 para. 6 and Art. 19 VR). The possibility to revoke the nomination of its own arbitrator is limited to the extent that cases of abuse in which the nomination of a different arbitrator merely serves to delay the

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<sup>8</sup> Riegler S. and Petsche A. (2012) 'Die Bildung des Schiedsgerichts' in Liebscher C., Oberhammer P., Rechberger W. *Schiedsverfahrensrecht*. I. Wien: Springer-Verlag, pp. 401-495, mn. 5/235.

<sup>9</sup> Horvath G. and Trittmann R. (2014) 'Article 20' in *Handbook Vienna Rules*. Vienna: WKÖ-Service GmbH, pp. 117-121, mn. 22.

proceedings are to be avoided. This is not to be assumed, as long as the change of the nomination of the arbitrator takes place within the time limit fixed to do so. If the other party so agrees, a replacement is permitted in any stage of the proceedings<sup>10</sup>.

### **Article 19 – confirmation of the nomination**

Article 19 was introduced by the Vienna Rules 2013 to prevent tedious challenge proceedings at the very outset thereby ensuring smoother and faster proceedings<sup>11</sup>.

Once the Secretary General has obtained the completed and signed declarations of the nominated arbitrators under Art. 16 para. 3 VR, she forwards them to the parties, granting the parties a time limit for comments on these declarations.

If no doubts exist as to the impartiality and independence of the respective arbitrator and his ability to carry out his mandate, the Secretary General shall, according to Art. 19 para. 1 VR, confirm the nominated arbitrator. If deemed necessary by the Secretary General, this decision shall be referred to the Board (Art. 19 para. 2 VR). The decisions by the Secretary General / Board are taken on a case-by-case basis. The Vienna Rules do not generally foresee the necessity to request and obtain comments from the parties or arbitrators at this stage.

The Secretary General / Board uses the (generally non-binding) IBA Guidelines on Conflicts of Interest in International Arbitration (“**IBA Guidelines**”) with their Green, Orange and Red Lists as a reference for their decisions in this context. In short: The Green List shows situations which should, under an objective test, never lead to the disqualification of arbitrators; consequently, such situations do not even need to be disclosed. The Orange List contains non-exhaustive examples of such situations that have to be disclosed because they could give rise to justifiable doubts. The Red List (waivable and non-waivable) includes circumstances where from the point of view of a reasonable third person an objective conflict of interest exists, and which therefore always have to be disclosed.

If an arbitrator discloses circumstances that cannot be classified under the Green List of the IBA Guidelines, the Secretary General will tend to refer the decision to the Board. If an arbitrator discloses circumstances belonging to the Red List of the IBA Guidelines, the Secretary General / Board will tend to deny confirmation without requesting any further comments. If an arbitrator discloses circumstances belonging to the Orange List of the IBA Guidelines, and in particular if one party has consequently filed an objection, the Secretary General / Board will tend to conduct a more extensive examination, taking into account any comments

<sup>10</sup> Riegler S. and Boras F. (2019) ‘Article 17’ in *Handbook Vienna Rules*. Vienna: WKÖ-Service GmbH, pp. 128-136, mn. 23 et seq.

<sup>11</sup> Riegler S. and Boras F. (2019) ‘Article 19’ in *Handbook Vienna Rules*. Vienna: WKÖ-Service GmbH, pp. 142-147, mn. 1.

from all parties and the respective arbitrator already at the stage of confirmation, similar to a challenge procedure where this is explicitly foreseen in the rules.

Whereas Art. 19 VR speaks of “doubts”, Art. 20 VR requires “justifiable doubts”. This distinction might seem a minor issue, a linguistic technicality, but in fact, it can make a difference in the decision making-process as the thresholds are slightly different. The Secretary General / Board will, however, in any case consider also under Art. 19 VR, whether the raised objections are substantiated enough to refuse the confirmation of a nominated arbitrator<sup>12</sup>. Mere allegations are thus not sufficient to trigger a denial of confirmation.

Before taking a formal decision on the confirmation of the nomination, the respective arbitrator always has the possibility to resign voluntarily.

### Article 20 – challenge of arbitrators

According to Art. 20 para. 1 VR, after his formal appointment, 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 fulfil the qualifications agreed by the parties. In contrast to Art. 19 (“doubts”), as already mentioned before, Art. 20 explicitly states that *justifiable* doubts are required to successfully challenge an arbitrator.

Neither the ACCP nor the Vienna Rules provide definitions of the respective terms. Impartiality is generally considered to mean neutrality vis-à-vis the parties to the arbitration, their representatives and the subject-matter of the dispute<sup>13</sup>. Impartiality is a state of mind (subjective criteria), or in other words a psychological concept determined by the inner workings of an arbitrator, i.e. the absence of bias<sup>14</sup>.

An arbitrator is deemed to be independent if he is personally and economically independent of the parties to the arbitration, exercises his office free from directives and has no economic interest in the outcome of the proceedings<sup>15</sup>. A lack of independence is signified by an arbitrator’s (financial or other) relationship to a party, its representative or even to another arbitrator, which exceeds a certain threshold; a lack of independence does not necessarily lead to a biased arbitral award, whereas a lack of impartiality certainly does<sup>16</sup>. When the Board

<sup>12</sup> Riegler S. and Petsche A. (2019) ‘Article 19’ in *Handbook Vienna Rules*. Vienna: WKÖ-Service GmbH, pp. 142-147, mn. 17.

<sup>13</sup> Hausmaninger C. (2016) ‘§ 588 ZPO’ in Fasching H. and Konecny A. (ed.) *Zivilprozessgesetz*. IV/23 Wien: Manz’sche Verlags- und Universitätsbuchhandlung, pp. 338-380, mn. 92.

<sup>14</sup> Schifferl M. (2016) ‘Section 588’ in Zeiler G. *Austrian Arbitration Law*. Neuer Wissenschaftlicher Verlag: Vienna, Graz, pp.72-79, mn. 7.

<sup>15</sup> Hausmaninger C. (2016) ‘§ 588 ZPO’ in Fasching H. and Konecny A. (ed.) *Zivilprozessgesetz*. IV/23 Wien: Manz’sche Verlags- und Universitätsbuchhandlung, pp. 338-380, mn. 93.

<sup>16</sup> Schifferl M. (2016) ‘Section 588’ in Zeiler G. *Austrian Arbitration Law*. Neuer Wissenschaftlicher Verlag: Vienna, Graz, pp.72-79, mn. 7 et seq.



has to decide on the independence of an arbitrator under Art. 20 para. 3 VR, it usually considers the type and frequency of contacts between the arbitrator and either one of the parties, parties' representatives or the other arbitrators. However, since it is not always easy to draw a clear line here, other factors are also taken into account, including whether there is only a small group of experts on the subject who have the necessary knowledge for a specific case<sup>17</sup>. The idea behind the concept of independence is that no one must act as judge in its own cause (objective criteria). Impartiality is needed to ensure that justice is done; independence is further needed to ensure that justice is also seen to be done.

In general, the IBA Guidelines including their Green, Orange and Red Lists serve as an important reference for the Board (see in detail above regarding Art. 19 VR), taking into account that these guidelines set out internationally recognized standards but are not binding for the arbitrators or the Board when deciding on a challenge, unless the parties agree otherwise<sup>18</sup>.

The Board also takes guidance from the case-law of the European Court of Human Rights on Art. 6 para. 1 European Convention on Human Rights. The Board has interpreted the phrase "*circumstances that give rise to justifiable doubt as to impartiality or independence*" in the past in a way that the mere appearance of bias is sufficient to dismiss an arbitrator.

The review is carried out according to objective criteria, i.e., the decisive test is whether a "reasonable" third party would deem the independence and/or impartiality of the arbitrator impaired<sup>19</sup>.

The VIAC Board shares the prevailing opinion that a non-disclosure by an arbitrator in breach of his duty is not necessarily a conclusive proof, but, indeed might be an indication of his lack of impartiality or independence<sup>20</sup>. In this context, the Austrian Supreme Court (docket-no. 18ONc1/14p) held as a general rule: the more serious the charge of non-disclosure, the more legitimate doubts about the arbitrator's impartiality or independence, especially if the suspicion arises that the arbitrator deliberately concealed certain circumstances in order to avoid a possible challenge.

Apart from the justifiable doubts as to the independence or impartiality of an arbitrator, the non-fulfilment of the qualifications agreed by the parties may also constitute a ground for a challenge, which underlines the primacy of

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<sup>17</sup> Horvath G. and Fischer E. (2019) 'Article 20' in *Handbook Vienna Rules*. Vienna: WKÖ-Service GmbH, pp. 155-161, mn. 4.

<sup>18</sup> Horvath G. and Fischer E. (2019) 'Article 20' in *Handbook Vienna Rules*. Vienna: WKÖ-Service GmbH, pp. 155-161, mn. 7.

<sup>19</sup> Horvath G. and Fischer E. (2019) 'Article 20' in *Handbook Vienna Rules*. Vienna: WKÖ-Service GmbH, pp. 155-161, mn. 7-9.

<sup>20</sup> Horvath G. and Fischer E. (2019) 'Article 20' in *Handbook Vienna Rules*. Vienna: WKÖ-Service GmbH, pp. 155-161, fn. 4.

party-autonomy in arbitration. Other criteria cannot be grounds for a challenge. Frequently required qualifications are for example language skills and special legal or technical expertise<sup>21</sup>. Therefore, the VIAC-Board always endeavors to identify someone who meets the parties' requirements, when it appoints an arbitrator.

According to Art. 20 para. 2 VR, a party's challenge of an appointed arbitrator shall be submitted to the Secretariat within 15 days from the date the party making the challenge became aware of the grounds for the challenge. The same applies to the day when the party should have reasonably become aware of the ground for the challenge. Consequently, the day on which the ground actually arose does not necessarily trigger the time limit. However, the burden of proof that the challenge was submitted within the time limit lies with the challenging party<sup>22</sup>.

Article 20 para. 1 VR states that a party may challenge the arbitrator whom it nominated, or in whose nomination it has participated, only for reasons of which the party became aware after the nomination or its participation in the nomination. Such challenge is only possible from the moment the arbitrator has been confirmed by the Secretary General or the Board. Prior to this confirmation, the parties are in principle not bound by their nomination of arbitrator and can revoke such nomination (Art. 17 para. 6 VR by *argumentum e contrario*, see in detail above regarding Art. 16 VR)<sup>23</sup>.

The challenge shall specify the grounds for the challenge and include corroborating materials to substantiate the challenge (Art. 20 para. 2 VR). If the challenged arbitrator does not resign voluntarily, the Board shall rule on the challenge (Art. 20 para. 3 VR). Before the Board makes a decision, the Secretary General shall request comments from the challenged arbitrator and the other party/parties (Art. 20 para. 3 VR) and, if deemed necessary, from the non-challenged arbitrators or other persons with allegedly relevant information (Art. 20 para. 3 VR). In order to ensure a transparent challenging process, all comments shall be communicated to the parties and the arbitrators (Art. 20 para. 3 VR). The content of the written challenge motion as well as the respective comments are very significant because the Board does not establish the facts and circumstances on its own initiative, but relies on the comments and material received<sup>24</sup>. The challenge procedure under the VIAC Rules is a summary

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<sup>21</sup> Horvath G. and Fischer E. (2019) 'Article 20' in *Handbook Vienna Rules*. Vienna: WKÖ-Service GmbH, pp. 155-161, mn. 10 et seq.

<sup>22</sup> Horvath G. and Fischer E. (2019) 'Article 20' in *Handbook Vienna Rules*. Vienna: WKÖ-Service GmbH, pp. 155-161, mn. 18.

<sup>23</sup> Horvath G. and Fischer E. (2019) 'Article 20' in *Handbook Vienna Rules*. Vienna: WKÖ-Service GmbH, pp. 155-161, mn. 12.

<sup>24</sup> Horvath G. and Fischer E. (2019) 'Article 20' in *Handbook Vienna Rules*. Vienna: WKÖ-Service GmbH, pp. 155-161, mn. 20.

proceeding where the affected persons may voice their stand-point but no replies or rejoinders to these submissions are foreseen.

When rendering a challenge decision, the Board has always stated its reasons<sup>25</sup> although the VIAC Rules do not require this (Art. 7 of Annex 2 VR “Internal Rules of the Board” provides that the Board is not obliged to state the reasons on which its decisions are based.). The Secretary General communicates the reasons to the parties and the arbitrators to facilitate a judicial review when necessary.

As already mentioned before, the arbitral tribunal, including the challenged arbitrator, may continue the arbitration while the challenge is pending but it may not issue an award until after the Board has ruled on the challenge (Art. 20 para. 4 VR). Whether the proceedings are continued or suspended in the event of a challenge is a discretionary decision of the arbitral tribunal. Important factors, which will have to be considered are, *inter alia*, whether it is an obvious attempt to delay the proceedings and the stage of the proceedings *per se*. As this decision as to whether the proceedings shall be continued or not can result in considerable delays and additional costs, the Board normally decides on the challenge within one to three weeks.

### **Practice under Article 17 Vienna Rules – appointment of an arbitrator by the Board**

When an arbitrator is not nominated by a party but appointed by the Board, the Secretary General also requests declarations according to Art. 16 para. 3 VR from such arbitrator whom the Board intends to appoint (before giving note of the intended appointment to the parties). In this case, Art. 19 VR on the (non-) confirmation of the nomination does not apply<sup>26</sup>. In past practice, where such an arbitrator discloses circumstances, which could raise doubts as to his impartiality or independence, the Board has reconsidered its decision and in some cases either refrained from such appointment by its own discretion or forwarded the disclosure to the parties, taking any comments into account when deciding whether to maintain the appointment. If no such doubts exist, the appointment of the arbitrator will become effective and (if not already done) the name and declaration according to Art. 16 VR are communicated to the parties.

Since these cases do not fall into the category of Art. 19 VR or that of Art. 20 VR, they are not listed among the case summaries below; one example is thus provided here: In a case administered under the Vienna Rules 2006, the Board intended to appoint a chairperson, who then disclosed that his law firm, but not himself personally, was involved in matters concerning the respondent and

<sup>25</sup> Horvath G. and Fischer E. (2019) ‘Article 20’ in *Handbook Vienna Rules*. Vienna: WKÖ-Service GmbH, pp. 155-161, mn. 21.

<sup>26</sup> Riegler S. and Petsche A. (2019) ‘Article 19’ in *Handbook Vienna Rules*. Vienna: WKÖ-Service GmbH, pp. 142-147, mn. 5.

noted that he would not be able to conduct an arbitration in the language that was agreed as language of the proceedings by the parties. The arbitrator added, however, that if VIAC wished to maintain the appointment, he would be pleased to act as chairperson. The respondent objected to his appointment and to English as the language of the proceedings, as another language had been agreed upon in the arbitration clause. The Board therefore decided not to maintain the appointment of the arbitrator and to appoint a chairperson, who was fluent in that particular language.

### **Article 21 – premature termination of the arbitrator’s mandate**

Besides the successful challenge of arbitrators, their voluntary resignation, death or an agreement of the parties leading to the premature termination of the arbitrator’s mandate, Art. 21 para. 1 VR stipulates that arbitrators can also be removed from office by the Board under certain circumstances. Paragraph 2 specifies that either party may request that an arbitrator be removed from office if the arbitrator is prevented from performing his duties more than temporarily or otherwise fails to perform his duties, including also the duty to proceed without any undue delay. In case of such a unilateral request, the Board has to grant the other parties as well as the affected arbitrator the opportunity to comment pursuant to Art. 21 para. 2 VR. This provision also entitles the Board to remove an arbitrator from office without a party’s request, if it is apparent to the Board that any incapacity is not merely temporary, or that the arbitrator is not performing his duties.

## **Statistics as to Articles 19 and 20 Vienna Rules**

Since the last publication of the statistics by Manfred Heider in the year 2014,<sup>27</sup> VIAC recorded all together 16 challenges of arbitrators under Art. 20 VR, of which 12, i.e. the vast majority, were dismissed by the Board of VIAC. Three challenge motions were followed by the voluntary resignation of the arbitrators. Consequently, among the decisions of the VIAC Board, only one challenge was successful. These numbers are obviously linked to the fact that, since the introduction of the 2013 version of the Vienna Rules, it has been possible to raise objections to the confirmation of the nomination of arbitrators, which – if successful – no longer made it necessary to submit motions for challenge. Altogether, there have been 11 objections to the confirmation under Art. 19 VR,

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<sup>27</sup> According to the statistics provided by Manfred Heider, from 1 January 2004 until the publication of his paper in 2014, the Board of VIAC had decided on challenges of 20 arbitrators in 15 arbitration proceedings. Of these, 9 were successful and 11 challenges were dismissed as unfounded. These statistics did not include those cases in which challenged arbitrators resigned voluntarily and the Board therefore did not have to decide on the challenge.

of which 5 were successful in the sense that either the arbitrator's nomination was not confirmed by the Board, the respective arbitrator resigned voluntarily or the party nominating the arbitrator withdrew the nomination itself. The unsuccessful objections were mostly, i.e. in 4 out of 6 cases, followed by a challenge of the arbitrator(s). In our statistics, we counted such cases as both, an objection to confirmation, and a challenge. These statistics include all requests as of 1 January 2014, including such arbitration cases that are still pending with VIAC.

## **Overview of individual cases under Articles 19 and 20 Vienna Rules**

This chapter provides a follow-up to the description of the cases by Manfred Heider in 2014 and therefore an overview of all the cases, where parties filed a challenge of an arbitrator as of 1 January 2014 (Art. 20 VR). In line with the 2013 revision of the Vienna Rules and therefore in addition to the 2014 publication, objections to confirmations of arbitrators are included in this overview (Art. 19 VR). For the sake of anonymization, this summary includes all requests as of 1 January 2014, however excluding such arbitration cases that are still pending with VIAC. Depending on the applicable rules, the cases contained in this overview are thus still subject to the Vienna Rules 2006 or 2013. The relevant cases are grouped and sub-grouped according to the major arguments for the challenges and/or objections.

### **Relationship between arbitrator / arbitrator's law firm and the law firm of one party / party's group**

#### ***Case # 1 - partner at arbitrator's law firm is married to respondent's counsel***

Art. 20 Vienna Rules 2013

In this case the arbitral tribunal had already been constituted and confirmed and the transmission of the file had taken place, when the claimant incidentally received the information that respondents' counsel, who had also signed respondents' last submission, was married to a partner of the chairperson's law firm. The counsel had replaced another counsel during the course of the proceedings, without the chairperson or respondents' counsel indicating the family relationship. This relationship was confirmed by the arbitrator, who did not see any concerns as to his independence or impartiality. When the circumstances emerged, the claimant challenged the chairperson based on the close family connection of respondents' counsel to a partner of the arbitrator's law firm *per se*. Moreover, it stated that by keeping the family connection secret,

both the chairperson and respondents' counsel violated their duty to disclose all circumstances that could give rise to doubts as to the arbitrator's impartiality and independence. The challenged arbitrator noted that the person was only one of more than 40 partners in his law firm and that, apart from that, the IBA Guidelines only mentioned in Art. 3.3.5 of the Orange List the situation where a close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, which would not be the case. The respondents also opposed claimant's challenging motion.

In its considerations, the Board referred to decisions of the Austrian Supreme Court where it had ruled that professional contacts or rapports between colleagues *per se* did not constitute bias. However, other than in case of state court judges, partners of a law firm generally have joint economic interests. Thus, circumstances existed, which would be objectively suited to raise the appearance of bias. In addition, the Board referred to a decision of the Austrian Supreme Court (docket no. 18 ONc 1/14p), finding that the lack of disclosure may contribute to the appearance of doubts as to the arbitrator's impartiality and independence. The Board therefore ruled that claimant's **challenge** of the chairperson of the arbitral tribunal **was justified and sustained**.

***Case # 2 - academic and legislative cooperation between arbitrator and one party's counsel / previously expressed legal opinions***

Art. 20 Vienna Rules 2013

The respondents challenged the co-arbitrator nominated by claimant after his confirmation on the ground that the latter had disclosed, belatedly, i.e. only after the acceptance of the mandate, that he had cooperated with the representative of the claimant and its associate, both in a commission on the reform of arbitration law and in the drafting of a commentary on arbitration law. The respondents claimed that since in the arbitration proceedings also questions of the jurisdiction of the arbitral tribunal had to be examined, and the challenged arbitrator dealt with this issue in the commentary, additional doubts would arise as to his impartiality. The arbitrator did not resign and argued that he had provided an extensive list of his contacts with the parties and their legal representatives as part of his declaration of independence and impartiality.

The respondents' **challenge** of the arbitrator nominated by the claimant was **rejected**, because the Board found that none of these circumstances raised in the challenge motion were suitable to give rise to justifiable doubts as to the arbitrator's impartiality and independence. The Board stated in its reasoning that in a smaller arbitration community it is unavoidable that a limited number of professionals frequently meet and *inter alia* work on joint publication projects. Consequently, this in itself did not create the appearance of bias *per se* and the

respondents were not able to assert that a close personal relationship between the arbitrator and claimant's counsel resulted from those projects. Furthermore, the Board noted that the alleged preconceived opinion on certain legal issues which might be applied in the case at hand was not a ground for challenge. This position was supported by Art. 4.1.1 of the IBA Guidelines, according to which it is not a ground for challenge if the arbitrator has previously expressed a legal opinion in general terms concerning an issue that also arises in the arbitration.

***Case # 3 – arbitrator was former partner in law firm representing respondent***

Art. 19 Vienna Rules 2013

In its answer to the statement of claim, the respondent objected to the appointment of the person nominated by claimant because he had never before acted in any arbitration as an arbitrator. Furthermore, the respondent noted that there could also be concerns as to his neutrality, since the arbitrator was formerly a partner with respondent's counsel's law firm. The claimant conceded that the fact that its nominee used to work for the law firm, which the respondent had chosen as representative in this case, put the claimant in a difficult position. Therefore, **the claimant withdrew the nomination of its arbitrator** and nominated someone else.

***Case # 4 - subletting relationship between arbitrator's law firm and the law firm representing respondent***

Art. 19 Vienna Rules 2013

In this case, the arbitrator nominated by the respondent disclosed that there was a subletting agreement between the law firm of which he was a member and the law firm representing the respondent. The arbitrator noted, however, that he was not a shareholder of his law firm and had no legal relationship whatsoever with the law firm subletting the offices. The claimant objected to the confirmation of this arbitrator, but the arbitrator once more reassured his independence and impartiality, pointing out that there were two entirely independent law firms with completely separate offices in a large office building.

The Board decided to **confirm the nomination of the co-arbitrator**, because the fact alone that the arbitrator was a member of a law firm, which had a subletting relationship with the respondent's representative, was not sufficient to raise doubts as to his independence and impartiality.

**Attorney relationship between arbitrator / arbitrator's law firm and one party / party's group**

***Case # 5 - arbitrator represented respondent's group multiple times in the past / arbitrator's former law firm still represents respondent's group***

Art. 19 and 20 Vienna Rules 2013

In this case, the claimants filed both an objection to confirmation as well as a formal challenge against the co-arbitrator nominated by the respondents.

The arbitrator, who was nominated by the respondents, did not disclose anything in this case. In their comments on the declaration of acceptance the claimants, however, alleged that this co-arbitrator had represented the group of the respondents on several occasions in the past. Even if a personal representation activity by the arbitrator was longer ago, there seemed to be a close relationship between him and the group according to the claimants. This argument was underlined by the fact that the arbitrator's former law firm still counted the group among its clients and the fact that the arbitrator did not disclose those circumstances in his declaration of acceptance. Thereupon, the arbitrator countered that there was no provision in the IBA Guidelines, which would indicate that clients of a law firm to which the arbitrator previously belonged should be taken into account in the conflict check. The only decisive factor would be whether the arbitrator himself has worked for or against such clients or associated companies in the past three years. Based on that the arbitrator explicitly confirmed that he had not acted for or against any of the parties or any of their related companies in the past three years.

Following that, the Secretary General **confirmed the arbitrator**, declaring that it cannot be inferred from this circumstance alone that there was a special emotional bond between the arbitrator and the respondents, especially since the representation dated back about 14 years. Consequently, the Secretary General found that there were no indications that the impartiality of this arbitrator could be adversely affected. Since the arbitrator had left the aforementioned law firm and the success (or failure) of the respondents therefore would not have a legal or economic impact on him, the Secretary General also had no doubts regarding the independence of the arbitrator, which is why he confirmed the arbitrator himself, without involving the Board.

After that, the claimants filed a challenge against the arbitrator, where they questioned his impartiality and independence, arguing that the arbitrator was until a few months before a shareholder and partner in the law firm, which obviously had been continuously representing the group of the respondents for years, and therefore benefited economically from the fee income of this party. It was also argued that the arbitrator's contacts led clients of the former law firm to nominate him as an arbitrator. The arbitrator and the respondents replied



that representation as a lawyer *ad personam* must be strictly separated from representation by the law firm.

The Board of VIAC **dismissed respondents' challenge** due to the consideration that the circumstances put forward did not give rise to justifiable doubts as to the arbitrator's impartiality or independence echoing the Secretary General's reasoning when confirming the arbitrator.

***Case # 6 - arbitrator's law firm advised one party's group in the past***

Art. 16 Vienna Rules 2006 (*see* Art. 20 Vienna Rules 2018)

In this case the co-arbitrator nominated by the claimant disclosed in his declaration of acceptance that one of his colleagues from his law firm rendered legal assistance to a branch of the claimant in the extent of six hours and for an invoiced amount of less than 1,000.- EUR. The arbitrator himself was not involved in these consultations. However, the respondent challenged the arbitrator on the ground that his law firm rendered legal assistance to an affiliated person of the claimant. It argued that the assistance could be related to the arbitration and that, since the arbitrator did not disclose the nature of that matter, the importance of this circumstance to the present arbitration could not be objectively evaluated. As long as the nature, timeframe and scope of the legal consultation services of the arbitrator's law firm as well as the existence of any direct or indirect relationships between the claimant and the arbitrator would not be analyzed and clarified, this would give rise to justifiable doubts as to the arbitrator's impartiality or independence. Thereupon, the arbitrator submitted a more detailed description of the advice provided by his colleague, as well as a signed statement from said colleague, both confirming in principle the arbitrator's previous disclosure and stating that the advice was in relation to an acquisition transaction.

The Board decided to dismiss respondent's challenge of the co-arbitrator, because the legal assistance was to be considered insignificant and because it was rendered 2 ½ years before the case arose and not by the arbitrator himself, but by an associated lawyer. It stated that, if one would apply the IBA Guidelines, the situation could be summarized as one of the "Orange List". It was found that the circumstances would not give rise to justifiable doubts as to the arbitrator's independence and impartiality, which is why the **challenge was rejected**.

***Case # 7 - arbitrator acts as counsel against one party's group in state court case / arbitrator's law firm represents one party's group in state court case***

Art. 19 and 20 Vienna Rules 2013

This case involved both, an objection by the respondent to the confirmation of the co-arbitrator nominated by claimant, as well as a formal challenge by the claimant against the co-arbitrator nominated by the respondent.

One of the co-arbitrators discovered during the process of finding a chairperson for the arbitral tribunal that the respondent was ultimately owned by the government of a State, against which he was acting as claimant's representative in a civil case pending before an Austrian court. The arbitrator then disclosed that circumstance, at the same time pointing out that he would remain impartial and independent for the duration of the proceedings. Since the co-arbitrators had not been confirmed by then, the respondent objected to the confirmation of the arbitrator. It was argued that there were conflicting obligations upon one and the same person, considering that the arbitrator was obliged, under his duty of loyalty as attorney-at-law towards his client, to act against the State and under his duty as arbitrator, to remain independent and impartial and to act, behave and decide in an unbiased manner in a case, where one of the parties was ultimately owned by that same State. Based on this objection, the arbitrator wrote that he **could not accept his nomination** to act as arbitrator in the proceedings anymore. As a result, a new arbitrator was nominated by the claimant. After that, the arbitral tribunal was constituted, followed by the transmission of the file to the same.

Shortly after that, however, the co-arbitrator nominated by the respondent, disclosed that a colleague in his law firm had accepted a mandate to act for that very State in an international dispute on the recognition and enforcement of an arbitral award between several investor parties and that State. The arbitrator noted that the subject matters were completely unrelated, but that he could not rule out that he would be involved as well, due to the urgency and the size of his law firm. Since this arbitrator had already been confirmed by the Secretary General, it was necessary for the claimant to file a challenge. In its challenge, the claimant brought forward basically the same arguments as the respondent had raised in its objection to the confirmation of the co-arbitrator nominated by the claimant. The arbitrator was invited by the claimant to **resign voluntarily**, which he did.

### **Corporate relationship between arbitrator / arbitrator's relatives and one party's group**

#### ***Case # 8***

Art. 19 and 20 Vienna Rules 2013

In this case, the respondent filed both an objection to confirmation as well as a formal challenge against the co-arbitrator nominated by claimant.

The respondent objected against the arbitrator nominated by the claimant, because two persons closely related to this arbitrator had been long-term members of the supervisory board of the majority shareholder of the claimant. Furthermore, the respondent stated that the arbitrator and one of those persons were also shareholders and members of the management board of the same company. It was

argued that the arbitrator's joint business ventures with a person who held a high position in the claimant's corporate structures would disqualify the arbitrator. The claimant countered that by arguing that mere family ties with former members of executive bodies of indirect co-shareholders could not be a reason to reject this arbitrator. Also the arbitrator himself pointed out that his family member ceased to be member of the supervisory board more than 10 years ago.

The Secretary General delegated this decision to the Board, which **confirmed the nomination** of the co-arbitrator, because it was not considered a matter of a close relationship between the co-arbitrator and a *current* member of the claimant's supervisory board, but a matter of a close relationship with a *former* member of the supervisory board of the claimant's parent company, which held numerous other participations in addition to the one in the claimant. Moreover, it noted that the fact that this supervisory board activity had taken place more than ten years ago would not give cause to fear a lack of independence on the part of the co-arbitrator.

After the respondent had received the notification of the confirmation, it filed a challenge of the arbitrator, where it once more stressed the long-term family relationships between the arbitrator's family and the companies from the claimant's group, which would make any time limits irrelevant. The respondent also pointed out that the arbitrator had not disclosed anything in his declaration of acceptance. Furthermore, it was claimed that the co-arbitrator in relation to the appointment of the chairperson of the arbitral tribunal openly acted in the interests of the claimant by unilaterally declaring that the co-arbitrators failed to agree upon a joint candidate and had sent an e-mail to the Secretary General indicating criteria that the chairperson should satisfy when appointed by the Board.

The challenged arbitrator argued in his comments that the cited e-mail was supposed to give the Board a clear overview showing where disagreement existed. The arbitrator denied all allegations but **resigned from office**, because in his opinion it was to be feared that it would not be possible to conduct the proceedings in a timely manner in that setting.

## **Arbitrator nominated by same party in preceding arbitration case**

### ***Case # 9 - similar factual and legal basis***

Art. 20 Vienna Rules 2013

Here the challenged arbitrator disclosed in his declaration of independence that he had acted as arbitrator in a preceding case, where he had also been appointed by the claimant. Based on that ground, the arbitrator nominated by the claimant was challenged by the respondent. The respondent stated that the statement of claim of this case and the counterclaim of the preceding case were based on

share purchase agreements with the same content and that both agreements were related to the transfers of shares of the same company. Therefore, the arbitrator would have a significant comparative advantage over the two other arbitrators because of his knowledge of all the documents produced in that case and because of his participation in the deliberation of the arbitral tribunal. Furthermore, the respondent argued that the arbitrator would have a preconceived opinion regarding the legal issues to be considered also in the case at hand.

Since the Board did not consider the arbitrator's knowledge obtained in the previous case to be a significant advantage over the other arbitrators because the question to be solved was mainly a question of law, it decided to **dismiss respondent's challenge** of the arbitrator nominated by the claimant. The Board of VIAC concluded that there would be a new decision-making process and a new discussion of the legal issues of the case at hand.

### ***Case # 10 - same parties and contracts***

Art. 19 and 20 Vienna Rules 2013

The respondents filed both an objection to confirmation as well as a formal challenge against the co-arbitrator nominated by claimant.

The claimant nominated an arbitrator, whom it had nominated already in a preceding case, which, at this time, had already been terminated. The respondents objected to his confirmation.

The Secretary General delegated this decision to the Board, which **confirmed the arbitrator** arguing that no doubts existed as to his impartiality and independence.

Following that, the respondents challenged the arbitrator based on the ground that the arbitrator had already expressed his opinion on the merits of the case. They alleged that, since both cases were initiated by the same claimant against the same respondents and the disputes originated from the same sales and purchase contracts, the arbitrator would undoubtedly be prejudiced. The arbitrator declared that there would be no circumstances, which could raise justifiable doubts as to his independence and impartiality. He pointed out that, although the claims in both proceedings stemmed from similar factual background, the claims put forward by the claimant in these two cases were different from one another.

The Board of VIAC **dismissed respondents' challenge** due to the consideration that the circumstances did not give rise to justifiable doubts as to the arbitrator's impartiality or independence.

## **Relationship of the arbitrator / arbitrator's law firm to the dispute**

### ***Case # 11 - attorney relationship between arbitrator's law firm and entities related to the dispute***

Art. 19 Vienna Rules 2013

In this case the co-arbitrator nominated by the claimant had not even been contacted by the VIAC Secretariat as to whether he would accept the mandate, when respondent already submitted an objection to the arbitrator's confirmation. It stated that the law firm of the co-arbitrator nominated by the claimant represented two banks who together were defined as "New Lenders" in the Framework Agreement in relation to the transaction underlying claimant's claims, i.e. the sale of the ownership interest of a company from claimant to respondent. According to the respondent, the law firm drafted various documents related to the refinancing of the loan of that company, and the fees for the refinancing of the loan by the banks, which were allegedly pre-financed by the claimant, were subject of claimant's claim. Following that, the arbitrator was invited to declare his independence and impartiality, which he did. However, he disclosed that colleagues from a different department of his law firm advised the mentioned banks in relation to a Facilities Agreement entered into between the banks as lenders, the company as borrower and the respondent as limited recourse guarantor. The arbitrator noted that the banks, according to his enquiries, were not likely to be involved as parties to the dispute, that the law firm was not involved in the negotiations of the framework agreement between the claimant and the respondent and that his law firm had no financial or other interest in the outcome of the dispute, since its engagement had already been terminated. These arguments were supported by the claimant in its submission. According to the claimant, it was irrelevant that the reimbursement of the financing fees, which had allegedly been paid by the claimant, were the subject-matter of the claim.

The Secretary General delegated the decision on confirmation to the Board, which invited the arbitrator to consider a voluntarily withdrawal. Consequently, the arbitrator **withdrew**.

### ***Case # 12 – appointment as arbitrator in preceding arbitration case related to the dispute***

Art. 19 Vienna Rules 2013

The arbitrator, who was nominated by the claimant, was also part of the arbitral tribunal in a preceding case, where an award had already been rendered. The subject-matter of the new proceedings, where the claimant and one of the respondents were identical to the preceding case, was the allegation that the respondents had frustrated the enforcement of the arbitral award by removing assets. Immediately after receiving the statement of claim, the respondents

declared that they considered the arbitrator nominated by claimant biased and requested that this arbitrator should not be confirmed. The claimant, however, insisted on its fundamental right to nominate an arbitrator of its choosing and alleged that the respondents only wanted to delay the proceedings. In their submissions, the parties discussed *inter alia* the meaning of “*prior involvement in the dispute*” in Art. 2.1.2 of the Waivable Red List of the IBA Guidelines and whether the paragraph was applicable to this case. The claimant pointed out that the present dispute was limited to the parties’ conduct after the rendering of the award in the preceding case and hence to facts that the arbitrator was not familiar with. In his declaration of acceptance, the arbitrator also referred to the preceding case, but assured that he was capable of performing his services as arbitrator impartially and without any predisposition towards any of the parties.

The Secretary General referred the decision according to Art. 19 VR to the Board. The Board denied confirmation of the nomination of this arbitrator, since the possibility of bias could not be entirely ruled out and the circumstances brought up by the respondents were sufficient grounds for refusing confirmation. According to the Board’s reasoning, it could not be excluded that the prior involvement of the arbitrator would influence his decision-making in the present case, since the subject-matter of the two proceedings were closely related. Furthermore, it stated that a pre-disposition of the arbitrator could arise because the former arbitral award and the circumstances leading to the rendering of the award might become relevant also in the present proceedings. Bearing in mind that the arbitrator could consider the conduct of the respondents as an “attack” against their award and that any appearance of bias was to be excluded at the outset of proceedings, the Board hence decided to **deny the confirmation**.

### **Arbitrators’ conduct of the arbitration - content of a procedural order, arbitrator’s comments on a challenge**

#### ***Case # 13***

Art. 16 Vienna Rules 2006 (*see* Art. 20 Vienna Rules 2018)

This dispute concerned claims by the claimant from two debt collection agreements. In addition to the debt collecting task, the claimant was supposed to issue a report on whether certain debtors existed or not.

Firstly, the claimant challenged the entire arbitral tribunal based on a procedural order that the tribunal had previously issued. In the said procedural order, the arbitral tribunal had decided to raise certain questions *proprio motu* pursuant to its *ex officio* powers “*to exclude that the debtor identification work was tainted by improper practices*”. According to the claimant, the tribunal insinuated that the Debtor Identification Report had been a fake exercise with no substance behind it and for the sole purpose of corruptive activities, even though until the moment when the tribunal started to investigate the Debtor Identification

Report as a possible source for corruption, the respondent had never even remotely alleged that. In its challenge, the claimant stated that it was of the firm conviction that the *ex officio* powers of a tribunal under Art. 20 para. 5 Vienna Rules 2006 may only be exercised under observance of the overriding principle of impartiality between the parties and the principles of burden of allegation and burden of proof. Those principles had been allegedly grossly violated by the arbitral tribunal. The claimant argued that the tribunal had behaved like a public prosecutor and found that this was a clear evidence of partiality. In his comments on the challenge, the chairperson wrote that the evidence presented by the parties displayed contradictions and inconsistencies, which the tribunal could not reconcile and which prompted the tribunal to raise questions *ex officio*. Whereas the co-arbitrator nominated by the respondent declared that he concurred with the submission as submitted by the chairperson, the co-arbitrator nominated by the claimant declared that he had personally never seen a necessity for making *ex officio* inquiries and that none of the mentioned procedural orders had been supported through his initiative. But this co-arbitrator also had not openly dissented with the relevant procedural orders.

Secondly, the claimant submitted a separate challenge against the chairperson, based on the comments he had submitted in connection with the challenge against the entire arbitral tribunal. The claimant stated therein that it had become clear that the chairperson was biased against the claimant and that, irrespective of the evidence and the explanations provided by the claimant, he had already formed a clear opinion that the Debtor Identification Report was a fake exercise with no substance behind it and for the sole purpose of corrupt activities. Based on the chairperson's comments, the claimant argued, the chairperson could no longer be considered as impartial.

The Board noted in its decision, that it was not the competent body to judge the arbitrators' decisions (such as POs) and that the procedure and decisions on challenges are of non-judicial nature. In light of that, the Board only had to examine whether or not the procedural orders of the arbitral tribunal or the chairperson's comments on the first challenge gave rise to justifiable doubts as to their impartiality or independence. The Board found that the procedural order appeared to be plausible and not to be influenced by unfair motives. It stated that the respondent had pleaded that illegal practices had taken place from the very beginning. According to the reasoning of the Board, the arbitral tribunal had exercised its powers as laid down in Art. 20 of the applicable Vienna Rules 2006 when it made *ex officio* enquiries to the parties based on allegations and indications. It was noted that it was in the interest of both parties that the arbitral tribunal handled questions like those, concerning public policy issues, in an extremely assiduous way, since a violation of those principles might have an impact on the enforceability of the award. Summarizing, the Board of the VIAC came to the result that in the case at hand there were no circumstances that gave rise to justifiable doubts as to the impartiality or

independence of the arbitral tribunal as a whole or the chairperson as an individual. Therefore, the Board decided to **dismiss claimant's challenges**.

### **Missing qualifications of arbitrator**

#### ***Case # 14***

Art. 19 Vienna Rules 2013

In this case, the respondent objected to the confirmation of the co-arbitrator nominated by the claimant, claiming that he was not qualified for the arbitration, because he was, *inter alia*, no expert in the applicable law and did not have any knowledge of the agreements between the claimant and the respondent. The arbitrator subsequently outlined his qualifications and also stressed that according to Art. 16 para. 1 VR, the parties were free to designate the persons they wish to nominate as arbitrators. The Secretary General referred the case to the Board of VIAC according to Art. 19 VR.

The free choice of an arbitrator as one of the cornerstones of commercial arbitration was also emphasized in the decision of the Board, when **confirming the nomination** of the arbitrator. Since there was no agreement upon any particular additional qualification requirements and the respondent had not put into question the arbitrator's impartiality or independence, the experience and knowledge of the arbitrator were found to meet the needs of the case.

### **Decision on a Challenge by the Austrian Supreme Court**

As outlined above in the section on Austrian arbitration law, when the Board of VIAC decides to reject a challenge of an arbitrator, the challenging party may then resort to the Austrian Supreme Court and file an application according to Sec. 589 para. 3 ACCP.

In the observed period, there was only one VIAC case, where a party applied to the Austrian Supreme Court after its challenge motion was dismissed by the Board of VIAC, which then led to a decision by the Austrian Supreme Court (docket-nr. 18ONc1/17t). Since the relevant VIAC arbitration is still pending, it is not included in the above overview of individual cases.

The holdings of the Austrian Supreme Court in this decision can be summarized as follows: The Court dismissed the request by claimant to hold an oral hearing for the setting-aside proceedings. It further considered some of the asserted grounds for the challenge to be time-barred. It held that the claimant was not entitled to rely on such challenge grounds that had not been subject matter of the underlying challenge proceedings before the arbitral tribunal / institution. The Court therefore only dealt with one ground for challenge, that is: the alleged



violation of the principle of equal treatment by means of two procedural orders. It held that, even if the granting of unequal time limits, as alleged by the applicant, may have contradicted the formal equal treatment of the parties, there was still no violation of the principle of fair treatment. Therefore, it found that there were no justified doubts as to the impartiality or independence of the arbitrators and consequently dismissed the challenge.

## **Conclusion**

The overview of Austrian Arbitration Law and the Vienna Rules 2018, as well as the description of VIAC's practice shows that there are several safeguards in place in order to ensure that arbitrations be conducted and decided by independent and impartial arbitrators. At the same time, these legal bases grant parties the right to nominate an arbitrator of their choosing. In their decisions, the Secretary General and Board of VIAC very carefully balance these interests.

The mechanisms offered in VIAC proceedings, in particular the possibility of parties to object to confirmations or challenge arbitrators, seem to entail good and effective results. Such applications usually lead to decisions at an early stage of the proceedings, only in few cases the Board sees itself forced to dismiss an arbitrator. Moreover there was only one decision by the Austrian Supreme Court in the relevant time period, and this one actually confirmed the VIAC Board's decision.

The legal framework, as well as the analysis of individual cases, show that VIAC renders its decisions on a case-by-case basis. The Secretary General and Board of VIAC are guided in their decision-making by the IBA Guidelines and Austrian as well as European case law. The overview of individual cases, including its groups and sub-groups, provides a detailed insight as to which sets of facts have been at issue in VIAC proceedings, and how such requests and decisions have been reasoned in recent years.

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