Rendering of the Award by Multipartite Arbitral Tribunals
How to Overcome Lack of Unanimity?

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I. Introduction

Arbitrators in a pending arbitration proceeding have a number of duties and obligations relating to their office. However, the tribunal's overriding objective is to decide the dispute and render an enforceable award.

The rendering of an award by a multipartite arbitral tribunal may be a complicated task in many cases: Where more than one person is sitting on the panel, it will be more often the case than not that there is no unanimity in respect to all issues to be decided and hence the making of the award.

The reasons for a lack of unanimity may be manifold and can range from disagreement on the outcome to disagreement on the reason for the outcome. It is also not unheard of that party-appointed arbitrators feel obliged to somehow express their "vicinity" with the nominating party – and therefore disagree, delay or abstain from the proceedings.

Naturally, it might also be the case that an arbitrator simply is unavailable and thus cannot participate in the decision-making process.

The issue then is how to find a way out – if indeed there is a way out that meets the parties' justified expectations and observes the requirements of due process.

In this context, the decision-making process of a multipartite tribunal raises a number of issues, including the following:

- Can an award be made by majority vote?
- In case of a deadlock, can the chairman of the tribunal decide alone?
- What can or must be done if an arbitrator refuses to take part in the vote?
- What can or must be done if an arbitrator refuses to sign the award?
- How to deal with dissenting opinions?

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The following contribution seeks to analyze the above issues from two viewpoints: Firstly, from an international perspective, by providing a summary overview on selected foreign jurisdictions, leading arbitration rules and on the UNCITRAL Model Law on International Commercial Arbitration (hereinafter referred to as "Model Law"). And secondly, in more detail, from the Austrian perspective, where also specific changes brought by the Austrian Arbitration Act 2006 (*Schiedsrechtsänderungsgesetz 2006* – AA06)[1]) are assessed.

II. Majority Awards and Awards by the Chairman

A. Can an Award Be Made by Majority Vote?

1. International Overview

Article 29 of the Model Law provides that in arbitral proceedings with more than one arbitrator, "any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal."

These general principles are representative of most national statutes, including France,[2]) Germany[3]) and Switzerland,[4]) and virtually all leading arbitration rules.[5])

2. Austria

The Austrian Code of Civil Procedure (*Zivilprozessordnung* – ACCP) in Section 604 no. 1 ACCP[6]) mirrors Article 29 of the Model Law and sets out the basic

[1]) BGBl I 7/2006.

[2]) Article 1470 French Code of Civil Procedure, however, provides for majority decisions without reference to the parties' agreement (as, e.g., Article 53 Arbitration Law of the People's Republic of China).

[3]) Section 1052 (1) German Code of Civil Procedure (*Deutsche Zivilprozessordnung* – GCCP).

[4]) Article 189 (2) Swiss Private International Law Act (*Schweizerisches Bundesgesetz über das Internationale Privatrecht* – SPILA); further examples are: Article 1701 (1) Belgian Judicial Code; Article 1057 (1) Dutch Code of Civil Procedure; Article 823 Italian Code of Civil Procedure.

[5]) *E.g.,* Article 31 (1) UNCITRAL Rules; Article 25 ICC Rules; Article 26 (1) VIAC Rules; Section 33.3 DIS Rules; Article 31 (1) Swiss Rules; Article 26.3 LCIA Rules; Article 35 (1) SCC Rules; Article 26 (1) AAA IA Rules; Article 43 (4) and (5) CIETAC Rules; Article 61 WIPO Rules.

[6]) Section 604 ACCP: "Unless otherwise agreed by the parties, the following shall apply:

1. in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members. Questions of procedure may be decided by the chairman alone, if so authorized by the parties or all members of the arbitral tribunal."

rule for the decision-making by permitting majority awards. The provision requires a majority of all members of the tribunal (i.e., not of the votes cast). It applies whenever the place of arbitration is in Austria.

B. In Case of a Deadlock, Can the Chairman of the Tribunal Decide Alone?

1. International Overview

Usually, an arbitral tribunal will consist of one or three (or another uneven number of) arbitrators.[7]) Deadlock *per definitionem* requires a multipartite tribunal. Furthermore, experienced chairmen will subdivide the issues to be decided in such way that a majority can be reached in the actual voting procedure on every issue.[8]) Thus, cases of actual deadlock are rare.[9])

Deadlock does occur, however; especially issues such as *quantum,* interest and costs are susceptible to insurmountable disagreement amongst all three members of the tribunal (or such other number of arbitrators making a majority decision impossible).

Accordingly, a number of national arbitration laws[10]) and leading arbitration rules[11]) provide for the chairman's authority to end a deadlock by deciding the dispute alone.

By contrast, the Model Law does not contain such provision. As cited above, Article 29 of the Model Law merely provides for majority decisions. In fact, the question of whether to provide for a tie-breaking vote in case of a deadlock was the primary issue discussed by the Commission with regard to the decision-making process.[12]) However, one of the main reasons not to do so was that Article 29 of the Model Law was considered to be non-mandatory. Thus, according to the *travaux*

[7]) *Cf., e.g.,* Article 1453 French Code of Civil Procedure; Section 1034 (1) GCCP; Section 15 English Arbitration Act 1996; Article 1681 Belgian Judicial Code; Article 30 Arbitration Law of the People's Republic of China; Article 8 (1) ICC Rules; Article 14 (1) VIAC Rules; Article 6 (1) Swiss Rules; Section 3 DIS Rules; Article 20 (1) CIETAC Rules.

[8]) *Cf., Paul Oberhammer,* Entwurf eines neuen Schiedsverfahrensrechts 112 (2002).

[9]) In ICC arbitration, for example, the provision in its rules that allows a presiding arbitrator to make decisions where there was no majority was said to have been used only twice in the period between the 1920's and 1980's (*Howard M. Holtzmann* & *Joseph E. Neuhaus,* A Guide to the UNCITRAL Model Law on International Commercial Arbitration 809 (1989)).

[10]) *E.g.,* Article 189 (2) SPILA; Article 1701 (2) Belgian Judicial Code; Section 20 (4) English Arbitration Act 1996; Section 30 (2) Swedish Arbitration Act; Article 53 Arbitration Law of the People's Republic of China.

[11]) *E.g.,* Article 25 (1) ICC Rules; Article 26 (1) VIAC Rules; Article 31 (1) Swiss Rules, Article 26.3 LCIA Rules; Article 61 WIPO Rules; Article 35 (1) SCC Rules.

[12]) *Howard M. Holtzmann* & *Joseph E. Neuhaus,* A Guide to the UNCITRAL Model Law on International Commercial Arbitration 808 (1989).

prparatoire, parties may always agree to provide for the presiding arbitrator to cast the deciding vote or for some other form of voting.[13])

2. Austria

Like Article 29 of the Model Law, Section 604 no. 1 ACCP does not specifically address the question of whether or not the chairman of the tribunal may decide alone in cases where a majority cannot be reached, thus the issue under Austrian law is two-fold:

1. Can the parties agree that the chairman may cast the deciding vote in deadlock situations?
2. Does the chairman have that authority in the absence of a party agreement?

a) Can the Parties Agree that the Chairman May Cast the Deciding Vote in Deadlock Situations?

Section 604 no. 1 ACCP permits majority awards "unless otherwise agreed by the parties". Therefore, the statute clearly envisages party autonomy. However, as to the extent of party autonomy in this context, the AA06's non-binding Official Comments[14]) state that the reference "to the parties' disposition can only be interpreted in such way that the choice enables the parties to increase the decision *quorum* but not to lower it, because a provision stating that a decision allowing a minority decision by the arbitrators as decisive (over the majority) would be absurd; affording particular weight to certain constellations may be seen as an attempt to unduly influence the 'composition' of the arbitral tribunal, which is *contra bonos mores* and would constitute a ground for setting-aside the award".

Section 604 no. 1 ACCP further provides that in the case of procedural questions, the chairman may decide alone if properly authorized to do so.

The above, taken together, could lead to the conclusion that a party agreement authorizing the chairman of the tribunal to decide the dispute alone would be prohibited. Indeed, the *Begutachtungsentwurf*[15]) had a provision to the effect that in cases where a majority cannot be obtained, the chairman is entitled to decide alone absent contrary party agreement; the ACCP as in force has no such provision.

While the Official Comments' argument that a minority decision on the merits would be impermissible certainly is correct, it should not be taken as an exhaustive comment on the permissible interpretation of Section 604 no. 1 ACCP. There is no convincing reason why parties should be prohibited from validly

[13]) *See id.* at 809.

[14]) Official Comments to the Draft Arbitration Act 2006 (*Erläuterungen der Regierungsvorlage des SchiedsRÄG 2006,* 1158 BlgNR 22. GP).

[15]) Draft of a new arbitration law *(Entwurf eines neuen Schiedsverfahrensrechtes, Veröffentlichungen des Ludwig Boltzmann-Institutes für Rechtsvorsorge und Urkundenwesen XXVII [2002]).*

agreeing that the chairman cast the decisive vote in case of a deadlock. By contrast, there are a number of reasons why it should be assumed that the legislator's intention was not to allow for a qualified majority or even unanimous decisions only:

- The parties are free to agree on a sole arbitrator. To mandate the chairman to cast the decisive vote in case of a deadlock has the same effect: The dispute will be decided by one single person that – in most cases – has not been directly appointed by the disputants.
- Provisions on majority decision-making aim to protect the parties from the views of the minority. The underlying idea to this principle is that the majority's view is better because more people agree with it. However, if those who should be protected by majority voting would due to a deadlock not receive any decision at all under this principle (because there simply is no majority agreeing on anything), they should be allowed to waive their protection by agreeing that the chairman casts the deciding vote. Otherwise, Section 604 no. 1 ACCP would be highly overprotective.
- Indeed, Section 604 no. 1 ACCP was a necessary and important improvement to the former Austrian arbitration law. Prior to the enactment of the AA06, whenever a majority decision could not be reached and the parties could not or did not agree on a solution for the case, each party could commence court proceedings aimed at declaring the arbitration agreement underlying the dispute rescinded or of no effect in the particular case.[16]) As the possibility to commence such court proceedings has been abolished, it would be almost absurd to argue that party agreements to overcome a deadlock would now be inadmissible too. Otherwise, the logical consequence would be that deliberations were to continue until a majority view is reached; a consequence which is entirely impractical and which could, in the worst case, frustrate the entire arbitration.
- Accepting the parties' freedom to confer upon the chairman the power to decide alone if the tribunal is unable to reach an agreement coincides with the commentary on Article 29 of the Model Law,[17]) which served as model for Section 604 no. 1 ACCP.[18])
- This view is also supported by Austrian legal literature.[19])

[16]) Section 591 (2) old ACCP stipulated the following: "If no other provision for this case [i.e., majority or unanimity cannot be reached] is contained in the arbitration agreement or in a subsequent written agreement of the parties, any party may apply to the Court mentioned in Section 582 for a declaration that the arbitration agreement is rescinded or of no effect in the particular case."

[17]) *See Howard M. Holtzmann* & *Joseph E. Neuhaus,* A Guide to the UNCITRAL Model Law on International Commercial Arbitration 809 (1989); *Marianne Roth* in *Frank-Bernd Weigand* (ed.), Practitioner's Handbook on International Arbitration 1261 mn. 6 (2002).

[18]) So even the Official Comments to the AA06.

[19]) *E.g., Barbara Kloiber* & *Hartmut Haller* in *Barbara Kloiber et al.,* Das neue Schiedsrecht 47 (2006); *Walter H. Rechberger & Werner Melis* in *Walter H. Rechberger* (ed.) Kommentar zur ZPO[3] (2006) § 604 mn. 2; *Stefan Riegler* in *Stefan Riegler et al.*, Arbitration Law of Austria: Practice and Procedure (2007) § 604 mn. 5.

- It is in line with well established international practice.[20]) As pointed out above, a number of leading arbitration rules provide for the chairman's authority to end a deadlock situation by deciding the dispute alone. All of these arbitration rules would have to be regarded as containing invalid provisions if the parties cannot validly agree on a chairman-only decision to overcome a deadlock.[21])
- It is also mandated by the principle of procedural efficiency – to promote expedient proceedings and to reduce the risk of wasted time and expense.

b) Does the Chairman in the Absence of a Party Agreement Have the Authority to Make an Award Alone?

As stated above, the *Begutachtungsentwurf* had a provision to the effect that in cases where a majority cannot be obtained, the chairman was entitled to decide alone absent contrary party agreement; the ACCP as in force has no such provision. This clearly indicates that absent party agreement,[22]) a majority view must be reached. Furthermore, where a presiding arbitrator would be empowered to decide in absence of a majority he was in effect a sole arbitrator; a form of tribunal the parties did not choose (at least so far).[23]) This result is also supported by the commentary to the corresponding provision of the Model law: "Under the first sentence of Article 29, the arbitral tribunal must reach a majority decision. Thus, if there is a deadlock […] the arbitral tribunal must continue to deliberate until a majority is formed, or else issue no award."[24])

Obviously, this bears not only the risk of increased time and expense, but also the risk that the arbitration is stalled infinitely. Thus, at this point, the parties have two options:

1. The parties can authorize the chairman to decide alone.
2. The parties may ask the tribunal to issue an order for termination of the proceedings because their continuation has become impossible.

If (i) no majority view can be reached, (ii) the parties refuse to confer upon the presiding arbitrator the power to cast the deciding vote, and (iii) the parties also do not ask for an order of termination, then the tribunal may or indeed must issue an order for termination *ex officio*.[25])

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[20]) *See supra* at II.B.1.

[21]) Explicitly permitting the application of, *e.g.,* Article 25 (1) ICC Rules for Austria: *Andreas Reiner,* The new Austrian Arbitration Law (2006) fn. 147; *Walter H. Rechberger & Werner Melis* in *Walter H. Rechberger* (ed.) Kommentar zur ZPO[3] (2006) § 604 mn. 2; *Stefan Riegler* in *Stefan Riegler et al.,* Arbitration Law of Austria: Practice and Procedure (2007) § 604 mn. 5.

[22]) Authorization by the co-arbitrators does not suffice.

[23]) *Marianne Roth* in *Frank-Bernd Weigand* (ed.), Practitioner's Handbook on International Arbitration (2002) 1260 mn. 5.

[24]) *Howard M. Holtzmann & Joseph E. Neuhaus,* A Guide to the UNCITRAL Model Law on International Commercial Arbitration (1989) 808 et seq.

[25]) Section 608 (2) no. 4 ACCP: "The arbitral tribunal shall terminate the arbitral pro-

The problem is alleviated by the fact that many leading arbitration rules confer the presiding arbitrator with decision-making power in cases of deadlock – in these arbitrations, the arbitration rules are part of the arbitration agreement and thus, valid authorizations for the presiding arbitrator to decide alone.[26])

C. What Can or Must Be Done if an Arbitrator Refuses to Take Part in the Vote?

1. International Overview

Different from a deadlock (where usually every arbitrator expresses his opinion) is the situation in which an arbitrator simply refuses to take part in a vote. Whereas the Model Law does not provide any specific rule on how to deal with such refusals, some national statutes such as the GCCP or the Swedish Arbitration Act, do.[27]) Furthermore, a number of leading arbitration rules provide for decisions by truncated tribunals, including the DIS Rules, the LCIA Rules and the SCC Rules.[28])

The general principle expressed in these provisions is that the refusing arbitrator must have been given reasonable opportunity to participate in the vote. Then, and only then, the other arbitrators are entitled to proceed. In addition, some of these provisions require that the parties are informed about the refusal before continuing the decision-making;[29]) some explicitly require that there must not have been a valid cause for such refusal.[30])

However, some commentators are of the opinion that even absent any express (statutory) authorization, a majority of a tribunal would generally be held to have the authority to make an award without the participation of the third arbitrator, provided that he or she had been given sufficient opportunities to deliberate and participate in a vote.[31])

2. Austria

Similar to the GCCP, the ACCP also has a provision in place for the decision-making process by a truncated tribunal. Section 604 no. 2 ACCP provides that ab-

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ceedings when [it] finds that the continuation of the proceedings has become impossible, in particular, because the parties active in the proceedings to that point do not continue the arbitral proceedings despite written notification by the arbitral tribunal which refers to the possibility of terminating the arbitral proceedings."

[26]) *See supra* fn. 21.

[27]) Section 1052 (2) GCCP; Section 30 (1) Swedish Arbitration Act.

[28]) *E.g.*, Section 33.4 DIS Rules; Articles 12 and 26.2 LCIA Rules, Article 36 (5) SCC Rules; Article 35 WIPO Rules.

[29]) *E.g.*, Section 1052 (2) GCCP; Section 33.3 DIS Rules; Article 12 LCIA Rules.

[30]) *E.g.*, Section 30 Swedish Arbitration Act; Article 36 (5) SCC Rules.

[31]) *Cf.*, *Howard M. Holtzmann & Joseph E. Neuhaus,* A Guide to the UNCITRAL Model Law on International Commercial Arbitration (1989) 809.

sent a contrary agreement by the parties, "if one or more arbitrators do not participate in a vote without justified reason, the other arbitrators may decide without them. In this case, the necessary majority shall be calculated by reference to the total number of all arbitrators participating and not participating. In the case of taking votes for an award, the parties must first be informed of the intention to proceed in this manner."[32]) Section 604 no. 2 ACCP applies whenever the place of arbitration is in Austria.

This provision, which was introduced by the AA06, must be considered a major improvement of the former legal regime. Under the former legislation, an arbitrator's refusal to participate in the decision-making process or to cast his vote made the award subject to challenge.[33]) The current Austrian arbitration law, by permitting a decision of truncated tribunals, serves the purpose of efficient arbitral adjudication of disputes generally and, at the same time, discourages misconduct by arbitrators.

However, the authority for a truncated tribunal to make an award is limited:

1. A truncated tribunal may decide the dispute only if there is no contrary agreement by the parties.
2. The parties must be informed in advance, prior to the making of the truncated tribunal's award.
3. No decision is permitted if there is a justified reason for not participating.

a) Justified Reason

The key limitation is the requirement that there be a justified reason for not participating. The standard to be applied to this requirement is narrow. It is only necessary that the defaulting arbitrator is given adequate opportunity to cast his vote[34]) and fails to do so. Also, delaying tactics by arbitrators claiming not to be able to participate or meet deadlines are covered and enable truncated decisions.[35]) Furthermore, it is not necessary that an arbitrator expressly refuses to participate.[36]) Whether there is a justified reason for non-participation or rather an unjustified default is decided by the arbitral tribunal. However, this decision should be made carefully, since an award rendered by a truncated tribunal might

[32]) This provision of the ACCP is applicable to arbitral awards; with respect to other decisions by a tribunal, it applies with the modification that the parties must be informed about the failure to participate in the vote only *after* such vote.

[33]) Section 595 (1) no. 3 old ACCP provided that the award shall be set aside "if statutory or contractual provisions regarding the composition of the arbitral tribunal or the method of reaching a decision have been infringed …".

[34]) *Cf., Howard M. Holtzmann & Joseph E. Neuhaus,* A Guide to the UNCITRAL Model Law on International Commercial Arbitration (1989) 809.

[35]) *Paul Oberhammer,* Entwurf eines neuen Schiedsverfahrensrechts (2002) 113; *Gerold Zeiler,* Schiedsverfahren (2006) § 604 mn. 6.

[36]) *Paul Oberhammer,* Entwurf eines neuen Schiedsverfahrensrechts (2002) 113; *Gerold Zeiler,* Schiedsverfahren (2006) § 604 mn. 6.

be subject to successful challenge if there was, in fact, a justified reason for an arbitrator not to participate (Section 611 (2) nos. 2 and 4 ACCP).[37])

b) Decision-Making or Substitute Arbitrator?

In situations where the lack of participation is apparent, it would also be possible to appoint a substitute arbitrator.[38])

It is generally for the arbitral tribunal to decide whether to proceed on a truncated basis or to ask the parties to appoint a substitute arbitrator.[39]) Provided the participating arbitrators do have the requisite majority of all of the arbitrators sitting on the panel,[40]) it is clearly more efficient and thus desirable to decide as a truncated tribunal.[41])

However, where the matter is not yet ripe for decision *(Spruchreife)*, proceedings ultimately cannot be continued on a truncated basis (even if there is non-participation for an illegitimate reason) – in these situations, a substitute arbitrator must eventually be appointed in accordance with Sections 590 and 591 ACCP or else the proceedings terminated pursuant to Section 608 (2) no. 4 ACCP.

In cases where the matter is ripe for decision *(Spruchreife)*,[42]) a truncated tribunal, even if it would have the required majority, may, instead of deciding the case because it finds that an arbitrator's non-participation is unjustified (and therefore amounts to a refusal to participate in the vote in the sense of Section 604 no. 2 ACCP), still ask the parties to appoint a substitute arbitrator in accordance with Sections 590 and 591 ACCP – there is neither a duty to make a truncated decision[43]) nor is it, even at this stage, irrelevant whether non-participation is justified or unjustified.[44])

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[37]) *Stefan Riegler* in *Stefan Riegler et al.*, Arbitration Law of Austria: Practice and Procedure (2007) § 604 mn. 19 and 22.

[38]) Section 590 (2) ACCP: "Any party may request the court to decide on the termination of the mandate when an arbitrator either becomes unable to perform his functions or fails to act without undue delay and 1. the arbitrator does not withdraw from his office; 2. the parties cannot agree on his termination; or 3. the procedure agreed on by the parties does not lead to the termination of the arbitrator's mandate." Section 591 (1) ACCP: "Where the mandate of an arbitrator terminates early, a substitute arbitrator shall be appointed …"

[39]) *Paul Oberhammer*, Entwurf eines neuen Schiedsverfahrensrechts (2002) 113.

[40]) As Section 604 no. 2 sentence 2 ACCP makes clear, a majority of the participating arbitrators is not sufficient.

[41]) *Paul Oberhammer*, Entwurf eines neuen Schiedsverfahrensrechts (2002) 112 et seq.

[42]) Which is always the case when deciding on an award.

[43]) *Paul Oberhammer*, Entwurf eines neuen Schiedsverfahrensrechts (2002) 112 et seq.

[44]) *Cf., Paul Oberhammer*, Entwurf eines neuen Schiedsverfahrensrechts (2002) 112 et seq. and 122; *Stefan Riegler's* view (*Stefan Riegler* in *Stefan Riegler et al.*, Arbitration Law of Austria: Practice and Procedure [2007] § 604 mn. 22) that in cases where the matter is ripe for decision it "may be assumed that the remaining arbitrators may indeed proceed on their own, regardless of whether the non-participation is due to a justified or unjustified reason" is not covered by Section 604 no. 2 ACCP. The mere fact that a matter is ripe for decision cannot justify the exclusion of the explicitly stated requirement of an unjustified reason, because the

Furthermore, the arbitral tribunal generally has the same discretion even in cases where an arbitrator's mandate has ended.[45]) Of course, it is true that in accordance with the mandatory[46]) Section 591 (1) ACCP a substitute arbitrator has to be appointed as soon as an arbitrator's mandate has ended (which would imply that the arbitral tribunal would not be permitted to render a truncated decision). However, the *telos* of Section 591 ACCP clearly is to avoid truncated tribunals only as long as the arbitral proceedings are ongoing.[47]) In contrast, the focus of Section 604 no. 2 ACCP clearly lies on the phase after the proceedings have closed.[48]) Consequently, there is neither any incompatibility between Section 591 ACCP and Section 604 no. 2 ACCP, nor a violation of Section 591 ACCP if the arbitral tribunal decides to proceed as truncated tribunal as long as the matter is already ripe for decision and the required majority can be achieved.[49]) Provisions such as Article 12 (5) ICC Rules[50]) are therefore valid[51]) (but, generally, not necessary).[52])

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focus of Section 604 no. 2 ACCP lies on the phase after the proceedings have closed (*see infra* at fn. 48).

[45]) *E.g.,* when an arbitrator resigns from his office, is successfully challenged or deceases.

[46]) *Andreas Reiner,* The new Austrian Arbitration Law (2006) fn. 92; *Jenny Power,* The Austrian Arbitration Act (2006) § 591 mn. 4; *see* also *Gerold Zeiler,* Schiedsverfahren (2006) § 591 mn. 1.

[47]) Already Section 591 (1) ACCP itself refers to an "early" termination of the mandate. Furthermore, *see* the Offical Comments: "[…] If [however] the arbitrator's mandate has ended because the continuance of the proceedings has become impossible or because the parties have jointly agreed to terminate the mandate because they do not want to continue the proceedings, then a substitute arbitrator does not need to be appointed *because the appointment of a substitute arbitrator is always conditional upon the continuance of the proceedings*" [emphasis added]; *see also Jenny Power,* The Austrian Arbitration Act (2006) § 591 mn. 3.

[48]) *Cf., Paul Oberhammer,* Entwurf eines neuen Schiedsverfahrensrechts (2002) 113.

[49]) *Cf., id.* at 113; *contra Stefan Riegler* in *Stefan Riegler et al.*, Arbitration Law of Austria: Practice and Procedure (2007) § 604 mn. 25. The other solution (that a substitute arbitrator needs to be appointed even in cases where the matter is ripe for decision) would also result in contradictory consequences to very similar situations: An arbitrator who whishes to obstruct the decision-making could, *inter alia,* refuse to take part in the vote or could resign. Whereas upon his refusal to take part in the vote, the remaining arbitrators could proceed as truncated tribunal, his resignation would seriously hamper the proceedings – if Section 591 (1) ACCP would have to be applied also after the matter is ripe for decision.

[50]) Article 12 (5) ICC Rules provides that "*[s]ubsequent to the closing of the proceedings,* instead of replacing an arbitrator who has died or been removed by the Court pursuant to Articles 12 (1) and 12 (2), the Court may decide, when it considers it appropriate, that the remaining arbitrators shall continue the arbitration. In making such determination, the Court shall take into account the views of the remaining arbitrators and of the parties and such other matters that it considers appropriate in the circumstances." [emphasis added] Articles 12 (1) and 12 (2) ICC Rules cover termination of an arbitrator's mandate because of death, resignation, challenge, request by all parties, and *de jure* or *de facto* inability to fulfill his function.

[51]) *Andreas Reiner,* The new Austrian Arbitration Law fn. 147 and 149 (2006); *contra Gerold Zeiler,* Schiedsverfahren (2006) § 591 mn. 4. Section 604 no. 2 ACCP only covers the

c) Party Autonomy

Section 604 ACCP is not a mandatory provision – it applies only "unless otherwise agreed by the parties". The question then is whether the parties can validly agree that a truncated tribunal may decide on an award regardless of whether or not there was a justified reason for the defaulting arbitrator to abstain from the decision-making process.

In the authors' view, the answer to this question is positive: Several of the reasons presented above with regard to the parties' ability to confer upon the chairman the power to decide alone in case of a deadlock are also valid in the context of an arbitrator refusing to take part in a vote and support the permissibility of a respective party agreement (in particular, that the parties would have been free to agree on a sole arbitrator, that the parties should be allowed to waive the protection from "minority" views, that already prior to the AA06 party agreements on overcoming a lack of majority were allowed and the principle of procedural efficiency).[53]) Furthermore, allowing respective party agreements is also covered by the apparent *telos* of that provision.[54]) Moreover, it has to be taken into account that in many cases it will be difficult to decide whether or not the default was justified and, as long as the losing party may perceive realistic chances to succeed with a challenge, awards rendered by truncated tribunals will be subject to increased setting-aside procedures. This might prompt the participating arbitrators, when in doubt, to ask the parties to appoint a substitute arbitrator in accordance with Sections 590 and 591 ACCP which delays the proceedings and increases costs. By allowing corresponding party agreements these risks can be eliminated.

The correct view, therefore, is to allow parties to agree that truncated decisions can be made even if there is a justified reason on the non-participating arbitrator's part.

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voting, but not the preceding deliberations. Article 12 (5) ICC Rules covers both. In the absence of an agreement by the parties on a provision such as Article 12 (5) ICC Rules, an arbitrator that fails to take part in preceding deliberations without justification is subject to challenge in accordance with Sections 588 and 589 ACCP or to removal in accordance with Section 590 ACCP, whereupon a substitute arbitrator must be appointed pursuant to Section 591 ACCP (*Andreas Reiner,* The new Austrian Arbitration Law [2006] fn. 149).

[52]) As the scope of Section 591 ACCP does not cover situations where an arbitrator's mandate has ended as long as the matter is ripe for decision, the parties do not need to contract out the possibility of an appointment of a substitute arbitrator. However, as long as the deliberations have not been concluded, a respective party agreement would be necessary to avoid the appointment of a substitute arbitrator (*see supra* fn. 51).

[53]) *See supra* at II.B.2.a).

[54]) According to the Official Comments to the AA06, the intention of Section 604 no. 2 ACCP is "to prevent individual arbitrators from effecting the incapacity of the tribunal by their non-participation". This intention supports the view that the parties may permit truncated decisions on the award irrespective of a justified reason on the non-participating arbitrator's part.

d) Notification to Parties

Section 604 no. 2 ACCP provides that the arbitral tribunal must notify the parties in advance of its intention to proceed as a truncated tribunal in case of taking votes for an award.[55])

The advance notice regarding awards serves two purposes: On the one hand, the parties should be given the opportunity to call on the defaulting arbitrator to participate in the vote[56]) and/or to terminate the arbitrator's mandate[57]) in accordance with Section 590 ACCP. On the other hand, the parties should be given the opportunity to agree on a different decision-making process such as instructing the presiding arbitrator to decide on his own.[58])

The failure to inform the parties could give rise to a successful challenge under Section 611 (2) no. 4 and 5.[59])

D. What Can or Must Be Done if an Arbitrator Refuses to Sign the Award?

1. International Overview

Different from a deadlock and the refusal to take part in the vote is the refusal to sign the award. Here, the award was already decided and voted upon – the refusal merely concerns the actual signature on the award. In contrast to the aforementioned two other issues, this situation is explicitly dealt with in most national laws[60]) and leading arbitration rules.[61]) The respective provisions are generally based on the principle that it is regarded sufficient if only a majority of the arbitra-

[55]) With regard to other decisions, the arbitral tribunal may inform the parties also after the voting.

[56]) *Barbara Kloiber & Hartmut Haller* in *Barbara Kloiber et al,* Das neue Schiedsrecht (2006) 48; *cf., Klaus Reichold* in *Heinz Thomas & Hans Putzo,* Zivilprozessordnung[26] (2004) § 1053 mn. 3.

[57]) *Stefan Riegler* in *Stefan Riegler et al.*, Arbitration Law of Austria: Practice and Procedure (2007) § 604 mn. 27.

[58]) *Barbara Kloiber & Hartmut Haller* in *Barbara Kloiber et al.,* Das neue Schiedsrecht (2006) 48; *Stefan Riegler* in *Stefan Riegler et al.,* Arbitration Law of Austria: Practice and Procedure (2007) § 604 mn. 27.

[59]) *Stefan Riegler* in *Stefan Riegler et al.*, Arbitration Law of Austria: Practice and Procedure (2007) § 604 mn. 28.

[60]) *E.g.,* Article 1701 Belgian Judicial Code; Section 52 (3) English Arbitration Act 1996; Article 1473 French Code of Civil Procedure; Section 1054 (1) GCCP; Article 823 Italian Code of Civil Procedure; Article 1057 (2) and (3) Dutch Code of Civil Procedure; Section 31 Swedish Arbitration Act; Article 189 (2) SPILA;

[61]) *E.g.,* Article 27 (3) VIAC Rules; Article 43 (6) CIETAC Rules; Article 26.1 LCIA Rules; Section 34.1 DIS Rules; Article 36 (3) SCC Rules; Article 32 (4) Swiss Rules; Article 26 (1) AAA-IA Rules; Article 62 (d) WIPO Rules.

tors signs the award. Frequently, a statement of the reasons for the omitted signature is to be included in or appended to the award.[62])

Exemplary for these principles, Article 31 (1) of the Model Law provides the following: "The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated."

Some national statutes and arbitration rules even allow for the signature of the chairman to suffice.[63])

2. Austria

Mirroring Article 31 (1) of the Model Law, Section 606 (1) ACCP provides the following: "The award shall be made in writing and shall be signed by the arbitrator or arbitrators. Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the chairman or another arbitrator records on the award the reason for any omitted signature."

This provision of the ACCP (i) applies whenever the place of arbitration is in Austria, (ii) is applicable only to arbitral awards (but not to other decisions by a tribunal) and (iii) defines in its first sentence the minimum requirements as to the form of an arbitral award which are mandatory and may not be waived. An award that does not show the required signature(s) is a non-award. A non-award *per definitionem* cannot be set aside; however, a court declaration to the effect that an award does not exist may be requested by an action pursuant to Section 612 ACCP. In addition, according to case law rendered under the former legislation, an action to have an arbitrator sign the award may be filed where such signature is necessary for the effectiveness of the award.[64])

By providing that the signatures of the majority of the arbitrators are sufficient, the ACCP prevents a minority from blocking the making of the award. The reasons for the omitted signature(s) must be recorded in the award. There is neither the necessity to give detailed explanations nor should this be interpreted as an invitation for setting out a dissenting opinion.[65])

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[62]) *E.g.,* Section 1054 (1) GCCP; Article 823 Italian Code of Civil Procedure; Article 1057 (3) Dutch Code of Civil Procedure; Section 31 Swedish Arbitration Act; *see* also Section 34.1 DIS Rules; Article 36 (3) SCC Rules; Article 32 (4) Swiss Rules; Article 26 (1) AAA-IA Rules; Article 62 (d) WIPO Rules.

[63]) *E.g.,* Article 189 (2) SPILA; Article 32 (4) Swiss Rules; Article 36 (3) SCC Rules; Article 62 (d) WIPO Rules. Some provisions require the parties' consent for this: *e.g.,* Section 31 Swedish Arbitration Act.

[64]) Austrian Supreme Court [OGH] Jul 10, 2001, 4 Ob 156/01x, ecolex 2002/39 (commented by *Georg Wilhelm*).

[65]) *Paul Oberhammer,* Entwurf eines neuen Schiedsverfahrensrechts (2002) 116; *Gerold Zeiler,* Schiedsverfahren (2006) § 606 mn. 26; *Stefan Riegler* in *Stefan Riegler et al.,* Arbitration Law of Austria: Practice and Procedure (2007) § 606 fn. 30.

Section 606 (1) 2nd sentence ACCP is subject to party agreement. The parties may thus agree that the signatures of all of the members of the tribunal are required. In practice, this will not often be the case.

The more interesting question is whether or not the parties may also agree that in case of a three-person tribunal, the signature by the chairman alone is sufficient. According to the non-binding Official Comments, the parties are only entitled to agree on an increase in the number,[66]) but not on a decrease.[67]) This is flawed for several reasons:

- It contravenes the plain wording of Section 606 (1) ACCP.
- Section 606 (1) ACCP must be read together with Section 604 ACCP. Like Section 604 ACCP, Section 606 (1) ACCP is aimed at preventing a deadlock in case of an arbitrator's refusal to sign the award. As has been discussed above, there are compelling reasons to permit agreements according to which the chairman of the tribunal may decide the dispute alone in cases of deadlock. On this basis, it is difficult to see why the chairman's signature should not suffice.
- The Official Comments state that Section 606 (1) ACCP is modeled on Article 31 of the Model Law. According to legal commentary on the Model Law, the parties may agree that the signature of the presiding arbitrator is sufficient.[68])
- Judgments by Austrian courts need not be signed by the judge(s) at all; there is no reason why the signature by the presiding arbitrator should not suffice when the parties confer such authority.[69])

Therefore, the better view, supported by Austrian legal commentary,[70]) is to permit party agreements providing for a signature of the presiding arbitrator only.

III. Dissenting Opinions

Decisions by multipartite arbitral tribunals are prone to disagreement between the arbitrators. Frequently, an arbitrator wishes to express his disagreement in a dissenting opinion, setting forth the reasons for a different view.

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[66]) The Official Comments in this context use the term *quorum.*

[67]) *Jenny Power,* The Austrian Arbitration Act (2006) § 606 mn. 2; *Barbara Kloiber & Hartmut Haller* in *Barbara Kloiber et al.,* Das neue Schiedsrecht (2006) 49.

[68]) *Marianne Roth* in *Frank-Bernd Weigand* (ed.), Practitioner's Handbook on International Arbitration (2002) 1265 mn. 3.

[69]) *See Stefan Riegler* in *Stefan Riegler et al.*, Arbitration Law of Austria: Practice and Procedure (2007) § 606 mn. 20; *Walter H. Rechberger & Werner Melis* in *Walter H. Rechberger* (ed.) Kommentar zur ZPO[3] (2006) § 606 mn. 3.

[70]) *Stefan Riegler* in *Stefan Riegler et al.*, Arbitration Law of Austria: Practice and Procedure (2007) § 606 mn. 20; *Walter H. Rechberger & Werner Melis* in *Walter H. Rechberger* (ed.) Kommentar zur ZPO[3] (2006) § 606 mn. 3.

A dissenting opinion, by definition, relates to the dispositive part of the award.[71]) The dissent may relate to the outcome of the dispute (and its reasoning) or merely to certain aspects of the dispute such as *quantum* or costs.

As the rendering of a valid and enforceable award is imperative, the main question in this context is whether dissenting opinions are permissible.

To answer this question, it is helpful to first elaborate on whether dissenting opinions are useful and desirable for international commercial arbitration. As will be shown below, provisions explicitly permitting or prohibiting dissenting opinions are rare. Thus, the degree of usefulness and *desirability* of dissenting opinions is an important tool for the interpretation of the relevant legislative framework when assessing the *permissibility* of dissenting opinions.

A. Are Dissenting Opinions Desirable as a Matter of Principle?

Dissenting opinions have appeared in international commercial arbitration as a "gift" from the common law.

The traditional justification for dissenting opinions in common law jurisdictions in the context of state court decisions is that they may contribute to the development of the law.[72]) This instantly leads to the question of whether the concept of dissenting opinions is in any way able to serve the same purpose in arbitration proceedings. Indeed, in most cases, there is no possibility to appeal against an award. Accordingly, a dissenting opinion cannot inform an appellate tribunal about alternative or different considerations.[73]) Furthermore, awards and dissenting opinions are generally not open to the public. Thus, future arbitral tribunals will not be able to take the arguments put forward in dissenting opinions into account when deciding on their own case. Moreover, the concept of binding precedence does not exist in international commercial arbitration.

As a result, dissenting opinions indeed seem to have far less to contribute to the arbitral process than to a (common law)[74]) judicial system.[75]) Therefore, are

[71]) A "concurring" opinion is the opinion of an arbitrator who agrees with the majority of the tribunal as far as the dispositive section of the award is concerned but disagrees with the reasoning (*Julian D. M. Lew, Loukas A. Mistelis & Stefan M. Kröll,* Comparative International Commercial Arbitration (2003) 24–45).

[72]) *Alan Redfern & Martin Hunter,* Law and Practice of International Commercial Arbitration[4] (2004) 8–82.

[73]) *Id.* at 8–82.

[74]) Additionally, with regard to civil law judicial systems one might argue that the development of the law by judicial decisions plays even a smaller role than in common law judicial systems. However, in international commercial arbitration – as in the civil law judicial system – there exists no system of *stare decisis.* Thus, differences between the common law and the civil law judicial system are not decisive in this context.

[75]) *Alan Redfern & Martin Hunter,* Law and Practice of International Commercial Arbitration[4] (2004) 8–82.

dissenting opinions merely a tool for disagreeing arbitrators to foster their image with their nominating party? Would it not be easier and more desirable to merely refer dissenting arbitrators to the possibility of simply not signing the award?

As one might expect, there are, of course, several arguments both *in favor of* as well as *against* dissenting opinions. These arguments shall be addressed in the following before turning to the question of the legal *permissibility* of dissenting opinions.

1. Arguments in Favor of Dissenting Opinions

Arguments that have been raised in support of dissenting opinions include the following:

a) Better Awards

The availability of dissenting opinions ensures that the majority properly addresses sensitive issues.[76]) It fosters that an award is well reasoned by giving the majority an opportunity to have the arguments of the dissenter in writing. Thereby, a more in depth discussion of often very complex facts or legal issues is possible and misunderstandings can be avoided.[77])

In this context, it should be emphasized that in international commercial arbitration, arbitrators are appointed due to their specialized knowledge of the law and/or any technical or other expertise. Usually, not all arbitrators of one panel will have the same special qualifications. Accordingly, dissent may also be routed in different views due to different knowledge and expertise. In these situations, it is of particular importance that all issues are properly addressed. Here, dissenting opinions are said to be especially beneficial.[78])

Furthermore, the possibility to dissent in an open and reasoned manner keeps arbitrators accountable for the rationale and consequences of their decision[79]) – they cannot hide behind one award anymore. Thereby, the possibility to communicate a dissenting opinion to the parties pushes each arbitrator to pay close attention to the arguments of the other arbitrators and the parties so that he, in case he does not agree with the majority view, can provide a well argued dissenting opinion. Thereby, the quality of the arguments will increase not only on the side of a (potential) dissenter but also – and more importantly – on the side of the majority.[80])

[76]) *Richard M. Mosk & Tom Ginsburg, Dissenting Opinions in International Arbitration,* 15 (4) Mealey's International Arbitration Report (2000) 26, 30.

[77]) *See Oliver M. Peltzer,* Die Dissenting Opinion in der Schiedsgerichtsbarkeit (2000) 111.

[78]) *See Oliver M. Peltzer,* Die Dissenting Opinion in der Schiedsgerichtsbarkeit (2000) 107 et seq.

[79]) *W. J. Brennan* cited in *Richard M. Mosk & Tom Ginsburg,* Dissenting Opinions in International Arbitration, 15 (4) Mealey's International Arbitration Report (2000) 26, 30.

[80]) *Cf., Oliver M. Peltzer,* Die Dissenting Opinion in der Schiedsgerichtsbarkeit (2000) 108 et seq.

Most importantly, dissenting opinions may expose fatal irregularities to the majority and might enable the tribunal to correct them before issuing the award.[81]) Thereby, a dissenting opinion also contributes to the enforceability of an award.

However, to play this role of ensuring and enhancing the quality of an award, it is imperative that dissenters circulate their opinions in advance, before the issuance of the award[82]) – as Judge Richard M. Mosk and Tom Ginsburg stated: "When it is not possible to circulate drafts in advance of the majority award, it is basic courtesy that dissenters should circulate their opinions before issuance, and any code of ethics for arbitrators should include such a requirement".[83])

b) Increasing Confidence in Proceedings

Without the possibility to express a differing view in a dissenting opinion, an arbitrator who is against the result of the case might be prompted to simply refuse to sign the award. Although some jurisdictions and rules require that a reason for such refusal shall be stated on the award, these statements will be short[84]) and would not allow an arbitrator to show his concerns in detail. Thereby, the respective party will be left without a proper reasoning for the dissent and might feel concerned whether all arguments have been considered properly and/or whether there have been any material substantive or procedural insufficiencies. Thus, the parties might doubt the legitimacy of the proceedings and their result. Research in social psychology showed that, for a losing party, the key factor in determining the legitimacy of the process is to be treated fairly.[85]) Providing a dissenting opinion that raises arguments in favor of a party's position will show this party that alternative arguments were considered[86]) and thus, that the proceedings were fair. Thereby, the possibility that an award will be complied with voluntarily – without enforcement proceedings – is increased.[87])

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[81]) *Richard M. Mosk & Tom Ginsburg,* Dissenting Opinions in International Arbitration, 15 (4) Mealey's International Arbitration Report (2000) 26, 30; *cf.* also, *Oliver M. Peltzer,* Die Dissenting Opinion in der Schiedsgerichtsbarkeit (2000) 108.

[82]) Working Party on Dissenting Opinions and Interim and Partial Awards of the ICC Commission on International Arbitration, *Final Report on Dissenting and Separate Opinions,* 2 (1) ICC International Court of Arbitration Bulletin 32, 35 (1991); *Alan Redfern & Martin Hunter,* Law and Practice of International Commercial Arbitration[4] (2004) 8–81.

[83]) *Richard M. Mosk & Tom Ginsburg,* Dissenting Opinions in International Arbitration, 15 (4) Mealey's International Arbitration Report (2000) 26, 30.

[84]) *See supra* fn. 65.

[85]) *Richard M. Mosk & Tom Ginsburg,* Dissenting Opinions in International Arbitration, 15 (4) Mealey's International Arbitration Report (2000) 26, 30.

[86]) *Richard M. Mosk & Tom Ginsburg,* Dissenting Opinions in International Arbitration, 15 (4) Mealey's International Arbitration Report (2000) 26, 30; *see Oliver M. Peltzer,* Die Dissenting Opinion in der Schiedsgerichtsbarkeit (2000) 110 et seq.; *see also Alan Redfern, The 2003 Freshfields – Lecture Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly,* 20 (3) Arbitration International (2004) 223, 230.

[87]) *Richard M. Mosk & Tom Ginsburg, Dissenting Opinions in International Arbitration,* 15 (4) Mealey's International Arbitration Report (2000) 26, 30.

c) Control Function

The mere possibility of a dissenting opinion will make individual arbitrators engage more intensely.[88]) Being provided with a dissenting opinion before issuing an award, the other arbitrators will be able to check their award with regard to the concerns raised in the dissenting opinion and might even change their view.

Furthermore, a dissenting opinion also provides the parties with additional information on substantive and procedural issues and might even unveil irregularities amounting to severe violations of substantive or procedural law.[89]) Therefore, dissenting opinions are serving as a corrective tool in an area where appeals are usually excluded.

d) Possibility for an Arbitrator to Defend His Reputation

If an arbitrator does not agree with the result of a case, he would still have to stand (at least indirectly – in case he refuses to sign) with his name for the award if open dissents were prohibited. This might lead to situations where an arbitrator's reputation is at stake as he would be accountable for mistakes of the majority. By allowing for dissenting opinions, arbitrators are given the possibility to distance themselves from a majority opinion and express their differing views.[90])

2. Arguments Against Dissenting Opinions

Arguments that have been raised against dissenting opinions include the following:

a) Decreasing Confidence in Proceedings

With the availability of dissenting opinions, arbitrators may feel pressure to support the party that appointed them and to disclose that support.[91]) So the question might arise whether a dissent is the result of an honest difference of opinion or whether it is influenced by the mere desire to keep favor with the party that appointed the dissenting arbitrator.[92]) For example, in the history of the Vienna International Arbitral Centre, every single dissenting opinion was drawn up by the arbitrator appointed by the losing party.[93]) Similar observations were made in

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[88]) *See Oliver M. Peltzer,* Die Dissenting Opinion in der Schiedsgerichtsbarkeit (2000) 111.

[89]) *Richard M. Mosk & Tom Ginsburg,* Dissenting Opinions in International Arbitration, 15 (4) Mealey's International Arbitration Report (2000) 26, 30.

[90]) *See Oliver M. Peltzer,* Die Dissenting Opinion in der Schiedsgerichtsbarkeit (2000) 109.

[91]) *See Richard M. Mosk & Tom Ginsburg, Dissenting Opinions in International Arbitration,* 15 (4) Mealey's International Arbitration Report (2000) 26, 32.

[92]) *See Alan Redfern & Martin Hunter,* Law and Practice of International Commercial Arbitration[4] (2004) 8–83.

[93]) This is based on oral information provided by the Vienna International Arbitral Centre in October 2007. So far dissenting opinions were drawn up in 7 or 8 cases only.

ICC arbitration.[94]) Thus, dissenting opinions can harm the legitimacy of proceedings by unduly emphasizing the connection between the parties and their appointed arbitrators.

Moreover, some authors argue that what others consider as advantage is actually a major disadvantage of dissenting opinions: Losing parties who see that there were different views on their case might be encouraged to believe that it was only the composition of the tribunal which made them lose[95]) or even not to accept the result at all. Therefore, dissenting opinions imperil the authority of arbitral awards and increase the likelihood that awards will be challenged.[96])

b) Discouraging Deliberations, Obstacle to Majority and Encouraging Incivility

As soon as arbitrators sense a dissent, they might concentrate more on drafting a dissenting opinion than on deliberations with the other arbitrators.[97]) Therefore, actual deliberations could be hindered. The admissibility of dissenting opinions might also discourage arbitrators to find a majority view at all.[98]) If all three arbitrators have different views, the question might arise who is actually dissenting from whom.

Furthermore, if arbitrators are encouraged to express disagreement with the majority, there is also a risk that dissenters will resort to inappropriate rhetoric.[99])

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[94]) According to *Alan Redfern,* in 2001 at the ICC, there were 24 dissenting opinions. In 22 of these, where it was possible to identify the dissenting arbitrator, the dissent was made in favor of the party that had appointed the dissenter (*Alan Redfern, The 2003 Freshfields – Lecture Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly,* 20 (3) Arbitration International [2004] 223, 234).

[95]) *Rolf A. Schütze,* Dissenting Opinions im Schiedsverfahren, in Festschrift für Hideo Nakamura (1996) 525, 529 (*Andreas Heldrich & Takeyoshi Uchida* eds.).

[96]) *See Richard M. Mosk & Tom Ginsburg,* Dissenting Opinions in International Arbitration, 15 (4) Mealey's International Arbitration Report (2000) 26, 34; *see also Oliver M. Peltzer,* Die Dissenting Opinion in der Schiedsgerichtsbarkeit (2000) 114.

[97]) *See Oliver M. Peltzer,* Die Dissenting Opinion in der Schiedsgerichtsbarkeit (2000) 114.

[98]) *See Richard M. Mosk & Tom Ginsburg, Dissenting Opinions in International Arbitration,* 15 (4) Mealey's International Arbitration Report (2000) 26, 33; *see also Helmut Pichler, Die Abweichende Meinung – ein Diskussionsanstoß,* 1981 RZ 157, 160.

[99]) *See Richard M. Mosk & Tom Ginsburg, Dissenting Opinions in International Arbitration,* 15 (4) Mealey's International Arbitration Report (2000) 26, 32; *see also Alan Redfern, The 2003 Freshfields – Lecture Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly,* 20 (3) Arbitration International (2004) 223, 228.

c) Prolongation of Proceedings and Higher Costs

Dissenting opinions will increase the time required to complete the proceedings[100]) and thus, may raise costs.[101]) Obviously, the preparation of dissenting opinions and their circulation and consideration will require extra time and therefore, have the potential to prolong the arbitral process.

d) Violation of Secrecy of Deliberations

One major concern is that dissenting opinions could infringe the secrecy of deliberations.[102]) The result of this would be that the validity of the procedure and thus, of the award might be jeopardized in some jurisdictions – especially in civil law countries.

3. Own View

Indeed, it is true that in arbitration, where decisions are published only in exceptional cases and appeals are generally excluded, dissenting opinions do not serve their original, most important function – the development of the law. However, as one can see from the above, there are several valid arguments in favor of dissenting opinions, of which the most important one is that they improve the quality of awards. Already, their mere availability should help raise standards.

With regard to the parties' confidence in the legitimacy of the proceedings, the arbitral practice shows that dissenting opinions in fact are only rendered in exceptional cases[103]) – the pressure on arbitrators to inappropriately support their nominating party obviously is quite low; where disagreement is the result of an honest difference of opinion, dissent is legitimate.

Furthermore, to dissent in favor of the nominating party does not *per se* mean that the respective arbitrator is violating his duties of impartiality and independence. After all, the parties are careful to select arbitrators with views similar to

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[100]) Working Party on Dissenting Opinions and Interim and Partial Awards of the ICC Commission on International Arbitration, *Final Report on Dissenting and Separate Opinions,* 2 (1) ICC International Court of Arbitration Bulletin 32, 33 (1991).

[101]) *See Richard M. Mosk & Tom Ginsburg, Dissenting Opinions in International Arbitration,* 15 (4) Mealey's International Arbitration Report (2000) 26, 33.

[102]) *Richard M. Mosk & Tom Ginsburg, Dissenting Opinions in International Arbitration,* 15 (4) Mealey's International Arbitration Report (2000) 26, 31; *Oliver M. Peltzer,* Die Dissenting Opinion in der Schiedsgerichtsbarkeit (2000) 20 et seq.; *Rolf A. Schütze, Dissenting Opinions im Schiedsverfahren,* in Festschrift für Hideo Nakamura (1996) 525, 533 et seq. (*Andreas Heldrich & Takeyoshi Uchida* eds.); Working Party on Dissenting Opinions and Interim and Partial Awards of the ICC Commission on International Arbitration, *Final Report on Dissenting and Separate Opinions,* 2 (1) ICC International Court of Arbitration Bulletin (1991) 32, 34.

[103]) On the low number of dissenting opinions before the Vienna International Arbitral Centre *see supra* fn. 93; also at the ICC, awards accompanied by dissenting opinions form a "small fraction" of ICC awards only: *see Yves Derains & Eric A. Schwartz,* A Guide to the ICC Rules of Arbitration[2] (2005) 308.

theirs.[104]) The remaining individual instances where an arbitrator lacks the necessary integrity should not lead to a general prohibition of dissenting opinions.

For those circumstances in which a dissenting opinion facilitates a challenge (or a non-enforcement) on legitimate grounds, the dissent – beyond doubt – serves a desirable purpose.

As to the possibility that dissenting opinions could be misused for personal attacks against co-arbitrators, one should consider that, in any case, arbitrators from the legal profession will be governed by their national rules of conduct and ethics. Moreover, gross breaches of ethics might generally give rise to corresponding actions of the affected co-arbitrators, which by themselves should be sufficient to dissuade inappropriate behavior. Furthermore, to prohibit dissenting opinions only because they might be misused is not sound policy. In the words of Laurent Levy: "It is preferable to eliminate or penalize abuses rather than the means, otherwise useful, which are used to commit them."[105])

The criticism that dissenting opinions could discourage deliberations is unconvincing. For a properly founded dissent, an arbitrator will have to consider carefully all of the arguments raised by the parties and the other arbitrators, and the majority, in return, will have to do the same with the arguments presented by the dissenter. Thereby, the deliberation process is actually not discouraged but merely shifted to a written level, in which dealing with every single issue that has been raised is even more likely to be successfully accomplished.

The further argument that dissenting opinions could even be an obstacle to building a majority view is similarly weak. Despite the fact that there are several commentators who fear exactly the opposite (admissibility of dissenting opinions could hamper diversity due to the pressure of having to draft a written dissent),[106]) in cases where all arbitrators have different views, it will rather be the different views than the admissibility of dissenting opinions hindering the process.

With regard to increased time and costs, dissenting opinions might, indeed, prolong the arbitral process and therefore, raise costs. However, all arbitrators should – and usually will – try to keep extra time and costs as low as possible. Here, the chairman of a tribunal will have to play a crucial role in aligning the pace of the majority and the dissenter – whereby, the chairman will usually also have the support of the respective arbitration institution.[107]) However, even if the process is

[104]) *Richard M. Mosk & Tom Ginsburg, Dissenting Opinions in International Arbitration,* 15 (4) Mealey's International Arbitration Report (2000) 26, 32.

[105]) *Laurent Levy, Dissenting Opinions in International Arbitration in Switzerland,* 5 (1) Arbitration International (1989) 35, 39.

[106]) *Hans W. Fasching,* Lehrbuch des österreichischen Zivilprozessrechts[2] (1990) 104 mn. 181; *Oskar J. Ballon* in *Hans W. Fasching & Andreas Konecny* (eds.), Kommentar zu den Zivilprozessgesetzen[2] (2000) §§ 9–14 mn. 18 .

[107]) For example, the ICC Working Group on Dissenting Opinions recommended that, generally, a dissenting opinion should only be communicated to the Court of Arbitration if it is received by the Secretariat before the date on which the award comes to the Court for scrutiny (Working Party on Dissenting Opinions and Interim and Partial Awards of the ICC Commission on International Arbitration, *Final Report on Dissenting and Separate*

prolonged and costs are increased, the parties will still benefit from it because they will be provided with a better award. In the words of Judge Richard M. Mosk and Tom Ginsburg: "Indeed, few would accept a substandard award simply because it costs less to render."[108])

The authors therefore believe that generally the availability of dissenting opinions – within certain limits – is desirable.

With regard to a potential violation of the secrecy of deliberations, the issue is actually less one of *desirability* than one of *permissibility.* This will be dealt with in the next chapter.

B. Are Dissenting Opinions Permissible?

1. International Overview

Most national arbitration laws are silent on the subject of dissenting opinions.[109]) Whereas no prohibition against dissenting opinions is known in the common law countries,[110]) commentators of some civil law jurisdictions argue that dissenting opinions – although not expressly prohibited by national law – are violating the secrecy of deliberations and are, thus, inadmissible.[111]) However, even in France – the backbone of the opposition to dissenting opinions[112]) – it is now commonly accepted that in international arbitration proceedings, dissenting

Opinions, 2 (1) ICC International Court of Arbitration Bulletin 32, 36 (1991)). Thereby, dissenters are effectively encouraged to prepare and submit their dissenting opinions on time.

[108]) *Richard M. Mosk & Tom Ginsburg, Dissenting Opinions in International Arbitration,* 15 (4) Mealey's International Arbitration Report (2000) 26, 33.

[109]) *Cf.,* English Arbitration Act 1996 (under which dissenting opinions are undoubtedly admissible); GCCP (under which some commentators believe that dissenting opinions are inadmissible: *e.g., Rolf A. Schütze, Dissenting Opinions im Schiedsverfahren,* in Festschrift für Hideo Nakamura (1996) 525, 535 (*Andreas Heldrich & Takeyoshi Uchida* eds)); Dutch Code of Civil Procedure (here, the authoritative commentary notes state that dissenting opinions are not excluded: *Alan Redfern & Martin Hunter,* Law and Practice of International Commercial Arbitration 8–78 (4th ed. 2004)).

[110]) *Alan Redfern & Martin Hunter,* Law and Practice of International Commercial Arbitration[4] (2004) 8–78.

[111]) *E.g.,* for France *see, e.g.,* the sources cited in *Jacques Werner, Dissenting Opinions – Beyond Fears* (1992) 9 (1) J.Int'l Arb. 23, 24; for Switzerland *see, e.g.,* Working Party on Dissenting Opinions and Interim and Partial Awards of the ICC Commission on International Arbitration, Final Report on Dissenting and Separate Opinions, 2 (1) ICC International Court of Arbitration Bulletin (1991) 32, 34 (however, under the SPILA the admissibility of dissenting opinions is generally accepted: *see Oliver M. Peltzer,* Die Dissenting Opinion in der Schiedsgerichtsbarkeit [2000] 90–95); for Germany *see, e.g., Rolf A. Schütze,* Dissenting Opinions im Schiedsverfahren, in Festschrift für Hideo Nakamura (1996) 525, 535 (*Andreas Heldrich & Takeyoshi Uchida* eds.,).

[112]) *Jacques Werner,* Dissenting Opinions – Beyond Fears (1992) 9 (1) J.Int'l Arb. 23, 23.

opinions are permissible;[113]) although French arbitration law explicitly provides that "[T]he deliberations of arbitrators shall be in camera".[114]) Only a few laws of non-common law countries expressly permit dissenting (or concurring) opinions.[115])

Also, most arbitration rules do not specifically address the issue of dissenting opinions. Exceptions which explicitly allow dissenting opinions are, for example, the Rules of the International Centre for the Settlement of Investment Disputes (ICSID), the CIETAC Rules and the Rules of the Iran-United States Claims Tribunal.[116])

During the discussions for the drafting of the Model Law, it was suggested that a provision be included to explicitly allow for dissenting opinions, but little need was seen to do so.[117]) According to legal commentary, the issue of dissenting opinions is governed by Article 19 of the Model Law as a matter of the conduct of proceedings.[118]) Based on this rationale, a dissenting opinion may be stated *in the award* if the parties so agree or if the arbitral tribunal so allows.[119]) However, the requirement of permission does not refer to the admissibility of dissenting opinions in general, so that a minority may still render a dissenting opinion *separately* even if the majority does not agree to issue it in or together with the award.[120])

The Model Law is representative of many national arbitration laws and indeed of the general trend in modern international commercial arbitration. The apparent general view is that even under laws where no express reference is made to dissenting opinions, they may still be delivered by arbitrators.[121])

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[113]) *Id.* at 24; *Oliver M. Peltzer,* Die Dissenting Opinion in der Schiedsgerichtsbarkeit (2000) 95 et seq.

[114]) Article 1469 French Code of Civil Procedure; France seems to be the only country were the secrecy of deliberations is explicitly provided for by statutory law for arbitral proceedings (*Klaus Lionnet & Annette Lionnet,* Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit[3] [2005] 396).

[115]) *See, e.g.,* Article 39 (1) Bulgarian Arbitration Law; Article 24 (2) Brazilian Arbitration Law; Article 53 Arbitration Law of the People's Republic of China.

[116]) Article 48 (4) Convention on the Settlement of Investment Disputes Between States and Nationals of Other States; Article 43 (4) CIETAC Rules; Article 32 (3) Tribunal Rules of Procedure of the Iran-United States Claims Tribunal.

[117]) *Howard M. Holtzmann & Joseph E. Neuhaus,* A Guide to the UNCITRAL Model Law on International Commercial Arbitration (1989) 837 and 856.

[118]) *Marianne Roth in Frank-Bernd Weigand* (ed.), Practitioner's Handbook on International Arbitration (2002) 1265 mn. 4.

[119]) *Id.* at 1265 mn. 4.

[120]) *Id.* at 1265 mn. 4; *Howard M. Holtzmann & Joseph E. Neuhaus,* A Guide to the UNCITRAL Model Law on International Commercial Arbitration (1989) 837 fn. 8

[121]) *Julian D. M. Lew, Loukas A. Mistelis & Stefan M. Kröll,* Comparative International Commercial Arbitration (2003) 24–47.

2. Austria

Like most national arbitration laws, the ACCP is silent on the subject of dissenting opinions. The ACCP's arbitration provisions (otherwise) set forth the relevant framework as follows:

- The ACCP generally permits majority awards – Section 604 no. 1.[122])
- The ACCP generally permits majority awards by truncated tribunals – Section 604 no. 2.[123])
- The ACCP generally requires that the award states the reasons upon which it is based Section 606 (2).[124])
- The ACCP requires the arbitrators to sign the award, whereas the signature of the majority of the members of the tribunal generally suffices, provided that the chairman or another arbitrator records on the award the reason for any omitted signature – Section 606 (1).[125])

As already pointed out above, the requirement to state on the award the reason for any omitted signature – according to legal commentary – should not be interpreted as an invitation for setting out a dissenting opinion.[126]) However, this provision certainly does not prohibit dissenting opinions either.

By contrast to France, Austrian arbitration law does not contain any explicit provision on the secrecy of deliberations in arbitration proceedings. Although this principle indeed also applies to arbitral procedures,[127]) its exact scope in arbitral settings was never defined by case law. As in other civil law jurisdictions, the main question with regard to the permissibility of dissention opinions remains whether their communication to the parties would violate the secrecy of deliberations. To answer this question, a brief look will be made at the relevant views concerning Austrian civil procedure in national courts, before turning to the scope of the secrecy of deliberations under Austrian arbitration law.

a) Secrecy of Deliberations in Civil Court Proceedings

For civil proceedings, the secrecy of deliberations is regulated in Section 413 ACCP. It provides that "[t]he deliberation and voting of judges is not public". However, an infringement of that principle is generally considered to amount only to a mere misdemeanor *(Ordnungswidrigkeit),* which does not lead to any proce-

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[122]) *See supra* at II.A.2.

[123]) *See supra* at II.C.2.

[124]) Failure to state the reasons for the award does not normally constitute grounds for challenging the award pursuant to Section 611 (2) ACCP but might provide grounds for refusal of recognition and enforcement under Art. V NYC – *cf., Stefan Riegler* in *Stefan Riegler et al.*, Arbitration Law of Austria: Practice and Procedure (2007) § 606 mn. 25.

[125]) *See supra* at II.D.2.

[126]) *See supra* fn. 65.

[127]) *Hans W. Fasching,* Schiedsgericht und Schiedsverfahren im österreichischen und im internationalen Recht (1973) 108 et seq..

dural consequences – in particular, not to any invalidity or grave defect of a judgment.[128])

Austrian procedural law does not recognize dissenting opinions. However, it is generally acknowledged that dissenting opinions are not permissible in civil court proceedings.[129]) The same is true for public law courts.[130]) The exclusion of dissenting opinions is, as in other civil law countries, based on the principle of secrecy of deliberations.[131]) The majority of the scarce comments on the exclusion of dissenting opinions in civil court proceedings also considers this to be a desirable result since dissenting opinions were, *inter alia,* said to have the potential of endangering the authority of judgments, and that in state court tribunals, it is not the individual judge but the continuity and the collective responsibility that stands in the foreground.[132])

Furthermore, as another result of Section 413 ACCP, judges are barred from being called as witnesses with regard to their deliberations and voting, even in official liability proceedings *(Amtshaftungsprozess).*[133])

b) Secrecy of Deliberations in Arbitration Proceedings

It seems to be clear that the secrecy of deliberations – covering also any votings – must not be lifted before the issuance of the award, so as to prevent that the decision-making process is not influenced by the parties in any way.[134]) How-

[128]) *Michael Bydlinski* in *Hans W. Fasching & Andreas Konecny* (eds.), Kommentar zu den Zivilprozessgesetzen[2] (2004) § 413 mn. 1; *Walter H. Rechberger* in *Walter H. Rechberger* (ed.) Kommentar zur ZPO[3] (2006) § 413 mn. 2.

[129]) *Oskar J. Ballon* in *Hans W. Fasching & Andreas Konecny* (eds.), Kommentar zu den Zivilprozessgesetzen[2] (2000) §§ 9–14 mn. 18; *Peter G. Mayr* in *Walter H. Rechberger* (ed.) Kommentar zur ZPO[3] (2006) §§ 9–14 mn. 2.

[130]) Not even at the Austrian Constitutional Court: *see Theo Öhlinger,* Verfassungsrecht (2007) 445 mn. 990. A vivid discussion in the late 90s on whether dissenting opinions should be introduced at the Austrian Constitutional Court (*see, e.g., Rudolf Machacek,* Die Einführung des "Dissenting Opinion" im internationalen Vergleich 1999 JRP 1; *Christoph Grabenwarter,* Die Bedeutung der "dissenting opinion" in der Praxis des Europäischen Gerichtshofs für Menschenrechte 1999 JRP 16; *Heinz Schäffer,* Die Einführung der "dissenting opinion" am Verfassungsgerichtshof aus Sicht der österreichischen Verfassungslehre 1999 JRP 33) did not lead to any legislative changes.

[131]) *See, e.g., Peter G. Mayr* in *Walter H. Rechberger* (ed.) Kommentar zur ZPO[3] (2006) §§ 9–14 mn. 2.

[132]) *Hans W. Fasching,* Lehrbuch des österreichischen Zivilprozessrechts[2] (1990) 104 mn. 181; *Oskar J. Ballon* in *Hans W. Fasching & Andreas Konecny* (eds.), Kommentar zu den Zivilprozessgesetzen[2] (2000) §§ 9–14 mn. 18; *contra Helmut Pichler, Die Abweichende Meinung – ein Diskussionsanstoß,* 1981 RZ 157.

[133]) Austrian Supreme Court [OGH] Sept 25, 2001, 1 Ob 151/01i, ecolex 2002/31; *Andreas Frauenberger* in *Hans W. Fasching & Andreas Konecny* (eds.), Kommentar zu den Zivilprozessgesetzen[2] (2004) § 320 mn. 7; *Walter H. Rechberger* in *Walter H. Rechberger* (ed.) Kommentar zur ZPO[3] (2006) § 320 mn. 6.

[134]) This was of particular importance with regard to Section 591 (1) of the old ACCP, which provided that if a tribunal could not reach the necessary majority, the parties had to be

ever, dissenting opinions are submitted at a stage where the parties cannot directly influence the content of the award anymore. Thus, the general interest on preserving a broad interpretation of the secrecy of deliberations cannot be that high any longer.

Despite this general observation, there are several reasons why the scope of the principle of secrecy of deliberations in Austrian arbitration law is narrower than under general Austrian civil procedure (and also narrower than, for example, under French and German arbitration law):

- The principle of secrecy of deliberations is not explicitly restated for arbitration proceedings by statutory arbitration law. (This is, for example, different under French arbitration law, where Article 1469 French Code of Civil Procedure explicitly provides for the secrecy of deliberations in arbitration proceedings). Furthermore, there is no Austrian case law that suggests that the secrecy of deliberations applicable to Austrian (international) arbitration should have a similarly broad scope as the one defined in Section 413 ACCP for national court proceedings. (This is, for example, different in Germany[135]).
- Although (and as already mentioned above), Section 606 (1) ACCP (record on award of reason for omitted signature) should not be interpreted as an invitation for setting out dissenting opinions, it allows that a dissent be stated on the award as reason for a missing signature and hence communicated to the parties. (This is, for example, different under French arbitration law. There, Article 1473 French Code of Civil Procedure allows that where a minority refuses to sign an award, "the others shall recite the same […]" only). Here, the Austrian legislature already shows that the secrecy of deliberations has a different scope in arbitration proceedings than in civil court proceedings. Furthermore, it needs to be emphasized that the authority of an arbitral award is at least similarly (if not even more) endangered by a mere statement on the award that an arbitrator refused to sign the award due to dissent as by a dissenting opinion; the endangerment of judgment authority-concerns raised in respect of civil court proceedings therefore do not apply to the same extent to arbitral awards.
- Unlike judges, arbitrators may be called as witnesses and may be asked about the content of their deliberations and voting. Arbitrators, in Austrian civil proceedings, do not even have the right to refuse to answer respective ques-

notified thereof. As in such situations, the parties could even agree on a change of the majority rule or the number of arbitrators (*see Hans W. Fasching,* Schiedsgericht und Schiedsverfahren im österreichischen und im internationalen Recht [1973] 121 et seq.), it was rightly emphasized that – due to the secrecy of deliberations – it would have been forbidden to inform the parties about which arbitrator voted for which result (*id.* at 121). Otherwise, the parties would have been able to influence the content of any subsequent award and thus, the result of the case.

[135]) *See, e.g.,* the German case law cited in *Oliver M. Peltzer,* Die Dissenting Opinion in der Schiedsgerichtsbarkeit (2000) 27.

tions.[136]) (This is, for example, different in German civil procedure, where arbitrators may refuse to give testimony on their deliberations and voting).[137])

- The individual arbitrators (except the chairman) are appointed directly by the parties (whereas Austrian judges get cases allocated according to the first letter of the claimant's name). Parties choose specific arbitrators according to their specialized knowledge and expertise. Thus, the individual in an arbitral tribunal is much more in the foreground as a judge on a panel of a national court; and the parties should be allowed to know what any of their arbitrators dissented with.
- The AA06 fundamentally renewed Austrian arbitration law. Although it is the apparent general view that even under laws where no express reference is made to dissenting opinions, they may still be delivered by arbitrators,[138]) the AA06 did not introduce any limitation in that regard. Furthermore, dissenting opinions are considered to be permitted under the VIAC Rules (although not specifically provided for)[139]) and have been admitted by the Vienna International Arbitral Centre at several occasions.[140]) Therefore, it must be assumed that by not expressly prohibiting dissenting opinions, the legislature intended to follow the trend[141]) to neither encourage nor discourage the giving of such opinions[142]) but, in any case, not to prohibit them in general.
- Recently, the Austrian Supreme Court had, for the first – and so far, the only – time, the chance to deal with the issue of dissenting opinions.[143]) The case concerned the enforcement of a foreign arbitral award in Austria and in this context the question of whether a dissenting opinion was considered to be part of the award.[144]) In its judgment, the Austrian Supreme Court explicitly

[136]) *E.g., Hans W. Fasching,* Schiedsgericht und Schiedsverfahren im österreichischen und im internationalen Recht (1973) 109; this is of particular importance for challenges of arbitral awards (*cf.,* Austrian Supreme Court [OGH] Jun 7, 1990, 7 Ob 584/90).

[137]) *Oliver M. Peltzer,* Die Dissenting Opinion in der Schiedsgerichtsbarkeit (2000) 34.

[138]) *See supra* at fn. 121.

[139]) *Christoph Liebscher,* Wiener Regeln, in Institutionelle Schiedsgerichtsbarkeit (2006) 255, 299 mn. 8 (*Rolf A. Schütze* ed.,); *Andreas Reiner,* The 2001 Version of the Vienna Rules (2001) 18 (6) J.Int'l Arb. 661, 666.

[140]) *See supra* at fn. 93; *see also Andreas Reiner,* The 2001 Version of the Vienna Rules (2001) 18 (6) J.Int'l Arb. 661, 666.

[141]) So, for example, the prevailing view of the Working Party on Dissenting Opinions and Interim and Partial Awards of the ICC Commission on International Arbitration, *Final Report on Dissenting and Separate Opinions,* 2 (1) ICC International Court of Arbitration Bulletin (1991) 32, 32.

[142]) The comments by *Paul Oberhammer, Gerold Zeiler* and *Stefan Riegler* cited *supra* at fn. 65 are pointing into the same direction.

[143]) Austrian Supreme Court [OGH] Apr 26, 2006, 3 Ob 211/05h; on this judgment s*ee also Alexander Petsche & Martin Platte,* Neuere Rechtsprechung zur Schiedsgerichtsbarkeit, 2006 ecolex 645.

[144]) The Austrian Supreme Court held that this was not the case. This is in line with

acknowledged the permissibility of dissenting opinions under ICC Rules. Any potential hindrance to the enforcement of the award due to the fact that a dissenting opinion was submitted was not mentioned by the Austrian Supreme Court.

- Lastly, the arguments regarding the desirability of dissenting opinions presented above in part III.A. do not mandate a broad interpretation of the principle of secrecy of deliberations.

As one can see from the above, there are differences to the relevant provisions under French and German law. Thus, it has to be kept in mind that any skeptical comments on the admissibility of dissenting opinions under these jurisdictions[145]) are based on a different legal framework.

Furthermore, and more importantly, the arguments presented above show that the scope of the secrecy of deliberations in arbitration proceedings is indeed more narrow than in court proceedings. In fact, there seem to be two different understandings of the principle of secrecy of deliberations. Whereas the broad understanding, which applies to national civil courts, does cover both, the deliberations and the voting,[146]) the secrecy on the voting *(Abstimmungsgeheimnis)* clearly does not apply to arbitral tribunals (*cf.*, Section 606 (1) ACCP).[147]) What remains is a secrecy of the actual deliberations. That the deliberations remain confidential is imperative – also in arbitration. Thereby, (i) the arbitrators will be able to express their views frankly without risking that their arguments will be disclosed involuntarily, (ii) the elemental authority of the award is safeguarded vis-à-vis the parties and (iii) the arbitrators' fundamental duties of collegiality, impartiality and diligence will not be infringed.

The secrecy of deliberations in its stricter meaning, as applicable in Austrian arbitration proceedings, will therefore be violated if an arbitrator in a dissenting opinion reveals the actual substance of the deliberations by, for example, explicitly linking specific views to single persons (and not just to the majority), citing specific statements made during the deliberations which were not revealed to the parties in the award or disclosing the process by which each arbitrator shaped his view. Conversely, there is no violation of the secrecy of deliberations if a dissenting opinion is limited to alternative views on issues of fact or law.

Therefore, with these limitations, dissenting opinions are permissible under Austrian law.

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other jurisdictions – *see Oliver M. Peltzer,* Die Dissenting Opinion in der Schiedsgerichtsbarkeit (2000) 73 fn. 278.

[145]) *See supra* at fn. 111.

[146]) *See supra* at III.B.2.a).

[147]) *Cf. also Peter Schlosser,* Das Recht der internationalen privaten Schiedsgerichtsbarkeit (1989) mn. 691.

IV. Concluding Remarks

As can be seen from the issues discussed in this article, the decision-making process of an arbitral tribunal composed of more than one arbitrator raises a number of issues. The short overview on selected foreign jurisdictions, leading arbitration rules and on the Model Law demonstrates that there are trends on how to deal with a lack of unanimity. Furthermore, it could be shown that Austrian arbitration law, after the amendments of the AA06, is a modern, state-of-the-art legislation that on some issues is well ahead of other national arbitration laws and arbitration rules. It provides a legal framework well suited for addressing respectively overcoming disagreement amongst arbitrators, unavailability of arbitrators or unwillingness to cooperate. Austrian arbitration law thus perfectly serves the ultimate purpose of arbitration: the efficient rendering of an enforceable award.