

How Confidential Is Arbitration in Austria? A Comparative Analysis

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I. Introduction

Confidentiality is one of the main features regularly referred to when pointing out the advantages of the arbitral process compared to state court proceedings.¹⁾ Although some research contains suggestions to the contrary,²⁾ there seems to be little doubt that confidentiality is indeed important to parties.³⁾

On the international level, the amount of literature dealing with the topic of confidentiality in arbitration has increased vastly in recent years. These discussions were mainly triggered by two infamous arbitration-related court decisions: a ruling of the Australian High Court in the *Esso* case⁴⁾ and a ruling of the Swedish Supreme Court in the *Bulbank* case.⁵⁾ Generally speaking, these decisions suggested that there is no general duty of confidentiality for the parties bound to an arbitration agreement. Contrary to this, for example, English courts are strongly

¹⁾ E.g., NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION *mn.* 1.96 (5th ed., 2009); Art 31 of the UNCITRAL Notes on Organizing Arbitral Proceedings.

²⁾ Richard W. Naimark & Stephanie E. Keer, *International Private Commercial Arbitration – Expectations and Perceptions of Attorneys and Business People*, in *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH* 43 (Christopher R. Drahozal & Richard W. Naimark eds., 2005); *cf. also*, Alice Fremuth-Wolf, Confidentiality in Arbitration, in *ARBITRATION LAW OF AUSTRIA: PRACTICE AND PROCEDURE* 661, 670 (Stefan Riegler et al. eds., 2007) (with reference to a 2002 survey of the Global Center for Dispute Resolution Research in New York).

³⁾ See, e.g., PRICEWATERHOUSECOOPERS, *INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES* 2006, 6 (2006); available at www.pwc.co.uk/pdf/2006_international_arbitration_study.pdf (ranking privacy among the top four advantages of arbitration). As regards the research presented by Naimark & Keer (*supra* note 2), it is argued that the bases for their conclusions appear flawed as they rely on surveys that rank the relative importance of different features of arbitration without attempting to identify the absolute value (GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 2251 n. 5 [2009]). The same seems to be true for the survey referred to by Fremuth-Wolf (*supra* note 2).

⁴⁾ *Esso Australia Resources Ltd v. Plowman*, XXI Y.B. COM. ARB. 137 (1996) (Australian High Court).

⁵⁾ *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc.*, XXVI Y.B. COM. ARB. 291 (2001) (Swedish Supreme Court).

advocating confidentiality to be an obligation implied in the arbitration agreement. In New Zealand, the Arbitration Act of 1996, in reaction to the *Esso* case, even explicitly provides for a general duty of confidentiality. Most recently, the discussions were revived by a procedural order in the *Beccara* case,⁶⁾ which confirmed – for ICSID arbitrations – a nuanced approach already advocated by an ICSID tribunal in the *Biwater* case.⁷⁾ It is therefore no surprise that confidentiality in arbitration is considered to be a “contentious and unsettled subject”⁸⁾ and that a comparative analysis published by the ICC in 2009 concludes that “we are far from an international consensus on the parties’ obligation of confidentiality”⁹⁾.

This article will closely look at confidentiality in contractual arbitration¹⁰⁾ from the Austrian perspective.¹¹⁾ For this purpose the Austrian statutory framework as well as the existence of any implied contractual duties are assessed and the respective provisions of the current version of the Vienna Rules are analyzed. This discussion is enhanced by a short comparative overview highlighting similarities with foreign jurisdictions or to point out where the Austrian approach differs.

In doing so, the following main aspects of confidentiality in arbitration are discussed:

- Privacy in arbitration connected state court proceedings;
- Privacy of arbitral proceedings;
- Confidentiality obligations of arbitrators;
- Confidentiality obligations of arbitral institutions;
- Confidentiality obligations of parties;
- Publication of award;
- Publication of decisions in arbitration connected state court proceedings.

Although, strictly speaking, privacy and confidentiality are two different concepts, aspects of privacy are deliberately included in this discussion for two reasons: Firstly, confidentiality obligations seem to be a corollary of the general

⁶⁾ *Giovanna a Beccara and Others v. The Argentine Republic*, Procedural Order No. 3, ICSID Case No. Arb/07/05 (Jan 27, 2010), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1390_En&caseId=C95.

⁷⁾ *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, Procedural Order No. 3, ICSID Case No. Arb/05/22 (Sept 29, 2006), available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC531_En&caseId=C67.

⁸⁾ Born, *supra* note 3 at 2249.

⁹⁾ Antonias Dimolitsa, *Institutional Rules and National Regimes Relating to the Obligation of Confidentiality on Parties in Arbitration*, 5, 22, 2009 ICC Bulletin (Special Supplement: Confidentiality in Arbitration).

¹⁰⁾ As opposed to treaty arbitration, which is not covered by this article.

¹¹⁾ Therefore, this article assumes that Austrian law applies to the various aspects of confidentiality discussed below. Whether this is always the case, where the seat of arbitration is in Austria, is not necessarily correct (for a good overview on the different possible approaches towards governing law issues in this context see, e.g., Born, *supra* note 3, at 2271–2272 and also 1670).

principle of privacy of arbitral proceedings. Indeed, several foreign courts and commentators base their findings on confidentiality in arbitration on the privacy of the arbitral process.¹²⁾ As summarised by one commentator, proponents of this position argue that “the concept of privacy would have no meaning if participants were required to *arbitrate privately by day* while being free to *pontificate publicly by night*.”¹³⁾ Secondly, Austrian arbitration law contains a very specific provision on the privacy of proceedings: According to Sec 616 (2) of the Austrian Code on Civil Procedure (*Zivilprozessordnung* – ACCP), the public may be excluded in arbitration connected state court proceedings upon request of a party, if a legitimate interest in doing so can be shown. As the Austrian statutory rules on arbitration are based on the UNCITRAL Model Law, which does not address the issue of confidentiality, there exist no other statutory provisions on confidentiality in arbitration. Therefore, one of the underlying questions to be discussed in the following will have to be whether any inference can be drawn from Sec 616 (2) of the ACCP regarding the privacy and general confidentiality obligations in Austrian arbitrations. Accordingly, Sec 616 (2) of the ACCP and the issue of privacy in arbitration-connected state court proceedings will be the starting point for the following discussion.

II. Privacy in Arbitration Connected State Court Proceedings

Previously, Austrian arbitration law did not contain any provision on confidentiality. This has been changed by the Austrian Arbitration Act 2006 (*Schiedsrechts-Änderungsgesetz* – AAA 2006), which introduced Sec 616 (2) of the ACCP. This section provides the following with regard to arbitration connected state court proceedings: “Upon request of a party the public may be excluded, if a legitimate interest in doing so can be demonstrated.”

This provision applies to all arbitration connected state court proceedings and not only to setting-aside proceedings or proceedings concerning the declaration of the existence or non-existence of an arbitral award.¹⁴⁾

¹²⁾ See, e.g., Born, *supra* note 3, at 2282; *Ali Shipping Corp. v. Shipyard Trogir* (1997) 2 All E.R. 136 (English Court of Appeal).

¹³⁾ L. Yves Fortier, *The Occasionally Unwarranted Assumption of Confidentiality*, 15 INT’L ARB. 131, 132 (1999) (emphasis in original).

¹⁴⁾ This is already apparent from the structure of Sec 616 of the ACCP, which refers in its Subsec (1) not only to setting aside proceedings or proceedings concerning the declaration of the existence or non-existence of an arbitral award but also to other arbitration connected proceedings; see also, Christian Hausmaninger, *Sec 616*, in KOMMENTAR ZU DEN ZIVILPROZESSGESETZEN, mnn. 24, 25 (Hans W. Fasching & Andreas Konecny eds., 2nd ed. 2007) (referring generally to court proceedings that are connected with or accompany arbitration proceedings); GEROLD ZEILER, SCHIEDSVERFAHREN, Sec 616 mn. 4 (2006) (referring generally to court proceedings that are connected with arbitration proceedings); *contra* Fremuth-Wolf, *supra* note 2, at 661–662 (referring only to setting aside proceedings or proceedings concerning the declaration of the existence or non-existence of an arbitral award).

The AAA 2006's non-binding Official Comments state the following with regard to Sec 616 (2) of the ACCP: "In line with the confidential nature of arbitration, a ground for excluding the public was introduced that exceeds Sec 172 of the ACCP¹⁵⁾ and also Sec 19 of the Law on Non-Contentious Proceedings"¹⁶⁾17) (*Außerstreitgesetz* – LNCP). This confirms that the exclusion of the public in arbitration connected state court proceedings has a wider range of applicability than with other civil court proceedings.¹⁸⁾ In particular it is not required that a "real" business secret is involved.¹⁹⁾ As regards state court hearings dealing with challenges with regards to an arbitrator, it is even argued that it can be assumed that there usually will exist a justified interest to exclude the public from such hearings.²⁰⁾ Generally speaking, the mere fact that the matter pertains to arbitration proceedings is not regarded to be sufficient *per se* to exclude the public from the proceedings.²¹⁾ The main reason for having left a certain degree of discretion with the court and not having provided for privacy in general is laid down in Art 6 (1) of the European Convention on Human Rights.²²⁾²³⁾

Sec 616 (2) of the ACCP is remarkable as it seems to provide a firmer basis – or at least an equivalent basis – for the exclusion of the public in arbitration connected state court proceedings compared to several of those jurisdictions, where a general duty of confidentiality between the parties to an arbitration is explicitly acknowledged.

¹⁵⁾ Sec 172 of the ACCP provides: "(1) The public is to be excluded if good morals or public order would seem endangered by it or if reasonable concern exists that the openness of the hearing would be misused for disturbing the hearing or for hampering the establishing of the facts of the case. (2) Furthermore, the court can exclude the public upon application of only one party, if facts of family life would have to be discussed and proven for deciding the dispute. (3) ...".

¹⁶⁾ Sec 19 of the LNCP provides the same reasons including two additional ones: "(2) The public is to be excluded by law if ... (iii) this is in the interest of the person being taken care of. (3) Furthermore, the public is to be excluded upon application of one party on reasonable grounds ...".

¹⁷⁾ Official Comments to the Draft Arbitration Act 2006 (Erläuterungen der Regierungsvorlage des SchiedsRÄG 2006, 1158 BlgNR 22. GP). The Official Comments indeed refer to the confidential nature and not just to the private nature of arbitral proceedings ("Dem vertraulichen Charakter des Schiedsverfahrens entsprechend ...").

¹⁸⁾ Hausmaninger, *supra* note 14, at Sec 616 mn. 25.

¹⁹⁾ Cf. PAUL OBERHAMMER, ENTWURF EINES NEUEN SCHIEDSVERFAHRENS 155 (2005).

²⁰⁾ Philipp Hanusch, *Challenge of Arbitrators Under the New Austrian Arbitration Act*, in AUSTRIAN ARBITRATION YEARBOOK 2007, 59, 85 (Klausegger et al. eds., 2007).

²¹⁾ ANDREAS REINER, THE NEW AUSTRIAN ARBITRATION LAW – ARBITRATION ACT 2006, note 231 (2006); Alexander Petsche in ARBITRATION LAW OF AUSTRIA: PRACTICE AND PROCEDURE Sec 616 mn. 13 (Stefan Riegler et al. eds., 2007); Hausmaninger, *supra* note 14, at Sec 616 mn. 25.

²²⁾ See OBERHAMMER, ENTWURF EINES NEUEN SCHIEDSVERFAHRENS 155 (2005).

²³⁾ Art 6 (1) of the ECHR provides: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and *public* hearing ..." (emphasis added).

For example, in England, one of the countries where extensive obligations of confidentiality have been repeatedly confirmed by the courts,²⁴⁾ the Civil Procedure Rules (CPR) provide the following in Part 62.10 for arbitration connected state court proceedings:

- (1) The court may order that an arbitration claim be heard either in public or in private.
- (2) Rule 39.2²⁵⁾ does not apply.
- (3) Subject to any order made under paragraph (1) –
 - (a) the determination of –
 - (i) a preliminary point of law under Sec 45 of the 1996 Act; or
 - (ii) an appeal under Sec 69 of the 1996 Act on a question of law arising out of an award, will be heard in public; and
 - (b) all other arbitration claims will be heard in private.

However, in a more recent decision of the English Court of Appeal, Mance L.J. – albeit recognizing that the privacy and confidentiality of arbitral proceedings can require connected court proceedings to be held in private – downgraded these presumptions to “starting points” and concluded for certain arbitration claims that the starting point in favor of private hearings may easily give way to a public hearing.²⁶⁾

In New Zealand, in reaction to the controversial decision of the High Court of Australia in the *Eso* case, the Arbitration Act 1996 explicitly confirmed a general duty of confidentiality in its Sec 14.²⁷⁾ However, in a 2000 decision the High Court Auckland concluded that, for the confidentiality attached to a private dispute resolution, in form of arbitration, to be extended to connected court proceedings, a clear and unambiguous determination of Parliament would be required.²⁸⁾ Consequently, the 2007 amendments to the Arbitration Act included the following provisions concerning arbitration connected court proceedings:

²⁴⁾ See *infra* note 70.

²⁵⁾ CPR 39.2 establishes the general rule that English court hearings are to take place in public unless the contrary is ordered on the basis of certain specified grounds.

²⁶⁾ *Department of Economic Policy and Development of the City of Moscow v. Bankers Trust Co. International Industrial Bank* (2004) EWCA (Civ) 314.

²⁷⁾ Sec 14 of the New Zealand Arbitration Act 1996 read in its original wording:

“14. Disclosure of information relating to arbitral proceedings and awards prohibited – (1) Subject to Subsec (2), an arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that the parties shall not publish, disclose, or communicate any information relating to arbitral proceedings under the agreement or to an award made in those proceedings. (2) Nothing in Subsec (1) prevents the publication, disclosure, or communication of information referred to in that subsection – (a) If the publication, disclosure, or communication is contemplated by this Act; or (b) To a professional or other adviser of any of the parties.”

14F Court proceedings under Act must be conducted in public except in certain circumstances

(1) A court must conduct proceedings under this Act in public unless the court makes an order that the whole or any part of the proceedings must be conducted in private.

(2) A court may make an order under Subsec (1) –

- (a) on the application of any party to the proceedings; and
- (b) only if the court is satisfied that the public interest in having the proceedings conducted in public is outweighed by the interests of any party to the proceedings in having the whole or any part of the proceedings conducted in private ...

14H Matters that court must consider in determining application for order to conduct court proceedings in private

In determining an application for an order under Sec 14F, the court must consider all of the following matters:

- (a) the open justice principle; and
- (b) the privacy and confidentiality of arbitral proceedings; and
- (c) any other public interest considerations; and
- (d) the terms of any arbitration agreement between the parties to the proceedings; and
- (e) the reasons stated by the applicant ...

However, not all jurisdictions that recognize a general duty of confidentiality do also allow for the possibility to have arbitration connected state court proceedings heard in private. In Spain, for example, where Sec 24 (2) of the Spanish Arbitration Act expressly provides that the parties are obliged to maintain confidentiality, there is no special provision for privacy in connected court proceedings.²⁹⁾ The same is true for France,³⁰⁾ although a general obligation of confidentiality has been repeatedly confirmed by the courts.³¹⁾

It is needless to add that in those countries that have more restrictive views confidentiality in arbitration, connected court proceedings are usually held in public. In Australia, for example, the fact that in arbitration connected court proceedings the award or the arbitration proceedings in general will become public

²⁸⁾ *Television New Zealand Ltd v. Langley Productions Ltd* (2000) 2 NZLR 250; see also *Cullen Investments Ltd v. G Lancaster & Another* 27/9/02, Chambers J, HC Auckland M980-IM01 (confirming *Langley* and emphasising that there is a strong presumption that everything that occurs in the courts is available for public scrutiny – even if the parties have stipulated for confidentiality); *Pot Hole People Ltd v. Fulton Hogan Ltd* (2003) 16 PRNZ 1023 (confirming *Langley* and *Cullen* and concluding that Sec 14 is not expressed explicitly so as to require privacy and confidentiality in arbitration connected court litigation).

²⁹⁾ Calvin A. Hamilton & Carlos Maestre de Robles, *Madrid Update: Confidentiality in Arbitration, An Issue For Personal Privacy*, 24/5 MEALEY'S International Arbitration Report 28, 30 (2009).

³⁰⁾ E.g., Hausmaninger, *supra* note 14, at Sec 616 mn. 17.

³¹⁾ See *infra* note 71.

was used as one of the main arguments against the existence of a general duty of confidentiality under Australian law.³²⁾

As this comparative overview shows, a provision such as Sec 616 (2) of the ACCP is usually a feature of a jurisdiction in which a general duty of confidentiality is acknowledged. However, even in some of these jurisdictions, an explicit basis for excluding the public is required to allow for privacy in more cases than usual in state court proceedings.

III. Privacy of Arbitral Proceedings

A. Austrian Law and Implied Contractual Duties

Austrian arbitration law does not – and never did – contain any statutory provision on the privacy of arbitral proceedings. However, that arbitration hearings are to be conducted in private – absent any party agreement to the contrary – is well recognized and the principle of privacy of arbitral proceedings as such is not disputed.³³⁾

Some commentators base the privacy of the arbitral process merely on the contractual relationship between the parties and between the parties and the arbitrators: It is rightly argued that third parties lacking this privacy of the contract also lack the right to participate in the proceedings.³⁴⁾

However, the introduction of Sec 616 (2) of the ACCP has further fostered the private nature of arbitral proceedings by expressly recognizing the need for privacy in arbitration connected state court proceedings and, thereby, indirectly confirming the application of the principle of privacy to the arbitral process.³⁵⁾

Also, on an international level, the privacy of the arbitral process is universally recognized. This extends not only to foreign case law³⁶⁾ and international

³²⁾ Mason C.J. in the *Esso* case, *supra* note 4.

³³⁾ HANS W. FASCHING, *SCHIEDSGERICHT UND SCHIEDSVERFAHREN IM ÖSTERREICHISCHEN UND IM INTERNATIONALEN RECHT* 104 (1973); Christoph Liebscher & Andreas Schmid, *Austria*, in *PRAC-TITIONER'S HANDBOOK ON INTERNATIONAL ARBITRATION* 541, 577 (Frank-Bernd Weigand ed., 2002); Oberhammer, *supra* note 19, at 155; Hausmaninger, *supra* note 14, at Sec 594 mn. 134; FRANZ T. SCHWARZ & CHRISTIAN W. KONRAD, *THE VIENNA RULES – A COMMENTARY ON INTERNATIONAL ARBITRATION IN AUSTRIA* mnn. 20-153, 20-154 (2009); *cf. also* HANS W. FASCHING, *LEHRBUCH DES ÖSTERREICHISCHEN ZIVILPROZESSRECHTS* mn. 2165 (1990); JENNY POWER, *THE AUSTRIAN ARBITRATION ACT*, Sec 616 mn. 3 (2006).

³⁴⁾ Schwarz & Konrad, *supra* note 33, at mnn. 20-153.

³⁵⁾ This is evident from the Official Comments to the Draft Arbitration Act 2006 and the interpretations of this provision by the commentators referred to in Part II above. Furthermore, as shown by the comparative overview in Part II above, Sec 616 (2) of the ACCP contains a comparably strong acknowledgement of the principle of privacy considering that in Austria confidentiality obligations between the parties to an arbitration are not explicitly confirmed by case law or statutory provisions.

³⁶⁾ Even those courts that have not recognized a general duty of confidentiality usually

commentators³⁷⁾ but also to virtually all international arbitration rules.³⁸⁾ Therefore, due to the contractual nature of arbitration and the general recognition and the indirect statutory confirmation of the principle of privacy, parties can and will usually expect that the arbitral process will be conducted in private. Thus, the privacy of arbitration proceedings will generally also be implied in the arbitration agreement between the parties.

As regards any possible exceptions to the privacy of arbitral proceedings, one of the commentators on the old Austrian Arbitration Law argued that the privacy of the proceedings is at the discretion of the arbitrators and that the arbitrators could also order the arbitration to be conducted in public.³⁹⁾ However, this would clearly go against the contractual nature of arbitration, the legitimate expectations of the parties and, since the introduction of the new Arbitration Law, against the indirect statutory recognition of the principle of privacy. Therefore, any deviation from the privacy of hearings should, if at all, be applied only in the rarest of circumstances (such as in cases where a special public interest overrides the principle of privacy).⁴⁰⁾

B. Vienna Rules

Art 20 (4) of the Vienna Rules expressly provides that “[h]earings shall be private”. Although Art 20 (1) of the Vienna Rules leaves the conduct of the arbitral proceedings at the absolute discretion of the arbitrator(s), Art 20 (4) makes it clear that the privacy of the proceedings is not at the discretion of the arbitrator(s) and also that one party alone cannot request the public conduct of the hearing.⁴¹⁾

Virtually all other main international arbitration rules also explicitly provide for the privacy of arbitral hearings.⁴²⁾ Although the standard provisions on pri-

accept the existence of the principle of privacy of the arbitral process. *E.g.*, *Esso Australia Resources Ltd v. Plowman*, *supra* note 4 (Chief Justice Mason: “... the arbitration held pursuant to the agreement is private in the sense that it is not open to the public.” Toohey J.: “The very nature of arbitration agreements, the established practice for arbitrations to be conducted in private and the importance attached to privacy in arbitration hearings indicate that a term requiring privacy should be implied as a matter of law.”); *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc.*, *supra* note 5 (“... outsiders are not entitled to attend hearings during the proceedings or have access to the written submission in the dispute.”).

³⁷⁾ *E.g.* Blackaby et al., *supra* note 1, at mn. 2.148 (concluding that the “‘privacy’ of arbitration hearings is ... uncontroversial.”); Dimolitsa, *supra* note 9, at 5 and 13 (listing the “universally accepted right to privacy, inherent in arbitration” as one of the findings of a comparative study on confidentiality and concluding that “all the national regimes studied accept the principle of the privacy of hearings”).

³⁸⁾ *See infra* Part III.B.

³⁹⁾ Fasching, *supra* note 33, at 104.

⁴⁰⁾ Schwarz & Konrad, *supra* note 33, at mn. 20-154 n. 333.

⁴¹⁾ *Id.* at mn. 20-155.

⁴²⁾ *See, e.g.*, Art 28 (3) of the UNCITRAL Rules; Art 21 (3) of the ICC Rules; Art 25 (4) of the Swiss Rules; Art 19 (4) of the LCIA Rules; Art 27 (3) of the SCC Rules; Art 20 (4) of the

vacy are worded similarly, two kinds of variations can be observed. Some rules, like the ICC Rules and the CIETAC Rules, require the consent of the parties for a public hearing as well as the approval of the tribunal.⁴³⁾ Others, like the LCIA Rules, allow for the tribunal to decide to open the hearings even without consent of the parties.⁴⁴⁾

In comparison, the privacy provision of the VIAC Rules does not provide for one of these variations and can, therefore, be seen as being fully in line with international standards.

IV. Confidentiality Obligations of Arbitrators

A. Austrian Law and Implied Contractual Duties

Austrian arbitration law does not contain a general provision on the confidentiality obligations of arbitrators. However, under Austrian contract law, arbitrators are subject to a strict duty of confidentiality derived from the general contractual duty of care, which has its statutory basis in particular in Sec 1151 (2) in conjunction with Sec 1009 of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch – ACC*).⁴⁵⁾

Moreover, lawyers admitted to the Austrian Bar are arguably also subjected to professional confidentiality when acting as arbitrators. Sec 9 (2) of the Austrian Lawyers Act (*Rechtsanwaltsordnung – AAL*) provides for a strict duty of confidentiality, which does not require that a lawyer is in fact representing the respective person(s) from whom he obtained information; it is generally considered to be sufficient that an attorney was provided with information due to his special qualifications as a lawyer.⁴⁶⁾

The fact that arbitrators in general are bound by a duty of confidentiality is also fostered by confidentiality obligations laid down in (international) codes of ethics and guidelines for arbitrators.⁴⁷⁾ Furthermore, confidentiality obligations

AAA-IA Rules; Art 23 (7) of the HKIAC Rules; Art 21 (4) of the SIAC Rules; Art 33 (1) of the CIETAC Rules. Although, as one of the rare examples, the DIS Rules do not contain any provision regarding the privacy of the hearings, there seems to be no doubt that also hearings under these rules have to be held in private due to the broad confidentiality provision contained in Art 43 of the DIS Rules.

⁴³⁾ Art 21 (3) of the ICC Rules; Art 33 (1) of the CIETAC Rules.

⁴⁴⁾ Art 19 (4) of the LCIA Rules.

⁴⁵⁾ Zeiler, *supra* note 14, at Sec 587 mn. 69.

⁴⁶⁾ ERICH FEIL & FRITZ WENNIG, *ANWALTSRECHT* 118 (5th ed., 2008). *But cf.* Zeiler, *supra* note 14, at Sec 587 mn. 70 (arguing that Sec 9 [2] of the AAL does not apply to lawyers acting as arbitrators because the provision refers to confidentiality interests of the “client” of the lawyer).

⁴⁷⁾ *E.g.*, Art 3.12 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration; Art 9 of the IBA Rules of Ethics for International Arbitrators; Canon VI (B) of the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes; Rule 8 of the The CIArb Code of Professional and Ethical Conduct for Members.

for arbitrators – not only concerning their deliberations – are universally recognized by foreign courts⁴⁸⁾, commentators⁴⁹⁾ and most international arbitration rules.⁵⁰⁾ Therefore, parties can and usually do expect that their arbitrators will keep confidential all information obtained in the course of their mandate. Thus, such obligation will have to be regarded as a duty implied in the contract between the parties and the arbitrators.

As regards the scope of an arbitrator's confidentiality duties towards persons not involved in the arbitration, all aspects of the arbitration not validly made public by the parties are covered by this duty (even the mere fact that there is a dispute between the parties pending). Regarding aspects of publishing awards *see infra* Part VII.

Confidentiality together with the parties' right to defense even needs to be considered in cases where an arbitrator serves in a related dispute between the same parties: The arbitrator should not refer to information in the second arbitration which he has received privately and confidentially in the first. Such behavior could lead to a successful challenge of the arbitrator⁵¹⁾ or the award.⁵²⁾

B. Vienna Rules

According to Art 7 (4) of the Vienna Rules, the arbitrators are "bound to secrecy in respect of all matters coming to their notice in the course of their duties".

Most of the main international arbitration rules contain similar provisions.⁵³⁾ Noteworthy exceptions are the UNCITRAL Rules, the ICC Rules and the LCIA Rules, which are silent on this issue. However, with regard to the first two, it

⁴⁸⁾ See, e.g., *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc.*, *supra* note 5 ("There should also be, in principle, a unanimous understanding that the arbitrators, by virtue of the assignment entrusted to them, must observe discretion in the arbitration proceedings; this applies even if an arbitrator has been appointed by a court."); *London & Leeds Estates Ltd v. Paribas Ltd* [1995] 2 E.G. 134 (Q.B.) (arbitrator breached duty of confidentiality by alluding to contents of statements by expert witness).

⁴⁹⁾ See, e.g., JULIAN D. M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL; *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* mn. 12-20 (2003); GUNNAR SACHS, *VERHALTENSTANDARDS FÜR SCHIEDSRICHTER* 253 (2008).

⁵⁰⁾ See *infra* Part IV.B.

⁵¹⁾ Hanusch, *supra* note 20, at 74.

⁵²⁾ Cf. Sec 611 (2) and (5) ACCP. However, for example, where a person is appointed as an arbitrator specifically because he has already been serving as an arbitrator in a previous dispute between the same parties, the arbitrator is free to draw from his knowledge in the previous arbitration as far as this is necessary for resolving questions of the scope of an award rendered in the previous proceedings in the context of *res iudicata* arguments in the second proceedings.

⁵³⁾ See, e.g., Art 43 (1) of the Swiss Rules; Art 43 (1) of the DIS Rules; Art 46 of the SCC Rules; Art 34 of the AAA-IA Rules; Art 39 (1) of the HKIAC Rules; Art 35 (1) of the SIAC Rules; Art 33 (2) of the CIETAC Rules.

may be legitimately argued that this topic was deliberately excluded as these rules generally do not cover the issue of confidentiality.⁵⁴⁾

V. Confidentiality Obligations of Arbitral Institutions

A. Austrian Law and Implied Contractual Duties

Also concerning the relationship between the parties and the arbitral institution, the above mentioned strict duty of confidentiality derived from the general contractual duty of care does apply.⁵⁵⁾ This would, of course, also apply to arbitral institutions merely acting as appointing authorities.⁵⁶⁾

However, such discussions are non-existent in the case of the International Arbitral Centre of the Austrian Federal Economic Chamber (Vienna International Arbitral Centre – VIAC) because the Vienna Rules contain explicit provisions on this issue.

B. Vienna Rules

Art 3 (6) of the Vienna Rules provides that the members of the Board of the VIAC are “bound to secrecy on all matters coming to their notice in the course of their duties”. The same applies to the Secretary General of the VIAC (Art 5 [3] of the Vienna Rules).

In addition to these – contractual – grounds for confidentiality, Sec 69 of the Economic Chamber Act (*Wirtschaftskammergesetz* – ECA) obliges all officers and employees of the VIAC to secrecy. These duties apply of course as well in cases where the VIAC is acting as the appointing authority.⁵⁷⁾

A general duty of confidentiality for the respective arbitral institution is also laid down in almost all other main international arbitration rules.⁵⁸⁾

With regard to publishing of arbitral awards, Art 30 of the Vienna Rules provides that the Board of the VIAC is entitled to publish an anonymous version of an

⁵⁴⁾ Cf., e.g., YVES DERAÏN & ERIC A. SCHWARTZ, A GUIDE TO THE ICC RULES OF ARBITRATION 284–286 (2nd ed., 2005); UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the Work of its Forty-Fifth Session, A/CN.9/614 (Oct 5, 2006), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V06/575/26/PDF/V0657526.pdf?OpenElement>.

⁵⁵⁾ See *supra* Part IV.A.

⁵⁶⁾ Cf., e.g., Crenguta Leaua, *The Appointing Authorities in International Commercial Arbitration*, in AUSTRIAN ARBITRATION YEARBOOK 2008 89, 112 (Klausegger et al. eds., 2008).

⁵⁷⁾ Like most other arbitral institutions, also the VIAC is willing to act as appointing authority (Werner Melis, *Austria*, at 4, Sept 30, 2010, available at http://portal.wko.at/wk/pub_detail.wk?AngID=1&DocID=1393247&StID=563340).

⁵⁸⁾ See, e.g., Art 6 of the Appendix I of the ICC Rules; Art 43 (1) of the Swiss Rules; Art 43 (1) of the DIS Rules; Art 46 of the SCC Rules and Art 9 of the Appendix I of the SCC Rules; Art 34 of the AAA-IA Rules; Art 39 (1) of the HKIAC Rules; Art 33 (2) of the CIETAC Rules.

award in legal journals or in its own publications, unless publication is objected to by at least one party within 30 days after service of the copy of the award (“opting out”).⁵⁹⁾

In comparison, it seems that most main international arbitration rules provide for an “opting in” regarding the publication of awards⁶⁰⁾ and only a few have chosen the more publication friendly “opting out”-approach provided for in the Vienna Rules.⁶¹⁾ However, so far only two awards issued under the auspices of the VIAC have been published.⁶²⁾ By contrast, the ICC regularly publishes extracts from ICC awards,⁶³⁾ although Art 28 (2) of the ICC Rules provides that awards shall not be made available to anyone else than the parties. However, Art 4 and 5 of the Appendix II of the ICC Rules allows the Chairman or the Secretary General of the Court to authorize researchers to acquaint themselves with awards and requires that such authorization shall not be given unless the beneficiary has undertaken to respect the confidential character of the documents made available and to refrain from any publication in their respect without having previously submitted the text for approval to the Secretary General of the Court.

On further aspects of confidentiality concerning publishing arbitral awards see *infra* Part VII.

VI. Confidentiality Obligations of Parties

A. Austrian Law and Implied Contractual Duties

There is no statutory provision in Austrian arbitration law regarding a confidentiality obligation of the parties in arbitral proceedings. There exists also no case law on this issue.

The only extensive comment in this context in Austrian literature concludes that, although Austrian law contains several provisions on the non-disclosure of certain information towards third parties, these provisions are far too general and, therefore, cannot form a legal basis for an obligation of confidentiality among

⁵⁹⁾ Arguably, the same should apply, *a maiore ad minorem*, to procedural orders and decisions of the VIAC (Schwarz & Konrad, *supra* note 33, at mnn. 30-005–30-006).

⁶⁰⁾ See, e.g., Art 34 (5) of the UNCITRAL Rules; Art 42 of the DIS Rules; Art 30 (3) of the LCIA Rules; Art 46 of the SCC Rules; Art 35 (2) in conjunction with Art 35 (3) of the SIAC Rules; *cf. also*, Art 33 (2) of the CIETAC Rules.

⁶¹⁾ See, e.g., Art 32 (5) in conjunction with Art 43 of the Swiss Rules; Art 27 (8) of the AAA-IAR; Art 39 (3) of the HKIAC Rules.

⁶²⁾ Schwarz & Konrad, *supra* note 33, at mn. 20-165; that this is still true was confirmed to the author by the Secretary General of the VIAC on 14 September 2010.

⁶³⁾ E.g., ICC, *Extracts from ICC Arbitral Awards in International Construction Disputes*, 19/2 ICC Bulletin 71 (2008); ICC, *Extracts from ICC Arbitral Awards Relating to Amiable Composition*, 18/1 ICC Bulletin 63 (2007); previously, the ICC published even entire collections of awards (see JEAN-JACQUES ARNALDEZ, YVES DERAIS & DOMINIQUE HASCHER, *COLLECTION OF ICC ARBITRAL AWARDS 1991–1995, 1997*).

parties.⁶⁴) It is furthermore argued that no implied duty of confidentiality exists under Austrian law, as the expectations and interests of the parties are too diverse, a party might be under a legal or contractual obligation to disclose relevant information or a party might need to disclose relevant information in order to ask for assistance from domestic courts in the course of arbitral proceedings.⁶⁵) Whereas the latter two arguments in itself concern more the delineation of an eventual duty of confidentiality, the argument that expectations of the parties to an arbitration agreement could be too diverse to allow a contractually implied duty of confidentiality seems to have its merits in particular when looking to other jurisdictions:

Although virtually all developed legal systems recognize the party's autonomy to agree on the confidentiality of arbitration proceedings, differing approaches are followed by foreign laws, courts and international arbitration rules regarding whether in the absence of a respective confidentiality agreement an implied duty of confidentiality does apply between the parties.⁶⁶) As regards foreign laws, there seems to be only one statutory provision that explicitly excludes a duty of confidentiality: Sec 5 of the Norwegian Arbitration Act provides that "[u]nless the parties have agreed otherwise, the arbitration proceedings and the decisions reached by the arbitration tribunal are not subject to a duty of confidentiality". On the other side of the spectrum are statutory provisions in New Zealand⁶⁷) and Spain⁶⁸) that explicitly prescribe a general confidentiality obligation of the parties. Also the approaches found in various arbitration rules are surprisingly different.⁶⁹) As regards foreign case law, the courts of some jurisdictions, such as England,⁷⁰) France⁷¹) and Singapore,⁷²) recognize a general duty of confidentiality among the parties, whereas courts of other countries, such as Australia,⁷³) Sweden⁷⁴) and the U.S.,⁷⁵) have denied such principle.

⁶⁴) Fremuth-Wolf, *supra* note 2, at 670 (with reference to Sec 16 of the ACC and Art 8 EHRC).

⁶⁵) Fremuth-Wolf, *supra* note 2, at 671; *cf. also* Hausmaninger, *supra* note 14, at Sec 581 mn. 264 (following Fremuth-Wolf).

⁶⁶) For a recent study *see* Dimolitsa, *supra* note 9, at 5.

⁶⁷) Sec 14 of the New Zealand Arbitration Act.

⁶⁸) Sec 24 (2) of the Spanish Arbitration Act.

⁶⁹) *See infra* Part VI.B.

⁷⁰) *E.g. Dolling-Baker v. Merrett and Another* (1991) 2 All E.R. 890 (English Court of Appeal); *Ali Shipping Corp. v. Shipyard Trogir*, *supra* note 12; *John Forster Emmott v. Michael Wilson & Partners Limited* (2008) EWCA (Civ) 184.

⁷¹) *Cf.* Dimolitsa, *supra* note 9, at 20 (referring to *Aïta v. Ojeh* and *Société True North et Société FCB International v. Bleustein et autres* in support of this proposition but also emphasizing that in the most recent case, *Société National Company for Fishing and Marketing "NAFIMCO" v. Société Foster Wheeler Trading Company AG*, the Paris Court of Appeal seems to have distanced itself from the view traditionally taken).

⁷²) *E.g. Myanma Yaung Chi Oo Co Ltd v. Win Win Nu*, (2003) 2 SLR 547.

⁷³) *E.g. Esso Australia Resources Ltd v. Plowman*, *supra* note 4; *Commonwealth of Australia v. Cockatoo Dockyard Pty Ltd.*, (1995) 36 NSWLR 662.

⁷⁴) *E.g. Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc*, *supra* note 5.

⁷⁵) *Cf.* Born, *supra* note 3, at 2264 (referring to *United States of America v. Panhandle*

Generally speaking, those courts advocating a general principle of confidentiality in arbitration, argue that “confidentiality ... arises as an essential corollary of the privacy of arbitration proceedings”.⁷⁶⁾ The exact opposite view is taken by those courts that neglect the existence of a duty of confidentiality. They argue that a requirement to conduct proceedings in private does not translate into a general confidentiality obligation.⁷⁷⁾

However, a closer look at Austrian civil procedural law reveals that in Austrian civil procedure the exclusion of the public triggers confidentiality obligations for the parties by law: Both, Sec 172 (3) of the ACCP and Sec 19 (4) of the LNCP provide that “[i]n as far as the public is excluded from hearings, the content of such hearings must not be made public”. Thus, Austrian civil procedural law considers confidentiality – like, for example, the courts in England in the context of arbitration – to be an essential corollary of the privacy of civil state court hearings. This general notion applies to all cases in which the public is excluded⁷⁸⁾ and, therefore, also to cases in which the arbitration specific Sec 616 (2) of the ACCP is applied. Noteworthy in this context is the fact that this principle is so strongly enshrined in the Austrian legal system that breaches of the privacy-triggered confidentiality obligation are even sanctioned by Sec 301 of the Austrian Criminal Code (*Strafgesetzbuch* – ACP).⁷⁹⁾ Consequently, based on the acknowledged principle of privacy of arbitral proceedings, there are even arguments in favor of a general duty of confidentiality of parties to an arbitration being implied in the law.

How far would such a general duty of confidentiality implied in the law go? Sec 172 (3) of the ACCP and Sec 19 (4) of the LNCP only prohibit publications to the “public”. Therefore, passing on information to a smaller and closed group, like, for example, to family members⁸⁰⁾ or a potential purchaser in the course of a due

Eastern Corp. and several other decisions but emphasizing that so far only lower courts have dealt with the issues of privacy and confidentiality).

⁷⁶⁾ *Ali Shipping Corp. v. Shipyard Trogir*, *supra* note 12; *see also, e.g., Myanmar Yaung Chi Oo Co Ltd v. Win Win Nu*, *supra* note 72 (“The first issue that is to be resolved is whether there is an implied duty of confidentiality. I prefer the English position over the Australian position. Parties who opt for arbitration rather than litigation are likely to be aware of and be influenced by the fact that the former are private hearings while the latter are open hearings.”).

⁷⁷⁾ *See, e.g., Esso Australia Resources Ltd v. Plowman*, *supra* note 4; *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Finance Inc*, *supra* note 5 (“One of the advantages of ... arbitration is believed to be the secrecy associated with arbitration proceedings. ... However, this advantage does not have to mean that there is a preconceived duty of confidentiality binding the parties. The real meaning of this, as compared with judicial proceedings, is instead that the proceedings are obviously not public, *i.e.*, that the public does not have any right of insight by being present at the hearings or having access to documents in the matter ...”).

⁷⁸⁾ Cf. Walter Schragel, *Sec 172 ACCP*, in *KOMMENTAR ZU DEN ZIVILPROZESSGESETZEN* mn. 4–12 (Hans W. Fasching & Andreas Konecny eds., 2nd ed. 2007).

⁷⁹⁾ However, this provision seems to be hardly ever applied in practice (*see, e.g., Christian Pilnacek*, Sec 301, in *WIENER KOMMENTAR ZUM STRAFGESETZBUCH* mn. 22 [Frank Höpfel & Eckart Ratz eds., 2nd ed. 2010]).

⁸⁰⁾ Schragel, *supra* note 78, at Sec 172 mn. 15.

diligence review would not be covered. The ruling itself (meaning the decision on the prayers of relief without the reasoning of an award) should not be covered either as Sec 172 (3) of the ACCP provides that those parts of a judgment that do not contain explicit references to private parts of the hearing are not covered by the exclusion of the public.⁸¹⁾ The same should be true for the publication of an award that was sufficiently redacted and made anonymous before being published. Furthermore, disclosure required by law or a competent regulatory body⁸²⁾ or in order to challenge or enforce an arbitral award or to ask for other assistance from courts in the course of arbitral proceedings should not be covered either.⁸³⁾ Whether disclosure for the establishment or protection of a party's legal right in relation to a third party would fall under such confidentiality obligation would depend on whether this can be regarded as a publication to the "public" in the meaning of Sec 172 (3) of the ACCP and Sec 19 (4) of the LNCP. A mere reference to the arbitration or information received in the course of the arbitration in a normal demand letter should not be covered. Whether the same is true for including such information in a written submission in state court proceedings, which are open to the public, seems questionable. However, as long as the respective information is used in good faith and the disclosing party does not try to publicize the latter proceedings, the better view should be that this is not in breach with the principles of 172 (3) of the ACCP and Sec 19 (4) of the LNCP.⁸⁴⁾ Lastly, breaches would not create a criminal liability under Sec 301 of the ACP because Sec 301 requires a breach of a statutory prohibition and – although indirectly confirmed by Sec 616 (2) of the ACCP – the principle of privacy of arbitral proceedings is not provided for by statutory law.

It seems, therefore, that a confidentiality obligation for the parties to arbitration based on the principle of confidentiality reflected in Sec 172 (3) of the ACCP and Sec 19 (4) of the LNCP could be a concept that would not restrict the parties too much but should still prevent the aggravation of the dispute by avoiding disturbances from unnecessarily involving the public, an aspect that has been also used to justify confidentiality obligations in the – generally more transparency

⁸¹⁾ *Id.* at mn. 14.

⁸²⁾ These binding statutory duties cannot be limited by an implied legal obligation.

⁸³⁾ As these possibilities are provided for by the applicable procedural law, there is no reason why an implied duty of confidentiality should override these remedies expressly granted by the legislature to arbitrating parties; at least as long as the respective remedy is used in good faith. If the applicable procedural law is Austrian law, there is even an argument for remedies used in bad faith not infringing any confidentiality obligations as Sec 616 (2) of the ACCP would allow for private hearings, if a legitimate interest in doing so can be shown, and court decisions would be published in anonymous form.

⁸⁴⁾ This seems to be supported by recent case law on the application of Sec 301 of the ACP: OGH, April 4, 2008, docket nos. 11 Os 21/08k and 11 Os 22/08g, in EvBl 2008/130, *in* ÖJZ 645 (2008) (Austria) (holding that the reading out of parts of a protocol of a private hearing in a public state court hearing does not amount to a publication to the broader public). However, Sec 301 of the ACP requires the publication to a "broader public" and not just to the "public", as stated in 172 (3) of the ACCP and Sec 19 (4) of the LNCP.

friendly – area of treaty arbitration.⁸⁵⁾ Furthermore, one of the most criticized consequences of confidentiality obligations in arbitration – the non-publication of the award⁸⁶⁾ – would not be an issue either.

Although Sec 616 (2) of the ACCP – as a feature usually only found in legal systems that recognize a general duty of confidentiality – could be used as a supporting argument for an analogous application of the principles laid down in Sec 172 (3) of the ACCP and Sec 19 (4) of the LNCP for arbitration proceedings, analogies from general civil procedural rules in the area of arbitration are generally – if at all – acceptable under very special circumstances only. Furthermore, it could be argued that Sec 172 (3) of the ACCP and Sec 19 (4) of the LNCP aim to protect very specific kinds of proceedings in which a special need for privacy and confidentiality arises, whereas the privacy of arbitral proceedings is – at least in its prime foundation – a mere consequence of the privacy of the contract and, therefore, should not trigger general confidentiality obligations.⁸⁷⁾ Therefore, it is questionable whether Austrian courts would indeed follow the above arguments and would conclude that a general confidentiality obligation is inherent in an arbitration agreement as a matter of law.

If one rejects the above notion, the question arises whether a general confidentiality obligation would be implied in an arbitration agreement by the will of the parties. Under Austrian law this will be – without explicit wording or other additional special reasons – not the case. As already emphasized above, the expectations of the parties will be usually too diverse to allow an implicit agreement on confidentiality.⁸⁸⁾ However, often the contract containing the arbitration agreement also contains a general confidentiality clause. If such a clause is formulated broadly enough it should generally extend to arbitral proceedings.⁸⁹⁾ Furthermore, in some special cases, where the parties have not included a general confidentiality clause into their contract, there might be an argument that due to the nature of the respective contract the parties would expect a certain degree of con-

⁸⁵⁾ See, e.g., *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, *supra* note 7, at mn. 163 (d); *Giovanna a Beccara and Others v. The Argentine Republic*, *supra* note 6, at mn. 103.

⁸⁶⁾ See generally Anjanette H. Raymond, *Confidentiality in a Forum of Last Resort: Is the Use of Confidential Arbitration a Good Idea for Business and Society?*, 16 AM. REV. INT'L ARB. 479 (2005); Cindy G. Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT'L ARB. 121 (2003); see also, Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301, 1312–1325, 1332–1337 (2006); cf. also, Noah Rubins, *Opening the Investment Arbitration Process: At What Cost, for What Benefit?* in AUSTRIAN ARBITRATION YEARBOOK 2009 483, 492 (Klausegger et al. eds., 2009).

⁸⁷⁾ Cf., e.g., Paul Oberhammer, *Zur Vertraulichkeit von Schiedsverfahren*, in FESTSCHRIFT FÜR KOSTAS E BEYS 1139, 1155 (Hideo Nakamura et al. eds., 2003) (arguing against a general duty of confidentiality under German law).

⁸⁸⁾ Fremuth-Wolf, *supra* note 2, at 671; cf. also Hausmaninger, *supra* note 14, at Sec 581 mn. 264.

⁸⁹⁾ Fremuth-Wolf, *supra* note 2, at 671.

confidentiality from each other and, therefore, that they must have implicitly agreed on confidentiality.⁹⁰⁾

However, if the notion of confidentiality obligations implied in Austrian law is rejected and there is also no indication from the agreement between the parties that there has been a preference for confidentiality, the respective provisions of the applicable arbitration rules are of decisive importance.

B. Vienna Rules

The Vienna Rules remain silent on the question of confidentiality concerning the parties. However, some commentators have suggested that where the parties have agreed to arbitrate under the Vienna Rules, there may be an argument that a more general confidentiality obligation is implied.⁹¹⁾ This argument is based on an alleged preference for confidentiality that is said to be reflected in several provisions of the Vienna Rules.

However, as was shown by the comparisons above, the Vienna Rules are quite within the usual range with regard to confidentiality related provisions in arbitration rules. Its provision on publishing awards is even comparably publication friendly – even if this possibility was hardly ever used by the VIAC. The better view is, therefore, that agreeing on the Vienna Rules *per se* does not imply a more general confidentiality obligation.

In comparison, also several other main international arbitration rules – such as the UNCITRAL Rules, the ICC Rules, the SCC Rules and the AAA-IA Rules – are silent on the issue of confidentiality obligations of the parties. However, meanwhile more and more arbitration rules explicitly provide for confidentiality.⁹²⁾ Out of all rules included in this analysis, the HKIAC Rules provide the most succinct confidentiality provision as it also prohibits disclosure on the fact that proceedings do exist.⁹³⁾ Noteworthy also are the Swiss Rules, which contain a special provision preventing parties from seeking to make arbitrators, tribunal-ap-

⁹⁰⁾ Oberhammer, *supra* note 87, at 1155 (listing as examples partnership agreements in general, partnership agreements or articles of association of law firms and banking services contracts).

⁹¹⁾ Schwarz & Konrad, *supra* note 33, at mn. 20-167.

⁹²⁾ See, e.g., Art 43 (1) of the Swiss Rules; Art 43 (1) of the DIS Rules; Art 30 (1) of the LCIA Rules; Art 39 (1) of the HKIAC Rules; Art 35 (1) of the SIAC Rules; Art 33 (1) of the CIETAC Rules.

⁹³⁾ As Art 39 (1) of the HKIAC Rules might serve as a good starting point for drafting a confidentiality clause, it shall be depicted here in its entirety: “Unless the parties expressly agree in writing to the contrary, the parties undertake to keep confidential all matters and documents relating to the arbitral proceedings, including the existence of the proceedings as well as all correspondence, written statements, evidence, awards and orders not otherwise in the public domain, save and to the extent that a disclosure may be required of a party by a legal or regulatory duty, to protect or pursue a legal right or to enforce or challenge an award in legal proceedings before a judicial authority. This undertaking also applies to the arbitra-

pointed experts and secretaries of the arbitral tribunal witnesses in other proceedings.⁹⁴⁾

VII. Publication of Award

A. Austrian Law and Implied Contractual Duties

Like the model law, the ACCP does not provide any guidance on the question under which conditions an arbitral award may be made available to the public after it has been issued to the parties.

As regards the arbitrators, their general confidentiality obligations⁹⁵⁾ prohibit also the publication of an arbitral award without the explicit consent of all parties.⁹⁶⁾ However, it is accepted that arbitrators can discuss their decisions, in anonymous and abstract form, in journals and specialized publications, just like any other abstract legal problem.⁹⁷⁾

As regards the parties, they are without the consent of the other party at least allowed to publish the ruling contained in the award rendered to them or to publish the entire award in sufficiently redacted and anonymous form. If one rejects the notion of general confidentiality obligations of the parties towards each other, it would be even permissible to publish the entire award in its original format without any consent.

However, often this issue is covered by the chosen arbitration rules.

B. Vienna Rules

As already stated above, with regard to publishing of arbitral awards Art 30 of the Vienna Rules provides that the Board of the VIAC is entitled to publish an anonymous version of an award in legal journals or in its own publications, unless publication is objected to by at least one party within 30 days after service of the copy of the award.

However, Art 30 of the Vienna Rules does not explicitly state that the arbitrators or the opposing party would be entitled to do so too. Therefore, for arbitrators⁹⁸⁾ and parties the general principles outlined above in Part VII.A. apply.

tors, the tribunal-appointed experts, the secretary of the arbitral tribunal and the HKIAC Secretariat and Council.”

⁹⁴⁾ Art 44 (2) of the Swiss Rules.

⁹⁵⁾ See *supra* Part IV.A.

⁹⁶⁾ Schwarz & Konrad, *supra* note 33, at mnn. 30-003–30-004.

⁹⁷⁾ *Id.* at mn. 30-004.

⁹⁸⁾ *Id.* at mn. 30-004. Arguably, the same should apply to procedural orders of the arbitral tribunal (*cf. id.* at mn. 30-005).

A comparative view shows that in this context a great variety of approaches can be found in international arbitral rules. Whereas some rules follow an approach similar to the one of the Vienna Rules and address or authorize only the institution,⁹⁹⁾ provisions of other rules seem to be directed to the institution, the arbitrators as well as the parties.¹⁰⁰⁾ The SCC Rules are special in that Art 46 addresses the SCC and its arbitrators (but not the parties), whereas Art 35 (2) of the SIAC Rules is directed to the parties and the arbitrators (but not the institution).

VIII. Publication of Decisions in Connected State Court Proceedings

In Austria, all decisions of the Austrian Supreme Court – except those that are rejections lacking any special reasoning – have to be published in full text at www.ris.bka.gv.at.¹⁰¹⁾

However, decisions of Austrian courts are cited by their date and document number and not by the names of the parties. This is due to the fact that names have to be made anonymous before publication.¹⁰²⁾ Furthermore, addresses and any other references to places and regions that allow inferences to the case are to be made anonymous by exchanging them with letters, numbers or abbreviations (the content of the decision needs to remain understandable though).¹⁰³⁾ This usually will not allow readers to draw any conclusions from published Supreme Court decisions to the actual parties of a case and any sensitive data.

⁹⁹⁾ See, e.g., Art 28 (2) of the ICC Rules and Art 4 and 5 of the Appendix II of the ICC Rules; Art 30 (3) of the LCIA Rules; Art 27 (8) of the AAA-IA Rules.

¹⁰⁰⁾ See, e.g., Art 34 (5) of the UNCITRAL Rules; Art 43 (3) of the Swiss Rules; Art 42 of the DIS Rules; Art 39 (3) of the HKIAC Rules; cf. also Art 33 (2) of the CIETAC Rules.

¹⁰¹⁾ See Sec 15 (1) and 15a (1) of the Act on the Supreme Court (*Bundesgesetz über den Obersten Gerichtshof* – ASC). Subject to capacity and technical conditions, the provisions of the ASC on the publication of decisions are also applicable to decisions of lower courts, as long as these decisions are of general interest (Sec 48a [1] of the Court Administration Act [*Gerichtsorganisationsgesetz*]).

¹⁰²⁾ Sec 15 (4) of the ASC. This is usually done by leaving the first name in full and using only the first letter of the surname. However, under certain circumstances it might be necessary that also the first name of a person is made anonymous, especially where the first name is rather seldom or in the given circumstances demonstrative (ERWIN FELZMANN, KARL-HEINZ DANZL & HERBERT HOPF, OBERSTER GERICHTSHOF – BUNDESGESETZ ÜBER DEN OBERSTEN GERICHTSHOF UND GESCHÄFTSORDNUNG DES OBERSTEN GERICHTSHOFES 2005, Sec 15 ASC mn. 7 [2nd ed., 2009]). Famous examples for cases in which the first name should have been made anonymous as well are the numerous decisions concerning the – meanwhile deceased – Austrian politician “Jörg H****” (see, e.g., OGH, Sept 21, 2006, docket no. 12 Os74/06h, in *EvBl* 2007/7, in *ÖJZ* 34 [2007] [Austria]).

¹⁰³⁾ Sec 15 (4) of the ASC.

However, in certain cases the usual methods to make anonymous might not be sufficient to warrant the anonymity of the parties.¹⁰⁴⁾ For such cases the deciding judges can prohibit the publishing of the full text in the database altogether, provided that the proceedings have been conducted in private in all instances.¹⁰⁵⁾ However, this provision is not mandatory and leaves a considerable degree of discretion with the competent judges.

A recent Supreme Court decision, however, confirmed that the central aspect for the judge in using his discretion has to be the value judgement of the legislature to allow in certain proceedings that the public can or is to be excluded from the hearing.¹⁰⁶⁾ A comparably strong value judgement has been made by enacting the above described Sec 616 (2) of the ACCP. Thus, as long as the hearings were conducted in private and publishing the decision in an anonymous form would not be sufficient to warrant the anonymity of the parties, it should be quite likely that the competent court decides not to publish the full text of the decision. Even if that were the case, the interest of the public in the legal content of the court decision is not too much obstructed as a short, abstract summary of the main legal conclusions is still published in the database.¹⁰⁷⁾

IX. Conclusion

As can be seen from the above, Austrian Law and Austria as a place of arbitration provide a comparably advantageous framework for arbitrations with confidentiality concerns. Austria's Sec 616 (2) of the ACCP is one of the very few statutory provisions in the world that facilitates special protection of the parties' privacy and confidentiality needs in arbitration connected state court proceedings. Furthermore, any decisions issued by Austrian courts will (if at all) only be published in anonymous and redacted format.

As regards general confidentiality obligations of the persons administering and leading the arbitration proceedings, Austrian Law provides for a strict duty of confidentiality for arbitrators and arbitral institutions. The VIAC and its officers and employees are even obliged to secrecy by a specific statutory provision.

Regarding confidentiality obligations of arbitrating parties towards each other, Austrian law allows for several arguments in favor of a confidentiality obligation implied by law. These arguments are mainly based on procedural statutory

¹⁰⁴⁾ See, e.g., OGH, Dec 14, 2004, docket no. 10 Ob 53/04y (*available at* www.ris.bka.gv.at/Jus/) concerning the intergovernmental organisation "O****" which was stated to have concluded with the Republic of Austria – so the full text of the decision – an "Agreement regarding the Headquarters of the Opec Fund for International Development", whereby certain provisions of this Agreement were decisive for the ruling in this case.

¹⁰⁵⁾ Sec 15 (2) of the ASC.

¹⁰⁶⁾ OGH, Sept 8, 2009, docket no. 4 Ob 101/09w, in EvBl 2010/18, in ÖJZ 127 (2010) (Austria).

¹⁰⁷⁾ Felzmann, Danzl & Hopf, *supra* note 102, at Sec 15 ASC mn. 5.

provisions making confidentiality a necessary corollary of privacy in state court proceedings and are further supported by Sec 616 (2) of the ACCP. As shown above, the scope of such obligation would provide a balanced confidentiality concept by, on the one hand, preventing the aggravation of the dispute but, on the other, not restricting the parties too much and even allowing for the publication of arbitral awards in an anonymous and redacted form. Thus, this confidentiality obligation would also not hinder the further development of predictability and legal certainty in arbitration.

However, due to lack of Austrian court decisions on this topic and because of the general reluctance to apply state court procedural rules to arbitral proceedings as well as the argument that the privacy of arbitration is a mere consequence of the privacy of contracts, parties with confidentiality concerns are still well advised to include an explicit confidentiality agreement in their arbitration clause. The same should be followed by parties choosing VIAC arbitration because – like several other main international arbitration rules – the Vienna Rules do not contain any special provision on confidentiality obligations between the parties.

For parties which have not done so but which have agreed on a confidentiality clause in the main contract, Austrian law should allow this agreement, if phrased broadly enough, to extend also to the arbitration proceedings and, thereby, also providing protection for confidentiality needs disputing parties may have but which they may not have explicitly provided for in their arbitration clause.

