Prevention and Challenge of Surprise Decisions in (Austrian) Arbitration Proceedings

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I. Introduction

No one likes bad surprises. Indeed, the outcome of a civil case may be surprising for a party to the proceedings, especially if the decision does not reflect their own procedural position or, in other words, if they have lost their case. Yet, not every unexpected outcome of the proceedings follows from a procedural deficiency and can be challenged as a so-called "surprise decision." This may be different, however, if the decision is actually based on a legal aspect that could not have been expected by one or both parties, as it had neither been pleaded by either of the parties nor had been discussed during the proceedings. Resorting to such an unforeseeable legal argument would catch at least one of the parties by surprise and would have potentially prevented this party from presenting their full case.

When it comes to civil proceedings before Austrian state courts, the prohibition of surprising the parties with a legal view is stipulated in the Austrian Code of Civil Procedure (CCP): Section 182a CCP requires the court to put legal arguments that have evidently been overlooked or considered irrelevant by one party to discussion before taking them into consideration in their judgment.[1] If no such legal discussion has taken place and the court bases their decision on a legal argument that could not have been foreseen by one or both parties, the decision can be challenged because of a procedural deficiency under Section 496 para 1 subpara 2 CCP.[2] Similar provisions on surprise decisions also exist in other jurisdictions.[3]

The situation is less clear when parties opt for arbitration proceedings. In arbitration cases, questions of preventing surprise decisions from the perspective of an arbitral

[1] Section 182a Austrian CCP: „(...) Außer in Nebenansprüchen darf das Gericht seine Entscheidung auf rechtliche Gesichtspunkte, die eine Partei erkennbar übersehen oder für unerheblich gehalten hat, nur stützen, wenn es diese mit den Parteien erörtert (§ 182) und ihnen Gelegenheit zur Äußerung gegeben hat."

[2] For a comprehensive analysis of measures to prevent and challenge "surprise decisions" in Austrian civil procedure, *see* Katharina Auernig, *Das Überraschungsverbot – Verhinderung und Bekämpfung von Überraschungsentscheidungen im Zivilprozess und im Schiedsverfahren* (Wien: Verlag Österreich, 2020) pp. 5- 139.

[3] *See*, e.g. for Germany Section 139 para 2 German CCP.

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tribunal on the one hand and the possibility of challenging surprising awards from the perspective of a party on the other hand are also of great practical importance. In the context of arbitration, however, the legal basis for determining surprise decisions is more difficult to establish.

II. Legal Basis for the Prohibition of Arbitral Surprise Decisions

When agreeing on Austria as the seat of arbitration, it is not the entire Code of Civil Procedure that applies to arbitration cases, but, just as in most other countries, only a rather small set of rules. The Austrian Arbitration Act (Chapter 6, Subchapter 4 of the Austrian CCP) contains only about 40 provisions, e.g. on the conduct of the proceedings (Section 594 para 1 CCP), on the appointment and challenge of arbitrators (Sections 586–592 CCP), or on the means for setting aside a flawed arbitral award (Sections 611–616 CCP). For the present context, it is noted that the Austrian *lex arbitri* – just like most other Arbitration Acts worldwide[4] – does not contain any explicit provisions on the prohibition of surprise decisions and/or on the obligation to put legal arguments to a discussion with the parties.

Due to the limited number of provisions in most Arbitration Acts, parties frequently agree upon institutional rules to be applied in their arbitration proceedings, such as the ICC Rules 2021, the LCIA Rules 2020, the DIS-Rules 2018, or the Vienna Rules 2021. Like the vast majority of national arbitration laws, however, most of those commonly chosen institutional rules also do not include explicit provisions on legal discussions and/or prohibitions to surprise the parties with a legal view.[5]

As a result of party autonomy being one of the core principles in arbitration, parties are free to set their own rules to be applied in their proceedings.[6] Hence, the parties may adopt a procedural rule that explicitly obliges the arbitral tribunal to put legal aspects to discussion. The downside of such autonomously agreed rules on the conduct of arbitral proceedings is, however, their lack of enforceability in Austrian

[4] Some, very few arbitration laws at least contain explicit provisions on the general power of the arbitral tribunal to raise legal issues in the proceedings, *see* Section 34 para 1 and para 2 English Arbitration Act, Article 1044 para 1 Dutch Wetboek van Burgerlijke Rechtsvordering or Section 27 para 2 Danish Lov om Voldgift.

[5] One exception marks Article 22.1. (iii) LCIA Rules 2020, according to which an arbitral tribunal may raise legal issues on its own motion provided that the parties' right to be heard is sufficiently granted. *See* also, in a similar vein, Article 7 Prague Rules 2018. Art 45 para 9.3 Vienna Rules 2021 mentions the discussion of legal issues in an oral hearing, however, only in the context of expedited proceedings.

[6] *See* Section 594 para 1 CCP.

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setting aside proceedings. Unlike in other countries, such as Germany[7], the Austrian Arbitration Act deviates from the (widely adopted) UNCITRAL Model Law on International Commercial Arbitration in this regard and does not include the breach of a procedural rule agreed upon by the parties (Section 34 para 2.a.iv UNCITRAL-ML) as a ground for setting aside an arbitral award according to Section 611 Austrian CCP. Thus, a deviation from a procedural rule agreed by the parties can by itself not lead to the setting aside of the award. The violation of an autonomously agreed procedural rule that prohibits the issuance of surprise decisions can therefore *per se* not be relied upon in Austrian setting aside proceedings.[8]

In summary, there is no *explicit* provision in the Austrian Arbitration Act on the basis of which an arbitral surprise decision can be challenged at the setting aside stage. Even in the absence of such an explicit provision, attention must be paid to general principles that ought to be applied in arbitration proceedings and whether, in fact, the prohibition of surprising the parties with a legal view may be deduced from such principles. Therefore, it is worth taking a closer look at one of the core procedural guarantees (also) applicable in arbitration proceedings: the right to be heard and to present one's case.

III. The Right to be Heard in Arbitration Proceedings

Pursuant to Section 594 para 2 CCP, the parties to an arbitration shall be treated fairly. Each party shall be granted the right to be heard. Section 594 para 2 CCP forms part of the – very few – mandatory provisions of the Austrian Arbitration Act.[9] It is also directly linked to the provisions on setting aside arbitral awards. The *travaux préparatoires* to the Austrian Arbitration Act 2006 affirm that a violation of the principle of the right to be heard under Section 594 para 2 CCP may qualify as a ground for setting aside an award pursuant to Section 611 para 2 subpara 2 CCP.[10]

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[7] *See* Section 1059 para 2 subpara 1 lit d German CCP.

[8] When it comes to enforcement of the arbitral award in other countries, however, a violation of procedural rules established by parties' agreement might of course become relevant from the perspective of the New York Convention (*see* Art V para 1 lit d NYC).

[9] For a list of all mandatory provisions, *see* Alice Fremuth-Wolf, 'Section 597 CCP' in Stefan Riegler/Alexander Petsche/Alice Fremuth-Wolf/Martin Platte/Christoph Liebscher (eds), *Arbitration Law of Austria. Practice and Procedure* (Vienna: Juris Publishing 2007) para. 13.

[10] Explanatory remarks on the government bill proposing the Austrian Arbitration Act 2006, ErläutRV 1158 BlgNR 22. GP, p. 17.

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The link between those two provisions has also been emphasised by the Austrian Supreme Court in several decisions[11] and is generally undisputed in legal literature.[12]

What remains, however, and what is indeed controversially discussed in Austrian legal doctrine and practice is the question which procedural flaws actually qualify as a violation of the right to be heard. In other words, it needs to be established how and according to which standards Section 594 para 2 CCP – and, as a consequence, also Section 611 para 2 subpara 2 CCP – ought to be interpreted to determine violations of the right to be heard that may cause a successful challenge of an arbitral award.

When it comes to the interpretation of the right to be heard and its standards, one cannot avoid looking more closely at the role and relevance of Article 6 ECHR in the context of arbitration proceedings.

A. The (Partial) Applicability of Article 6 ECHR in Austrian Arbitration Proceedings

The right to be heard as one of the most fundamental procedural guarantees is prominently enshrined in Article 6 para 1 ECHR. In contrast to other countries,[13] Austria has adopted the ECHR on a constitutional level.[14] Being part of the Austrian constitution, the role and relevance of Article 6 ECHR is of particular interest also when it comes to arbitration proceedings. This section assesses if and to what extent

[11] Austrian Supreme Court [in the following: Austrian OGH], 30.6.2010, 7 Ob 111/10i; 23.2.2016, 18 OCg 3/15p; 28.9.2016, 18 OCg 2/16t. All decisions of the Austrian OGH can be accessed via http://ris.bka.gv.at/Jus/ with their case number.

[12] *See*, e.g. Jenny Power, *The Austrian Arbitration Act* (Vienna: Manz 2006) Section 594 CCP para. 4; Andreas Reiner, *Das neue österreichische Schiedsrecht. SchiedsRÄG 2006* (Vienna: LexisNexis ARD Orac 2006) Section 611 CCP para. 196; Gerold Zeiler, *Schiedsverfahren*, 2nd edn. (Vienna: NWV 2014) Section 611 CCP para. 18a (with reference to *Reiner*); a more restrained approach is followed by Christian Hausmaninger, '§ 611 ZPO' in Hans W. Fasching/Andreas Konecny (eds), *Zivilprozessgesetze*, Vol. IV/2, 3rd edn. (Vienna: Manz 2016) para. 101.

[13] In Germany, for instance, the ECHR has been formally adopted on a mere statutory (sub-constitutional) level (*see* Christoph Grabenwarter/Katharina Pabel, *Europäische Menschenrechtskonvention*, 7th edn. [Vienna: C.H. Beck – Helbing Lichtenhahn – Manz 2021] Chap. 3 paras. 8 et seqq), in Switzerland, the ECHR ranks as a source of international law between the constitutional and the statutory level (*see* Daniel Thürer, 'Verfassungsrechtlicher und völkerrechtlicher Status der Grundrechte', in Detlef Merten/Hans-Jürgen Papier, *Handbuch der Grundrechte. Grundrechte in der Schweiz und in Liechtenstein* (Heidelberg: Müller 2007) para. 41, with further references. Both Germany and Switzerland have, however, expressly incorporated the right to be heard in their constitution (cf. Article 103 para. 1 German GG; Article 29 para. 2 Swiss BV).

[14] Austrian Federal OJ I 1964/59; all Austrian federal statutes can be accessed via https://www.ris.bka.gv.at/Bund/ with their title; amendments can be found by their OJ number.

parties to an arbitration waive the guarantees of Article 6 ECHR when resorting to arbitration.

The applicability of Article 6 ECHR in arbitration proceedings constitutes a controversially discussed issue in national as well as international academia and practice.[15] Starting point of the controversy marks a permanent line of case law by the European Court of Human Rights (EuCHR), according to which parties can waive certain rights contained in Article 6 ECHR, provided that this derives from the parties' free and deliberate choice.[16] A closer look into the EuCHR's (and the European Commission on Human Rights') case law shows, however, that parties are not free to waive the guarantees of Article 6 ECHR in their entirety but are rather only entitled to express a partial waiver with respect to some of the procedural rights provided therein.[17] As the EHRC has pointed out prominently in *Osmo Suovaniemi et al/Finnland*, "an unequivocal waiver of Convention rights is valid only insofar as such waiver is 'permissible'. Waiver may be *permissible with regard to certain rights but not with regard to certain others*. A distinction may have to be made even between different rights guaranteed by Article 6."[18]

The question remains *which* of the guarantees enshrined in Article 6 para 1 ECHR are considered to be waivable and, thus, do not necessarily apply (e.g. to arbitration proceedings) and which ones, on the other hand, belong to the core safeguards of Article 6 ECHR and therefore mandatorily apply whenever it comes to proceedings dealing with "civil rights and obligations".[19] While the EuCHR has developed some case law with regard to the permissible waiver of several procedural guarantees, such as the right of access to court (which justifies the existence of arbitration in the first

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[15] *See* for details on this discussion and further references Auernig, *Überraschungsverbot,* pp. 158-62.

[16] European Commission on Human Rights (EuComHR) 5.3.1962, 1197/61, *X./Germany*: „(...) que la conclusion d'un compromis d'arbitrage entre particuliers s'analyse juridiquement en une *renonciation partielle* à l'exercice des droits que définit l'article 6 paragraphe 1" (emphasis added). Decisions of the EuComHR and the EuCHR can be accessed via https://hudoc.echr.coe.int/.

[17] EuComHR 12.10.1982, 8588/79 and 8589/79, *Bramelid et Malmström/Sweden* I para. 2.c: „[T]here is nothing in the Convention to prevent a person from renouncing the exercise of *certain* rights guaranteed under Article 6, paragraph I, in the case of a dispute involving civil rights and obligations, provided that the person's decision is taken freely and without coercion" (emphasis added). EuComHR 27.11.1996, 28101/95, *Nordström-Janzon et Nordström-Lehtinen/Netherlands*: „[T]here was a renunciation by the parties of a procedure before the ordinary courts satisfying *all* the guarantees of Article 6 (Art. 6) of the Convention" (emphasis added).

[18] EuCHR 23.2.1999, 31737/96, *Osmo Suovaniemi et al/Finnland* (emphasis added).

[19] For more details on the term "civil rights and obligations" that fundamentally defines the scope of Article 6 para 1 ECHR, *see* only Jochen Frowein, 'Artikel 6 EMRK', in Jochen Frowein/Wolfgang Peukert (eds), *Europäische Menschenrechtskonvention*, 3rd edn (Kehl: N.P Engel Verlag 2009) paras. 6-24, with further references.

place)[20] and the right to a public[21] and/or an oral[22] hearing, the Strasbourg Court has not yet provided an exhaustive list of (non-)waivable guarantees contained in Article 6 para 1 ECHR.

There is, however, a general principle that can be deduced from the existing case law and be applied when asking for a potential waiver of other guarantees, such as the required independence and impartiality of the deciding body, the right to obtain a decision within a reasonable time or – as relevant in the present case – the right to be heard. In fact, it is the fundamental principle of ensuring a *fair conduct of the proceedings* against which the question of permissible waiver and/or substitution of the respective guarantees of Article 6 para 1 ECHR is to be tested. As an example, the right of access to a court including the requirement of a "tribunal established by law" pursuant to Article 6 ECHR is designed as a mechanism to ensure a fair conduct of the proceedings. Substituting such a "tribunal" by another deciding body – e.g. an arbitral tribunal that does not meet these requirements[23] – is not generally in conflict with Article 6 para 1 ECHR as long as there are sufficient legal mechanisms[24] to safeguard the *equitable constitution* of the (arbitral) tribunal. Having been constituted in a fair and equitable manner, such a tribunal is equally capable of conducting a fair proceeding. The same argument applies to the right to a public and/or an oral hearing: Provided that the parties enjoy sufficient core guarantees such as their full right to be heard, the overall fairness of the proceedings may not be affected although the hearing is not held in public or for some cases even only conducted in a written form.[25] For the guarantee of the right to be heard, however, the test against the

[20] EuComHR 12.10.1982, 8588/79 and 8589/79, *Bramelid and Malmström/Schweden* I para. 2.c; EuComHR 13.7.1990, 11960/86, *Axelsson et al/Sweden* para. 1. For more references and further discussion on this issue, *see* Auernig, *Überraschungsverbot*, pp. 155-7.

[21] EuCHR 23.6.1981, 6878/75, 7238/75, *Le Compte, Van Leuven and De Meyere/Belgium* para. 59; EuComHR 27.11.1996, 28101/95, *Nordström-Janzon et Nordström-Lehtinen/Netherlands*. For more references, *see* Auernig, *Überraschungsverbot*, p. 160.

[22] EuComHR 13.7.1990, 11960/86, *Axelsson et al/Sweden* para. 2 (this decision, however, dealt with court proceedings on the validity of an arbitration agreement); *see* also Franz T. Schwarz, 'Die Durchführung des Schiedsverfahrens', in Christoph Liebscher/Paul Oberhammer/Walter Rechberger (eds), *Schiedsverfahrensrecht*, Vol. II (Vienna: Verlag Österreich 2016) paras. 8/261-266.

[23] An arbitral tribunal it is not permanently and directly established by law but rather constituted upon a party agreement, for more details and references, *see* Auernig, *Überraschungsverbot*, pp. 155-6.

[24] E.g. provisions on the potential challenge of arbitrators, *see* for Austria Sections 588-591 CCP.

[25] The EuCHR has pointed out in a permanent line of case law that in the course of proceedings, where exclusively legal or highly technical questions are at stake, the requirements of Article 6 ECHR may be fulfilled even in the absence of an oral hearing, *see* e.g. EuCHR 5.2.2002, 42057/98, *Speil/Austria*; EuCHR 3.5.2007, 17912/05, *Bösch/Austria* para. 27; EuCHR 18.9.2012, 10781/08, *Ohneberg/Austria* paras. 31-2.

principle of conducting a fair proceeding must lead to the result that a waiver of this guarantee is not permissible. Unlike the guarantees mentioned above, the right to be heard cannot be left aside or substituted by any other procedural mechanism. Rather, the right to be heard forms part of the very core of guarantees Article 6 para 1 ECHR provides for. In accordance with the opinion of several scholars and arbitration practitioners, the right to be heard cannot validly be waived by the parties, e.g. by opting for arbitration proceedings to resolve their dispute on civil rights and obligations.[26]

Apart from the fact that a waiver of the right to be heard is not permissible under Article 6 para 1 ECHR, it must be emphasized that, in practice, parties also generally do not *want* to waive or shorten their right to be heard when it comes to arbitration proceedings. By choosing arbitration, they intentionally waive their right of access to court; very often they also intend to avoid publicity and therefore deliberately waive their right to a public hearing. Being able to fully present their case, however, is one of the main procedural expectations each party brings along, even (more so) when they have opted for arbitration.[27]

In summary, the right to be heard constitutes one of the core guarantees that ensure the fair conduct of proceedings on civil rights and obligations, and a waiver of this right – e.g. by opting for arbitration – is neither permissible under Article 6 para 1 ECHR nor would it usually even be covered by the parties' will. As a consequence, it is the standard of Article 6 para 1 ECHR that necessarily applies to the interpretation of the right to be heard also when it comes to arbitration proceedings.[28]

B. Wording and *telos* of Section 594 para 2 CCP

It has been elaborated above that the right to be heard according to Article 6 para 1 ECHR cannot be waived by the parties resorting to arbitration. Apart from this

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[26] Christoph Grabenwarter/Theresa Ganglbauer, 'Die Stellung des Schiedsverfahrens aus verfassungsrechtlicher Sicht' in Dietmar Czernich/Astrid Deixler-Hübner/Martin Schauer (eds), *Handbuch Schiedsrecht* (Vienna: Manz 2018) para. 1.59; Georg E. Kodek, 'Verfassung und Grundrechte', in Christoph Liebscher/Paul Oberhammer/Walter Rechberger (eds), *Schiedsverfahrensrecht*, Vol. I (Vienna: Springer 2012) para. 1/72; Andreas Reiner, 'Schiedsverfahren und rechtliches Gehör' (2003) ZfRV 52-72, p. 61. For further discussion on this issue and references, *see* Auernig, *Überraschungsverbot*, pp. 162-6.

[27] See, e.g. Grabenwarter/Ganglbauer, 'Stellung' para. 1.59. For details and further references, *see* Auernig, *Überraschungsverbot*, pp. 166-7.

[28] Due to space limits in this paper, the question of whether an arbitral tribunal may be regarded as a direct addressee of the obligations enshrined in Article 6 ECHR or rather only be bound in an indirect manner cannot be covered. For a detailed discussion on this issue, *see* Auernig, *Überraschungsverbot*, pp. 167-77.

constitutional perspective, a clue to the relevance of Article 6 para 1 ECHR and the respective case law of the EuCHR can be found in the *travaux préparatoires* to the Austrian Arbitration Act 2006, where Article 6 para 1 ECHR and the existing case law on this provision are expressly invoked in the context of interpreting Section 594 para 2 CCP.[29] It can therefore be seen that the Austrian legislator explicitly thought of the standards of Article 6 ECHR when designing the provision of Section 594 para 2 CCP and linking it to the respective ground for setting aside in Section 611 para 2 subpara 2 CCP.[30]

IV. Article 6 ECHR as Fundamental Basis for the Prohibition of Surprise Decisions

Having established that arbitral tribunals, when conducting their proceedings, have to observe the standards stipulated by the right to be heard pursuant to Article 6 ECHR, it remains to be examined whether a *surprising* arbitral award actually qualifies as a violation of said provision and can, therefore, potentially cause the setting aside of an arbitral decision.

Surprising the parties with an unexpected legal view is a result of the arbitral tribunal's failure to provide the parties with sufficient opportunities to comment on the relevant legal aspects of the case. Thus, the prohibition of rendering surprise decisions is intrinsically linked to the fundamental procedural right of the parties to be heard. In the following, it will be shown that recent case law of the EuCHR contains explicit rulings on surprise decisions in the context of Article 6 ECHR and, thereby, provides the crucial basis for determining surprise decisions (also) in Austrian arbitration proceedings.

Before turning to the abovementioned rather recent line of the EuCHR's case law on surprise decisions, two general preliminary observations on the right to be heard as it is enshrined in Article 6 ECHR shall be discussed to prepare for the detailed examination of arbitral surprise decisions.

First, as has been convincingly elaborated by leading German scholars and courts, the right to be heard includes a) the right to be *informed* about the potentially relevant factors the court's decision might be based upon, b) the right to *submit own arguments and comment* on arguments brought up by the other party, the court or any other participant in the proceedings (e.g. an expert or a witness) and, finally, c) the

[29] Explanatory remarks on the government bill proposing the Austrian Arbitration Act 2006, ErläutRV 1158 BlgNR 22. GP, p. 17.

[30] Ibid.

right that the court effectively *takes into account* the party's arguments.[31] While the latter guarantee rarely comes into play in the context of surprise decisions – as there was indeed *no* possibility for the party to comment and therefore nothing for the court/tribunal to take into consideration – the right to be sufficiently informed, which is the necessary prerequisite for exercising one's right to comment,[32] and the right to comment itself are of core importance when it comes to the determination of surprise decisions from an ECHR perspective.

The second preliminary consideration concerns the scope of the right to be heard that has to be granted in civil proceedings, which is – at least in Austria – indeed of a controversial nature.[33] However, as the EuCHR has now expressly affirmed in its recent case law, the right to be heard pursuant to Article 6 para 1 ECHR is not only to be granted with regard to the *factual aspects* but also with regard to the *legal dimension* of a case.[34] In fact, the hypothesis of a right to be heard on legal issues can already be deduced from the EuCHR's established case law, according to which "the requirements of Article 6 may be fulfilled" even in the absence of an oral hearing "where exclusively *legal* or highly technical questions are at stake".[35]

The abovementioned indication that Article 6 ECHR requirements also need to be fulfilled when it comes to legal issues became even more explicit, when the EuCHR had to deal with some national courts' allegedly surprising judgments in the more recent past. In this vein, the EuCHR established that a national court must respect the adversarial principle in particular when it decides upon the dispute on the basis of a legal ground raised *ex officio* or if it legally requalifies the facts on its own

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[31] *See*, for extensive elaborations, Barbara Remmert, 'Artikel 103 deutsches Grundgesetz' in Theodor Maunz/Günter Dürig (eds), *Grundgesetz*, 90th supplement (Munich: C.H. Beck February 2020) paras. 62-104, with numerous references to German case law and literature; Peter Philipp Germelmann, *Das rechtliche Gehör vor Gericht im europäischen Recht* (Baden-Baden: Nomos Verlagsgesellschaft 2014) pp. 61-77; for further references on the German – and Swiss – approach, *see* Auernig, *Überraschungsverbot*, pp. 32-5.

[32] *See,* e.g., EuCHR 23.6.1993, 12952/87, *Ruiz-Mateos/Spain* para. 63*;* EuCHR 14.6.2005, 39553/02, *Menet/France* para. 24; *see* also Grabenwarter/Pabel, *EMRK*, Chap 24 para. 72; Frowein, 'Artikel 6 EMRK', para. 114.

[33] *See* for more details on this discussion and further references Auernig, *Überraschungsverbot*, pp. 35-42.

[34] *See*, e.g. EuCHR 5.9.2013, 9815/10, *Čepek/Czech Republic* para. 45; EuCHR 17.5.2016, 4687/11, *Liga Portuguesa de Futebol Profissional/Portugal* para. 58; EuCHR 27.10.2016, 4696/11 and 4703/11, *Les Authentiks and Supras Auteuil 91/France* para. 50; EuCHR 22.1.2019, 65048/13, *Rivera Vazquez and Calleja Delsordo/Switzerland* para. 41.

[35] *See,* e.g., EuCHR 5.2.2002, 42057/98, *Speil/Austria*; EuCHR 25.4.2002, 64336/01, *Varela Assalino/Portugal*; EuCHR 3.5.2007, 17912/05, *Bösch/Austria* para. 27; EuCHR 2.10.2018, 40575/10, 67474/10, *Mutu and Pechstein/Switzerland* paras. 177, 185-8.

motion.[36] The Strasbourg Court continued by stating that the principle of the right to be heard prohibits a tribunal from basing its decision on factual or legal elements that have not been discussed during the proceedings and that cause a twist to the litigation that not even a diligent party could have foreseen.[37]

Starting from 2013, this rather recent but nevertheless already constant line of argumentation in the EuCHR's jurisprudence not only expressly confirms that the right to be heard is to be granted also when it comes to the *legal* elements of a case but also provides a general definition of the prohibition of surprise decisions in light of Article 6 ECHR.[38] A more detailed analysis of this definition shall follow in the next chapter on the challenge of surprise decisions in arbitration.

Generally, however, it can be recapitulated at this point that a surprising decision, be it a (civil) court's ruling or an arbitral award, may constitute a violation of the right to be heard under Article 6 para 1 ECHR.

V. Challenge of Arbitral Surprise Decisions in Austria

Any rule can only be measured by its enforceability. In the present context, it is crucial whether a violation of the prohibition to surprise the parties with a legal view can indeed lead to a successful challenge of the surprising arbitral award.

The challenge of arbitral awards in Austria follows the strict regime of Sections 611 et seqq of the Austrian Arbitration Act. Notably, Section 611 para 2 CCP lists the grounds for setting aside an arbitral award rendered by a tribunal seated in Austria in an exhaustive manner. Hence, procedural or substantive deficiencies that do not fall

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[36] *See*, e.g., EuCHR 22.9.2009, 12532/05, *Cimolino/Italy* para. 44; EuCHR 5.9.2013, 9815/10, *Čepek/Czech Republic* para. 45; EuCHR 3.5.2016, 66522/09, *Alexe/Romania* para. 34; 17.5.2016, 4687/11, *Liga Portuguesa de Futebol Profissional/Portugal* para. 58; EuCHR 27.10.2016, 4696/11 and 4703/11, *Les Authentiks and Supras Auteuil 91/France* para. 50; EuCHR 26.6.2018, 56396/12, 52757/13, 57186/13 and 68115/13, *Pereira Cruz et al/Portugal* para. 199; EuCHR 22.1.2019, 65048/13, *Rivera Vazquez and Calleja Delsordo/Switzerland* para. 41.

[37] EuCHR 5.9.2013, 9815/10, *Čepek/Czech Republic* para. 48; EuCHR 3.5.2016, 66522/09, *Alexe/Romania* para. 37; EuCHR17.5.2016, 4687/11, *Liga Portuguesa de Futebol Profissional/Portugal* para. 59; EuCHR 27.10.2016, 4696/11 and 4703/11, *Les Authentiks and Supras Auteuil 91/France* para. 50; 26.6.2018, 56396/12, 52757/13, 57186/13 and 68115/13, *Pereira Cruz et al/Portugal* para. 199; EuCHR 22.1.2019, 65048/13, *Rivera Vazquez and Calleja Delsordo/Switzerland* Rz 41, 48: „Le principe du contradictoire commande que les tribunaux ne se fondent pas dans leurs décisions sur des éléments de fait ou de droit qui n'ont pas été discutés durant la procédure et qui donnent au litige une tournure que même une partie diligente n'aurait pas été en mesure d'anticiper".

[38] For further details, *see* Auernig, *Überraschungsverbot*, pp. 35-42.

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under one of the grounds set out by Section 611 para 2 CCP cannot lead to the award being set aside.

The grounds listed in Section 611 para 2 CCP reflect the cornerstones upon which the Austrian Arbitration Act is built. Amongst those principles, all of which justify the setting aside of an award, the right to be heard as one of the core prerequisites to ensure due process is expressly mentioned. Thus, an award may be challenged pursuant to Section 611 para 2 subpara 2 CCP if "a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was for other reasons unable to present its case".

Not only but also in the context of arbitral surprise decisions, the interpretation of the "other reasons" mentioned in Sec 611 para 2 subpara 2 CCP that render a party "unable to present its case" is of particular interest. Apart from a general determination of this term, the intriguing question in the present context is whether arbitral surprise decisions may fall under the provision of Sec 611 para 2 subpara 2 CCP and may thus be successfully challenged as a violation of the right to be heard. The discussion shall start with the interpretation of the right to be heard as provided by the Austrian Supreme Court, bearing in mind that the Austrian Supreme Court has recently changed its line of reasoning in this regard (A), followed by a critical analysis of this case law these decisions (B) and a proposal on how to establish the thresholds when examining arbitral surprise decisions as possible infringements of the right to be heard in setting aside proceedings (C). The latter approach will take into account the results that could be deduced from the chapters above and add a comparative law perspective.

A. The Austrian Supreme Court's Case Law on The Right to Be Heard in Arbitration Proceedings

If parties consider themselves unduly surprised by a legal argument an arbitral award is based upon, the ground for setting aside regularly invoked is Section 611 para 2 subpara 2 CCP.[39] This provision allows for awards to be set aside if a party had not been given sufficient opportunity to present their case. Despite the high number of cases on various nuances on right to be heard violations brought up in setting aside claims, the Austrian Supreme Court for many years took an approach that allowed

[39] Sometimes, surprise decisions are (additionally) challenged as a violation of the procedural *ordre public* pursuant to Section 611 para 2 subpara 5 CCP, *see* on the relation of these two grounds for setting aside awards in detail Katharina Auernig, 'Neue Wege bei der Beurteilung von Gehörsverstößen im Schiedsverfahren' (2018) JBl 221-228; p. 227; Auernig, *Überraschungsverbot*, pp. 261-4.

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to deal with potential violations of the right to be heard in arbitration on a rather abstract level.

1. The Principle of "Absolute Deprivation" (RIS-Justiz RS0045092)

For almost a century, Austria has been known for an extraordinarily rigid approach when it comes to the examination and determination of the right to be heard in arbitral setting aside proceedings. Starting from 1926,[40] the Austrian Supreme Court has constantly held that "[a]n arbitral award may only be set aside *if the right to be heard has not been granted at all*. A mere incomplete recollection of the facts or an insufficient discussion of legally relevant facts may not justify the annulment of the award (...)."[41] The legal rule ("Rechtssatz") RIS-Justiz RS0045092 was re-used in a series of the Austrian Supreme Court's findings on the right to be heard in arbitration, rendering it almost impossible to challenge an arbitral award on the basis of an alleged violation of the right to be heard.

For understandable reasons, this approach taken by the Austrian Supreme Court became subject to broad criticism by legal scholars and arbitration practitioners.[42] Some of them also expressly referred to Article 6 para 1 ECHR as a standard for the right to be heard that should be equally relevant and applicable in the context of arbitration.[43]

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[40] For a more detailed analysis of the origins of this line of case law, *see*, e.g., Reiner, 'Schiedsverfahren' pp. 57-9; Michael Nueber, 'Neues zum rechtlichen Gehör im Schiedsverfahren' (2013) wbl 130-5, pp. 130-1.

[41] RIS-Justiz RS0045092 (unofficially translated and emphasis added by the author).

[42] In a much cited legal article, Reiner, 'Schiedsverfahren' pp. 59-60, called the approach „wrong and dangerous" and pointed out that while the respective provisions of the Austrian CCP have been adopted before Austria became part of the ECHR, such a strict interpretation nowadays cannot meet a modern right to be heard standard. A range of scholars shared the criticism, *see* for example Dietmar Czernich, 'Kriterien für die Aufhebung des Schiedsspruchs wegen mangelnden rechtlichen Gehörs' (2014) JBl 295-301, p. 298; Christoph Liebscher, 'Rechtsbehelfe gegen den Schiedsspruch', in Christoph Liebscher/Paul Oberhammer/Walter Rechberger (eds), *Schiedsverfahrensrecht*, Vol. II (Vienna: Verlag Österreich 2016) para. 11/178; Stefan Riegler, 'Section 611 CCP' in Stefan Riegler/Alexander Petsche/Alice Fremuth-Wolf/Martin Platte/Christoph Liebscher (eds), *Arbitration Law of Austria. Practice and Procedure* (Vienna: Juris Publishing 2007) para. 36; Schwarz, 'Durchführung', para. 8/85.

[43] Christian Klausegger, 'Rechtliches Gehör im Schiedsverfahren - OGH 3 Ob 122/10b; Kündigt ein belanglos wirkender Zurückweisungsbeschluss eine Judikaturwende an?' (2003) ecolex 37-9, p. 38; Reiner, 'Schiedsverfahren', p. 61; for a more restrained approach regarding the applicability of the ECHR-standards Nueber, 'Schiedsverfahren', p. 132.

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The Austrian Supreme Court reflected on the critique expressed in legal doctrine. In a number of judgments, starting from 2010[44], the Court addressed the respective arguments, while noting on several occasions that the respective case did not require a definite answer as to whether the heavily criticised line of case law should be overruled.[45]

2. National Appeal Proceedings as New Standard of Comparison

The more recent case law of the Austrian Supreme Court, however, gives good reason to assume that indeed a change in the Supreme Court's jurisprudence on the right to be heard in arbitration has taken place. So far, the Austrian Supreme Court has not yet explicitly overruled the doctrine enshrined in the above-mentioned "Rechtssatz" RIS-Justiz RS0045092. Nevertheless, it is apparent that setting aside decisions on the right to be heard have been focusing on an entirely new line of argumentation:

A ground for setting aside an arbitral award due to a violation of the right to be heard shall only be fulfilled, if such a procedural error, had it occurred in civil proceedings before national courts, would have qualified as a ground for invalidity ("Nichtigkeitsgrund"). If, however, the procedural error would only have constituted a non-substantial procedural deficiency ("sonstiger, einfacher Verfahrensmangel") in national appeal proceedings, such an error would not justify the setting aside of an arbitral award.[46] While not having expressly rejected and declared RIS-Justiz RS0045092 as overruled, the Austrian Supreme Court has indeed turned to the abovementioned comparison to national appeal proceedings as the main (and in recent decisions the only) criterion, gradually leaving the argumentation of an absolute deprivation of the right to be heard behind.[47]

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[44] Austrian OGH 1.9.2010, 3 Ob 122/10b; Austrian OGH 28.11.2012, 4 Ob 185/12b; Austrian OGH 24.4.2013, 9 Ob 27/12d; Austrian OGH 10.10.2014, 18 OCg 2/14i.

[45] Ibid.

[46] Amongst others, *see* Austrian OGH, 23.2.2016, 18 OCg 3/15p; Austrian OGH 28.9.2016, 18 OCg 3/16i; Austrian OGH 2.3.2017, 18 OCg 6/16f; Austrian OGH 9.10.2018, 18 OCg 2/18w; Austrian Supreme Court, 15.1.2020, 18 OCg 9/19a. In Austrian OGH 15.5.2019, 18 OCg 1/19z, the Austrian Supreme Court cited RIS-Justiz RS0045092, however, only used parts of the "Rechtssatz" in its reasoning, leaving the argument on absolute deprivation aside; similarly, Austrian OGH 15.5.2019, 18 OCg 6/18h; Austrian OGH 17.2.2021, 18 OCg 5/20i.

[47] *See,* e.g. Austrian OGH 28.9.2016, 18 OCg 3/16i; Austrian OGH 6.12.2016, 18 OCg 5/16h; Austrian OGH 2.3.2017, 18 OCg 6/16f; Austrian OGH 9.10.2018, 18 OCg 2/18w; Austrian OGH 15.1.2020, 18 OCg 9/19a.

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Section 477 para 1 CCP lists grounds for invalidity of national court judgments (in a non-exhaustive manner),[48] two of which (subpara 4 and subpara 5 leg cit) deal with infringements of the right to be heard.[49] For the context of this paper, it is important to note that according to the established case law of the Austrian Supreme Court, surprise decisions rendered by Austrian national courts do *not* fall under either of the grounds for invalidity pursuant to Section 477 para 1 CCP but can rather only be challenged as a "non-substantial" procedural deficiency under Section 496 para 1 subpara 2 CCP.[50] Evidently, this established case law for civil proceedings has also affected the treatment of arbitral surprise decisions in recent setting aside proceedings, which shall be shown in the following.

3. The Austrian Supreme Court's Case Law on Arbitral Surprise Decisions

The number of Austrian Supreme Court cases that have dealt with the examination and determination of arbitral surprise decisions is still fairly limited.

In its decision 9 Ob 120/99h[51], the Austrian Supreme Court dealt with a legal qualification of the arbitral tribunal deviating from the parties' (legal) submissions. By invoking RIS-Justiz RS0045092, the Supreme Court denied the violation of the right to be heard without further need for a closer definition of a potential surprise decision of the arbitral tribunal. Similarly, in 4 Ob 185/12b[52], the Austrian Supreme Court refused the setting aside based on RIS-Justiz RS0045092 and added that it could be left open if and under what circumstances an arbitral surprise decision may be qualified as a violation of the right to be heard.

In 9 Ob 27/12d[53], the Supreme Court referred to Article 6 ECHR, stating that an arbitration agreement constitutes a partial waiver of the guarantees enshrined therein. Having done so, the Supreme Court returned to RIS-Justiz RS0045092, according to

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[48] Cf. Herbert Pimmer, '§ 477 ZPO' in Hans W. Fasching/Andreas Konecny (eds), *Zivilprozessgesetze*, 3rd ed. (Vienna: Manz 2019) paras. 7-8.

[49] According to Section 477 para 1 CCP, a judgment can be challenged *inter alia*, if a party has been deprived of the opportunity to appear before court due to an irregular process, especially in the context of formal delivery (subpara 4 leg cit) or if a party was not represented at all in the proceedings or, if it was not represented by a required legal representative, unless the procedure was duly approved subsequently (subpara 5 leg cit).

[50] RIS-Justiz RS0120056; *see* for an extensive and critical elaboration on this distinction, Auernig, *Überraschungsverbot,* pp. 103-116.

[51] Austrian OGH, 1.9.1999, 9 Ob 120/99h.

[52] Austrian OGH, 28.11.2012, 4 Ob 185/12b.

[53] Austrian OGH, 24.4.2013, 9 Ob 27/12d.

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which no setting aside was indicated in the present case. Further down in the decision, the Supreme Court referred to Section 182a CCP as the provision for determining surprise decisions in state court proceedings. The Supreme Court held, however, that the present award could in any event not be regarded as a surprise decision pursuant to Section 182a CCP and that it could therefore be left open whether a surprising arbitral award may qualify as a breach of procedural public policy.[54]

In 18 OCg 2/14i[55] and 18 OCg 2/15s[56] – being amongst the first decisions rendered by the newly constituted 18th division of the Austrian Supreme Court specified in arbitration matters – the Supreme Court likewise denied the setting aside of an (allegedly) surprising arbitral award based on RIS-Justiz RS0045092. As already in 9 Ob 27/12d, the Supreme Court expressly referred to the criticism expressed against the established line of case law on the absolute deprivation on the right to be heard. The Supreme Court held, however, that the present case did not give enough reason to test the validity of said line of case law, as the parties could, in any way, not have been unduly surprised by the final arbitral award.[57] Notably, in 18 OCg 2/14i the Supreme Court added – as an auxiliary argument – that a failure to discuss legal issues in state court proceedings would only constitute a non-substantial procedural deficiency, not, however, a ground for invalidity. Only the latter, however, could be tantamount to the grounds for setting aside arbitral awards.[58] This decision marks a starting point for the gradual transformation in the Supreme Court's case law on determining right to be heard violations by means of a comparison to national appeal proceedings.

In 18 OCg 3/15p[59], the Austrian Supreme Court examined an alleged arbitral surprise decision in light of a potential violation of the right to be heard (Section 611 para 2

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[54] *See* on the qualification of surprise decisions as violation of procedural public policy pursuant to Section 611 para 2 subpara 5 CCP and/or as a violation of the right to be heard pursuant to subpara 2 leg cit Auernig, 'Neue Wege', p. 227; Auernig, *Überraschungsverbot*, pp. 261-4.

[55] Austrian OGH, 10.10.2014, 18 OCg 2/14i.

[56] Austrian OGH, 19.8.2015, 18 OCg 2/15s.

[57] In the case underlying 18 OCg 2/14i, the arbitral tribunal's (auxiliary) legal reasoning had been expressly covered by one party's submission and the main legal reasoning had been a mere legal evaluation of the facts presented by the parties. Thus, according to the Supreme Court, the other party could in any way not have been unduly surprised by the final arbitral award. In 18 OCg 2/15s, the Austrian Supreme Court found that the arbitral tribunal had sufficiently outlined their envisaged further procedural steps and could therefore not have surprised the parties by issuing the final award without further ado after being notified that negotiations between the parties had finally failed.

[58] Austrian OGH, 10.10.2014, 18 OCg 2/14i.

[59] Austrian OGH, 23.2.2016, 18 OCg 3/15p.

subpara 2 CCP) as well as a potential violation of procedural public policy (subpara 5 leg cit), concluding, however, that neither of the grounds were fulfilled. The Supreme Court referred to the recently established line of case law on the comparison to grounds of invalidity and non-substantial procedural deficiencies in state court proceedings and emphasized that the threshold for an arbitral tribunal may in any case not be stricter than for a state court judge. To round off the argument, the Austrian Supreme Court added comparative law elements by referring to the case law on surprising arbitral awards in Germany, according to which arbitral awards may be set aside if the tribunal had deviated from a legal view that it had revealed to the parties during the proceedings.

The new line of case law on the comparison to national appeal standards was further consolidated in 18 OCg 3/16i[60]. In this decision, the Austrian Supreme Court refrained completely from mentioning RIS-Justiz RS0045092 and the principle of absolute deprivation of the right to be heard but rather only took the newly established line of argumentation on comparable grounds for invalidity/non-substantial procedural deficiencies as a standard for testing the alleged violation of the right to be heard. With reference to 18 OCg 3/15p,[61] the Austrian Supreme Court added that a ground equating to a ground of invalidity in state court proceedings might be fulfilled if the award contained a legal argument that deviated from a legal view that the arbitral tribunal had previously expressed in the proceedings.[62] Unlike indicated by the Austrian Supreme Court, however, the latter argument does not follow from case law and legal doctrine on grounds of invalidity in state court proceedings but rather roots in the comparative law approach taken in 18 OCg 3/15p, thereby importing standards applied by German courts when deciding upon arbitral surprise decisions.[63]

In 18 OCg 10/19y[64], the Austrian Supreme Court again tested the alleged arbitral surprise decision against the standards set up in national appeal proceedings and found that the arbitral tribunal's conduct in the present case would not correspond to a ground for nullity in state court proceedings. Notably, the Austrian Supreme

[60] Austrian OGH, 28.9.2016, 18 OCg 3/16i.

[61] Austrian OGH, 23.2.2016, 18 OCg 3/15p, *see* just above.

[62] In the present case, however, the Austrian Supreme Court saw no need to further examine this argument, as the respective submission of the party in the setting aside proceedings was considered belated.

[63] The benefits of a comparative law approach rather than a comparison to national civil law shall be set out below in Section V.1.C.

[64] Austrian OGH, 2.3.2021, 18 OCg 10/19y.

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Court also expressly referred to Section 182a CCP and the respective case law on surprising court judgments to find that a surprise decision could only be confirmed if the party, had it known about the surprising legal element of the decision, had submitted other *factual* arguments. A merely different legal evaluation of given facts could, however, not constitute a surprise decision.[65]

To sum it up, the Austrian Supreme Court has indeed acted upon the criticism expressed in literature and has consistently shifted its case law from the principle of an absolute deprivation of the right to be heard (RIS-Justiz RS0045092) towards a comparative approach taking into account provisions in the Austrian CCP to be applied in national state courts. When it comes to the determination of arbitral surprise decisions, however, this new approach does eventually not lead to a different outcome. As a result of both the "new" and the "old" lines of the Supreme Court's case law, arbitral surprise decisions have so far generally *not* been recognized as a violation of the right to be heard justifying the setting aside of an arbitral award. This result, as well as the methods applied by the Austrian Supreme Court to reach this conclusion, shall now be subject to a critical analysis.

B. Critical Analysis of the Supreme Court's Case Law

The long-lasting line of the Austrian Supreme Court's case law on the "absolute deprivation" of the right to be heard when examining Section 611 para 2 subpara 2 CCP[66] has been broadly and extensively criticized in legal literature. The main arguments have already been set out above.[67] Roughly summarized, this approach to a large extent cut off examinations of potential infringements of a party's right to be heard. When the assessment led to the result that the party right had not been totally deprived of the right to be heard but had at least been granted this right to some extent, it sufficed to cite RIS-Justiz RS0045092, and no deeper look into the alleged infringement was necessary.[68]

It has been shown in the analysis on Article 6 ECHR and its (partial) applicability to arbitration proceedings that arbitrators are indeed bound to respect and grant a certain standard of guarantees enshrined in Article 6 para 1 ECHR, which naturally

[65] This line of arguments shall be further addressed below in Section V.C.4.

[66] The same approach has already been followed by the Austrian Supreme Court with regard to Section 575 para 1 subpara 2 CCP in the version before the Austrian Arbitration Act 2006.

[67] *See* above Section V.1.B.

[68] Despite the strict line of case law, the Supreme Court still provided some *obiter dicta* on more specific aspects of the right to be heard in some decisions, *see*, in the context of surprise decisions, e.g. Austrian OGH 22.2.2007, 3 Ob 281/06d.

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goes beyond the requirements set up by the Austrian Supreme Court's long-lasting jurisprudence in challenge proceedings.[69] The situation that arbitral tribunals are bound to comply with fundamental procedural standards, yet a violation of such standards would not generally be sanctioned by setting aside the arbitral award, has indeed been unsatisfactory.

As shown above, the Austrian Supreme Court has – in light of widespread criticism – corrected this approach and is believed to have largely abandoned RIS-Justiz RS0045092 when it comes to the examination of right to be heard infringements in arbitration.[70] The more recent approach, however, equally needs to face up to critical analysis. Comparing violations of the right to be heard in arbitration proceedings with similar situations occurring in proceedings before national courts and then examining the respective remedies against such violations to find out the "degree of severity" national civil procedure law attaches to the various infringements seems to be very compelling at first sight – for an Austrian lawyer. However, the hypothesis that a violation of the right to be heard in arbitration proceedings should only lead to a successful challenge of the award if such an infringement in state court proceedings would constitute a ground for invalidity according to Section 477 (subpara 4 or 5) CCP, not, however, if it could only be remedied as a non-substantial procedural deficiency pursuant to Section 496 para 1 subpara 2 CCP, can ultimately neither withstand the test from a dogmatic nor from a practical point of view.

Dogmatically, it needs to be stressed that the provisions on legal remedies in Austrian civil procedure (not only the provisions on appeal measures but also including actions for annulment pursuant to Sections 529 et seq CCP, etc) constitute a closed and complementary system. There are some right to be heard violations that can even be invoked after a judgment has gained *res judicata* effect, while some others may not. The respective action for annulment pursuant to Section 529 subpara 2 CCP has a different scope than the grounds for appeal due to invalidity pursuant to Section 477 subpara 4 and 5 CCP, the first one being significantly more narrow than the latter one. Nevertheless, both may evidently serve as a remedy against right to be heard violations pursuant to Article 6 para 1 ECHR at the respective stage of the

[69] It must also be stressed that the rigid approach of the Austrian Supreme Court has only had a very limited effect on the parties' treatment by arbitral tribunals. In fact, ensuring due process and granting the parties' their full right to be heard has rather been an issue that arbitrators – in national as well as in international arbitration proceedings – would take utmost seriously (as shown in the 2015 International Arbitration Survey conducted by the Queen Mary University London and White and Case LLP, stakeholders have even mourned a so-called "due process paranoia" [*see*, http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf, p. 10, last accessed on 10 September 2021]).

[70] *See* above Section V.A.2.

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proceedings. The ECHR does *not* require the Convention States to establish one *single* remedy that covers all violations of the right to be heard pursuant to Article 6 para 1 ECHR but rather demands the States to establish an *overall* system (that can contain different components), which, regarded as a whole, ensures that the requirements of Article 6 ECHR are met.[71] The Austrian civil procedure system fulfils these demands by providing various different remedies against right to be heard infringements – also including the remedy to invoke (according to national law "non-substantial") procedural deficiencies pursuant to Section 496 para 1 subpara 2 CCP. In this context, the treatment of surprise decisions serves as a prime example. As has been set out above,[72] surprising the parties with a legal view that they had no sufficient opportunity to comment on, constitutes a violation of the right to be heard according to Article 6 para 1 ECHR. This remains true even though surprise decisions pursuant to Section 182a CCP may "only" be challenged as non-substantial procedural deficiency according to Section 496 para 1 subpara 2 CCP. The ECHR demands *an* effective remedy pursuant to Article 13 ECHR; it is, however, within the State's discretion to grant different sorts of remedies to various forms of right to be heard violations.[73]

Transferring this argument to the field of arbitration, it can be seen that the *overall* system of legal remedies the ECHR requires a State to provide against violations of the right to be heard has been limited to one single option: The challenge of the award pursuant to Section 611 para 2 subpara 2 CCP. In other words, violations of the right to be heard as a core guarantee of Article 6 para 1 ECHR, which cannot validly be waived by parties when resorting to arbitration,[74] ought to be examined and sanctioned on the (one and only) level of setting aside proceedings as a result of the State's obligation to comply with the requirements set by the ECHR. The threshold to be applied is the one of Article 6 para 1 ECHR. Conversely, it is of no relevance in what way (i.e. by which specific legal remedy) violations of Article 6 ECHR may

[71] *See* only Jens Meyer-Ladewig/Stefan Harrendorf/Stefan König, 'Artikel 6 EMRK', in Jens Meyer-Ladewig/Martin Nettesheim/Stefan von Raumer (eds) *Europäische Menschenrechtskonvention,* 4th edn (Baden-Baden: Nomos – Manz – Helbing Lichtenhahn 2017) para. 94; Germelmann, *Rechtliches Gehör,* p. 286, with further references.

[72] *See* above Section **Fehler! Verweisquelle konnte nicht gefunden werden.**.

[73] EuCHR 23.2.2016, 11138/10, *Mozer/Moldova & Russia*, para. 207; EuCHR 20.1.2011, 19606/08, *Payet/France*, para. 129.

[74] *See* on this aspect above Section III.**Fehler! Verweisquelle konnte nicht gefunden werden.**.

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be sanctioned in State Court proceedings.[75] The differentiation between grounds for invalidity (Section 477 subpara 4 or 5 CCP) and non-substantial procedural deficiency (Section 496 para 1 subpara 2 CCP) can therefore not serve as an orientation, let alone a threshold, for determining challenges of arbitral awards pursuant to Section 611 para 2 subpara 2 CCP.[76]

From a practical point of view, a (required) comparison to national procedural remedies cannot meet the demands of arbitration, being a mechanism specifically suited for international disputes. The players involved in arbitration proceedings – be it the parties and/or the arbitrators – may well be from different countries with different legal backgrounds. Command of the German language, let alone profound knowledge of Austrian procedure law (outside the Austrian Arbitration Act) *must not* be a prerequisite for participating in arbitration proceedings seated in Austria.[77] Fostering Austria's attractiveness as a place for international arbitration disputes has been one of the declared goals both of the Arbitration Act 2006 and its amendment 2014.[78] Even if formally incorporated into the Austrian CCP,[79] the (stand-alone) Austrian Arbitration Act based on the UNCITRAL Model Law is one of the main pillars to attract international parties to choose Austria as the seat of their arbitration.[80]

As a result, while the Supreme Court's longstanding approach on "absolute deprivation" of the right to be heard was rightfully criticized and also seems to have been widely overruled by now, the new approach of referring to national procedure law remedies can ultimately also not convince when it comes to the determination of violations of the right to be heard – amongst those also the issuance of surprise decisions – by arbitral tribunals.[81]

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[75] *See* for more arguments against the comparability of national appeal measures when it comes to determining the threshold for setting aside arbitral awards pursuant to Section 611 para 2 subpara 2 CCP: Auernig, 'Neue Wege', p. 222-4.

[76] *See* for a more detailed elaboration on this issue, Auernig, *Überraschungsverbot*, p. 202-10.

[77] *See* also Paul Oberhammer/Katharina Plavec, 'Ein Jahrzehnt neues österreichisches Schiedsrecht im Spiegel der Rechtsprechung, 21 (2016) ZZPInt 89-117, p. 105.

[78] Explanatory remarks on the government bill proposing the Austrian Arbitration Act 2006, ErläutRV 1158 BlgNR 22. GP, p. 4.

[79] *See* Sections 577 et seqq CCP.

[80] Explanatory remarks on the government bill proposing the Austrian Arbitration Act 2006, ErläutRV 1158 BlgNR 22. GP, p. 2.

[81] For more details, *see* Auernig, *Überraschungsverbot*, p. 206-10.

C. Threshold and Guidance for Determining Arbitral Surprise Decisions in Setting Aside Proceedings

The critique against the past and current approach in the Austrian Supreme Court's jurisprudence on the right to be heard in arbitration has been laid out. What, however, should be the appropriate alternative when interpreting the ground for setting aside arbitral awards due to a violation of the right to be heard?

The proposed answer can be deduced from the examinations conducted in the chapters above. The core point of reference shall be the (non-waivable) guarantees of Article 6 para 1 ECHR, which also include the right to be heard. As has been elaborated above, determining the right to be heard as it is defined in Article 6 para 1 ECHR and interpreted by the EuCHR is not only the appropriate and sensible but also the constitutionally required standard when examining if an arbitral award shall be set aside pursuant to Section 611 para 2 subpara 2 CCP.[82]

For the determination of certain aspects of the right to be heard that cannot directly be deduced from the wording of Article 6 ECHR and that have not yet been specifically dealt with by the EuCHR, the suggested approach is to resort to case law and literature dealing with right to be heard violations in setting aside proceedings of other jurisdictions, preferably jurisdictions that have also adopted the UNCITRAL Model Law or have otherwise implemented provisions similar to the Austrian Arbitration Act. Such a *comparative law approach* may not only prove a helpful supplement to an ECHR-based determination but also takes into account the international character of arbitration proceedings and the standards to be applied therein.

The abovementioned two-fold approach should also be applied when it comes to the definition of arbitral surprise decisions and the numerous specific implications one has to deal with in this context. In fact, there is some room for discussion on what may indeed be qualified as a surprise decision challengeable as a violation of the right to be heard and what only constitutes an unfavourable – and, in that sense, also somewhat "surprising" – outcome of the proceedings for one party, which eventually cannot justify the setting aside of an arbitral award.

For a more precise determination of (arbitral) surprise decisions pursuant to Article 6 para 1 ECHR, the general definition used by the EuCHR already in a number of cases shall serve as the first basis: "The adversarial principle requires the tribunals *not to base* their decisions on factual or *legal elements*, which have not been discussed

[82] For more details on this argument, *see* above Section **Fehler! Verweisquelle konnte nicht gefunden werden.**.

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during the proceedings and which cause a twist in the matter in dispute that even a diligent party would not have been able to anticipate."[83]

Starting from this basic definition and taking into account the procedural realities and problems frequently occurring in the context of (potential) surprise decisions, there are some questions that remain to be resolved to allow for a more profound and reliable determination and interpretation of surprise decisions as a violation of the right to be heard, such as: **1.)** How (broadly or narrowly) is a "*legal element*" that an arbitral tribunal has to put to discussion in order to avoid a potential surprise decision to be defined? **2.)** When can the outcome of a case be qualified as *unforeseeable*, thus justifying the challenge of an award? **3.)** Can there be a (challengeable) surprise decision if the respective legal argument had previously been *brought up by the other party* in the proceedings? **4.)** Is an arbitral surprise decision only to be set aside if the party seeking annulment would have submitted further/other *factual* arguments, had it known about the relevant (yet surprising) legal element? Or does a surprising arbitral award that has "only" cut off the parties' *legal* submissions equally have to lead to a setting aside pursuant to Section 611 para 2 subpara 2 CCP? **5)** Can a surprising arbitral award be set aside even if a legal discussion on the surprising element would not have changed anything regarding the outcome of the proceedings? Or is there a requirement of a *causal link* between the violation of the right to be heard and the decision on the merits of the case?

As has been set out above, answers to questions like the ones raised above should primarily be sought by consulting the respective jurisprudence of the EuCHR on Article 6 para 1 ECHR. Where the case law of the Strasbourg Court is (still) silent on a specific issue, a comparative law approach with a special focus on jurisdictions with similar arbitration laws serves as a helpful supplement. For the purpose of the following analysis, comparative law input shall be gained from German and Swiss case law developed in the context of handling arbitral surprise decisions at the stage of setting aside proceedings.[84]

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[83] „Le principe du contradictoire commande que les tribunaux ne se fondent pas dans leurs décisions sur des éléments de fait ou de droit qui n'ont pas été discutés durant la procédure et qui donnent au litige une tournure que même une partie diligente n'aurait pas été en mesure d'anticiper" (EuCHR 5.9.2013, 9815/10, *Čepek/Czech Republic* para 48; emphasis added).

[84] Due to space limits in this paper, only a summarized version of the research results can be presented in the following. For a more thorough and detailed analysis, *see* Auernig, *Überraschungsverbot*, pp. 220-57.

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1. Definition of a "Legal Element"

Looking at the general definition the EuCHR has used to describe a tribunal's duty to initiate a legal discussion in order to prevent a surprise decision violating Article 6 para 1 ECHR,[85] the EuCHR uses the term of an unforeseen "legal element" that might cause a twist in the matter in dispute.[86] The EuCHR, however, adds no further explanation of how broadly or narrowly said "legal element" is to be defined. Neither does a look into the respective case law in Germany and Switzerland lead to a general definition of a legal aspect that needs to be put to discussion with the parties. There is, however, at least one general principle that can be found both in the EuCHR jurisprudence and in German and Swiss case law: The tribunal's duty to put legal aspects to a discussion *cannot* go as far as forcing the tribunal to disclose their *legal evaluation of the specific case*.[87]

Apart from this general indicator, a method that may help to shape the idea of a (potentially surprising) legal element is to aggregate various cases into groups. When having to determine a potential surprise decision, it might prove helpful to look into existing case law dealing with this or a similar (allegedly surprising) legal element. Over the last decades, the EuCHR and national courts at the setting aside stage have decided, *inter alia*, upon the surprising *interpretation of contracts* (e.g. qualifying them as null and void),[88] surprisingly closing the case on the basis of a *procedural rather than a substantive argument* (e.g. denying jurisdiction or otherwise rejecting the

[85] *See* above Section **Fehler! Verweisquelle konnte nicht gefunden werden.**.

[86] *See*, e.g., EuCHR 5.9.2013, 9815/10, *Čepek/Czech Republic* para 48; EuCHR 22.1.2019, 65048/13, *Rivera Vazquez and Calleja Delsordo/Switzerland* paras. 41, 48.

[87] Particular emphasis on this argument is laid in German case law, *see*, e.g. German BGH 8.10.1959, VII ZR 87/58 (1959) NJW 2213-5, p. 2214; OLG Stuttgart 30.7.2010, 1 Sch 3/10 (2011) SchiedsVZ 49-54, p. 53; OLG Munich 4.7.2016, 34 Sch 29/15 (2016) NJOZ 2016, 1483-1490, p. 1485. For Switzerland, *see*, e.g., Swiss BGer 2.3.2001, 4P.260/2000 para 6.a; Swiss BGer 15.4.2015, 4A_554/2014 para 2.1; Swiss BGer 26.1.2017, 4A 716/2016 para 3.1. Judgments of the Swiss Federal Court (Swiss BGer) can be accessed via https://www.bger.ch/index/juridiction.htm.

[88] *See*, e.g. EuCHR 22.9.2009, 12532/05, *Cimolino/Italy* para 47; for Germany, *see* German BGH 21.12.1989, III ZR 44/89 BeckRS 1989, 31069016; for Switzerland, *see* Swiss BGer 18.10.2004, 4P.104/2004 para 5.4; Swiss BGer 3.8.2010, 4A_254/2010 para 3.3. For Austria, *see* Austrian OGH 24.4.2013, 9 Ob 27/12d. For an (allegedly) surprising interpretation in the context of a contract termination, *see* EuCHR 18.1.2011, 25512/06, *Amirov/Azerbaijan*; for Switzerland BGE 130 III 35-41 para 6.2, p. 41; for Austria, *see* Austrian OGH 10.10.2014, 18 OCg 2/14i.

University of Vienna Law Review, Vol. 5 No 1 (2021), pp. 47-81, https://doi.org/10.25365/vlr-2021-5-1-47.

claim as inadmissible)[89] or a surprising *application of a certain law or legal provision*.[90] The attempt to group the legal aspects raised in the various decisions, however, also reveals the limits of this method. On the one hand, there are quite some legal issues that cannot be grouped properly and, thus, cannot really be visualized in a general summary.[91] On the other hand, it must be admitted that these groups clearly cannot be considered a closed list for what is meant by a surprising legal element. They may only help to increase sensitivity as to discuss certain legal aspects in order to avoid a potential surprise decision. Hence, a look into previous case law may be helpful to get a feeling on how a surprising "legal element" should be defined. A general definition can, however, not be deduced from the existing case law so far.

2. (Un-)foreseeability of a Legal Element

One of the most salient questions when it comes to defining a (challengeable) surprise decision is under what circumstances a legal argument must be considered unforeseeable for the parties to a dispute. With express reference to German case law and literature, the Austrian Supreme Court has recently held in 18 OCg 3/15p that a violation of the right to be heard pursuant to Section 611 para 2 subpara 2 CCP may only be considered "if a tribunal has deviated from legal view already expressed or otherwise made discernible and the parties have, in reliance on this opinion, refrained from making further submissions in this regard".[92] This argument was further developed by the Austrian Supreme Court in 18 OCg 3/16i.[93] The comparative approach taken by the Austrian Supreme Court in this regard is to be

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[89] EuCHR 17.5.2016, 4687/11, *Liga Portuguesa de Futebol Profissional/Portugal* para. 61; EuCHR 18.12.2003, 74291/01 et 74292/01, 63000/00, *Skondrianos/Greece* para 30 (this case, however, dealt with criminal proceedings); for a surprising qualification of a claim as inconclusive in Switzerland, *see* BGer 9.1.2008 4A_450/2007 para 4.2.2.

[90] EuCHR 13.10.2005, 65399/01, 65406/01, 65405/01 and 65407/01, *Clinique des Acacias et al/France* para 41, EuCHR 3.5.2016, 66522/09, *Alexe/Romania* para. 41; for Germany, *see*, e.g., OLG Frankfurt 25.9.2002, 17 Sch 3/01 BeckRS 2002, 30284443; OLG Munich 5.10.2009, 34 Sch 12/09 BeckRS 2011, 08217; for Switzerland, *see* Swiss BGer 9.2.2009, 4A_400/2008 para. 3.2; Swiss BGer 21.5.2015, 4A_634/2014 para 4.2.

[91] For examples of decisions, which were difficult to "categorize", *see* German BGH 18.1.1990, III ZR 269/88 (1990) NJW 1990, 2199-2201, p. 2200 or Swiss BGer 26.1.2017, 4A_716/2016 para 3.2.

[92] "Nur wenn es von einer bereits geäußerten oder sonst erkenntlich gemachten Rechtsauffassung wieder abweicht und die Parteien im Vertrauen auf diese Auffassung von weiterem Vorbringen abgesehen haben, kommt eine Gehörsverletzung in Betracht." (Austrian OGH 23.2.2016, 18 OCg 3/15p, with further reference to German case law and literature).

[93] Austrian OGH 28.9.2016, 18 OCg 3/16i, stating that such a conduct of the arbitral tribunal would equate to a ground for nullity in national court proceedings and may therefore justify the challenge of an arbitral award. For a critical analysis of this comparison, *see* Auernig, *Überraschungsverbot*, pp. 233-4.

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considered very positive. Further analysis – especially of the German case law, from where this argument was deduced – shows that the deviation from a previously expressed legal view may indeed justify the setting aside of an arbitral award. It can, however, not be the sole and mandatory criterion when it comes to determining the unforeseeability of a legal argument.

The general definition the EuCHR frequently uses when dealing with surprise decisions in the context of Article 6 para 1 ECHR also mentions a "twist" in the litigation caused by the new legal argument.[94] It is indisputable that such a twist can be caused by a tribunal deviating from a previously expressed legal view. A look into the cases in which the EuCHR has already found a violation of Article 6 para 1 ECHR shows, however, that the Strasbourg Court has a broader understanding of said "twist" and that an unexpected legal argument can make a legal discussion necessary even if the court/tribunal had not led the parties on the wrong track before.[95] In Germany, where the argument of deviating from a previously expressed legal view has indeed been frequently used to qualify (arbitral) surprise decisions,[96] there likewise still is a number of cases where a legal element has been found unforeseeable under different circumstances.[97] While Swiss jurisprudence also had to deal with some cases where an arbitral tribunal had indicated a certain (different) legal view at an earlier stage of the proceedings, the Swiss Federal Court has not deduced a "general rule" from this.[98]

A truly general criterion, however, which can be equally found in the EuCHR's jurisprudence as well as in German and Swiss case law is that the legal argument that the challenged decision is based upon has caught a *diligent* party by surprise.[99] In such

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[94] *See,* e.g., EuCHR 5.9.2013, 9815/10, *Čepek/Czech Republic* para 48.

[95] *See*, for example, EuCHR 13.10.2005, 65399/01, 65406/01, 65405/01 and 65407/01, *Clinique des Acacias et al/France* para 43; EuCHR 16.2.2006, 44624/98, *Prikyan et Angelova/Bulgaria* para. 52; EuCHR 3.5.2016, 66522/09, *Alexe/Romania* para. 44; For a broad overview on the EuCHR's case law on surprise decisions, *see* Auernig, *Überraschungsverbot*, pp. 224-6.

[96] *See*, e.g., German BGH 21.12.1989, III ZR 44/89 BeckRS 1989, 31069016; OLG Stuttgart 30.7.2010, 1 Sch 3/10 (2011) SchiedsVZ 49-54, p. 53; OLG Munich 12.4.2011, 34 Sch 28/10 (2011) SchiedsVZ 230-2, p. 232. For a more detailed analysis of this line of German case law and its development over the years, *see* Auernig, *Überraschungsverbot*, pp. 235-9.

[97] OLG Karlsruhe 27.3.2009, 10 Sch 8/08 BeckRS 2011, 08009; OLG Munich 9.11.2015, 34 Sch 27/14 (2015) SchiedsVZ 2015, 303-9, p. 305.

[98] *See*, e.g. Swiss BGer 18.10.2004, 4P.104/2004 para 5.4; Swiss BGer 3.11.2016, 4A_136/2016 para 5.2.

[99] *See*, e.g., EuCHR 5.9.2013, 9815/10, *Čepek/Czech Republic* para. 48; EuCHR 3.5.2016, 66522/09, *Alexe/Romania* para. 37; EuCHR 17.5.2016, 4687/11, *Liga Portuguesa de Futebol Profissional/Portugal* para. 59; EuCHR 27.10.2016, 4696/11 and 4703/11, *Les Authentiks and Supras Auteuil 91/France* para. 50; EuCHR 26.6.2018, 56396/12, 52757/13, 57186/13 and 68115/13, *Pereira Cruz et al/Portugal* para. 199; EuCHR 22.1.2019, 65048/13, *Rivera Vazquez and Calleja*

a scenario, even a diligent party could not have reasonably expected this argument to be brought up by the tribunal and, thus, said party was left without an adequate opportunity to comment on it and present their case. The focus must therefore not only be laid on the tribunal being silent on a certain legal argument as such but also on the party's ability to recognize and react to the potentially relevant legal aspects of a case.

One important factor enabling the party to react to a new legal argument without the tribunal's intervention might be that this very argument had already been raised by the opposing party. In the following, it shall therefore be examined whether a surprise decision is (generally) excluded where a legal argument had already been brought up by the other party and had therefore become "foreseeable".

3. Surprised by a Legal Element Already Mentioned by the Opposing Party?

Taking into account the arguments raised above, it should follow as a logical conclusion that an arbitral award cannot be challenged successfully if the "surprising" legal element had in fact been introduced in the proceedings – e.g. by the opposing party. Indeed, the Austrian Supreme Court has also used this argument when denying the setting aside of an arbitral award.[100]

In a similar vein, the EuCHR as well as other national courts have frequently found that – even in absence of a legal discussion triggered by the tribunal – no violation of the right to be heard can be assumed where a party would have had the opportunity to comment on a legal aspect that had previously been mentioned by its counterparty.[101]

For most cases this conclusion is a convincing one. Can it, however, serve as a general criterion that fits all circumstances? In fact, there may be cases where basing a judgment on a legal argument, even if it has already been brought up by the opposing party and is therefore not completely new or unknown, can still be considered

Delsordo/Switzerland para. 41. For Germany, *see* German Reichsgericht (RG) 26.4.1944, IV 28/44 (1944) DR 810, p. 810; OLG Munich 9.11.2015, 34 Sch 27/14 (2015) SchiedsVZ 303-9, p. 304-5. For Switzerland, *see* BGE 130 III 35-41 para. 5, p. 39; Swiss BGer 3.8.2010, 4A_254/2010 para 3.1; Swiss BGer 26.1.2017, 4A_716/2016 para. 3.1.

[100] Austrian OGH 24.4.2013, 9 Ob 27/12d.

[101] EuCHR 27.10.2016, 4696/11 and 4703/11, *Les Authentiks and Supras Auteuil 91/France* para. 52. For Germany, *see* OLG Düsseldorf 3.7.1997, 6 U 67/96 BeckRS 1997, 15713; OLG Munich 4.7.2016, 34 Sch 29/15 (2016) NJOZ 1483-90, p. 1486. For Switzerland (where the Swiss Federal Tribunal follows a rather strict approach in this regard), *see* Swiss BGer 7.9.2006, 4P.134/2006 para. 6; Swiss BGer 26.1.2017, 4A_716/2016 para 3.2.

unforeseeable for the other party.[102] This may hold true especially in very complex cases, which tend to be of a fairly long duration and in which the parties exchange numerous – legal and factual – arguments. Under such special circumstances, even a diligent party cannot be expected to comment on every single argument raised by the other side, especially if there is no further indication that the tribunal would consider this particular argument to be relevant for the proceedings.[103]

4. Truncated Factual vs Legal Arguments

The unforeseeable element of a surprise decision in the narrow sense is – *per definitionem* – always a *legal* issue that the tribunal failed to put to discussion or otherwise give the parties an opportunity to comment on. A question distinct from the "surprising" (legal) element itself is, however, what kind of arguments a party would have been able to *raise*, had it been fully aware of the legal dimension of the case.

The prototype of surprise decisions, as it is also recognized in proceedings before Austrian national courts, is given where the surprising decision cut off the party's opportunity to fully present their case on a factual level. Had the party known about the relevance of a certain legal aspect, it would have submitted new or other facts that would potentially have changed the outcome of the case.[104] Can, however, a surprising arbitral award also form the basis for a successful challenge if a party, had it known about the surprising element, had merely raised *legal* arguments in order to (potentially) convince the arbitral tribunal of their respective position?

In its recent decision 18 OCg 10/19y[105], the Austrian Supreme Court expressly referred to the approach taken by the civil courts in this regard, according to which a judgement that only cuts off legal arguments cannot be considered a surprise decision, and implemented this as a standard in setting aside proceedings.[106]

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[102] *See*, e.g. EuCHR 13.10.2005, 65399/01, 65406/01, 65405/01 and 65407/01, *Clinique des Acacias et al/France* para 41; OLG Stuttgart 18.8.2006, 1 Sch 1/06 BeckRS 2006, 11581; OLG Munich 30.10.2013, 34 SchH 8/12 BeckRS 2014, 01199.

[103] *See* for a further detailed analysis of this issue Auernig, *Überraschungsverbot*, pp. 242-6.

[104] *See* only Robert Fucik, '§ 182a ZPO' in Walter H. Rechberger/Thomas Klicka (eds), *ZPO – Zivilprozessordnung*, 5th edn (Vienna: Verlag Österreich 2019) para. 4, with further references.

[105] Austrian OGH, 2.3.2021, 18 OCg 10/19y.

[106] On the latter approach, *see* only Jürgen C. T. Rassi, '§§ 182, 182a ZPO' in Hans W. Fasching/Andreas Konecny (eds), *Zivilprozessgesetze*, Vol. II/3; 3rd edn. (Vienna: Manz 2015) para. 94, with further references.

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A look into the EuCHR's case law, which shall – as has been outlined above – serve as the main and mandatory point of reference when examining right to be heard violations in arbitration proceedings pursuant to Section 611 para 2 subpara 2 CCP, reveals, however, that this distinction between cut-off factual and legal arguments cannot be applied to surprising arbitral awards. In fact, there is no such explicit distinction to be found in the EuCHR's jurisprudence on surprise decisions. Rather, the EuCHR has already examined a number of cases that dealt with surprise decisions only on a legal level and has, amongst those cases, also found various violations of Article 6 para 1 ECHR. One illustrative example has been set by the case *Alexe/Romania*, where the national court had – surprisingly – applied a legal provision in a certain (earlier) version.[107] The EuCHR considered this to be a violation of the right to be heard pursuant to Article 6 para 1 ECHR.[108] Had the party known about the court's intention during the proceedings, it would have raised mainly (if not exclusively) *legal* arguments on the prohibition of retroactivity.

German and Swiss courts have also not expressly referred to a distinction between truncated factual and legal elements and have therefore also not generally denied the setting aside of surprise decisions with a mere legal dimension. Indeed, the Swiss Federal Court has expressly confirmed a violation of the right to be heard in cases where the arbitral tribunal's interpretation of a contract[109] or the application of a specific legal provision[110] was considered to be surprising.[111]

As a conclusion, arbitral awards must be challengeable on the basis of a violation of the right to be heard not only if a party – had it known about the surprising legal element during the proceedings – would have submitted further *factual* arguments to the tribunal, but also if the party would (merely) have raised further *legal* submissions in order to fully present their case.

5. Causal Link Necessary?

The final question on the determination of arbitral surprise decisions to be dealt with in this paper is, whether there has to be a *causal link* between the violation of the right to be heard and the outcome of the case. In other words, does a party seeking annulment have to prove a (potential) influence on the result of the proceedings due

[107] EuCHR 3.5.2016, 66522/09, *Alexe/Romania* paras. 41-2.

[108] EuCHR 3.5.2016, 66522/09, *Alexe/Romania* para. 44.

[109] BGE 130 III 35-41 para. 6.1, p. 40-1.

[110] Swiss BGer 9.2.2009, 4A_400/2008 para. 3.2.

[111] *See* for further details, Auernig, *Überraschungsverbot*, pp. 246-50.

to the tribunal's lack of discussing certain legal elements that later formed the basis for its decision?

The Austrian Supreme Court has not yet taken a firm stance on this issue. While it indicated in setting aside decisions dated 1955[112] and 1999[113] that there would be a relevance criterion when examining alleged right to be heard infringements, it revealed a rather reluctant approach towards the requirement of a potential influence of the right to be heard violation on the outcome of the case in decisions dated 1981[114] and 2016[115]. In 18 OCg 5/16h, the Austrian Supreme Court finally held that a violation of the Austrian procedural public policy – of which the right to be heard is a part[116] – cannot be considered in cases where it follows already from the reasoning of the award that the procedural deficiency eventually turned out to be irrelevant for the outcome of the case.[117] Hence, the Supreme Court set a kind of negative requirement, as setting aside is denied if it becomes clear from the reasoning of the award that there could not have been a causal link between the violation and the decision on the merits. Austria's legal scholars are divided on this issue. While some claim that a party seeking annulment shall not carry the additional burden of a causality proof,[118] others plead for the requirement of a "potential" relevance to the outcome of the proceedings.[119]

From the EuCHR's established case law on Article 6 ECHR, two lines of argumentation on the issue of causality can be deduced, both of which prove to be helpful in this context. First, the EuCHR has repeatedly emphasized that it was not to judge whether a party's cut-off submission would have been justified and eventually

[112] Austrian OGH 13.1.1955, 2 Ob 422/54 (1955) JBl 503-4, p. 504.

[113] Austrian OGH 1.9.1999, 9 Ob 120/99h.

[114] Austrian OGH 24.9.1981, 7 Ob 623/81 EvBl 1982/77.

[115] Austrian OGH 23.2.2016, 18 OCg 3/15p, with a critical reference to Czernich, 'Kriterien', p. 300.

[116] For a detailed elaboration on the relation between the right to be heard (Section 611 para 2 subpara 2 CCP) and procedural public policy (Section 611 para 2 subpara 5 CCP), *see* Auernig, 'Neue Wege', p. 227; more in detail Auernig, *Überraschungsverbot*, pp. 261-4.

[117] Austrian OGH 6.12.2016, 18 OCg 5/16h. In Austrian OGH 19.12.2018, 3 Ob 153/18y, the question of a causality criterion in the context of Art V para 1 lit b NYC was left open.

[118] Liebscher, 'Rechtsbehelfe', para. 11/119; Riegler, 'Section 611', para. 38; cf also Elisabeth Lovrek/Gottfried Musger, 'Aufhebungsklage' in Dietmar Czernich/Astrid Deixler-Hübner/Martin Schauer (eds), *Handbuch Schiedsrecht* (Vienna: Manz 2018) pp. 541-594, para. 16.76.

[119] *See*, e.g. Czernich, 'Kriterien', p. 300; Hausmaninger, '§ 611 ZPO', para. 107; for further references, *see* Auernig, *Überraschungsverbot*, pp. 251-2.

successful.[120] Second, however, the EuCHR consistently held that the ECHR would not safeguard merely theoretical or illusory rights,[121] thus, there cannot be a violation of Article 6 para 1 ECHR where the surprising element only constituted an additional, auxiliary part of the decision's reasoning.[122]

In German case law, there has been a longstanding tradition of applying the requirement of a (at least potential) relevance of the right to be heard infringement for the outcome of the case, which needs to be proven by the party seeking annulment.[123] Conversely, the Federal Court of Switzerland for many years emphasized the "formal nature" of the right to be heard, denying the necessity of examining in setting aside proceedings whether the tribunal would have possibly reached a different result if the parties' right to be heard had been fully granted.[124] Current developments, however, reveal a significant change in Swiss case law in this regard. In a number of recent decisions, the Swiss Federal Court has started to refer to the argument of a certain relevance of the violation for the outcome of the proceedings.[125] Finally, in a 2019 judgment, the Swiss Federal Court for the first time expressly denied the setting aside of an arbitral award based on the argument that granting the right to be heard on the issue at stake could not possibly have had any influence on the decision ultimately taken by the arbitral tribunal.[126]

As a conclusion, it can be deduced that – following the EuCHR's approach but also taking into account international best practices – the question of a relevance criterion should be answered on the basis of a two-fold approach: On the one hand, setting aside shall not be denied on the basis that the parties' arguments would (probably) not have changed the arbitral tribunal's mind in their decision-finding process. Setting such boundaries of examination at the annulment stage is also essential to avoid a

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[120] EuCHR 13.10.2005, 65399/01, 65406/01, 65405/01 and 65407/01, *Clinique des Acacias et al/France* para. 42; EuCHR 16.2.2006, 44624/98, *Prikyan et Angelova/Bulgaria* para. 50; EuCHR 3.5.2016, 66522/09, *Alexe/Romania* para. 43.

[121] „[L]a Convention ne vise pas à protéger des droits purement théoriques ou illusoires" (EuCHR 15.6.2004, 1814/02, *Stepinska/France* para. 18; EuCHR 21.3.2006, 39765/04, *Salé/France* para. 19; EuCHR 22.9.2009, 12532/05, *Cimolino/Italien* para. 50).

[122] EuCHR 22.9.2009, 12532/05, *Cimolino/Italy* paras. 48-9.

[123] *See,* e.g., German BGH 21.12.1989, III ZR 44/89 BeckRS 1989, 31069016; German BGH 18.1.1990, III ZR 269/88 (1990) NJW 2199-2201, p. 2201.

[124] *See*, amongst many others, Swiss BGer 16.5.2011, 4A_46/2011 para. 4.3.2; Swiss BGer 4.2.2014, 4A_460/2013 para. 3.1.

[125] BGE 142 III 360-3, para. 4.1.3, 363; Swiss BGer 18.4.2018, 4A_247/2017 para. 5.1.3.

[126] Swiss BGer 29.1.2019, 4A_424/2018 paras. 5.2.2, 5.7.

révision au fond of the arbitral tribunal's decision.[127] On the other hand, it seems convincing to refuse the setting aside of an arbitral award where it can already be seen from the award's reasoning that the surprising element only forms *one* of the pillars the decision is based upon. If even when leaving aside the surprising argument, the other arguments would have also *per se* propped the decision, the annulment of the award cannot be deemed necessary.

VI. Conclusion

From *arbitral tribunals*, which strive for a fair conduct of the proceedings granting the parties full and equal rights to present their case, to *national courts* at the setting aside stage, which have to strike the balance between sanctioning infringements that occurred during the arbitral process and avoiding a *révision au fond* – the proper identification and handling of surprise decisions is of great practical importance.

One of the core findings in this regard is that a party's right to be heard according to Article 6 para 1 ECHR not only covers the factual but also the *legal* aspects of the case. The right to be heard on legal issues equally involves the right to be informed about the legal dimension of the case, the right to submit their own legal arguments and comment upon those raised by others in the proceedings, and the right to have the submitted legal arguments taken into account by the court/tribunal.[128]

When opting for arbitration, parties are free to waive some of the guarantees enshrined in Article 6 para 1 ECHR, such as the right to a public hearing. However, there are some core guarantees that the EuCHR regards non-waivable to ensure the conduct of a fair proceeding. These non-waivable guarantees mandatorily apply also to arbitration proceedings and include the right to be heard as it is incorporated in Article 6 para 1 ECHR and interpreted by the EuCHR.[129]

In its rather recent case law, the EuCHR has held that tribunals must not base their decisions on legal elements that have not been discussed in the proceedings and that cause an unexpected twist to the matter in dispute even from the point of view of a diligent party. Thereby, the EuCHR has expressly qualified surprise decisions as a violation of Article 6 para 1 ECHR.[130]

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[127] *See* on this principle RIS-Justiz RS0045124; Hausmaninger, '§ 611 ZPO', para. 3, with further references.

[128] *See* above Section **Fehler! Verweisquelle konnte nicht gefunden werden.**.

[129] *See* above Section III.**Fehler! Verweisquelle konnte nicht gefunden werden.**.

[130] *See* above Section **Fehler! Verweisquelle konnte nicht gefunden werden.**.

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It follows from the results above that when determining surprising arbitral awards at the annulment stage, one has to refer to Article 6 para 1 ECHR and its interpretation by the EuCHR and, if a violation of Article 6 para 1 ECHR has been confirmed, the award needs to be set aside pursuant to Section 611 para 2 subpara 2 CCP. Thus, the main point of reference for interpreting violations of the right to be heard – including surprise decisions – should be Article 6 para 1 ECHR. Additional input can be gained from a comparative law analysis of countries with similar arbitration laws in order to acknowledge and encourage the international nature of arbitration.

When it comes to the identification of arbitral surprise decision by resorting to the parameters mentioned above, there is a number of specific questions and issues a case at hand may raise. This paper has tackled some of those issues by collecting some new ideas as well as existing approaches as points of reference.

The overall aim of this paper and the underlying research has been to raise and enhance sensitivity when it comes to the treatment of procedural human rights, especially with regard to the legal issues of a case.

VII. Bibliography

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