Islamic Law in Domestic Arbitration: Some Thoughts on a Recent Austrian 'Scandal'. Case Note on Vienna Regional Court for Civil Matters, 2 May 2025, 47 R 65/25v and 47 R 66/25s

La ley islámica en el arbitraje nacional: noticias sobre un «escándalo» Austriaco. Nota sobre el caso del Tribunal Regional de Viena para Asuntos Civiles, 2 de mayo de 2025, 47 R 65/25v y 47 R 66/25s

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Recibido: 05.02.2026 / Aceptado: 11.02.2026
DOI: 10.20318/cdt.2026.10293

Abstract: In the summer of 2025, private international law briefly captivated Austrian media. Two merchants had agreed that any dispute arising out of their legal relationship should be resolved by arbitration in accordance with principles of Islamic law. A dispute arose and resulted in a domestic award ordering the defendant to pay damages exceeding EUR 1,000,000. The award creditor successfully moved for enforcement. On appeal, the award debtor alleged that an application of Islamic law in arbitral proceedings violates Austrian substantive public policy. The appellate court rejected this argument, finding that the resolution of a commercial dispute under Islamic law does not upset fundamental notions of the Austrian legal system. The case caused an uproar, first in the Austrian tabloids, then in wider society, resulting in calls for banning the application of Islamic law in Austria. The Austrian government has created a working group studying the possibility of law reform in this sense. Potential clashes with EU and international law loom.

Keywords: Arbitration, Islamic law, Sharia law, religious law, public policy.

Resumen: En el verano de 2025, el derecho internacional privado acaparó brevemente la atención de los medios de comunicación austriacos. Dos comerciantes habían acordado que cualquier controversia que surgiera de su relación jurídica se resolvería mediante arbitraje de conformidad con los principios del derecho islámico. Surgió una controversia que dio lugar a un laudo nacional por el que se condenaba al demandado a pagar una indemnización por daños y perjuicios superior a 1.000.000 EUR. El acreedor del laudo solicitó con éxito su ejecución. En apelación, el deudor del laudo alegó que la aplicación del derecho islámico en los procedimientos arbitrales violaba el orden público sustantivo austriaco. El tribunal de apelación rechazó este argumento, al considerar que la resolución de una controversia comercial con arreglo al derecho islámico no alteraba los principios fundamentales del ordenamiento jurídico austriaco. El caso causó un gran revuelo, primero en la prensa sensacionalista austriaca y luego en la sociedad en general, lo que dio lugar a demandas para prohibir la aplicación de la ley islámica en Austria. El Gobierno austriaco ha creado un grupo de trabajo para estudiar la posibilidad de una reforma legislativa en este sentido. Se avecinan posibles conflictos con el Derecho de la Unión Europea y el Derecho internacional.

Palabras clave: Arbitraje, ley islámica, ley sharía, ley religiosa, orden público.

Sumario: I.Excerpt of the Decision.II.Introduction. III. Facts and procedural history.IV. Decision and Analysis.V.Conclusion.

I. Excerpt of the Decision[1] (translated from German by the authors)

[…]

The appellant argues that the arbitral award is not enforceable as it violates public policy in the sense of § 611(2)(8) Code of Civil Procedure. He alleges that the law had been arbitrarily applied, that the interpretation of Sharia law is subject to discussions within the Muslim community, and that its principles vary in the interpretation of different scholars. As it is thus unknown what law had been applied, the appellant argues, the reference to Sharia law violates public policy.

[…]

Regarding § 611(2)(8):

The public policy rule is generally recognized and a part of the legal system. This conclusion is supported not only by national law (§§ 6 PIL Act; 611 Code of Civil Procedure), but also by provisions of European Union law, e.g. Art 45(1)(a) [Brussels Ia Regulation], Art 40(a) [Succession Regulation], Art 24(a) [Maintenance Regulation]. It therefore also applies where – as in the present case – the PIL Act does not apply due to no (recognizable) foreign nexus existing.

Islamic law (Sharia law) is based on the Qur'an and on tradition as manifested by the Sunnah. Sharia law is not a codified set of legal provisions but a "method and methodology of making law" […]. Islamic law is heterogeneous and based on various schools of thought, differing in their teachings […].

In the present case, absent any further indication, it is assumed that the phrase „Ahlus-Sunnah wal-Jamaah", added in ellipses within the arbitration agreement, apparently refers to a concretization of Islamic law to a particular interpretation or school of interpretation […].

Islamic law, the Sharia, differentiates between religious rules which regulate the relationship between humans and God (prayer, fasting etc) and legal rules for the interaction of humans among each other (contract law, family law, criminal law etc). While the religious rules of the Sharia are protected by religious freedom under Art 4(1) and (2) of the [German] Basic Law [sic], application of the legal rules contained within the Sharia is subject to the public policy rule of private international law. Where private international law in a given case refers to the provisions of the Sharia, fundamental rights and the German legal system [sic] dictate the framework within which the results must be examined in the individual case. If application of the Sharia leads to a result which blatantly contradicts the German legal system [sic], the public policy exception provides that it must not be applied in order to protect public order […].

By judgment of 19 December 2018, the Grand Chamber of the ECHR decided in case no 20452/14 that an application of Islamic law (Sharia law) in a succession dispute, against the wishes of the Muslim decedent, violates the Convention. The subject matter of the decision was a provision of Greek law which in certain (succession) cases provided for an application of Islamic law (this provision has since been repealed). From a comparative perspective, the Court explained that Islamic law is applied in member states of the Council of Europe only within the framework of private international law, i.e. where several national legal frameworks collide. In the course of this, Islamic law is not applied by European states as such, but as a component of the national law of a non-European state. The only exception is Great Britain [sic], where Sharia Courts apply Islamic law. This is only the case, however, where a matter is referred to the court voluntarily; the judgments are not binding under state law.

The Sharia is (partly) incorporated into the national law of some states (eg Saudi Arabia […], Syria […], Iran […]). On case no 9 Ob 34/10f, Fucik has argued that Sharia law is to be applied in Austria unless its application would lead to a result which is incompatible with fundamental notions of the Austrian legal system […].

In case no 8 Ob 88/24k, the Supreme Court of Justice held that a dowry agreed in accordance with Islamic law is based on "Muslim faith or Muslim custom" and that no corresponding statutory duty exists under Austrian law.

[1] The original order, including full in-text citations omitted here, is available in German on the website of the Austrian Legal Information System: ris.bka.gv.at/Dokumente/Justiz/JJT_20250502_LG00003_04700R00065_25V0000_000/JJT_20250502_LG00003_04700R00065_25V0000_000.html

Fundamental notions of the legal system comprise in particular the principles of the federal constitution, the principles of the ECHR, of criminal law, private law, procedural law, and public law. Fundamental notions are essential notions which have shaped Austrian law. The object of protection are not the subjective legal positions of the parties, but the domestic legal system, which is protected from the intrusion of legal thought which is completely incompatible with it, and of an unbearable violation of its fundamental notions. In this respect, the end result of the arbitral award is relevant and not the grounds provided. This ground for annulment thus does not allow for recourse as to whether and to what extent the arbitral tribunal has resolved the factual and legal questions arising during the course of the arbitral proceedings correctly. The examination whether an award violates public policy thus must not lead to an (exhaustive) review of the arbitral award from a factual and/or legal perspective (impermissibility of an appeal on the merits). Incorrect decisions must therefore, in principle, be accepted. An exception is only potentially considered in cases of an arbitrary application of the law by the arbitral tribunal […].

The scope of protected fundamental notions of the Austrian legal system cannot be specifically defined and is also subject to changing with the times. In any case, constitutional principles play a fundamental role: personal freedom, equal treatment, the prohibition of discrimination based on birth, race, or religious group are encompassed by the protective scope of public policy. Apart from constitutionally protected fundamental notions, the principle of monogamous marriage, the prohibition of child marriage and forced marriage, the protection of child welfare under the law of parentage or the prohibition on the exploitation of an economically and socially weaker party and equal treatment of the genders are encompassed […].

Since the public policy rule constitutes an exception which is at odds with the concept of the overall system, it is generally cautioned that a particularly sparing use of the exception is in order; simple inequity of the end result or a mere violation of mandatory Austrian legal provisions does not suffice. The violation must instead concern fundamental notions of the Austrian legal system. The second significant requirement for the application of the public policy rule is that the end result of the application of foreign law is offensive to public policy and not just the applicable foreign law itself; furthermore, a sufficient domestic nexus is required[…].

With the phrasing legal provisions or legal rules (§ 603 Code of Civil Procedure), the legislator intended to clarify that a choice cannot (only) concern law enacted by states or comparable organizations, but that the parties may also refer to "other systems of rules of conduct". A more precise definition of the term "legal rules" was intentionally not undertaken to give the "broadest possible avenue" to party autonomy […].

[…]

Islamic law is not state law and it is also not codified. As the judgment of the ECHR reveals, it does not constitute – at least in Europe – immediately applicable law in the sense of § 603 Code of Civil Procedure. Islamic law per se is not applied in Austria. § 603 Code of Civil Procedure, however, grants the parties freedom of choice of law. Regardless of whether Sharia law can be regarded as a (state) legal framework/law in the sense of § 603 Code of Civil Procedure, it is definitely a "system of rules of conduct" and thus constitutes a set of legal rules in the sense of that provision. Islamic legal provisions could thus be validly agreed upon in the present arbitration agreement, even more so considering that contract law is concerned. In this regard, it does not matter that the legal provisions to be applied are not generally known, as only the end result of an arbitral award is to be examined for the assessment of a public policy violation.

Furthermore, the parties agreed in the arbitration agreement that the arbitral tribunal shall "decide ex aequo et bono to the best of its knowledge and belief".

A decision ex aequo et bono means that the arbitral tribunal resolves the dispute without regard to legal provision or legal rules […].

Even if one did not consider Sharia law to constitute legal provisions or legal rules, the agreement on a decision "ex aequo et bono" constitutes a valid arbitration agreement under § 603(3) Code of Civil Procedure. In any case, (only) the arbitral award may be assessed for compatibility with public policy, that is to say whether the end result of the arbitration proceedings is compatible with fundamental notions of the Austrian legal system […].

Applying these principles to the arbitral award in question, a violation of public policy must be rejected. The arbitrator conducted proceedings with the involvement of both parties, examined evidence, and made comprehensible and reasoned factual determinations in the arbitral award. Neither the legal assessment nor the remaining remarks contain indicia for an arbitrary decision. Even the appellant has been unable to name concrete violations. It is noted that no examination is in order as to whether Islamic

legal provisions were actually applied or which ones, or whether the arbitral award is substantively correct. The end result of the decision does not offend fundamental notions of the Austrian legal system. The ground for annulment under [§ 611(2)](8) is not fulfilled.
[…]

I. Introduction

1. In August 2025, controversy surrounding a decision of the Vienna Regional Court for Civil Matters (*Landesgericht für Zivilrechtssachen Wien – LGZ Wien*) rocked Austria. Faced with an appeal against an order granting enforcement of an arbitral award decided in accordance with provisions of Islamic law, the Court found that Austrian law permits the choice of religious law in the context of arbitration, provided that the end result comports with Austrian public policy. Initially reported in the legal section of a daily broadsheet newspaper,[2] the story was quickly picked up throughout the media landscape and dominated the political discourse for several days. The debate soon turned away from arbitration and took on a more general character, with members of the governing coalition calling for a full prohibition of "*Sharia law*" in Austria. A governmental working group is currently studying the possibility of legal reform.

2. A sober review of the case quickly reveals that grave concerns about parallel justice systems or radical modifications to Austrian private international law are uncalled for.[3] Nonetheless, the policy implications of arbitral tribunals applying religious law are well worth discussing. In addition, the decision of the LGZ Wien touches upon a number of interesting and unique elements of Austrian arbitration law.

I. Facts and Procedural History

3. The parties' arbitration agreement stipulated that "*all current and/or future disputes in connection with contracts*"[4] be submitted to the decision of a named sole arbitrator and resolved "*according to Islamic provisions of law (Ahlus-Sunnah wal-Jamaah), ex aequo et bono to the best of [the tribunal's] knowledge and belief*".[5] Little is known about the dispute underlying the arbitration proceedings. The order on appeal merely states that the arbitration related to "*a claim for damages arising from a breach of contract*".[6] The broader context reveals the dispute to be commercial in nature, since specific provisions on consumer and labor arbitration[7] were not discussed. Whatever the precise nature of the commercial relationship, a dispute eventually arose and was submitted to the previously nominated sole arbitrator. On 15 January 2024, that arbitrator issued an award, ordering the respondent to pay damages in the amount of about EUR 1 mn.

4. The respondent and award debtor did not file an application for annulment and the award creditor eventually applied for partial enforcement of the award. The District Court of Vienna Fünfhaus (*Bezirksgericht Wien-Fünfhaus – BG Fünfhaus*) granted enforcement, ordered the attachment of certain rights and movable property of the award debtor, garnished four of his claims, and ordered the compulsory auction of his real estate. In a further decision, the Court ordered wage garnishment.

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[2] Philipp Aichinger, "Schiedsspruch nach Scharia in Österreich gültig", *Die Presse*, 2025/34/01.

[3] See also Paul Eichmüller, "Green Light for the Application of Religious Rules in Arbitration of Pecuniary Claims", *EAPIL Blog*, eapil.org/2025/08/28/green-light-for-the-application-of-religious-rules (28 August 2025).

[4] In the original: "*Alle Streitigkeiten, die entstanden sind und/oder künftig im Zusammenhang mit Verträgen entstehen*".

[5] In the original: "*Das Schiedsgericht entscheidet anhand der islamischen Rechtsvorschriften (Ahlus-Sunnah wal-Jamaah) nach Billigkeit in der Sache nach bestem Wissen und Gewissen*".

[6] In the original: "*ein Schadenersatzanspruch des Betreibenden aus der Vertragsverletzung durch den Verpflichteten*".

[7] Restrictions on choice of law exist for any proceedings involving a consumer (§ 617(6)(1) ZPO) or a labor dispute (§ 618 ZPO). These provisions, evidently, did not play a role.

5. The award debtor appealed both enforcement orders to the LGZ Wien. He alleged that the precise content of Islamic law could not be clearly defined due to diverging scholarly opinions. Consequently, the award would be arbitrary, and the BG Fünfhaus had committed an error of law in granting its enforcement.

II. Decision and Analysis

6. The LGZ Wien rejected the appeal and upheld the enforcement orders. It held that the subject matter of the dispute was arbitrable and that the award did not violate Austrian substantive public policy. This decision is final and cannot be appealed any further.[8]

7. This case note will first outline the scope of *de novo* review of domestic arbitral awards under Austrian enforcement law, before turning to the Court's discussion of choice of law and substantive public policy issues. By way of background, it is necessary to know that Austria has implemented the UNCITRAL Model Law on International Commercial Arbitration (MAL), and extended it to purely domestic proceedings.[9] However, Austria has added some twists to the MAL, which are relevant for the following discussion.

1. Incidental Review of Compatibility with Substantive Public Policy

8. The proceedings at hand related to the enforcement of a final domestic arbitral award. Normally, an Austrian domestic award is enforceable *ex lege* without any *exequatur* procedure.[10] The parties can apply for annulment, but had failed to do so in the instant case. It was only at the enforcement stage that one of the parties raised objections against the award. Normally, the award debtor's failure to apply for annulment precludes him from later impugning the award.[11] Nonetheless, the LGZ Wien correctly considered two annulment grounds *ex officio* in its capacity as an enforcement court: Austrian law mandates that those annulment grounds which are in the public interest – i.e. arbitrability and substantive public policy[12] – must be scrutinized even if no party proactively sought annulment. More concretely, the Austrian Code of Civil Procedure (*Zivilprozessordnung – ZPO*) states:[13]

If a court or authority determines in any other proceedings [non-annulment proceedings], for instance enforcement proceedings, that a ground for annulment under § 611(2)(7) or (8) is fulfilled, the arbitral award shall not be given effect.

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[8] Court orders fully confirmed upon appeal are not subject to further appeal, § 528(2)(2) ZPO in conjunction with § 78(1) Enforcement Act.

[9] Austrian Federal Law Gazette (vol. I), no 7/2006, Arbitration Law Amendment Act 2006 (*Schiedsrechtsänderungsgesetz 2006*).

[10] § 607 ZPO; § 1(16) Enforcement Act; Christian Koller, "Anerkennung und Vollstreckung von Schiedssprüchen", in Christoph Liebscher, Paul Oberhammer, and Walter Rechberger (eds.), *Schiedsverfahrensrecht* (vol. *II)*, Vienna, Verlag Österreich, 2016, mn. 12/3; Christian Hausmaninger, "§ 607 ZPO" in Hans Fasching and Andreas Konecny (eds.), Zivilprozessgesetze (vol. IV/2), Vienna, Manz, 3rd edn. 2016, mn. 19; Johann Höllwerth, "§ 1 EO", in Astrid Deixler-Hübner (ed.), *Exekutionsordnung*, Vienna, LexisNexis ORAC, 34th inst. 2022, mn. 114; Werner Jakusch, "§ 1 EO", in Peter Angst and Paul Oberhammer (eds.)*, Kommentar zur Exekutionsordnung*, Vienna, Manz, 3rd edn. 2015, mn. 88. This reflects the approach also taken by Spanish law, see Art 44 of the Spanish Arbitration Act and Art 517(2)(ii) of the Spanish Code of Civil Procedure (Law 1/2000 of 7 January on Civil Procedure), for a detailed summary of the legislative considerations, see Paul Oberhammer, *Entwurf eines neuen Schiedsverfahrensrechts*, Vienna, Manz, 2001, pp. 142 et seq.

[11] *Res judicata*: § 607 ZPO, the provision has no equivalent in the MAL (Christian Hausmaninger, "§ 607 ZPO", in Hans Fasching and Andreas Konecny (eds.), *Zivilprozessgesetze* (vol. IV/2) (fn 10), (mn. 7) but is similar to Art 43 first case of the Spanish Arbitration Act (Law 60/2003 of 23 December on Arbitration); preclusion of annulment grounds: § 611(1) in conjunction with (4) ZPO.

[12] § 611(2)(7) ZPO (identical in content to Art 34(2)(b)(i) MAL) and § 611(2)(8) ZPO (modeled on Art 34(2)(b)(ii) MAL, but narrower in scope, as violations of procedural public policy constitute a separate annulment ground, see Christian Hausmaninger, "§ 611 ZPO", in Hans Fasching and Andreas Konecny (eds.), *Zivilprozessgesetze* (vol. IV/2) (fn 10), mn. 137).

[13] § 613 ZPO; in the original: "*Stellt ein Gericht oder eine Behörde in einem anderen Verfahren, etwa in einem Exekutionsverfahren, fest, dass ein Aufhebungsgrund nach § 611 Abs. 2 Z 7 und 8 besteht, so ist der Schiedsspruch in diesem Verfahren nicht zu beachten.*"

9. As no streamlined *exequatur* procedure exists for domestic awards, this review occurs incidentally, without a time limit, and is conducted *ex officio* by any court seized of the matter.[14] What is more, a court's findings in an incidental review procedure do not acquire *res judicata* effects and are thus not binding on other courts.[15] This makes it possible that enforcement of an arbitral award is rejected by one court for public policy concerns but granted by another. In these respects, incidental review differs from annulment proceedings, where a final judgment – whether it be affirmative or negative – precludes reexamination of the same questions by enforcement courts,[16] and from the recognition of foreign arbitral awards, where a streamlined procedure exists.[17]

2. Choice of Non-State Legal Rules

10. The core of the dispute is the parties' selection of Islamic law. This selection concerns § 603 ZPO, the central conflict-of-laws pillar of Austrian arbitration law. It is closely modeled on Art 28 MAL but exhibits two major differences. The provision reads:[18]

> *(1) The arbitral tribunal shall decide the dispute in accordance with the legal provisions or legal rules on which the parties have agreed. Agreement on the law or legal system of a particular state shall be understood as a direct reference to the substantive law of that state and not to its conflict-of-laws provisions, unless the parties have expressly agreed otherwise.*
> *(2) If the parties have not selected the applicable legal provisions or legal rules, the arbitral tribunal shall apply those legal provisions which it regards as appropriate.*
> *(3) The arbitral tribunal shall only decide ex aequo et bono if the parties have expressly empowered it to do so.*

11. On the one hand, Austrian law opts for a *voie directe* approach in absence of party choice, allowing the tribunal to directly determine the "*legal provisions which it regards as appropriate*" in such cases (§ 603(2) ZPO).[19] On the other hand, Art 28(4) MAL, which prescribes that the tribunal shall decide in accordance with the contract and take into account trade usages, was consciously omitted. It was considered "*self-explanatory*" and therefore not adopted expressly.[20]

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[14] Christian Koller, "Anerkennung und Vollstreckung von Schiedssprüchen", in Christoph Liebscher, Paul Oberhammer, and Walter Rechberger (eds.), *Schiedsverfahrensrecht* (vol. II) (fn 10), mn. 12/10.

[15] Paul Oberhammer (fn 10), p. 145.

[16] Christian Koller, "Anerkennung und Vollstreckung von Schiedssprüchen", in Christoph Liebscher, Paul Oberhammer, and Walter Rechberger (eds.), *Schiedsverfahrensrecht* (vol. II para) (fn 17), mn. 12/11; Christian Hausmaninger, "§ 613 ZPO", in Hans Fasching and Andreas Konecny (eds.), Zivilprozessgesetze (vol. IV/2) (fn 10), mn. 10.

[17] § 403 Enforcement Act in conjunction with § 416(1) Enforcement Act and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959, 330 UNTS 3). Barbara Kloiber and Harmut Haller, "Das neue Schiedsverfahrensrecht – eine Einführung", in Barbara Kloiber, Walter Rechberger, Paul Oberhammer, and Hartmut Haller (eds.), *Das neue Schiedsrecht*, Vienna, Manz, 2006, pp. 62 et seq.

[18] In the original: "*(1) Das Schiedsgericht hat die Streitigkeit in Übereinstimmung mit den Rechtsvorschriften oder Rechtsregeln zu entscheiden, die von den Parteien vereinbart worden sind. Die Vereinbarung des Rechts oder der Rechtsordnung eines bestimmten Staates ist, sofern die Parteien nicht ausdrücklich etwas anderes vereinbart haben, als unmittelbare Verweisung auf das materielle Recht dieses Staates und nicht auf sein Kollisionsrecht zu verstehen.*

(2) Haben die Parteien die anzuwendenden Rechtsvorschriften oder Rechtsregeln nicht bestimmt, so hat das Schiedsgericht jene Rechtsvorschriften anzuwenden, die es für angemessen erachtet.

(3) Das Schiedsgericht hat nur dann nach Billigkeit zu entscheiden, wenn die Parteien es ausdrücklich dazu ermächtigt haben."

[19] For the reasoning, see Explanatory Notes on the Government Draft, 22nd Legislative Period, Supplement no. 1158 to the Minutes of the Austrian National Council, p. 22; Paul Oberhammer, "Rechtspolitische Schwerpunkte der Schiedsrechtsreform", in Barbara Kloiber, Walter Rechberger, Paul Oberhammer, and Hartmut Haller (eds.), *Das neue Schiedsrecht* (fn 16), p. 133.

[20] Paul Oberhammer (fn 10), p. 111.

12. As regards party autonomy, § 603(1) ZPO takes a decidedly liberal stance on the range of systems from which parties may choose. The provision clarifies that they may designate two types of legal standards:

– "*legal provisions*" ("*Rechtsvorschriften*") or
– "*legal rules*" ("*Rechtsregeln*")

13. "*Legal provisions*" is understood to signify formal systems of law.[21] These are the typical national legal systems or private law rules governing autonomous communities, federal states or other subunits of a state. In contrast, the expression "*legal rules*" is interpreted to mean "*other systems of rules of conduct*".[22] The introduction of this second standard is a major innovation of Austrian law in comparison to other laws, such as those that follow the MAL. The express permission given to the parties to select legal rules as the basis for the arbitration proceedings is ensures the possibility of choosing non-state rules. Among them are rules set by international institutions, e.g., the UNIDROIT Principles of International Commercial Contracts, or rules drafted by scientific groups, e.g. the Principles of European Contract Law. Some contend that the expression "*legal rules*" also covers the (in-)famous *lex mercatoria*.[23]

14. Importantly for the case at hand, the expression "*legal rules*" can also be interpreted to cover the choice of religious rules of conduct. This is consonant with the intention behind § 603(1) ZPO to create "*the broadest possible avenue*" for party autonomy.[24] Academic authors underscore that there is no reason to meaningfully restrain the parties in their choice of law where they are free to empower a tribunal to decide *ex aequo et bono* (§ 603(3) ZPO), thus without reference to any legal standard.[25]

15. The LGZ Wien fully joined this reasoning within the order on appeal. It stressed the broad autonomy afforded to parties in matters of choice of law, further reinforced in the instant case by the specific language of the dispute resolution agreement, which stated that disputes shall be resolved "*according to Islamic provisions of law (Ahlus-Sunnah wal-Jamaah), ex aequo et bono to the best of [the tribunal's] knowledge and belief*". The clause thus combines (non-state) "*legal rules*" in the sense of § 603(1) ZPO with a decision *ex aequo et bono* under § 603(3) ZPO.

16. A possible objection against this combination is that it leaves the hierarchy between the chosen religious rules and a decision *ex aequo et bono* unclear. This criticism is not completely unwarranted. Yet the degree of discretion granted to the sole arbitrator is no greater than with a decision fully rendered *ex aequo et bono*, and the clause does not rise to such a level of incomprehensibility as to render it incapable of being interpreted at all. Consequently, there is little reason to doubt that Austrian arbitration law as currently in force permits an effective choice of religious law as the *lex causae*. As no differentiation is made between domestic and international arbitration,[26] this also holds true for entirely domestic proceedings.

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[21] Helmut Heiss and Leander Loacker, "Anwendbares Recht", in Christoph Liebscher, Paul Oberhammer, and Walter Rechberger (eds.), *Schiedsverfahrensrecht* (vol. II) (fn 10), mn. 9/94.

[22] Explanatory Notes on the Government Draft (fn 19), p. 22: "*sonstige Systeme von Handlungsanordnungen*".

[23] Christian Hausmaninger, "§ 603 ZPO", in Hans Fasching and Andreas Konecny (eds.), *Zivilprozessgesetze* (vol. IV/2) (fn 10), mn. 48.

[24] Paul Oberhammer (fn 10), p. 109: „*eine möglichst breite Einfallspforte*"; Helmut Heiss and Leander Loacker, "Anwendbares Recht", in Christoph Liebscher, Paul Oberhammer, and Walter Rechberger (eds.), *Schiedsverfahrensrecht* (vol. II) (fn 10), mn. 9/95; Katharina Plavec, "§ 603 ZPO", in Georg Kodek and Paul Oberhammer, *ZPO-ON*, Vienna, Manz, 2023, mn. 7.

[25] Paul Oberhammer (fn 10), p. 109; Helmut Heiss and Leander Loacker, "Anwendbares Recht", in Christoph Liebscher, Paul Oberhammer, and Walter Rechberger (eds.), *Schiedsverfahrensrecht* (vol. II) (fn 10), mn. 9/95.

[26] Explanatory Notes on the Government Draft (fn 19), p. 3; Walter Rechberger, "Bemerkungen zum neuen österreichischen Schiedsverfahrensrecht", in Barbara Kloiber, Walter Rechberger, Paul Oberhammer, and Hartmut Haller (eds.), *Das neue Schiedsrecht* (fn 16), p. 76.

17. There is no doubt that the conflict-of-laws issue was correctly decided. However, the appropriateness of the result reached in this case should be questioned from a *de lege ferenda* perspective. There is no convincing policy reason to justify the parties' right to choose a non-state legal system in purely domestic agreements. Where the case has no foreign nexus and the proceedings take place before state courts, many legal systems exclude a choice of law altogether.[27] Art 3(3) Rome I Regulation is somewhat more liberal because it does not deprive the choice of its validity, yet it prohibits any derogation from mandatory rules of domestic law in such cases.[28] A derogation from such norms is also not justifiable by reference to Art 28 MAL, which was designed only for international arbitration (Art 1(1) MAL).

18. Austrian law departs in this respect from the European and international models. The government draft proposing implementation of the MAL into Austrian law mentions a need to "*ensure that mandatory provisions of Austrian law from which, for instance, no derogation is possible via a choice of law, cannot be circumvented through a choice of (arbitral) proceedings*".[29] The legislator recognized this potential risk only for proceedings involving consumers, and tried to mitigate it by adding an additional annulment ground for deviations from overriding mandatory provisions.[30] Yet critically, the same risk of circumvention also exists in B2B disputes, where it is currently unresolved: Mandatory laws can be deselected even in domestic disputes, despite such circumvention being impossible in proceedings before state courts.[31]

19. A liberal approach to party autonomy and choice of law is appropriate in international arbitration, and only a loose foreign nexus should be required to trigger such freedom. However, where no foreign element at all can be discerned, the policy motivation of broad party autonomy does not apply, and the choice of dispute resolution method should not entail far-reaching consequences on the applicable law. For this limited number of purely domestic cases, the legislator should consider supplementing the general rule on party autonomy regarding choice of law (§ 603(1) ZPO) with a provision replicating the rule under Art 3(3) Rome I Regulation. This provision should state that, where all relevant factors of a case point to one jurisdiction, a choice of law cannot derogate from mandatory substantive rules of that jurisdiction. Such a simple clarification would be sufficient to tackle the issue. A more drastic intervention, such as the creation of an additional non-harmonized annulment ground for violations of the choice of law regime, is unwarranted.

3. The Public Policy Exception as a Ground for Setting Aside

20. Having established its duty of incidental review and the ability of the parties to select rules of religious law to govern their dispute, the LGZ Wien finally turns to the central question of the proceedings: compatibility of the arbitral award with Austrian substantive public policy under § 611(2)(8) ZPO. The Court examines conformity in two respects: first, it assesses whether the arbitral award was the result of an arbitrary decision; second, it assesses whether the content of Islamic law in general comports with Austrian substantive public policy.

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[27] See the Austrian case law, eg OGH 10 November 1998, 4 Ob 279/98b; Verena Cap, "§ 11 IPRG", in Simon Laimer (ed.), *IPR Praxiskommentar*, Vienna, LexisNexis ORAC, 2024, mn. 10; Matthias Neumayr, "§ 11 IPR-G", in Peter Bydlinski, Stefan Perner, and Martin Spitzer, *ABGB Kurzkommentar*, Vienna, Verlag Österreich, 7th edn. 2023, mn. 1; Bea Verschraegen, "§ 11 IPRG", in Peter Rummel, Meinhard Lukas, and Andreas Geroldinger, *ABGB*, Vienna, Manz, 4th edn. 2023, mn. 3.

[28] See in detail Gralf-Peter Calliess, "Art 3 Rome I Regulation", in Gralf-Peter Calliess and Moritz Renner, *Rome Regulations*, Alphen aan den Rijn, Kluwer, 3rd edn. 2020, mn. 52–55; Peter Mankowski, "Art 3 Rome I Regulation", in Ulrich Magnus and Peter Mankowski, *European Commentaries on Private International Law* (vol. II), Munich, sellier, 2017, mn. 374–377.

[29] Explanatory Notes on the Government Draft (fn 19), p. 30: "*dafür Sorge zu tragen, dass zwingende Bestimmungen österreichischen Rechts, die etwa auch durch Rechtswahl nicht abbedungen werden können, nicht durch die Wahl des (Schieds) Rechtsweges umgangen werden können*".

[30] § 617(6)(1) ZPO; Explanatory Notes on the Government Draft (fn 19), p. 30.

[31] See above fn 30 and 31.

a) Substantive Arbitrariness

21. The appellant himself only invoked the first of these aspects, namely arbitrariness of the decision. In his appeal, he cited differing scholarly opinions and "*discussions*" within the Muslim community on the precise content of Islamic law, producing uncertainties in determining the exact rules on which the parties had agreed. The appellant seemed to imply that any resultant award would necessarily be an arbitrary synthesis of various views, rendering the selection and interpretation of those rules arbitrary.

22. Indeed, Austrian case law has repeatedly entertained the idea that an arbitral award rooted in arbitrariness as to the substantive result may violate public policy when it is the result of an "*arbitrary application of the law*"[32] or "*a completely untenable interpretation [of the law]*".[33] In line with the international standard established by the MAL and the NYC, the arbitrariness exception is interpreted narrowly. It does not provide comprehensive recourse against the tribunal's interpretation or application of the law governing the merits (prohibition of the *révision au fond*).[34]

23. In line with this standard, the LGZ Wien roundly rejected the appellant's submissions on arbitrariness. It reasoned that the sole arbitrator "*conducted proceedings with the involvement of both parties, examined evidence, and made comprehensible and reasoned factual determinations. Neither the legal assessment nor the remaining remarks contain indicia for an arbitrary decision*".[35]

24. This does not fully encapsulate the issue of arbitrariness under § 611(2)(8) ZPO, though. On the one hand, substantive arbitrariness relates only to the interpretation and application of the law governing the substance of the dispute within the award itself. It is distinct from a violation of the right to be heard, failure to conduct fair proceedings, or failure to give reasons. The latter reasons are examined under different grounds – either a violation of the right to be heard[36] or a violation of procedural public policy[37] – and would be precluded by the appellant's failure to file an application for annulment.[38] This reveals a deeper issue with the jurisprudence qualifying arbitrary application of the law as a violation of substantive public policy: Such questions remain open to court review indefinitely.[39] Substantive arbitrariness stands out as an annulment ground in that it is primarily in the interest of the affected party but need not be raised in annulment proceedings. This is contradictory and does not fit into the overall system of incidental review, which normally protects (only) overarching public interests.[40] Furthermore, this qualification is incompatible with the oft-repeated principle that substantive public policy relates only to the result of an award, not its justification.[41]

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[32] OGH 15 May 2019, 18 OCg 1/19z: "*im Falle willkürlicher Rechtsanwendung*".

[33] OGH 20 March 2018, 18 OCg 1/17x: "*ein völlig untragbares Auslegungsergebnis*"; the exception was first considered in OGH 23 February 2016, 18 OCg 3/15p on the basis of German case law (Christian Hausmaninger, "§ 611 ZPO", in Hans Fasching and Andreas Konecny (eds.), *Zivilprozessgesetze* (vol. IV/2) (fn 10), mn. 162) and has since been firmly accepted, see Katharina Plavec, "§ 603 ZPO", in Georg Kodek and Paul Oberhammer, *ZPO-ON* (fn 24), mn. 54.

[34] OGH 23 February 2016, 18 OCg 3/15p; 20 March 2018, 18 OCg 1/17x; 15 May 2019, 18 OCg 6/18h; 15 May 2019, 18 OCg 1/19z; 15 January 2020, 18 OCg 12/19t; 17 October 2024, 18 OCg 1/24g.

[35] In the original: "*[…] führte ein Verfahren unter Beteiligung der Parteien durch, erhob Beweise und traf im Schiedsspruch nachvollziehbare und begründete Feststellungen*".

[36] § 611(2)(2) ZPO; see OGH 15 May 2019, 18 OCg 6/18h; 15 May 2019, 18 OCg 1/19z; 2 March 2021, 18 OCg 10/19y; 17 October 2024, 18 OCg 1/24g.

[37] § 611(2)(5) ZPO; see OGH 28 September 2016, 18 OCg 3/16i; 9 October 2018, 18 OCg 2/18w; 15 May 2019, 18 OCg 1/19z; 2 March 2021, 18 OCg 10/19y; 17 October 2024, 18 OCg 1/24g.

[38] On the interplay between these three grounds, see in particular OGH 15 May 2019, 18 OCg 6/18h; 15 May 2019, 18 OCg 1/19z; 17 October 2024, 18 OCg 1/24g.

[39] See § 613 ZPO, which asks courts and administrative authorities to ignore arbitral awards that are incompatible with public policy.

[40] See above IV.1.

[41] Eg OGH 15 December 2021, 18 OCg 5/21s; 15 May 2019, 18 OCg 1/19z; 19 December 2018, 3 Ob 153/18y.

b) Content of Islamic Law

25. In the public debate following the LGZ Wien's decision, the question whether an arbitral award rendered in accordance with principles of Islamic law comports with fundamental notions of the Austrian legal system was prominently discussed. In reality, however, this was not the most significant issue of the proceedings. The appellant had expressly relied on allegations of substantive arbitrariness only and had not taken issue with the notion of Islamic law itself.

26. Nonetheless, the Court interspersed general considerations on the nature and content of "*Sharia law*" throughout the order on appeal. It was noticeably overwhelmed with this task from a methodological perspective. Not only did the Court define the terms "*Sharia*" and "*Ahlus-Sunnah wal-Jamaah*" by reference to Wikipedia and a personal Tumblr blog.[42] It also cited a report of the German Federal Parliament on the compatibility of Sharia law with German fundamental rights – verbatim, without quotation marks, and even without replacing references to "*Germany*" with "*Austria*". This handling of the available source material – crucial for a dependable decision – warrants criticism.

27. As pertains to case law, the Court discussed at length the judgment of the Europan Court of Human Rights in *Molla Sali v. Greece*.[43] In that ruling, the application of Islamic law to a succession case against the will of the deceased individual was found to violate the Convention. It is not clear, and remains unexplained, however, how the reasoning of that case transposes to a voluntary choice of Islamic law in arbitral proceedings. It rather seems that the LGZ Wien cited the judgment for its detailed comparative considerations. Only thereafter did the Court briefly refer to some Austrian case law applying the family or succession law of Muslim-majority jurisdictions.[44]

28. These sources appear entirely distinct form the case before the LGZ Wien. From the start, the Court failed to concretize a specific concern to assess from the vantage point of public policy. As no issue was ever properly stated, the Court was unable to engage concretely with the implications of specific provisions of Islamic law, and it never revealed which ones were relevant. Nor did it properly assess the concrete outcome of the application of Islamic law to the parties' dispute, as established private international law methodology would have required it to.[45]

III. Conclusion

29. From the perspective of Austrian private international law, an assessment of the LGZ Wien's decision produces ambivalent results. On the one hand, the Court's barebones analysis of Islamic law leaves much to be desired, regarding both analytical accuracy and the quality of authority consulted. The decision is a fitting example of the difficulties frequently faced by lower courts in identifying reliable sources on foreign law. On the other hand, the sober and open-ended perspective of the LGZ Wien must be commended. The Court did not give in to preconceived notions and was unimpressed by the appellant's unfounded allegations of arbitrariness. Nonetheless, the Court remained firm on public policy. It showed a willingness to vigorously oppose the imposition of religious views which are at odds with civil rights or other fundamental notions of the Austrian legal system, should it be presented with such cases.

[42] As citations have been omitted from the translation, this is not evident from the above excerpt of the decision.

[43] ECHR 19 December 2018, *Molla Sali v Greece*, Case No 20452/14.

[44] Namely OGH 28 February 2011, 9 Ob 34/10 (rejecting a violation of public policy through application of restrictive rules on post-divorce maintenance claims under Saudi law); 22 October 2010, 9 Ob 70/10z (rejecting a violation of public policy due to impossibility of adult adoption under Syrian family law for the Muslim population); 1 December 2022, 5 Ob 42/22w (rejecting a violation of public policy for proxy marriages, provided the parties have personally consented to the identity of their spouse); 26 September 2024, 8 Ob 88/24k (*mahr* is subject to the provisions on dowry of the Austrian Civil Code).

[45] See above fn 45.

30. It can be hoped that a similarly measured response from the legislator will follow. This should concern domestic arbitration, where the degree of autonomy currently afforded to parties in respect of subjective choice of law should be reconsidered. Arbitration should be primarily chosen for its characteristics as a dispute resolution process, not for achieving higher autonomy with regard to the choice of the applicable substantive rules.

31. At present, wider adjustments are under discussion. A complete ban of Islamic law seems out of the question. In particular, such a ban may entail devastating effects for existing family relationships even where no public policy concerns exist.[46] It would also run counter to international conventions, such as the Hague Maintenance Protocol, and European regulations, such as the Rome I–III Regulations and the Succession Regulation. For the Austrian Private International Law Act, the governing coalition has announced a planned shift from the principle of nationality – which still prevails in Austrian private international law – to the domicile principle.[47] This would be in line with developments in European and international law and, as such, well worth discussing.

32. However, the coalition program justifies this shift with its goal to avoid the application of Islamic law in Austria. This argument is misleading: unlike the sole arbitrator in the proceedings discussed here, state courts will never apply Islamic law directly, but only insofar as it forms part of a foreign national legal system.[48] In doing so, the Austrian court's function is not to assess the validity or religious significance of a certain rule; it is simply tasked with identifying the objective legal reality – private law as it is actually applied.[49] Principles of Islamic law can only be relevant insofar as they are actually applied in the foreign jurisdiction in question. The result of applying these principles is, naturally, subjected to Austria's public policy regime.

33. On the other hand, it must be underscored that the change of connecting factor would not exclude the application of national laws based on Islamic law. While the shift from the nationality criterion to the habitual residence criterion may reduce the application of such laws in some situations, it will increase it in others, for instance for Austrian nationals living in Muslim-majority countries.

[46] Florian Heindler, "Subject to the Principles of the Glorious Shari'a – Anmerkungen zu LGZ Wien 47 R 65/25v, 47 R 66/25s", *Zeitschrift für Familien- und Erbrecht*, 2026, p. 6.

[47] Austrian Federal Chancellery, *Regierungsprogramm 2025–2029*, Vienna, 2025, p. 125.

[48] Instructively BGH, 12 December 1979, IV ZB 65/79, *Neue Juristische Wochenschrift*, 1980, p. 412; this holds true under the prevailing view for Art 3 Rome I Regulation, see Gralf-Peter Calliess, "Art 3 Rome I Regulation", in Gralf-Peter Calliess and Moritz Renner (eds.), *Rome Regulations* (fn 28), mn. 33.

[49] Bea Verschraegen, "§ 3 IPRG", in Peter Rummel, Meinhard Lukas, and Andreas Geroldinger (eds.), *ABGB* (fn 27), mn. 5.