Austria: Developments in Arbitration – where we are and what is to come

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Austria and its capital Vienna, remain a focal point for international arbitration and the settlement of domestic as well as international commercial disputes. Complementing its reliable legal framework, is its equally strong and continuing record of engaging with legal systems and industry sectors prevalent in Western, Eastern and Central Europe, placing it at the forefront to service this market globally. In seeking to retain its prominence as a pivotal venue for international arbitration, Austria has implemented significant legislative changes and reversed long-standing judicial practices over the course of the last decade. With the onset of the new year and the aim to attend to future-oriented client concerns, it is thus worth highlighting these recent transitions in order to effectively consider the current state of the law and what may lie ahead in the months to come.

With the 2013 revision of the Austrian Code of Civil Procedure (CCP), Austria's Supreme Court has become the first and final instance in most arbitration-related matters and is thus among a minority of jurisdictions in which rulings on motions to set aside are not subject to further appeal upon the rendering of a final award. In line with this development, there have been a number of significant directional changes regarding the Supreme Court's jurisprudence that set the foundation for a richer arbitration landscape.

Procedural Challenges and Fair Treatment

The Court's most recent decision centring on the sufficiency of underlying reasoning in the arbitral award stems from 28.09.2016 (18 OCg 3/16i) and marks one such pivotal turning point in reversing long-standing practices of Austrian courts. While the setting aside of arbitral awards on the basis of insufficient reasoning or the absence thereof had previously not been considered a violation of the procedural ordre public, the Court now found that a departure from Section 611(2) para 5 ACCP could be an enforceable ground for breach. In particular, it held that:

The reasoning should neither be illogical or contrary to the decision, nor should it be limited to "meaningless phrases" (inhaltsleere Floskeln);

Although an award cannot be re-assessed as to its merits, this does not negate the necessity of providing a comprehensive account on what considerations inform the tribunal's decision;

Provided the tribunal makes reference to its own position during the course of the arbitration, an arbitral award is only then sufficiently reasoned if its position is also discussed in the subsequent award.

Arbitration Agreement and the Applicable Law

The case was brought before the Court once more on 07.09.2017 (18 ONc 1/17t). This time guiding principles were established on a wider field of issues:

On the matter of time limits in special challenge procedures agreed to by the parties, the Court distanced itself from the previous ambiguous terminology of "without delay" (unverzüglich) and pointed towards the more precise duration of 15 days as detailed in the Vienna Rules post 2013;

In reiterating its supervisory role in challenge proceedings, the Court drew on Section 589(3) CCP, holding that new facts could only be relied upon to supplement existing arguments that had been asserted previously;

With regard to fair treatment under Section 594(2) CCP, a distinction is to be drawn between "fair" and "equal"; contrary to the assumption that both terms can be used interchangeably, an objective difference in the length of deadlines does not imply an infringement on the right to fair treatment.

Conflict of Interest

Lastly, it is the question of arbitrator independence that stood at the forefront of the Supreme Court's recent decision of 15.05.2019 (18 ONc 1/19w). In this case, the arbitrator who had been jointly appointed by six respondents, disclosed that his law firm had been retained by a party to an unrelated arbitration. Additionally, it was revealed that this party had also engaged counsel for two of the respondents to the present arbitration. The issue thus centred on whether

an arbitrator acting in a dual capacity of party counsel in one arbitration and co-counsel in another would offend the principle of arbitrator independence and give rise to disqualification. The Court adopted a stringent standard reinforcing the notion that justice must not only be done, but must be seen to be done. It established that an integral part of these efforts is not only a display of competence but of trust in independent, unbiased state court judges and an impartial judicial system as a whole, holding that:

IBA Guidelines can serve as a useful aid in applying this high standard to arbitral challenge proceedings;

While peripheral engagements between arbitrator and counsel are an integral part of the financial and professional reality within the arbitral sphere, doubts are considered justified if a reasonable and informed third party concludes that there is a likelihood that the arbitrator's decision-making could be influenced by factors other than the facts presented by the parties;

The cooperation of several legal representatives appointed by one party extends beyond contacts of a peripheral nature as it signifies a closer liaison both in terms of time spent on and content of the subject matter being discussed;

Unlike the IBA Guidelines, which suggest that acting as current co-counsel or having done so during the course of the past three years could cast doubt on the impartiality of arbitrators, the Supreme Court took a more rigorous stance by singling out current co-counselling as a legitimate justification for removal;

Common legal representation is considered contemporaneous ("current co-counselling") and therefore cause of justifiable concern for purposes of arbitrator impartiality if joint legal representation is based on a mandate given after the arbitral tribunal was constituted and during an ongoing arbitration – this principle therefore also applies to arbitrator and counsel acting as co-counsel in an unrelated matter to the one in question.

Comment

The centralisation of the Austrian jurisdiction concerning arbitration-related matters is certainly to be welcomed. Its dual approach of providing rigorous guidance yet allowing for a contextual approach to leave room for considering the factual circumstances of the case before it has vastly served to improve the quality and overall efficiency of Austrian arbitrations. With regard to arbitration awards, the standards outlined by the Supreme Court both in relation to the process of drafting awards as well as concerning assessing success rates in setting aside proceedings serves arbitrators and counsellors alike. Similarly, its mitigation of strict legal rules in challenge proceedings creates a modern arbitration framework fit to meet the concerns, needs and demands of the arbitration community as well as contemporary legal practice as a whole. While the Court's approach on the issue of conflict of interest is significantly more stringent in nature (going beyond the boundaries of the IBA Guidelines), it would be false to expect an incremental rise in complaints. On the contrary, it is by virtue of the quality of the decisive underlying standards that undue delays can be circumvented.

In light of these recent developments, Austria has solidified its position as an arbitration-friendly jurisdiction defined by modern legislation and equipped with an efficient Supreme Court. For the year 2020, Austria is said to see a removal of one of its last remaining restrictions on arbitration (Baker McKenzie, The Year Ahead, 2020: p6(3)).i At present the power to conclude arbitration agreements on behalf of another party is subject to rigorous rules including the requirement of the power of attorney to be in writing. These standards are said to be eased by future legislation, the implications of which are to be seen. Suffice to say, directional change regarding the jurisprudence of the Austrian Supreme Court promises to be fruitful in continuing to strengthen the country's reputation as a highly qualitative and preferred place for arbitration.

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Endnotes

[i] Baker McKenzie. The Year Ahead. Developments in Global Litigation and Arbitration in 2020. [Online]. Available from: https://www.bakermckenzie.com/en/insight/publications/2020/01/year-ahead-litigation-arbitration.