
Austria: Challenging Arbitrators: An Update From The Austrian Supreme Court

Wednesday, March 3rd, 2021

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On 23 July 2020, the Austrian Supreme Court (*Oberste Gerichtshof*, OGH) rendered its decision in 18 ONc 1/20x,¹ in which it considered a (repeated) challenge of an arbitrator in a VIAC proceeding.

Facts

The Respondent in the arbitral proceeding had already unsuccessfully objected to the arbitrator's appointment on a prior occasion. Drawing on Article 20 of the Vienna Rules, the Respondent had expressed doubt over impartiality and independence in their first formal challenge in May 2019.

The VIAC Board, which has jurisdiction to rule on a challenge if the arbitrator does not resign, denied the request in June 2019. In early 2020, the arbitrator was named as a member of the VIAC Board. Citing additional, new concerns over impartiality and independence, the Respondent once again challenged the appointment of the arbitrator, yet was once more denied this request in March 2020 by the VIAC Board.

Section 589(3) of the Austrian Civil Code (*Zivilprozessordnung*, ZPO) sets a strict four-week time limit to seek recourse to the OGH concerning a party whose challenge of an arbitrator has been refused by the tribunal. The four-week period commences when a party - by whatever means - has obtained knowledge of the rejection. Once this period has lapsed, the party is precluded from seeking recourse.

The Respondent petitioned the OGH to allow their challenge and to have the arbitrator declared partial towards the Claimant. Since the initial challenge was denied in June 2019, the four-week time limit, set forth by section 589(3) ZPO, had long lapsed by the time the request was submitted to the Court.

The OGH Position

The OGH reiterated that if a challenge to an arbitrator is unsuccessful and the Court is not petitioned within the required period, an additional challenge is to be excluded and declared unjustified.

However, it further held that the re-evaluation of a reason for refusal that had already been recognized as unjustified requires that new circumstances are asserted, which fall within the same substantive framework and are, at least abstractly, suitable to bring about a different (overall) assessment. These new circumstances were considered to be present in the case at hand.

Comment

While the OGH eventually rejected the challenge against the appointed arbitrator, this case is notable due to the acknowledgment that recourse to the Court may be granted even after the period set forth in section 589(3) ZPO has passed, subject to the aforementioned emergence of new circumstances.

Footnote

1. OGH 23.7.2020, 18 ONc 1/20x

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

