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Vienna Perspective – 2011

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Commentary

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Introduction

The following article presents a commentary on recent arbitration-related decisions by the Austrian Supreme Court and is the second of an annual contribution[1] that provides readers with a "Vienna Perspective" on issues relevant for international arbitration.

This year we focus on a decision dealing with the setting aside of an arbitral award based on a violation of the right to be heard because a party's request for an oral hearing had been ignored. To provide a comparison in which circumstances such arguments have not been successful, we discuss in our overview section another decision that concerns the right to be heard and oral hearings. Other decisions in our overview section address arbitration-related interim measures, the validity of an arbitration clause in a distribution contract, the effects of an arbitration clause in a CMR bill of lading as well as the objective arbitrability of shareholder disputes under Austrian law.

Focus: Setting Aside Of An Award • Right To Be Heard • Hearing To Be Held If Requested

In its decision docket No. 7 Ob 111/10i[2] the Supreme Court had to deal with an application for setting aside of an award, based on an alleged violation of claimant's right to be heard because requests for an oral hearing had been ignored.

The Claimant in the arbitration and the setting-aside procedure was a construction company that had been commissioned by an Austrian association to carry out construction works. The Parties had concluded an arbitration agreement, in which they had agreed on a specific member of the association as the sole arbitrator for any disputes.

A dispute arose on open payments and the scope of the commissioned works so that, in February 2007, the Claimant filed a claim with the Sole Arbitrator. In the course of the proceedings, the Arbitrator prompted the Claimant repeatedly to comment on various aspects of the claim and to produce documents. The Claimant, in return, requested several times an oral hearing. Finally, the Arbitrator ordered the Claimant to provide evidence on specific issues and clarified that, if Claimant would not provide conclusive documents thereon within 14 days, a decision on these issues will be rendered. The Claimant complied with the Procedural Order and filed a submission in time, but, again, requested an oral hearing. Nevertheless, the Arbitrator ignored Claimant's request for an oral hearing and rendered, a couple of days later, an arbitral award dismissing Claimant's claims.

The Claimant challenged the award based on a violation of the right to be heard pursuant to sec. 611 (2) No. 2 of the Austrian Code of Civil Procedure.[3]

The court of first instance applied Austria's former arbitration law, the Code of Civil Procedure in force before 1 July 2006, with the argument that the arbitration agreement had been concluded before July 2006. As the former arbitration law did not contain a provision on the oral or written conduct of arbitration proceedings, the court deemed the right to be heard sufficiently granted by the fact that the Claimant had been given the opportunity to file written submissions.

Upon appeal by the Claimant, the court of appeal amended the ruling of the court of first instance in that the Arbitration Reform Act 2006, on correct application of its transitional provisions, would apply, as the arbitral proceedings had been initiated before 1 July 2006. Pursuant to sec. 598 of the Code of Civil Procedure, it is, if so requested by a party, mandatory for the arbitral tribunal to hold an oral hearing at an appropriate stage of the proceedings. However, according to the court of appeal, which based its findings on learned literature on the new arbitration law, the lack of an oral hearing, despite the adequate request of a party, is not considered as a violation of the right to be heard, if the party had the opportunity to express itself in written form.

Upon appeal, the Austrian Supreme Court, as a first step, confirmed that, pursuant to its transitional provisions, the Arbitration Reform Act 2006 is applicable to the case at hand.

The Supreme Court held that sec. 598 of the Code of Civil Procedure is mandatory and requires the arbitral tribunal to hold, if so requested by a party, an oral hearing at an appropriate stage of the proceedings, unless the Parties had generally agreed to exclude an oral hearing. Thus, the Supreme Court continued, in the case at hand sec. 598 of the Code of Civil Procedure had been violated. However, the remaining question was whether this violation would amount to a violation of the right to be heard and, therefore, justify a setting aside of the award. In its legal reasoning the Supreme Court, contrary to the opinion of the court of appeal, characterized sec. 598 of the Code of Civil Procedure as a provision containing pillar principles on written procedure and oral hearings that further substantiate the parties' right to be heard. In particular, to introduce in the new arbitration law the explicit order to hold an oral hearing upon request of a party would, in the view the Supreme Court, be useless if its violation were not qualified as a sufficient ground for setting aside the award because of a violation of the right to be heard. In line with firmly established case law, when interpreting a legal provision one shall not assume that the legislator was pursuing a useless and inoperable or, in practice, in-executable regulatory aim. The Supreme Court, therefore, decided to set aside the award.

Furthermore, the Supreme Court supported its conclusion by a reference to sec. 477 (1) No. 4 of the Code of Civil Procedure, pursuant to which a judgment of an ordinary court is null and void if a mandatory hearing was not held.

* * *

In the present decision, the Austrian Supreme Court deals for the first time after the coming into force of the Arbitration Reform Act 2006 with the question whether an arbitral tribunal has to hold an oral hearing if requested by a party and whether to ignore such a request could lead to a setting aside of the award.

Before the Arbitration Reform Act 2006, the Code of Civil Procedure did not contain any specific provision on oral hearings but simply provided in sec. 587 (1) 2nd sentence that the procedure is determined by the free discretion of the arbitral tribunal as long as the arbitration agreement or a subsequent written agreement between the parties do not provide anything to the contrary. Based on this provision, Austrian case law is very restrictive in setting aside arbitral awards on the ground of a violation of the right to be heard or of violations of due process. In particular, the Austrian Supreme Court held that it is not necessary to conduct oral hearings as long as the parties have the opportunity of presenting their case[4] and that, in the absence of an agreement between the parties, the arbitral tribunal shall determine whether to conduct oral hearings or decide on a documents only basis.[5] Furthermore, the Austrian Supreme Court held that an arbitral award is only challengeable if a party was generally denied the right to be heard[6] and that an arbitral tribunal disregarding a party's arguments,[7] not fully establishing the facts of the case[8] or ignoring applications for the taking of evidence[9] does not violate the right to be heard.

Correspondingly, Austrian learned literature has considered the right to be heard sufficiently respected if the parties had the possibility to submit their arguments in writing.[10] This view was even advocated

after sec. 598 of the Code of Civil Procedure had been introduced.[11] Thus, the decisions of the lower courts in the case at hand were in accordance with Austrian learned literature.

However, already under the former arbitration law the above principles were partly criticized as too narrow for adequately safeguarding the right to be heard.[12] Also, in the process of the arbitration reform the importance of oral hearings was emphasized.[13] In this context one must probably also consider that over the last decades the mobility of parties of international arbitration proceedings has drastically increased and technical means, such as video conferencing, opened up new possibilities for oral submissions without causing appreciable delays. Furthermore, the wording of sec. 598 of the Code of Civil Procedure does not only follow Art. 24 (1) of the UNCITRAL Model Law but is also similar to the corresponding provisions of several major international arbitration rules. For example, the ICC Rules provide that "[t]he arbitral tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing".[14] Worth mentioning in this context is also Art. 6 of the European Convention on Human Rights, which is argued to require, in the context of arbitral proceedings, an oral hearing even against the agreement of the parties, in certain cases.[15] The introduction of sec. 598 into the Code of Civil Procedure, therefore, reflects the practical and legal developments of the last decades.

Nevertheless, that a violation of sec. 598 of the Code of Civil Procedure has to lead necessarily to a setting aside of the award, is not as convincing as it may seem at first glance. Namely, the legislator in the Explanatory Notes to the Draft Bill of the Arbitration Reform Act 2006 pointed out that oral hearings are of less relevance in arbitral proceedings than in disputes before ordinary courts. For this reason, the reference of the Austrian Supreme Court to sec. 477 (1) No. 4 of the Code of Civil Procedure, which is a provision on proceedings before ordinary courts, appears misguided.[16]

Also, to invoke the principle of interpretation according to which the legislator would not enact a provision without practical consequence seems not entirely convincing, as the legislator could have just intended to provide the parties, under certain circumstances, with the right to merely have an oral hearing, without necessarily safeguarding violations thereof with a setting aside of the award.[17]

Moreover, had the Parties agreed on arbitration rules that require to hold a hearing upon request of a party – what the Parties apparently did not in the case at hand – one could question whether to ignore the request of Claimant would have indeed justified the setting aside of the award: The Austrian legislator deliberately refrained from implementing into Austrian law Art. 34 (2) (a) No. iv of the UNCITRAL Model Law, which, *inter alia*, provides for a setting aside if the arbitral procedure was not in accordance with the agreement of the Parties or the Model Law, and instead introduced sec. 611 (2) No. 5 into the Code of Civil Procedure, which provides for a setting aside in cases of procedural *ordre public* violations. This divergence was based on the argument that not all deviations from – possibly only implicit – party agreements should justify a challenge, in particular in light of the fact that arbitration rules have become more and more elaborate in recent years.[18]

In any case, both sec. 598 of the Code of Civil Procedure and the present decision support the conclusion that a tribunal may justifiably reject a request for a hearing if the request is belated or aimed at just delaying the proceedings.[19]

When assessing the implications of the decision at hand a more general question arises as well: Does the decision of the Supreme Court mark a general turn when applying the principles of due process and the right to be heard to challenges and enforcement of arbitral awards? In this context also the decision docket No. 3 Ob 122/10b of the Supreme Court (discussed *supra*) becomes relevant as it deals also with an alleged violation of the right to be heard. Although the Supreme Court did not refuse the enforcement of the corresponding award, it made clear reference to the above mentioned critical voices on the quite restrictive Austrian case law in this context, what could indicate that the Supreme Court will be more cautious in future cases involving due process and the right to be heard.[20] Yet, the restrictive approach of Austrian courts in setting aside arbitral awards or refusing their enforcement on the basis of due-process arguments is based on a well established line of case law. According to a recent analysis by the authors of this commentary, since 1990 approximately 60 decisions of the Austrian Supreme

Court dealt with applications for setting aside arbitral awards or with oppositions to their enforcement. In approximately a third of these cases arguments of due process and the right to be heard were raised and only in a single case – the very case at hand – were these arguments successful. Therefore, although the above decision seems to account for the growing importance of oral hearings in international arbitration, it should not be read as a door opener to a new trend. A main reason why parties agree on arbitration is that arbitral proceedings are considered to be faster than proceedings before ordinary courts. This, together with other characteristics of arbitration, leads to the fact that parties, when agreeing on arbitration, waive certain aspects of legal protection they might have benefited from before ordinary courts. Therefore, the Explanatory Notes to the Draft Bill of the Arbitration Reform Act 2006, as quoted above, and the legislator's refusal to implement Art. 34 (2) (a) No. iv of the Model Law together with the well established line of case law should restrict the meaning of the decision docket No. 7 Ob 111/10i to what it actually is: The setting aside of an award which was rendered by an arbitrator who, without proper justification and, therefore, in clear violation of a mandatory provision of Austrian arbitration law, persistently ignored timely raised requests for an oral hearing.

Overview

Enforcement Of Foreign Awards • Right To Be Heard • No Participation In Hearing

In enforcement proceedings relating to an arbitral award of the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry, the Respondent argued that, when none of the employees were available to represent Respondent during the sole hearing, the Arbitral Tribunal rejected his request to postpone the hearing. Moreover, when the Respondent sent his attorney to attend the hearing, the Arbitral Tribunal did not admit him because he was not able to show a sufficient power of attorney. The Respondent based its appeal on Art. V (1) (b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention"), in particular on the violation of the right to be heard.

The court of appeal rejected the argument that the right to be heard had been violated and emphasized that Austrian *ordre public* would not be violated by Ukrainian arbitration rules which do not provide for the preliminary admission of an attorney.

The Respondent appealed to the Supreme Court. Whereas the Supreme Court rejected the appeal on procedural grounds, it nevertheless made several statements as to the merits of the case:[21]

First, the Supreme Court mentioned that, even in the view of the Respondent, Art. V (1) (b) of the New York Convention requires only to give the Parties an opportunity to present their case. Yet, not to use the opportunity does not violate Art. V (1) (b) of the New York Convention.

Then, the Supreme Court turned to the question whether a party could challenge an arbitral award only when it was generally denied the right to be heard, but not when the facts of a case were not fully established, a line of case law partly criticized in the learned literature. Yet, the Supreme Court saw no need for a closer review of this question in the case at hand, because the Respondent had received the Statement of Claim, had been given the opportunity to nominate an arbitrator, had been informed of the date of the oral hearing and also about the rejection of its request to postpone the hearing and, finally, had sent a lawyer to the oral hearing who could not provide a sufficient power of attorney. Furthermore, the minutes of the arbitral oral hearing showed that the arguments of the Respondent had been assessed. Rather, the tribunal had decided in favor of the Claimant apparently because the Respondent had not offered sufficient evidence, even not in its written submissions. In addition, in its appeals the Respondent had not submitted any valid reason why none of its employees were able to participate at the hearing and why its attorney was not provided with a sufficient power of attorney. The Supreme Court, therefore, concluded that the Respondent could not prove a violation of the right to be heard.

A commentator of this decision points out that the clear reference of the Supreme Court to academic voices criticizing the established line of case law on the violations of the right to be heard could be understood in such a way that the Supreme Court, in a clearer cut case, might reassess the current case law.[22] One could indeed argue that, to set aside arbitral awards or

refuse their enforcement exclusively in cases in which a party had no opportunity at all to present its case, would be in conflict with the guarantees under Art. 6 of the European Convention on Human Rights. However, such a conclusion is not necessarily justified because the Supreme Court is used to find clearer words should it consider to deviate from established case law. Furthermore, as already mentioned in the above comments on the Supreme Court's decision docket No. 7 Ob 111/10i, there are several arguments that should prevent the Supreme Court to change its overall stance to due process and the right to be heard.

In any case, the decision provides clear guidance for situations in which a party refuses to participate in the arbitration proceedings. As the Supreme Court emphasized, it is only necessary that the parties be given the opportunity to present their case and if parties do not do so, even a default award can be rendered. An enforcement of such awards would not violate Art. IV (1) (b) of the New York Convention. This again underlines the strict view taken by the Austrian Supreme Court in allowing only a narrow interpretation of the right to be heard and of due process.

Validity Of Arbitration Clause In Distribution Contract • Interim Measures

An Austrian company, the Claimant, concluded with a U.S. company, the Respondent, a distribution contract, which entitled the Claimant to exclusively distribute Respondent's medical coils in Austria. In the contract, the Parties agreed to settle any disputes through arbitration. Several years later the Respondent terminated the distribution contract.

The Claimant was of the opinion that the termination was without reason and, therefore, invalid and filed a claim for damages and for indemnity under sec. 24 of the Austrian Commercial Agents Act (*Handelsvertretergesetz – HVertrG*) with an Austrian State court. As regards the jurisdiction of the court, the Claimant argued that the arbitration clause had become inoperable due to lapse of time (with the argument that the distribution contract ended before).

The Claimant applied also for an interim injunction to secure the amounts claimed by requesting to freeze the goods of Respondent warehoused in Austria or, in the alternative, to order the customer of Respondent to keep the purchase price for the goods in custody or to order the deposit of a security.

The Respondent argued that, according to the arbitration clause, an arbitral tribunal in California would have exclusive jurisdiction and that the distribution contract had been prolonged by implicit agreement so that the arbitration clause was still valid. In fact, proceedings were already pending before the Californian tribunal and Claimant had already asserted the corresponding damages and indemnity by way of a set-off defense, without, however, pursuing in these proceedings its defense any further. Respondent also argued that the Austrian Commercial Agents Act would not apply to the dispute, not even by analogy, as Austrian law would not apply. Lastly, an interim injunction should be rejected because the Claimant did not assert nor prove an imminent danger.

The Court of First Instance rejected the claim on jurisdictional grounds arguing that the distribution contract had been impliedly renewed and that, therefore, the arbitration clause was still valid. However, the Court of First Instance granted an interim injunction and ordered the customer of Respondent to keep in custody the purchase price for goods purchased from Respondent.

The Court of Appeal confirmed the rejection of the claim but annulled the interim injunction issued by the Court of First Instance.

The Claimant appealed to the Austrian Supreme Court. However, the Supreme Court rejected the appeal on procedural grounds.[23] In its decision the Supreme Court, nevertheless, gave some useful guidance on the merits of the case:

Firstly, the Supreme Court qualified the Claimant as a distributor not coming within the ambit of the Austrian Commercial Agents Act, not even by analogy. According to pertinent Austrian case law, only distributors who are integrated, like a commercial agent, into the principal's sales organization and who are contractually obliged to make available their customer data to the principal, are per analogy protected under the Austrian Commercial Agents Act. The Claimant, in the case at hand, was a mere reseller who did not fulfill these requirements. For the same reason, the ECJ's famous Ingmar decision would not apply. By way of

background, in this decision the ECJ gave overriding effect to the internationally mandatory provisions on indemnity for commercial agents, as laid down in the Commercial Agents Directive[24] (which was implemented into Austrian law by sec. 24 of the Austrian Commercial Agents Act), and, thus, declared inoperable a choice of non-European law, which does not provide for equivalent protection of commercial agents providing services within the European Union.

In this context it is particularly interesting to note the Supreme Court's reference to a recent decision of the German Upper Regional Court of Munich on jurisdiction clauses in agency contracts.[25] In this decision the German court extended the Ingmar approach for governing law clauses to jurisdiction clauses by declaring an arbitration clause null and void, which had designated an arbitral tribunal in the United States to decide upon disputes arising from an agency contract. According to the German court, substantive law would require "procedural support" in case a jurisdiction clause or an arbitration clause might result in German internationally mandatory law not being applied by a non-European forum. Although the Austrian Supreme Court did not explicitly state, had the Claimant been a commercial agent, that it would have applied the approach of the German court, the clear reference to the decision of the Upper Regional Court of Munich strongly indicates the likelihood of the Supreme Court to do so.

Secondly, the Claimant had based its application for interim measures on sec. 379 (2) No. 2 of the Austrian Enforcement Act [*Exekutionsordnung – EO*], pursuant to which interim measures may be issued when a judgment would have to be enforced in a state which is not party to the European mutual enforcement regime.[26] According to pertinent case law, the Supreme Court emphasized, this statutory provision has been designed to protect the enforcement of decisions rendered in Austria and by no means the enforcement of foreign decisions.[27] However, as the Supreme Court had refused jurisdiction in the case at hand, no decision on the merits could be rendered in Austria so that also interim measures had to be denied.

Arbitration Clause In CMR Bill Of Lading • Alternative Jurisdiction for State Courts?

Goods had to be transported by road from Barcelona to Salzburg. The transport fell within the scope of the Convention on the Contract for the International Carriage of Goods by Road (CMR). In the Bill of Lading, the following arbitration clause had been inserted: "The contractual parties determine that in case of disputes regarding the interpretation and fulfillment of the contract for carriage, to which this bill of lading refers, these must be decided by the Junta Arbitral del Transporte de Mercanias de Madrid, which has to apply the CMR-Convention. . . ."

The goods were damaged during the transport. The insurance company paid the amount insured to the consignor, was thereby subrogated into the damage claim and wanted to enforce it, as the Claimant, before the Regional Court of Salzburg against the Spanish Carrier.

The Claimant based the jurisdiction of the Salzburg state court on the argument that the places of jurisdiction listed in Art. 31 (1) (a) (b) CMR, among them Salzburg as the place of delivery, are mandatory pursuant to Art. 41 CMR, and that the arbitration clause which would exclude such venue was therefore null and void. The Respondent shared the view that the arbitration clause would exclude, in general, the jurisdiction of any state court but contended that such exclusion was valid under the CMR, in particular in light of Art. 33 CMR, which allows parties to include an arbitration clause in CMR transport matters.

After the court of first instance had followed the view of Respondent and, thus, rejected the claim, and the court of appeal, contrarily, had held that the state court had jurisdiction, the Austrian Supreme Court in its decision docket No 7 Ob 216/09d[28] concluded the following:

As a first step, it must be examined in CMR matters whether the arbitration clause provides that the tribunal shall apply the CMR Convention (Art. 33 CMR), a requirement applied by Austrian case law in a literal and, thus, strict way in order to warrant in transportation matters a consistent application of the CMR by arbitral tribunals.[29]

As this requirement was given in the case at hand, the Supreme Court turned to the interpretation of Art. 31 (1) CMR, which provides that: ". . . the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory . . . the place where the goods

were taken over by the carrier or the place designated for the delivery is situated".

Here one must add that, in contrast to the authentic English and French versions, the German translation, as incorporated into Austrian law, does not refer to "courts or tribunals" but only to "courts" and, in particular, is less clear on whether the places of jurisdiction listed in Art. 31(1) CMR are mandatory in the sense that an agreement excluding them would be void. Anyhow, the Supreme Court shared the latter interpretation of Art. 31(1) CMR.

In relation to the case at hand, the Supreme Court found that the arbitration clause provided only for the jurisdiction of a specific arbitral tribunal (seated in Madrid) but was not intended to exclude the jurisdiction, in general, of ordinary (state) courts so that Claimant could bring the matter before the Salzburg Regional Court. As a consequence, the interesting question whether Art. 31 (1) CMR (which mandates the jurisdiction of "courts" competent for the places defined therein) would disallow and thus render void an arbitration agreement excluding the jurisdiction of these courts remained unanswered.

The decision was criticized with the counter-argument that an arbitration clause, even without explicit statement, is always intended to exclude the jurisdiction of state courts.[30] Then, the above question would have to be decided by either treating Art. 33 CMR as *lex specialis* in relation to Art. 31 (1) CMR and validly giving the arbitration tribunal exclusive jurisdiction, or by looking on Art. 31 (1) as the prevailing statutory provision and thus declaring void an arbitration clause which would not (explicitly) allow a claimant to refer a matter also to one of the state courts designed in Art. 31 (1) CMR. Since arbitration clauses regularly, explicitly or impliedly, exclude (or, under some jurisdictions, even have to exclude) the jurisdiction of state courts, the authors of this commentary believe that the first answer (Art. 33 CMR being *lex specialis* in relation to Art. 31 (1) CMR) is the right one and that, therefore, the Austrian Supreme Court should have denied the jurisdiction of the Salzburg Regional Court.

Arbitration Clause In Shareholder Agreement • Objective Arbitrability

Shareholders of an Austrian private limited company (*Gesellschaft mit beschränkter Haftung – GmbH*) had entered into a shareholder agreement (*Syndikatsvertrag*) containing an arbitration clause. A party of the shareholder agreement (as a matter of fact, simultaneously a shareholder of the *GmbH*) sought, before an arbitral tribunal seated in Austria, declaratory relief against another party/shareholder reproaching the latter of having committed a material breach of the shareholder agreement. After the award had been handed down, the Respondent filed an application for the setting aside of the award with the competent Austrian State court, in essence with the argument that no objective arbitrability was given for that kind of company-law matters.

The Austrian Supreme Court, as the last instance, rejected the motion with the following arguments:[31]

A shareholder agreement, by its very nature, establishes among its parties a contractual relationship qualifying, under Austrian substantive law, as a civil-law partnership and, thus, shall not be confused with the relationship among shareholders created by the articles of association of the corporation. Although a shareholder agreement might be a useful supplement of the articles of association of a corporation, it does not have a direct legal impact on the organization and structure of the corporation.

Therefore, the appealing party's arguments, which related to disputes arising between the shareholders or between the corporation and its shareholders and, in particular, to the annulment of shareholder resolutions, where deemed not relevant. The dispute between the parties of the shareholder agreement would not imply or necessitate an extended legal effect (*gesetzliche Rechtskrafterstreckung*) on other shareholders of the *GmbH*.

Even so, the Austrian Supreme Court briefly touched on the issues which would be at stake should a dispute necessitating such extended legal effect be brought before an arbitral tribunal. In the view of the authors of this commentary, such requirements are those the German Supreme Court has laid down in a recent decision[32] and which have been reflected meanwhile in the German DIS-Supplementary Rules for Corporate Law Disputes 09 (SRCoLD): To assure the arbitrability of this kind of "corporate disputes", a single decision binding all shareholders and the corporation must be produced by including these "concerned other

parties" into the arbitral proceedings, in particular by way of delivering to them the statement of claim and inviting them to join the proceedings, continuously informing them of the development of the proceedings, giving them the opportunity to participate in the nomination of the arbitrator(s), providing for the combination of potential parallel proceedings and, finally, explicitly agreeing on the extension of effects of the arbitral award to all "concerned parties".

Yet in the case at hand all that was not relevant because a shareholder agreement, due to its contractual nature, has legal effects only between the individual parties. The Austrian Supreme Court concluded that this was an issue of substantive law and the arbitral tribunal had accurately resolved it so that no basis was given for setting aside the award. In another case, the Austrian Supreme Court, again, was confronted with an appeal against an award relating to the breach of a shareholder agreement, and arrived at the same conclusion.[33]

Endnotes

1. *See* Christian Dorda & Veit Öhlberger, *Vienna Perspective – 2010*, 25 Mealey's International Arbitration Report 43 (2010).

2. Oberster Gerichtshof [OGH] [Supreme Court] June 30, 2010, docket No. 7 Ob 111/10i *in* 132 JBl 724 (2010); an English translation of the decision is annexed. *See also* Christoph Stippl, Case Comment, *Schiedsspruchaufhebung mangels Durchführung einer mündlichen Verhandlung*, 2010 ecolex 1159; Martin Platte, Case Comment, *Schiedsspruch mangels mündlicher Verhandlung aufgehoben*, 2010 ÖJZ 1017; Alfred Siwy, Case Comment, *Supreme Court strengthens the right to be heard*, http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=39c9a582-deba-4027-87f4-a321de957097.

3. The Claimant also challenged the award based on a violation of procedural *ordre public* pursuant to sec. 611 (2) n°5 of the Code of Civil Procedure arguing that the sole arbitrator was biased. However, this argument was not successful and therefore is not further analysed.

4. Oberster Gerichtshof [OGH] [Supreme Court] Feb. 26, 1901 *in* GlUNF 1304.

5. Oberster Gerichtshof [OGH] [Supreme Court] Jun. 9, 1937, docket No. 3 Ob 402/37 *in* 1937 EvBl 722.

6. Oberster Gerichtshof [OGH] [Supreme Court] Jan. 13, 1955, docket No. 2 Ob 422/54 *in* 1955 JBl 503; Oberster Gerichtshof [OGH] [Supreme Court] Sept. 6, 1990, docket No. 6 Ob 572/90 *in* 1991 RdW 327.

7. Oberster Gerichtshof [OGH] [Supreme Court] Jul. 24, 1997, docket No. 6 Ob 186/97i *in* 70 SZ No. 156.

8. Oberster Gerichtshof [OGH] [Supreme Court] Jan. 13, 1955, docket No. 2 Ob 422/54 *in* 1955 JBl 503; Oberster Gerichtshof [OGH] [Supreme Court] Sept. 6, 1990, docket No. 6 Ob 572/90 *in* 1991 RdW 327; Oberster Gerichtshof [OGH] [Supreme Court] Nov. 27, 1991, docket No. 3 Ob 1091/91; Oberster Gerichtshof [OGH] [Supreme Court] May. 5, 1998, docket No. 3 Ob 2372/96m; Oberster Gerichtshof [OGH] [Supreme Court] Sept. 1, 1999, docket No. 9 Ob 120/99h *in* 2000 EvBl No. 44.

9. Oberster Gerichtshof [OGH] [Supreme Court] Jan. 13, 1955, docket No. 2 Ob 422/54 *in* 1955 JBl 503.

10. Hans W. Fasching, Schiedsgericht und Schiedsverfahren im östereichischen und im internationalen Recht 105 (1973); Gerold Zeiler, Schiedsverfahren § 594 mn. 23; Christian Hausmanninger in Kommentar zu den Zivilprozessgesetzen § 598 mn. 34 (Hans W. Fasching und Andreas Konecny eds., 2nd ed. 2007).

11. Gerold Zeiler, Schiedsverfahren § 594 mn. 23; Christian Hausmanninger in Kommentar zu den Zivilprozessgesetzen § 598 mn. 34 (Hans W. Fasching und Andreas Konecny eds., 2nd ed. 2007).

12. Andreas Reiner, *Schiedsverfahren und rechtliches Gehör* 2003 ZfRV 52, 59-60.

13. Paul Oberhammer, Entwurf eines neuen Schiedsverfahrensrechts 101 (2002).

14. Art. 20 (6) of the ICC-Rules; *see, e.g., also* Art 20 (3) of the Vienna Rules ("The proceedings may be oral or only in writing. Oral hearings shall take place at the request of one party or if the sole arbitrator (arbitral tribunal) to whom (which) the case has been referred considers it necessary.") and Art 17 (3) of the UNCITRAL Rules ("If an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument.").

15. Andreas Reiner, The New Austrian Arbitration Law, mn. 124 (2006); Christoph Stippl, Case Comment, *Schiedsspruchaufhebung mangels Durchführung einer mündlichen Verhandlung*, 2010 ecolex 1159, 1161.

16. *See also* Alfred Siwy, Case Comment, Supreme Court strengthens the right to be heard, http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=39c9a582-deba-4027-87f4-a321de957097.

17. Alfred Siwy, Case Comment, Supreme Court strengthens the right to be heard, http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=39c9a582-deba-4027-87f4-a321de957097.

18. Paul Oberhammer, Entwurf eines neuen Schiedsverfahrensrechts 133 (2002).

19. Christoph Stippl, Case Comment, *Schiedsspruchaufhebung mangels Durchführung einer mündlichen Verhandlung*, 2010 ecolex 1159, 1160; *see also* Alexander Petsche in Arbitration Law of Austria: Practice and Procedure, sec. 598 mn. 6 (Stefan Riegler et al. eds, 2007).

20. *See* Christian Klausegger, *Rechtliches Gehör im Schiedsverfahren OGH 3 Ob 122/10b – Kündigt ein belanglos wirkender Zurückweisungsbeschluss eine Judikaturwende an?* 2011 ecolex 37.

21. Oberster Gerichtshof [OGH] [Supreme Court] Sept. 1, 2010, docket No. 3 Ob 122/10b; *see also* Christian Klausegger, *Rechtliches Gehör im Schiedsverfahren OGH 3 Ob 122/10b – Kündigt ein belanglos wirkender Zurückweisungsbeschluss eine Judikaturwende an?* 2011 ecolex 37.

22. *See* Christian Klausegger, *Rechtliches Gehör im Schiedsverfahren OGH 3 Ob 122/10b – Kündigt ein belanglos wirkender Zurückweisungsbeschluss eine Judikaturwende an?* 2011 ecolex 37, 38.

23. Oberster Gerichtshof [OGH] [Supreme Court] Jan. 27, 2011, docket No. 7 Ob 255/09i (7 Ob 256/09m). *See also* Alfred Siwy, Case Comment, Court decides on interim measures to ensure enforceability of foreign awards, http://www.internationallawoffice.com/Newsletters/detail.aspx?g=bcc12023-49c4-4634-8116-c43b19cc1a59; Markus Schifferl, *Decisions of the Austrian Supreme Court in 2009 and 2010*, in Austrian Yearbook on International Arbitration 2011, 257, 262.

24. Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents.

25. Oberlandesgericht München [OLG München] [Upper Regional Court of Munich] May 17, 2006, docket No. 7 U 1781/06 (Germany) *in* 2007 IPRax 322; *see also* Giesela Rühl, *Die Wirksamkeit von Gerichtsstands- und Schiedsvereinbarungen im Lichte der Ingmar-Entscheidung des EuGH*, 2007 IPRax 294.

26. I.e., the European Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels Convention) and the Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

27. Some commentators question the applicability of this reasoning to the case at hand: Alfred Siwy, Case Comment, Court decides on interim measures to ensure enforceability of foreign awards, http://www.internationallawoffice.com/Newsletters/detail.aspx?g=bcc12023-49c4-4634-8116-c43b19cc1a59 (arguing that the previous case law addresses only cases in which a judgment or award rendered by the foreign court or tribunal was to be enforced in that same country but that it has not been decided before whether it is possible to issue interim measures if the judgment is to be enforced outside the country in which these measures are issued); Markus Schifferl, *Decisions of the Austrian Supreme Court in 2009 and 2010*, in Austrian Yearbook on International Arbitration 2011, 257, 265-266 (emphasizing that the European mutual enforcement regime referred to in

sec. 379 (2) No. 2 of the Austrian Enforcement Act does not apply to arbitration and that, therefore, there would have been a good argument to allow the granting of interim measures in all cases where an arbitration award would have to be enforced outside Austria).

28. Oberster Gerichtshof [OGH] [Supreme Court] May. 5, 2010, docket No. 7 Ob 216/09d; *see also* Heidrun Halbartschlager, Case Comment, *Wirkung von Schiedsklauseln im Anwendungsbereich der CMR: fakultative oder ausschließliche Zuständigkeit?* 2010 ecolex 872; Markus Schifferl, *Decisions of the Austrian Supreme Court in 2009 and 2010*, in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2011, 257, 269.

29. *See, e.g.*, Oberster Gerichtshof [OGH] [Supreme Court] Mar. 20, 2007, docket No. 10 Ob 20/07z in 2007 SZ No. 42.

30. Heidrun Halbartschlager, Case Comment, *Wirkung von Schiedsklauseln im Anwendungsbereich der CMR: fakultative oder ausschließliche Zuständigkeit?* 2010 ecolex 872, 873; Markus Schifferl, *Decisions of the Austrian Supreme Court in 2009 and 2010*, in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2011, 257, 272.

31. Oberster Gerichtshof [OGH] [Supreme Court] Oct. 22, 2010, docket No. 7 Ob 103/10p *in* 2011 ecolex 135.

32. Bundesgerichtshof [BGH] [(German) Supreme Court] Apr. 6, 2009, docket No. II ZR 255/08.

33. Oberster Gerichtshof [OGH] [Supreme Court] Nov. 16, 2010, docket No. 5 Ob 95/10x.

[docket No.:] **7 Ob 111/10i**

Republic of Austria
Supreme Court

[decision of 30 June 2010]

The Supreme Court has, as appellate court, by the president of this Chamber of the Supreme Court Dr. Huber as presiding judge and by the judges of the Supreme Court Dr. Schaumüller, Dr. Hoch, Dr. Kalivoda and Dr. Roch as further judges in the legal matter between the Claimant m***** gmbh, *****, represented by Karasek Wietrzyk Rechtsanwälte GmbH from Vienna, against the Respondent A*****, represented by Dr. Werner Masser and other attorneys at law in Vienna, regarding the setting aside of arbitral awards, following the appeal for review on legal grounds of the Claimant against the decision of the Higher Regional Court of Linz as court of appeal, dating 12 March 2010, GZ 6 R 198/09v-26, which partially confirmed and partially amended the decision of the Regional Court of Wels, dating 6 October 2009, GZ 6 Cg 44/09s-19, decided rightly in closed session:

Holding

The appeal for review on legal grounds is granted.

The contested decision is amended so that it has to read including its undisputed parts:

"1. The Claimant's main claim to set aside the arbitral award dated 11 September 2007 is rejected.

2. is declared that the "arbitral award" dated 11 September 2007 is not an arbitral award.

3. Furthermore, it is declared that the decision on costs contained in the arbitral award dated 19 September 2007 is invalid.

4. Moreover, the arbitral award dated 19 September 2007 is set aside.

5. The Respondent is due to reimburse the Claimant for the procedural costs in the amount of 6,119.20 EUR (including 887.50 EUR of value added tax and 749 EUR of cash expenditure). The Respondent is due to reimburse the Claimant for the costs of the appeal proceedings in the amount of 5,595.88 EUR (including 627.48 EUR of value added tax and 1,851 EUR of cash expenditure).

Facts and Procedural History:

The Claimant, who is running a construction company, constructed a garage for an Austrian association, the Respondent. Its claim against the Respondent at the Regional Court Linz (docket No. 15 Cg 63/06t) regarding the payment for its construction work in the amount of 50,277.34 EUR was rejected because the parties to the dispute had concluded an arbitration agreement on 6/8 December 2003 in order to avoid the costs of a court litigation, by which DI J***** E***** had been appointed as arbitrator (docket No. 6 Ob 194/08k). At the time of the conclusion of the arbitration agreement, the Claimant was aware of the fact that DI E***** (in the following "arbitrator") was a member of the Respondent association.

The Arbitrator rendered a decision in written form on 11 September and on 19 September 2007 which were both named "arbitral awards". The Claimant applied in the present proceedings (after adjustment of the claim) for the setting aside of these awards, alternatively for a declaration of their non-existence as well as the invalidity of the decision on costs contained in the arbitral award of 19 September 2007.

Due to the decision of the court of appeal which has amended the decision of the Court of First Instance in this point, it is ascertained that the decision of 11 September 2007 is not an arbitral award. Subject of the proceedings on appeal on questions of law is only the arbitral award of 19 September 2007, by which firstly, the costs invoiced by the Claimant to the Respondent for injections of concrete at the north side of the building site were rejected as not validly existing for lack of a respective mandate by Respondent and secondly, Claimant's claim for interest for delayed payment in the amount of 12 % was rejected as well as thirdly, the costs of the arbitral proceedings were ascertained at 6,480 EUR and the Claimant was ordered to bear the costs in their entirety.

The Claimant, as far as this is still relevant in the proceedings on appeal on questions of law, based its application for setting aside the arbitral award on the grounds that its right to be heard in the arbitral proceedings had been infringed as its request for an oral hearing had been declined (sec. 611 (2) No. 2 of the Code of Civil Procedure [*Zivilprozessordnung – ZPO*]). The Arbitrator had violated the principle of fair treatment of the parties by treating the Respondent preferentially in an arbitrary manner. The arbitral proceedings were conducted by him in a way so as to violate Austrian public policy (*ordre public*) (sec 611 (2) No. 5 of the Code of Civil Procedure).

The Court of First Instance only confirmed the alternative application of declaring invalid the decision on costs contained in the arbitral award of 19 September 2007. The main application as well as the other alternative application concerning this arbitral award was rejected by the Court of First Instance. The further facts as established by the Court of First Instance can be summarized as follows:

On 27 February 2007, the Claimant filed with the arbitrator a Request for Arbitration claiming the amount of 50,277.34 EUR. The Arbitrator prompted the Claimant repeatedly to comment on various parts of the claim and to produce documents. The Claimant requested several times for an oral hearing to be arranged. It repeatedly urged the submission of the Answer to the Request by the Respondent, which was eventually sent to Claimant. The Respondent's deadline for the submission of the Answer to the Request was extended by the Arbitrator several times. By letter of 31 August 2007, the Arbitrator ordered the Claimant to provide evidence that the Respondent was obliged to bear the costs of the injections of concrete at the north border of the real estate. In case Claimant would not provide conclusive documents within 14 days concerning two matters to be evidenced, an interim decision on these issues would be rendered. By written submission of 6 September 2007, the representative of Claimant filed its submissions on these instructions. In conclusion, it once again requested that an oral hearing should be arranged. The Arbitrator then rendered the above mentioned "arbitral awards" without following the request for an oral hearing.

Moreover, the Court of First Instance ascertained in summary that the construction project in dispute concerned a building in Linz, which had been purchased by the Arbitrator together with Dr. H***** H***** and a third person in order to turn it into a dormitory for socially challenged students. The arbitrator became acquainted with Dr. H***** H***** in the years 1962/1963; they then established a friendship due to their joint participation in the association. The mentioned purchasers passed on their proprietary right in the real estate to the Respondent association. After several strokes, the Arbitrator passed away in December 2008.

In its legal reasoning, the Court of First Instance emphasized that the legal framework before the Arbitration Reform Act 2006 [*Schiedsrechtsänderungsgesetz 2006 - SchiedsRÄG 2006*] was applicable in the present case, because the arbitration agreement had been concluded before 1 July 2006. Interim decisions could not be challenged at ordinary courts. Only a decision on the merits, by which at least one part of the request is decided in a final manner, could be set aside. Points 1 and 2 of the arbitral award dated 19 September 2007 were decisions rejecting a claim. Therefore, this arbitral award can in principle be challenged. The grounds for challenge mentioned by the Claimant were, however, not given. As the Claimant was aware of DI E*****'s membership in the Respondent association already at the time of his appointment as arbitrator, Claimant therefore is barred from invoking this as a reason for challenge. A one-sided preferential treatment of the Respondent was not seen in the course of the arbitral proceedings. The fact that the arbitral award was rendered without preceding oral hearing would not lead to the setting aside of the award for lack of a provision on this issue before the amendment of the arbitration law in 2006. The Claimant's right to be heard had been granted by the fact that the Claimant had the opportunity to render a written statement. The decision on costs

contained in the arbitral award was, however, invalid, as such a decision is only to be rendered after the end of the arbitral proceedings.

The Court of Appeal, upon appeal by the Claimant, confirmed the decision of the Court of First Instance concerning the arbitral award of 19 September 2007. Contrary to the opinion of the Court of First Instance, it came to the conclusion that the provisions of the Arbitration Reform Act 2006 were applicable to all arbitral proceedings initiated before 1 July 2006, which was the case in the present matter. Pursuant to sec. 598 of the Code of Civil Procedure, it is, upon request of a party, mandatory for the arbitral tribunal to hold an oral hearing at an appropriate stage of the proceedings. This appropriate stage of the proceedings has to take place before the arbitral award is rendered and also before an arbitral award is rendered, by which [only] a partial decision is made. The arbitrator did not follow the Claimant's request to hold an oral hearing before rendering the arbitral award dated 19 September 2007. Learned literature on the new arbitration law takes the position that the lack of an oral hearing despite an adequate request of a party is not considered as a violation of the right to be heard (and, therefore, no reason to set aside an arbitral award pursuant to sec. 611 (2) No. 2 of the Code of Civil Procedure), if the party has had the opportunity to express itself in written form. As the claimant did not allege that it was not given such opportunity, a reason to set aside the arbitral award pursuant to sec. 611 (2) No. 2 of the Code of Civil Procedure is not given. As reasons for the bias of the arbitrator, the Claimant only stated the fact that the arbitrator had been member of the Respondent association. As the Claimant had already been aware of that fact at the time of the conclusion of the arbitration agreement, it could not rely on this reason for a bias later on. It is indeed correct that the circumstances established by the Court of First Instance concerning the purchase of the building by the arbitrator etc would result in a bias of the arbitrator. The Claimant also correctly pointed out that the arbitrator would have been obliged, pursuant to sec. 588 of the Code of Civil Procedure, to inform the Claimant about these circumstances. However, both were not pleaded as a reason to set aside the arbitral award. The respective facts established by the Court of First Instance been seen as excessively established facts could, therefore, not be taken as a basis of the legal assessment. As the bias of the arbitrator and the violation of the duty of disclosure pursuant to sec. 588 of the Code of Civil Procedure would constitute the ground for setting aside an arbitral award pursuant to sec. 611 (2) No. 4 of the Code of Civil Procedure only, these circumstances could not have been taken into account *ex officio*.

The court of appeal decided that the ordinary appeal for review on legal grounds was admissible, because of the lack of case law of the Supreme Court concerning arbitration proceedings after the coming into force of the Arbitration Reform Act 2006. In particular, the Supreme Court has never dealt with a violation of the duty to hold an oral hearing before.

Claimant's appeal for review on legal grounds is directed against the decision of the Court of Second Instance to the extent it dismisses the application for setting aside the arbitral award dated 19 September 2007. The Claimant bases its appeal for review on legal grounds, on incorrect legal assessment and requests the amendment of the disputed decision so that the application for setting aside the arbitral award dated 19 September 2007 will be sustained. Alternatively, a request to set [the decision of the Court of Appeal] aside is made.

In its reply, the Respondent requests a dismissal of the appeal for review on legal grounds of the Claimant on procedural grounds or to reject it for substantive reasons.

Legal Reasoning

The appeal for review on legal grounds is admissible due to the reasons mentioned by the Court of Appeal; the appeal is also justified.

The Claimant still argues that, as the arbitrator did not comply with its request to hold an oral hearing pursuant to sec. 598 of the Code of Civil Procedure, the ground for setting aside pursuant to sec. 611 (2) No. 2 of the Code of Civil Procedure is fulfilled.

The deciding chamber has considered the following:

The arbitral proceedings were initiated on 27 February 2007. Therefore, it is not contested, as the Court of Appeal has correctly pointed out, that pursuant to Art. VII (2) of the Arbitration Reform Act 2006 (Federal Law Gazette I 2006/7), which came into force on 1 July 2006, the provisions of this law are applicable in the present case.

According to the former legal framework, the arbitral tribunal could reject a party's request to hold an oral hearing within its discretion pursuant to sec 587 (1) 2nd sentence of the Code of Civil Procedure (former version). Meanwhile, sec 598 of the Code of Civil Procedure stipulates as a mandatory provision ("shall") that, unless the parties have agreed that oral hearings should not take place, hearings have to be held at an appropriate stage of the proceedings, if so requested by a party. This wording follows Art 24 (1) of the UNCITRAL Model Law on International Commercial Arbitration; a similar provision can also be found in sec. 1047 (1) of the German Code on Civil Procedure. By this provision, the party's right to be heard, stipulated in sec. 594 (2) 2nd sentence of the Code of Civil Procedure, is substantiated (Christian Hausmaninger in KOMMENTAR ZU DEN ZIVILPROZESSGESETZEN, § 598 ZPO mn 1 (Hans W. Fasching & Andreas Konecny eds., 2nd ed. 2007)). The Court of Appeal has already rightly pointed out that only the time before rendering a (partial) arbitral award can be considered as an "appropriate stage of the proceedings". In the present case, it is therefore certain that the mandatory provision of sec. 598 2nd sentence of the Code of Civil Procedure has been violated.

The question arises whether by this, one of the, according to the prevailing opinion in sec. 611 (2) of the Code of Civil Procedure (like in Art. 34 of the Model Law and sec. 1059 of the German Code of Civil Procedure) exhaustively enumerated (Hausmaninger, op. cit. § 611 ZPO mn. 82), grounds for setting aside of an arbitral award – only sec. 611 (2) No. 2 of the Code of Civil Procedure could be relevant – is fulfilled. The Explanatory Notes to the Draft Bill [*Erläuterungen zur Regierungsvorlage – ErläutRV*] (ErläutRV 1158 BlgNr 22. GP 19 and 27) do not comment on this issue. The Court of Appeal has, following Hausmaninger (op. cit. § 598 ZPO mn. 34), advocated the opinion, that a violation of the parties' right to be heard and, therefore, a reason to set aside an arbitral award pursuant to sec. 611 (2) No. 2 of the Code of Civil Procedure would only be fulfilled if the parties were not given any opportunity to make a written statement. As the Claimant was given this opportunity in the present case, the arbitral tribunal violating sec. 598 2nd sentence of the Code of Civil Procedure would have no consequences.

The deciding chamber cannot follow this opinion: As already pointed out, sec. 598 of the Code of Civil Procedure contains (in accordance with Art 24 (1) of the Model Law and sec. 1047 (1) of the German Code of Civil Procedure) principles on oral hearing and the written procedure and therefore substantiates the parties' right to be heard as stipulated in sec. 594 (2) 2nd sentence of the Code of Civil Procedure. If the legislator's will, regardless of the mandatory provision in sec. 598 of the Code of Civil Procedure on a duty to hold an oral hearing, would be fulfilled if the party's right to be heard would be sufficiently protected by the possibility of a mere written statement, this would correspond entirely with the situation under the previous arbitration law. The explicit stipulation of a compulsory hearing in sec. 598 2nd sentence of the Code of Civil Procedure would, therefore, be without any consequence. According to established case law, when interpreting the law it cannot be assumed that the legislator was pursuing a useless and inoperable or in practice not executable regulatory will (RIS-Justiz RS0111143). It cannot be assumed that the legislator had intended that the stipulation of a compulsory duty to hold a hearing pursuant to the Arbitration Reform Act 2006 should not be relevant. If the amendment of arbitration law should be granted any practical relevance, an arbitral tribunal ignoring a request to hold an oral hearing, therefore, has to be considered contrary to the previous arbitration law as fulfilling the ground for setting aside the arbitral award pursuant to sec. 611 (2) No. 2 of the Code of Civil Procedure (*see* Alexander von Saucken, DIE REFORM DES ÖSTERREICHISCHEN SCHIEDSVERFAHRENSRECHT AUF DER BASIS DES UNCITRAL-MODELLGESETZES ÜBER DIE INTERNATIONALE HANDELSSCHIEDSGERICHTSBARKEIT, 223 (2004); *see also* Karl Heinz Schwab & Gerhard Walter, SCHIEDSGERICHTSBARKEIT, chapter 16 mn. 32 with further references (7th ed. 2005)). This corresponds with constant case law concerning sec. 447 (1) No. 4 of the Code of Civil Procedure that wherever a law stipulates a mandatory oral hearing, to hinder a party against such law to participate at

such hearing, constitutes a ground for annulment pursuant to the respective provision of such law (Erich Kodek in KOMMENTAR ZUR ZIVILPROZESSORDNUNG, § 447 mn. 7 (3rd ed. 2006); docket No. 4 Ob 193/01p and others).

As the [afore]mentioned ground for setting aside the arbitral award is given in respect of the arbitral award dated 19 September 2007, the Claimant's appeal for review on legal grounds is justified. Therefore, there is no more need to deal with the other arguments concerning the question of bias of the Arbitrator. The request to set aside the arbitral award dated 19 September 2007 is, therefore, granted.

[Decision on costs not translated] ■

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