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Vienna Perspective – 2013

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and
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Commentary

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Introduction

The following article comments on recent arbitration-related developments in Austria and is the fourth of an annual contribution that provides readers with a "Vienna Perspective" on issues relevant for international arbitration.

This year we focus on the amendment of Sections 615 and 616 of the Austrian Code of Civil Procedure (ACCP), which deal with the setting aside of arbitral awards by Austrian state courts, and the new Vienna Rules. As in the previous years we also provide an overview of recent arbitration-related decisions by the Austrian Supreme Court. This year, these decisions deal with a claim of an arbitrator for fees against an arbitral institution, conflicting proceedings before an arbitral tribunal and a state court, the arbitrability of shareholder disputes and the enforcement or an ad hoc award against a foreign state.

Focus

Amendment of Austrian Arbitration law • Austrian Supreme Court will be the only instance for challenging an award

Austria has long been known as an ideal place for international commercial arbitration. The reasons are Austria's status as a neutral country; role as a gateway to the CEE region; high quality infrastructure; community of internationally oriented arbitrators; and, especially, arbitration law, which has provided a flexible and well tested framework for arbitration since 1895. The 2006 amendment of the Austrian Arbitration law brought it into line with the UNCITRAL Model Law.[1]

Arbitral institutions, like the Vienna International Arbitral Centre ("VIAC"),[2] are in fierce competition for a share of the arbitration market. Austrian set-aside proceedings (three judicial instances) were perceived as burdensome and disadvantageous - a perception, however, detached from the fact that Sec 611 ACCP, in essence, follows the restrictive pattern of Art 34(2) Model Law so that only very few awards of tribunals seated in Austria were actually challenged.

A new law (*SchiedsRÄG 2013*)[3] will dramatically change this situation when it comes into force on January 1, 2014.[4] Pursuant to Sec 615 ACCP, as amended, the Austrian Supreme Court will be the only instance for set-aside proceedings. Moreover it will have jurisdiction over proceedings to declare the existence or non-existence of an arbitral award, as well as for certain functions of arbitration assistance and supervision (in particular,

appointing or replacing an arbitrator and deciding on the challenge of an arbitrator). The Supreme Court must apply the same procedural rules as a court of first instance. The Supreme Court is likely to establish a senate specialized in arbitration, which will consolidate the making of Austrian arbitration-related jurisprudence and expert knowledge.

In disputes involving a consumer, however, the current system will continue: in principle, three instances. (Separate Austrian legal advice should be sought in matters where a party's qualification under Austrian consumer protection law is uncertain.)[5]

The law also adapts the court fees for set-aside proceedings which, as of 1 January 2014, will be 5% of the value in dispute (with a minimum fee of EUR 5,000).[6]

For comparison, most other jurisdictions have two or three instances for set-aside proceedings. For example, the procedural laws of France, Germany and Sweden all provide for two instances in set-aside proceedings, whereas English law and New York State law (as well as theoretically also US Federal law) provide even for three. The only other country of relevance for international arbitration to take such a streamlined, party-conscious approach remains Switzerland.

To sum up, Austria has taken a strong measure to increase its desirability as a "go to" arbitral destination.

New Vienna Rules

VIAC introduced its first arbitration rules ("Vienna Rules") in 1975, and the most recent amendment will become effective on July 1, 2013.[7] Since their introduction, the Vienna Rules have been regarded as succinct and flexible.[8] The 2013 amendment does not change this approach. The length of the rules remains essentially the same. However, some of the wording was further simplified and a few new provisions were added. The following gives a short overview on the most significant changes:

Confirmation of arbitrators

Under the new Vienna Rules, the Secretary General or, if deemed necessary by the Secretary General, the Board of the VIAC shall separately confirm the nomination of an arbitrator, on condition that no doubts exist as to the impartiality and independence of the arbitrator and his ability to carry out his mandate. This is an additional tool to ensure quality and to keep at bay ungrounded challenges of arbitrators.

Joinder of third parties

The new rules authorize the arbitral tribunal to order the joinder of a third party upon the request of either party or a third party. The tribunal is granted wide discretion on how to join third parties (e.g., full party status or *amicus curiae*). The new rules also allow cross-claims by or against the third party and provide for the third party's involvement in the constitution of the arbitral tribunal.

Consolidation of proceedings

The new rules now include a provision on the consolidation of two or more proceedings. Pursuant to Article 15, a consolidation requires: (i) a request by a party, (ii) the parties' agreement to consolidate or that the same arbitrator(s) are appointed, and (iii) the same place of arbitration. The authority to decide on consolidation is vested with the Board, which shall hear the parties and the arbitrators already appointed, before rendering its decision.

Expedited proceedings

Another new feature is the fast-track rules (new Article 45). They apply if agreed by the parties along with the submission of the answer to the statement of claim, at the latest. Their main features include: shorter time limits for nominating arbitrators, for submissions and for rendering the award (6 months, unless extended by VIAC);[9] a sole arbitrator to hear the case; written submission limited to Statement of Claim, Answer and one additional round only, which must conclusively contain all factual arguments and written evidence; only one oral hearing to be held.

Costs

Although the cost scale was slightly amended, VIAC arbitration remains cost effective compared to other international institutions. The arbitrator's flat-rate fee (as opposed to hourly rates) was maintained. The new rules contain an explicit undertaking by the parties to bear advances on costs in equal shares and authorize the arbitral tribunal to order a defaulting party to pay up.

Overview

Standing of an arbitral institution for an arbitrator's claim for fees • Adjustment of advance on costs • VAT

The Supreme Court in case docket No. 4 Ob 30/12h[10] dealt with a claim of a sole arbitrator against VIAC for

a fee higher than the one fixed by the institution's secretary general. In the underlying arbitration, the Defendant had raised a counterclaim, which was neither in fact nor in law connected with Plaintiff's claim. Pursuant to Article 36(4) of the Vienna Rules 2006, the secretary general determined the value of the matter with the aggregate value of claim and counterclaim and invited both parties to increase the advance on costs accordingly. The parties to the arbitration, however, did not pay the deposit and instructed the institution to discontinue the arbitral proceeding. The secretary general, thereafter, fixed the arbitrator's fees with an amount based on the initial value of Plaintiff's claim, reduced to 40% of the amount in light of the early termination of the arbitration.

The sole arbitrator (Plaintiff) argued that the institution's secretary general: (i) had belatedly fixed the value of the matter in dispute; (ii) had invited not only the Defendant (counter-claimant) but both parties so that the Plaintiff "lost its interest in continuing the arbitral proceeding"; (iii) had ignored his own valuation of the matter in dispute; and that (iv) the institution is liable for paying the arbitrator additional fees because it was the institution which employed Plaintiff and which is responsible for its secretary general's misconduct; and (v) VAT applies to the entire amount of fees as opposed to the half only.

The VIAC (Defendant) argued: (i) not to be in a contractual relationship with Plaintiff; (ii) the secretary general had acted properly; (iii) the increase of the advance on costs had not yet become effective due to it not having been deposited with the institution; (iv) the reduction to 40% results from the premature termination of the arbitration, and (v) Austrian VAT applies only to half of the fees because one (of the two) Defendants was seated in another member state of the European Union.

The Supreme Court took the opportunity to characterize the contractual position of arbitrators. It started with the undisputed view that in *ad hoc* arbitral proceedings, even tacitly, an arbitrators' contract comes into existence between all arbitrators and all parties. It can be characterized as a contract for work with elements of a contract of agency. Unless agreed otherwise, all parties to the arbitration are obliged to pay the fees of the arbitrators. Whereas parties of an institutional arbitral proceeding equally enter into a contractual relationship, it is disputed as to who is the counterpart of the arbitrators. In an earlier decision, the Supreme Court had assumed that an arbitrators' agreement existed between the parties of the arbitral proceedings, on the one hand, and the arbitrators, on the other, even when the chairman of the tribunal had been appointed by the institution.[11] This is also the view, as the Supreme Court found in the present case, of the prevailing doctrine which bases the appointment of the arbitrator on an, at least implicit, authorization of the institution by the parties.[12] According to a contrary academic view the arbitrator enters into a contractual relationship with the institution, which instructs him or her to conduct the arbitral proceedings and has the responsibility to pay the arbitrator's fees.

Based on the forgoing considerations, the Supreme Court found that in institutional arbitral proceedings it will depend on the rules of the institution as to who are the contractual counterparts of the arbitrators and, thus, who is the debtor of the arbitrator's fees. After analyzing the applicable Vienna Rules, the Supreme Court held that a contract existed between the arbitrators and the parties because: (i) the task of VIAC has been outlined to organize, but not to decide, the case; (ii) VIAC did not have (under the Rules presently in force) any influence, let alone a right, to confirm the nomination by the parties of the arbitrators[13] (whereas the nomination of an arbitrator by the institution can be attributed to the parties' authorization of the institution resulting from the parties' acceptance of the Rules); and (iii) VIAC, with regard to the fees of the arbitrators, merely provides a service.

The Supreme Court added that the Vienna Rules grant the institution administrative discretion when fixing the arbitrator's fees and that the increase of the value of the dispute would have become effective only upon deposit of the additional advance by the parties.

The Supreme Court also confirmed the calculation by the institution of Austrian VAT with reference to the reverse-charge principle applying to a party residing in another member state of the European Union and, thus, not being subjected to Austrian VAT.[14]

Setting aside an award on jurisdictional objection • Conflicting proceedings before arbitral tribunal and state court • Cancellation of arbitration agreement because of failure to object to jurisdiction of state court • Identity of object of dispute

Before an Austrian state court, a board member ("Mr A") of a stock corporation (*Aktiengesellschaft* – "the AG") had sued the AG to provide him with an interim certificate evidencing the ownership of shares of the AG. The AG, as the Defendant, did not raise jurisdictional objections. Such objections could have been based on an arbitration clause that had been agreed to by the AG and Mr A in a side agreement to Mr A's employment as a board member, entitling him to receive the shares of the AG evidenced by the interim certificate.

In order to demonstrate that Mr A was not entitled to receive the interim certificate, the AG initiated arbitral proceedings against Mr A seeking a declaration that the subscription agreement underlying the interim certificate was void.

Mr A, as the Defendant in the arbitration, raised jurisdictional objections with the argument that the arbitral proceeding would relate to the same subject of dispute as the case before the state court where the AG, as said above, had failed to object to jurisdiction.

The Supreme Court found[15] that the AG had submitted to the jurisdiction of the state court so that Section 584(1) ACCP would apply, which reads:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall reject the claim, unless the defendant makes submissions on the substance of the dispute or orally pleads before the court without making an according objection.

The Supreme Court, however, also found that the matter brought before the state court was not identical with the case before the arbitral tribunal: Before the state court, Plaintiff had requested Defendant to deliver an interim certificate and had applied for an interim declaratory statement of the court that the side agreement was invalid. On the other hand, the validity of the side agreement constituted a preliminary issue for the arbitral tribunal when asked to decide on the invalidity of the subscription agreement. The Supreme Court found that no "identity of the object of dispute" existed between the preliminary issue before the state court and the subject of dispute before the arbitral tribunal. To put it more generally, no such identity exists between a subject of dispute constituting a preliminary issue in one proceeding and the main issue of the other.

Arbitrability of shareholder disputes • effects on third parties • right to be heard

In case docket No. 6 Ob 42/12p the Supreme Court had to deal again with the arbitrability of shareholder disputes and, in particular, challenging shareholder resolutions. The Defendant was a company with several shareholders, one of which ("Company S") was the indirect shareholder of a building company with whom the Defendant had concluded a building contract. The building contract had been entered into by one of the three managing directors of Defendant, who simultaneously was the sole shareholder of Company S. The Plaintiff, another shareholder of Defendant, filed a claim challenging a shareholder resolution approving the building contract. Plaintiff argued that Company S had participated in the vote although it indirectly received an advantage by concluding the building contract.

Despite the fact that the articles of association of the Defendant contained an arbitration clause providing for arbitration of all disputes between the company and its shareholders as well as among the shareholders themselves, Plaintiff brought its challenge of the shareholder resolution before an Austrian state court. Plaintiff argued that arbitration would not be permissible and, thereby, denied the arbitrability of the dispute with the argument that an arbitral award would affect the rights of the building company which was not a party to the arbitration agreement and, therefore, could not be heard in an arbitration proceeding. The argument was based on the notion advocated by some legal scholars that a challenge to a shareholder resolution is not arbitrable if the shareholder resolution has a direct legal effect (*Außenwirkung*) on third parties.

The Austrian Supreme Court rejected the claim for the following reasons: It is a well established principle under Austrian arbitration law that challenges of shareholder resolutions are arbitrable. There is no need to grant the building company a right to be heard in arbitration on a challenge of a shareholder resolution.

Since the building company had no right to participate in the decision making on the shareholder's approval of the building contract, there is no need to admit the building company to the proceeding challenging the shareholder resolution. Furthermore, the shareholder resolution did not have a direct legal effect on a third party, which would otherwise extend the legal effect of the arbitral award to such party. The arbitral award would merely have a factual or consequential effect (*Tatbestands- oder Reflexwirkung*) on the building company. Such an effect does not trigger a right to participate in proceedings and the right to be heard. Mere factual or consequential effects of a decision on third parties do not hinder the arbitrability of a claim seeking such a decision. Thus, the Supreme Court concluded that the case was arbitrable.

The decision shows again that the Austrian Supreme Court tends to give effect to arbitration agreements whenever possible.

Enforcement of *ad hoc* award • State immunity • Action for enforcement directed into pieces of art owned by foreign State

A Liechtenstein company had obtained an *ad hoc* arbitral award against the Czech Republic and sought enforcement in Austria. In the enforcement application, the Plaintiff requested enforcement in relation to moveable objects in general and, in particular, to three pieces of art (two paintings and one sculpture) owned by the Czech Republic, which were on show in a museum in Vienna.

The Court of First Instance declared the arbitral award enforceable in Austria and granted enforcement against moveable objects, in general, and the three pieces of art, in particular. Consequently, the bailiff seized the paintings and the sculpture. The Czech Republic appealed against the declaration of enforceability and the approval of the enforcement. *Inter alia*, the Czech Republic argued that the seized sculpture and paintings were cultural heritage of the Czech Republic used for sovereign purposes. Therefore, the sculpture and paintings shall be immune from enforcement.

The Court of Appeal repealed the decisions of the Court of First Instance and rejected the application of Plaintiff. It argued that, by concluding an arbitration agreement, the Czech Republic had waived its immunity in relation to the jurisdiction of the arbitral tribunal only, but not in relation to enforcement proceedings. Thus, the seized sculpture and paintings are excluded from the jurisdiction of Austrian courts.

Upon appeal of Plaintiff, the Supreme Court reinstated the decision of the Court of First Instance, for the following reasons:[16]

A waiver of immunity regarding a jurisdiction does not include enforcement proceedings.[17] Under Austrian law, the procedure in which a foreign arbitral award is declared enforceable is a separate proceeding distinct from enforcement proceedings[18] and is considered supplemental to the main proceeding (*i.e.*, in the case at hand, the *ad hoc* arbitration). As the Czech Republic had waived its immunity for the main proceeding, the Court of First Instance, in the view of the Supreme Court, indeed had jurisdiction to declare the award enforceable.

Since the Czech Republic had invoked immunity only with regard to the seized sculpture and paintings, the Supreme Court did not see a reason to refuse the approval of enforcement against moveable objects as such. Specific requests for enforcement that would be based on the general enforcement approval, however, would have to be rejected if objects were attached that are immune from enforcement.

As regards the seized sculpture and paintings, the Supreme Court held that they did not appear to serve a sovereign purpose. The burden of proof for immunity from enforcement of specific objects is with the party that invokes immunity (referring thereby to the principle of *in dubio pro jurisdictione*). Thereby, the Supreme Court distinguished the present case from a previous one where it had held that bank accounts of an embassy can be assumed to serve sovereign purposes.[19] This was not obvious with regard to sculptures or paintings.

Two findings by the Supreme Court are remarkable: First, a declaration of enforceability (as opposed to the actual enforcement approval) can be issued in case a foreign sovereign had not waived its immunity also in relation to enforcement proceedings. Second, the Supreme Court narrowed down the scope of its previous decision regarding bank accounts of foreign embassies by explaining that, generally speaking, the party invoking immunity has the burden of proof that the attached

objects are indeed immune from enforcement. Whereas the burden of proof shall be shifted to the applicant in case of moneys held on an embassy's bank account, this is not the case with regard to objects of art.

Endnotes

1. It should be added that Vienna is the host city of UNCITRAL.

2. See http://www.viac.eu/en/; the second most important arbitral institution for Austria is the ICC, with Vienna ranking seventh in the number of ICC arbitrations conducted there, directly after Singapore and New York (ICC, 2012 Statistic Report, 22/1 ICC International Court of Arbitration Bulletin 1, 14 (2013)).

3. See http://www.parlament.gv.at/PAKT/VHG/XXIV/I/I_02322/fname_303828.pdf.

4. The new law will apply to state court proceedings which are initiated by submissions filed after 31 December 2013.

5. For further details *see*, *e.g.*, Christian Dorda & Veit Öhlberger, Vienna Perspective - 2010, 25/3 Mealey's International Arbitration Report 43, 48 (2010).

6. In cases, which run through all three instances, the currently applicable court fee system results in a total of more than 5.4% of the value in dispute.

7. For an English version of the new Vienna Rules *see* http://www.viac.eu/en/arbitration/arbitration-rules-vienna.

8. For English commentaries on the 2006 version of the Vienna Rules *see*, *e.g.*, FRANZ T. SCHWARZ & CHRISTIAN W. KONRAD, THE VIENNA RULES - A COMMENTARY ON INTERNATIONAL ARBITRATION IN AUSTRIA (2009); Christoph Stippl, *International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC)*, *in* INSTITUTIONAL ARBITRATION, 273 (Pascale Gola, Claudia Götz Staehelin & Karin Graf eds., 2009).

9. The average duration of proceedings under the Vienna Rules is approximately one year.

10. Oberster Gerichtshof [OGH] [Supreme Court] September 18, 2012, 4 Ob 30/12h.

11. Oberster Gerichtshof [OGH] [Supreme Court] April 28, 1998, 1 Ob 253/97f, 71 SZ No. 76.

12. *See*, *e.g.*, FRANZ T. SCHWARZ & CHRISTIAN W. KONRAD, THE VIENNA RULES - A COMMENTARY ON INTERNATIONAL ARBITRATION IN AUSTRIA (2009).

13. Thus, the above described change in the Vienna Rules could lead to a different conclusion in the future.

14. Sec 3a Austrian VAT Code, reflecting Art 44 and 45 of Council Directive 2006/112/EC.

15. Oberster Gerichtshof [OGH] [Supreme Court] March 15, 2012, 6 Ob 15/12t.

16. Oberster Gerichtshof [OGH] [Supreme Court] Juli 11, 2012, 3 Ob 18/12m.

17. *See also* Landesgericht für Zivilrechtssachen Wien [LGZ Wien] [Regional Court in Civil Law Matters Vienna] June 17, 1994, 46 R 804/94, 1995 ZfRV 162 (with comments from Ignaz Seidl-Hohenveldern); Oberster Gerichtshof [OGH] [Supreme Court] December 14, 2004, 10 Ob 53/04y.

18. Although in Austria the request for declaring an award enforceable can be combined with the enforcement application.

19. Oberster Gerichtshof [OGH] [Supreme Court] April 30, 1986, 3 Ob 38/86, 59 SZ No. 76. ■

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