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Trends and Developments

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Konrad Partners is a highly specialised international law firm delivering premier international arbitration services. The firm maintains offices in Vienna, Prague, Bratislava, Skopje and London. The firm's extensive experience in the field of international arbitration and with various arbitration rules, along with its strategic and tactical strength, helps clients secure their rights in international disputes. Its lawyers serve both as advocates and as arbitrators in ad hoc and institutional proceedings, are qualified in multiple jurisdictions and have extensive expertise in handling high-profile arbitration cases before a wide range of international bodies. The team integrates comprehensive legal expertise and technical industry knowledge to handle disputes across all key sectors successfully, including construction and engineering, energy and natural resources, licensing, infrastructure, bilateral investment treaties, post-M&A, pharmaceuticals, and insurance and reinsurance. Its lawyers regularly advise clients on the enforcement of arbitration awards and court judgments, as well as represent them successfully before Austrian courts in commercial disputes. Furthermore, the firm supports clients in protecting their investments and acts as deal counsel for multi-national companies and investors searching for and executing investment opportunities in Africa and Central & South Eastern Europe (CEE/SEE).

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Austria and its capital Vienna remain a leading hub for international arbitrations. A reliable legal framework, coupled with modern infrastructure and a convenient location, has contributed to Austria becoming one of the most popular arbitration locations worldwide.

In a bid to retain this popularity, Austria has recently amended its legislation to provide for a single-instance jurisdiction of the Supreme Court in most arbitration-related matters, which has substantially shortened such proceedings and vastly improved the quality of decisions. At the institutional level, after the major revision of its Vienna Rules in 2013, the Vienna International Arbitration Centre (VIAC) adopted further amendments in 2018, ensuring that the rules reflect modern arbitration approaches, as well as meet the needs and demands of contemporary legal practice. This seems to have worked well – the Centre received 64 new cases in 2018, which was a substantial increase from 43 in 2017. A larger caseload is expected in the coming years, also due to recent changes in the Austrian legislation governing the Chamber

of Commerce, which now enables VIAC to administer purely domestic arbitrations as well.

In addition to the institutional arbitrations at VIAC, an increasing number of ICC arbitrations seated in Vienna have been reported by practitioners. According to the 2017 ICC Dispute Resolution Statistics, 17 ICC arbitrations were seated in Vienna that year. Austrians also remain among the most frequently appointed arbitrators at the ICC Court, with 41 appointments in 2017.

Challenge Proceedings and the Obligation to Accord Fair Treatment

Since the 2013 revision of the Austrian Code of Civil Procedure (CCP), the Austrian Supreme Court has been the first and final instance in most arbitration-related matters, ie, proceedings concerning appointments of arbitrators and their challenges, declaration of the existence or non-existence of an arbitral award, as well as requests for setting aside arbitral awards. Austria is, therefore, one of the few countries where decisions on setting aside are not subject to appeal, helping avoid unnecessary delays in court proceedings after an award has been rendered.

In last year's article, we reported of a decision of the Supreme Court (18 OCg 3/16i) that reversed the long-standing practice of Austrian courts according to which even a complete absence of reasons for an award was not considered a breach of procedural ordre public. In that decision, the Supreme Court noted that, although an award should not be considered on the merits, the tribunal must nevertheless explain in a comprehensible manner on what essential considerations – in particular on which assumptions of fact – the decision is based. It found, departing from its earlier practice, that a lack or incompleteness of reasons may well constitute a breach of procedural ordre public, depending on the degree of the incompleteness. It noted that, in determining whether a violation has in fact occurred, it is decisive whether considerations were based on the parties' submissions, or whether they were identified by the tribunal during the course of the arbitration. If the latter was the case and if the parties had not had the opportunity to express their views, the tribunal would have to explain the reasons for its decision in all the more detail.

About a year later, in 2017, the Supreme Court saw the case again, this time under docket number 18 ONc 1/17t, in the context of challenge proceedings against the tribunal initiated under Section 589(1) of the Austrian Code of Civil Procedure (CCP), the equivalent of Article 13(3) of the UNCITRAL Model Law. The applicant had previously filed a challenge against the tribunal pursuant to Article 16 of the 2007 Vienna Rules, which were applicable to the proceedings. This challenge was rejected by the VIAC Board and the challenge was made in front of the Supreme Court as an authority of 'second instance'.

The Supreme Court provided guidance on a number of issues. As regards the respondent's objections that the challenge regarding some of the grounds had not been made in time, the Court pointed out the general rule contained in Section 582(2) of the CCP, pursuant to which a challenge shall be made within four weeks from when the challenging party has become aware of the circumstance giving rise to the challenge. This, however, is a dispositive rule and the parties had agreed on a special challenge procedure, namely, the one contained in the Vienna Rules. The 2003 Vienna Rules provide in Article 16(2) that challenges should be made 'without delay' ('unverzüglich'). The Court referred to Swiss case law, pursuant to which the term 'without delay' 'probably mean[t] 30 days' and noted that, by using the term, the drafters of the 2013 Vienna Rules certainly did not intend to extend the statutory time-limit of four weeks. It also pointed out that, since 2013, the Vienna Rules have provided for an explicit time-period of 15 days rather than the wording 'without delay'. It therefore found that the time-limit for making the challenge for two of the grounds on which the challenge was based had expired and did not consider them in its decision.

The Court reiterated its established practice pursuant to which challenge proceedings under Section 589(3) CCP are limited to a supervisory function of the previous challenge proceedings based on the parties' agreement, in this case, those before the VIAC Board. Therefore, it is not admissible to rely on facts which had not been part of the prior challenge proceedings. The Court, however, provided welcome guidance for future cases, pointing to German expert expositions according to which, under German law, new facts could be relied upon only as a means of supplementing the arguments made previously in the challenge proceedings. This is limited to cases where the grounds for challenge consist of a mosaic of repeating individual acts, some of which have been argued previously. As that was not the case, the Court declined to consider the newly made arguments on the challenge.

The only arguments considered on the merits were therefore the applicant's allegations that the parties had been treated unequally. Namely, the tribunal had, upon the request of the claimant in the arbitration (applicant), accorded the parties an opportunity to submit comments on the partial setting-aside of the interim award and to amend their requests for relief accordingly. In doing so, the respondent was accorded a longer period of time for its submission than the claimant (applicant). In deciding the issue, the Court relied on Section 594(2) CCP, pursuant to which the parties shall be treated fairly and each party shall be granted the right to be heard. The Court confirmed that this is one of the most important mandatory procedural principles which has to be complied with for the duration of the proceedings. It noted, however, that there was a difference between the words 'fairly' as contained in the CCP and 'equally' as argued by the

applicant. The CCP does not require a mere formal equality of the treatment of the parties in the sense of according them equally long deadlines for their submissions. Rather, the Court pointed out, objective differences in the length of the deadlines are permissible. Since it was the applicant that requested the opportunity to make the submissions, its representatives had had an opportunity to liaise with their client already before the commencement of the deadline, whereas this was not the case with the representatives of the respondent. The decisive criterion, however, was that the applicant had been accorded five weeks for the preparation of its submission and it had never claimed that this period had not been sufficient. Since the applicant had ample opportunity to make its arguments, the Court found that its right to a fair treatment had not been breached. It noted that, even though deadlines of different length may not have been formally equal, there had been no breach of the right to fair treatment as provided for by Section 594(2) CCP.

Law Applicable to the Arbitration Agreement

In its decision of 19 December 2018 (3 Ob 153/18y) the Supreme Court dealt with a request for revision of a decision on recognition and enforcement of a Swedish arbitral award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). The applicant for revision, inter alia, argued that the arbitration agreement was invalid under Cypriot law (which, in its opinion, was the law applicable to the arbitration agreement) since the contract contained both an arbitration clause as well as a provision on court jurisdiction.

The arbitral tribunal had found in the award that the law of Sweden, as the law of the place of arbitration, was applicable to the arbitration agreement and that under Swedish law the tribunal did have jurisdiction to decide the dispute.

The crux of the decision was therefore whether Swedish or Cypriot law was applicable to the arbitration agreement. The Supreme Court relied on Article V(1)(a) of the New York Convention, pursuant to which recognition and enforcement of an award may be refused if the party against whom it is invoked furnishes proof that the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made. Primarily, therefore, the law that the parties had chosen is to be applied and only in the absence of such choice would the law of the seat of arbitration apply. The Court therefore examined whether a choice of the law had indeed been made by the parties, noting that such a choice may also be made implicitly.

In doing so the Court examined the wording of the choice-of-law clause ("This contract is governed by, and is to be interpreted according to, the laws of Cyprus"). It observed that the issue whether the choice-of-law clause contained in the main contract also extends to the arbitration agreement in the absence of an explicit indication thereof is particularly controversial. The Court therefore noted that the determination should be made on a case-by-base basis. In applying this approach, the Court found that the wording of the choice-of-law clause did in fact allow for an interpretation that the choice-of-law clause also extends to the arbitration agreement. It is noteworthy, however, that the Court did not provide any further explanation for this finding, in particular given that Austrian scholars have in the past repeatedly pointed out that a general choice-of-law clause could not solely be relied on in determining the law applicable to the arbitration agreement. It is therefore somewhat unfortunate that the Supreme Court did not use this opportunity to clarify what criteria it employed in concluding that this, rather general, choice-of-law clause extended also to the arbitration agreement, in particular given its observation that the law applicable to the arbitration agreement should be determined on a case-by-case basis.

The parties in the enforcement proceedings had presented diverging opinions by legal experts on whether a tribunal would in fact also have jurisdiction should Cypriot law apply to the arbitration agreement. Given its ruling that Cypriot law was applicable, that the Parties' expert opinions on Cypriot law were diverging and there had been no examination of the Cypriot law by the courts of lower instances, the Supreme Court repealed their decisions and referred the case to the court of first instance.

Conclusion

Austria remains an arbitration-friendly jurisdiction with modern legislation and an efficient Supreme Court. The centralisation of jurisdiction in arbitration-related matters with some of the jurisdiction's most experienced judges has contributed vastly to the quality and overall efficiency of arbitrations seated in Austria. Coupled with the modern approaches of VIAC as well as highly skilled arbitration practitioners and a growing arbitration community, Austria is determined to keep and continue to strengthen its reputation as a preferred place for arbitration.

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