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International Arbitration

Austria: Trends & Developments

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Trends and Developments

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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. As has already been reported, the Vienna International Arbitration Centre overhauled its Vienna Rules in 2013, and adopted further amendments in 2018, reflecting modern arbitration approaches, and meeting the needs and demands of contemporary legal practice. The caseload of the Centre remains stable, with 45 newly registered cases in 2019, and a larger caseload is expected in the coming years, due to recent amendments in the Austrian legislation governing the Chamber of Commerce, which now also enables VIAC to administer purely domestic arbitrations.

In addition to proceedings administered by VIAC, a stable number of ICC arbitrations seated in Vienna have been reported by practitioners. According to the ICC Dispute Resolution Statistics, 13 newly registered ICC arbitrations were seated in Austria in 2018. Austrians also remain among the most frequently appointed arbitrators at the ICC Court, with 27 appointments in 2018.

Recent Jurisprudence of the Supreme Court
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, and requests for setting aside arbitral awards. Austria is, therefore, one of the countries where decisions on setting aside are not subject to appeal, which helps to avoid unnecessary delays in court proceedings after an award has been rendered. Furthermore, the concentration of the cases in front of the specialised 18th senate of the Supreme Court ensures a high quality of decisions in line with international arbitral practice. A short report on some of the Court's noteworthy recent decisions is provided below.

Arbitrability and Verification of Claim in Insolvency Proceedings
In a landmark decision in its case 18 ONc 2/18s, the Court clarified long-standing divergences in scholarly writings on the issue of whether the claim verification procedure as defined in insolvency law (*Prüfungsverfahren*) may be conducted by an arbitral tribunal where there was an arbitral agreement concerning the disputed claim. The main criticisms of such an approach were the statutorily prescribed exclusive jurisdiction of the insolvency court for the verification procedure, and concerns about the possibility of the remaining creditors wishing to dispute the claim to participate in such claim verification procedure in arbitration.

The Court had been called upon by the claimant to nominate an arbitrator following the respondent's failure to do so. However, before the appointment was made, insolvency proceedings were opened against the respondent and the Court subsequently stayed the nomination proceedings. Once the claimant attempted to register its claim in the insolvency proceedings, the insolvency administrator contested the claim. The Claimant thereupon requested the Court to lift the suspension of the proceedings and continue with the appointment of an arbitrator, stating that it was the arbitral tribunal, rather than the insolvency court, that had jurisdiction over the claim and therefore for conducting the verification procedure.

When a claim is contested, its validity and ranking are examined in a verification procedure pursuant to the Insolvency Law (*Insolvenzordnung*). The exclusive jurisdiction for this verification procedure lies with the court conducting the insolvency proceedings. However, where proceedings have been instituted in front of another court before the commencement of insolvency proceedings, they are to be continued in front of that court. The rationale of this provision is to avoid the loss of procedural effort already expended in the previously commenced proceedings, as opposed to starting proceedings anew in another forum.

The Court thereupon examined the effect of a forum selection clause; where proceedings have commenced in a court selected by the parties prior to the commencement of the insolvency proceedings, they should be continued in front of that court. Since an arbitration agreement has – in principle – the same effect as a forum selection clause, this approach extends also to arbitral proceedings. Given that there has been no doubt that the insolvency administrator is bound by an arbitration agree-

ment entered into by the insolvent debtor, the Court held that, where it was only the insolvency administrator who disputed the claim, the proceedings are to continue in arbitration.

With its decision, the Court addressed the disputed concerns of a part of the Austrian scholarly doctrine, particularly as regards the possibility for other creditors of the insolvent debtor to participate in arbitral proceedings. The Court disposed with those concerns, stating that, when a remaining creditor has not disputed the claim, it has no legal interest to participate in the proceedings anyway. With regard to any remaining creditors wishing to dispute the claim, the Court noted that the fact that the effect of a final and binding court judgment of an arbitral award applies "between the parties" (Article 607 CCP) does not mean that an extension of this effect to third parties cannot be achieved by other legal provisions. Such extension, however, requires that these third parties have an opportunity to participate in the proceedings. In the case of the verification procedure under insolvency law, this can be achieved by allowing other insolvency creditors to dispute the claim in the arbitration. Should they not dispute the claim, they have no legal interest to participate in the arbitration. The Court thus found that the mere abstract possibility of contesting a claim cannot result in a general impossibility of conducting the verification procedure in arbitration. The Court therefore lifted the suspension of the proceedings and appointed an arbitrator as requested.

In the case at hand, it was only the insolvency administrator who disputed the claim; therefore, the Court did not decide on whether the rest of the creditors were bound by the arbitration agreement. However, the Court's obiter dictum explanation was in favour of such an approach. It stated that disputing creditors would be bound to a forum selection agreement entered into by the debtor and, given the equal effect, in principle, of arbitration and state court proceedings, the Court saw no reason for differentiating between the effects of a forum selection clause and an arbitration agreement. These creditors, like the administrator, are not exercising their own rights based on insolvency law but rather acting in the interest of the community of creditors. This in turn suggests that, like the administrator, the disputing creditors are bound by the procedural dispositions made by the debtor before the commencement of the insolvency proceedings.

Furthermore, the Court did not exclude the possibility for the verification procedure to be conducted in arbitral proceedings even where they commence after the declaration of insolvency. The answer, pursuant to the Court, will depend on whether a forum selection clause takes precedence over the exclusive jurisdiction of the bankruptcy court.

With this welcome and thoroughly reasoned decision, the Supreme Court has clarified a long-standing issue regarding the possibility for the claim verification procedure to be carried out in arbitration. It ruled that the claim verification procedure may be conducted in an arbitration that has commenced prior to the opening of the insolvency proceedings (and where none of the remaining creditors have disputed the claim).

Besides its ruling, the Court provided a welcome and clear guidance in its obiter dictum. As the Court is the only judicial authority to deal with such arbitration-related matters, it is not likely to depart from this opinion in its future jurisprudence. The well-reasoned decision reflects the Court's understanding and awareness of the legal debates within the Austrian dispute resolution community and their practical significance, and has made a considerable contribution to legal certainty in cases of insolvency of a party in arbitration proceedings.

Challenge Proceedings – Co-operation of Arbitrator and Party Representative in Another Matter

Another exclusive competency of the Supreme Court in arbitration-related matters is to decide as an authority of "second instance" on arbitrator challenges initiated pursuant to Article 589(3) of the Code of Civil Procedure (CCP), the equivalent of Article 13(3) of the UNCITRAL Model Law. In a particularly interesting case, 18 ONc 1/19w, the Supreme Court was deciding on a challenge against an arbitrator whose law firm had, after the constitution of the tribunal, started co-operating as co-counsel in a different matter together with one of the representatives in the original arbitration. The arbitrator duly informed the parties and co-arbitrators thereof, stating that the appointments of the two law firms as co-counsel had happened independently from each other and had not been co-ordinated between the two firms.

The challenge was first rejected in challenge proceedings before the arbitral tribunal conducted pursuant to Article 589(2) CCP. In its decision to reject the challenge, the arbitral tribunal noted that, given the size of the Austrian arbitration community which is limited to specialised attorneys and professors, its members are bound to also meet and co-operate in other venues. It found that such co-operation, particularly in the case at hand, did not give rise to justifiable doubts as to the arbitrator's independence and impartiality. The challenging parties filed a challenge request at the Supreme Court.

In line with its established jurisprudence, the Court applied as guidance the provisions on conflict of interest applying to the judges of the state judiciary, as well as the IBA Guidelines on Conflict of Interest in International Arbitration. Regarding the former in particular, it is worth noting that, before the 2006 enactment of the new arbitration law, the conflict of interest

provisions for state court judges applied also to the challenge of arbitrators. This was abolished in 2006, but the Supreme Court has consistently found that those provisions, which serve the protection of the reputation of the state judiciary, may be used as guidelines in deciding arbitrator challenges. The Court noted that, comparable to the reputation of the state judiciary, the reputation of arbitration as a means of dispute resolution should also be protected by applying a strict standard of assessment of potential bias, which requires the arbitrators not only to be professionally competent, but also to act in an independent and impartial manner, free from any conflicts of interest.

The Court was further guided by the standard of justifiable doubts as contained in the IBA Guidelines. In this regard, it noted that a conflict of interest exists where facts or circumstances have arisen that would lead a reasonable third person who had knowledge of the relevant facts and circumstances to have justifiable doubts as to the arbitrator's impartiality or independence. Doubts are justifiable when such third person would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

The Court first noted its established practice, according to which doubts as to the impartiality and independence are not justified if the relationship to the law firm of the party representative is peripheral and does not go beyond an objective relationship of a professional nature (citing its case 18 ONc 2/14k). It considered that contacts of arbitration practitioners are frequent due to economic or professional circumstances, and should therefore not be regarded as legitimate grounds for challenge. If every prominent lawyer who engages in professional circles is exposed to justifiable doubts as to his or her impartiality, arbitration would largely be impossible in Austria's well-networked legal scene (citing its cases 18 ONc 2/14k and 18 ONc 1/14p).

Applied to the situation before it, however, the Court found that the co-operation of several legal representatives in the representation of the same party did not amount to contacts of a merely peripheral nature. From the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, such co-representation would imply intensive contacts between the party representatives. The Court noted that this situation has been included on the orange list of the IBA Guidelines as a situation where justifiable doubts could arise, depending on the facts of a given case (IBA Guidelines, II.3 in connection with 3.3.9). Work as co-counsel would, referring also to Austrian scholarly writings, not be problematic if it had occurred in the past. This, however, does not apply to current co-counsel appointments. Based on the restrictive standard applied by case law, such a situation would give to a reasonable third party the appearance of such a degree of familiarity that could preclude an impartial assessment of the arbitration matter. With regard to the preservation of the reputation of arbitration as a means of dispute resolution, the Court found that the simultaneous co-operation of an arbitrator and party representatives in another matter as co-counsel would cause justifiable doubts as to the arbitrator's impartiality. It therefore found that the challenge was justified.

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 best judges has vastly contributed to the quality and overall efficiency of arbitrations seated in Austria, which has been reflected in the recent decisions. Coupled with the modern approaches of VIAC as well as highly skilled arbitration practitioners, Austria is determined to keep and continue to strengthen its reputation as a preferred place for arbitration.

Konrad Partners is a highly specialised international law firm delivering premier international arbitration services, with 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 successfully handle disputes across all key sectors, including construction and engineering, energy and natural resources, licensing, infrastructure, bilateral investment treaties, post-M&A, pharmaceuticals, and insurance and reinsurance. The lawyers regularly advise clients on the enforcement of arbitral awards and court judgments, and successfully represent them before Austrian courts in commercial disputes. Furthermore, the firm supports clients in protecting their investments and acts as deal counsel for multinational companies and investors searching for and executing investment opportunities in Africa and Central & South Eastern Europe (CEE/SEE).

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