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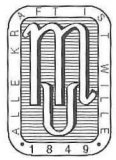

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Decisions of the Austrian Supreme Court on Arbitration in 2012 and 2013

Gerold Zeiler/Michael Nueber

This contribution to the Austrian Yearbook on International Arbitration 2014 is a continuation of a series of articles that ran through the 2008–2013 annual editions of the Yearbook. The current article covers, in chronological order, three recent decisions rendered by the Austrian Supreme Court.

I. Right to be Heard[1])

A. Facts of the Case

In this case, the Austrian Supreme Court had to deal with an annulment claim based on the purported violation of the right to be heard and the allegation that the tribunal had exceeded its capacity.

The case was based on a dispute arising from a corporate relationship between the parties. Following a lengthy procedural history, the arbitral tribunal issued a procedural order, according to which new facts were allowed to be submitted only before the expiration of a deadline set by the tribunal. Subsequent to the expiration of that deadline, Respondent extended his counterclaim and, in response, Claimant requested the tribunal to dismiss this extension due to delay. The arbitral tribunal did not explicitly decide on the admissibility of the extended counterclaim but nevertheless reached a decision on its merits. Hence, Claimant challenged the arbitral award, *inter alia*, based on sec 595 (1) (2) ACCP[2]) (violation of the right to be heard).

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[1]) OGH, Nov 28, 2012, docket no. 4 Ob 185/12b (Austria).

[2]) Sec 611 (2) (2) ACCP, as amended by the Austrian Arbitration Act 2006 (SchiedsRÄG 2006).

B. Decision of the Supreme Court

The Supreme Court referred to state court procedure which permits implicit decisions about an extension of a claim. It argued that arbitration proceedings may not be subject to stricter requirements.

In addition, the Supreme Court found that Claimant must have been aware of the acceptance of the extended counterclaim because the arbitral tribunal made all other applications for extensions by the parties dependent on an amendment to the arbitrators' contract. Since the tribunal did not request such an amendment for the extension in dispute, there could not have been any doubt that the tribunal intended to deal with the extended counterclaim without further ado.

Furthermore, the Supreme Court upheld a line of decisions whereupon the right to be heard in arbitration is only violated if a party, at all stages of the proceedings, is completely deprived of any possibility to argue its case.[3])

This line of decisions has been heavily criticized by scholarly writing but the Supreme Court finally concluded that, **at least in the case at hand, there was no reason to deviate from it.** In addition, the court ruled that it had not been sufficiently proven that the arbitral tribunal had not considered Claimant's argument in respect to the counterclaim. In fact, the Supreme Court established that the arbitral tribunal had taken Claimant's plea into consideration since it made findings on the respective issues.

With regard to the plea to set aside the arbitral award due to a transgression of the arbitrator's jurisdiction, the Supreme Court found that Claimant would have had to raise that objection during the arbitral proceedings. Hence, this ground for annulment was precluded according to sec 592 (2) ACCP.[4])

C. Additional Remarks

The rather narrow view of the Austrian Supreme Court on the violation of the right to be heard has a long tradition. Actually, this view dates back to two Supreme Court decisions from the beginning of the 20th century.[5]) The Supreme Court upheld its rulings in the following decades without taking into account developments of modern arbitration proceedings. In 2010, a change in judicature loomed slightly.[6]) In its decision[7]) on an annulment proceeding based on the violation of the right to be heard – more precisely, on the mandatory nature of an oral hearing[8]) – the Supreme Court for the first time decided in favor of such an annulment claim. Furthermore, in the course of the enforcement of an arbitral award rendered in Ukraine, the Supreme Court referred to criticism in scholarly writing[9]), stating that **in the case at hand, whether or not the current judicature regarding the right to be heard should be upheld was a matter that could remain undecided.**[10]) Approximately two years later, the Supreme Court, again in the course of the enforcement of an arbitral award, returned to its narrow view that in arbitration proceedings the right to be heard is only violated if it was not granted as a whole, i.e. at no stage of the proceedings.[11])

The present case constitutes another silver lining on the horizon. The Court saw **"in the present case no reason to deviate from its previous line of decisions".** That may suggest a change in the Supreme Court's rulings in the near future.[12]) One might assume that such change in judicature will consider both the nature of arbitration as a proceeding based on (time) efficiency and party autonomy as well as the parties' need for an increased level of the right to be heard.[13])

II. Refusal of Recognition and Enforcement of an Arbitral Award due to Article V (1) (e) NYC[14])

A. Facts of the Case

The applicant requested that an arbitral award rendered by an ad-hoc tribunal in the Czech Republic be declared enforceable pursuant to the Convention on Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (New York Convention, NYC). The application expressly referred to the respective arbitration agreement, according to which the arbitral award could be appealed before an appellate tribunal within 30 days after delivery of the award. Such application to review the arbitral award was submitted by the Czech Republic's Minister of Health and the general manager of the governmental department responsible for representing the Czech Republic regarding property issues.

The applicant argued that only a representative of the competent regional department for property issues had authority to ask for a review of the award and

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[3]) *See, e.g.* OGH Legal Holding RS0045092.

[4]) As amended by the Austrian Arbitration Act 2006.

[5]) OGH, Oct 27, 1926, ZBl 1927/60, 141; OGH, Nov 20, 1934, Rsp 1935/17/10, 11.

[6]) *See* in detail Michael Nueber, *Neues zum rechtlichen Gehör im Schiedsverfahren*, wbl 130 (2013).

[7]) OGH, June 30, 2010, docket no. 7 Ob 111/10i (Austria).

[8]) *See* sec 598 ACCP, according to which an oral hearing has to be implemented at a proper stage of the proceeding if any party requests to do so and the parties have not excluded this right (*see* Gerold Zeiler, Schiedsverfahren sec 598 item 3 [2006]).

[9]) Andreas Reiner, *Schiedsverfahren und rechtliches Gehör*, ZfRV 52 (2003).

[10]) OGH, Sept 1, 2010, docket no. 3 Ob 122/10b (Austria).

[11]) OGH, April 18, 2012, docket no. 3 Ob 38/12b (Austria); *see also* Markus Schifferl, *Decisions of the Austrian Supreme Court on Arbitration in 2012*, in Austrian Yearbook on International Arbitration 2013 189 (Klausegger et al., eds. 2013).

[12]) Michael Nueber, remarks on OGH, Nov 28, 2012, docket no. 4 Ob 185/12b, wbl 288–290 (2013); *see also* Gregor Schett, *Ein Schritt des OGH am langen Weg zum rechtlichen Gehör im Schiedsverfahren, Anmerkung zum OGH-Beschluss 28.11.2012, 4 Ob 185/12b*, ecolex 628 (2013).

[13]) Michael Nueber, *supra* note 12, wbl 289–290 (2013).

[14]) OGH, April 16, 2013, docket no. 3 Ob 39/13a (Austria).

hence no valid appeal had been filed. To the contrary, the obliged party argued that the plea to review the arbitral award had been made in time and no decision on the appeal had been reached. It thus relied on the ground for refusal of enforcement provided in Article V (1) (e) NYC.

The Court of Appeal ruled that due to the commencement of the (appellate) arbitration proceeding to review the arbitral award, the plea for enforcement had to be rejected on the basis of Art V (1) (e) NYC. This decision was appealed by the applicant. The Supreme Court's ruling on that issue is presented in the following section.

B. Decision of the Supreme Court

As a preliminary question, the Supreme Court made clear that alleged grounds for refusal of enforcement must be examined in proceedings for enforcing a (foreign) arbitral award (rather than in different proceedings initiated by the obliged party, *Impugnationsklage*).

Furthermore, the Supreme Court ruled that within the scope of Article V (1) (e) NYC, the obliged party carries the burden of proof that the prerequisite of that ground for refusal – namely that the arbitral award was not yet binding – had been fulfilled. If an arbitral award has become binding, the Court of Exequatur only has the power to suspend the recognition/enforcement proceeding if a legal remedy has been taken in the State of origin of the arbitral award.

In a next step, the Supreme Court defined the notion of "binding award" in accordance with Art V (1) (e) NYC. With reference to (Austrian and German) jurisprudence, the Supreme Court made clear that an award is binding if it can no longer be reviewed by either a municipal court or another arbitral tribunal.

In line with this conclusion, an arbitral award rendered in "first instance" is not binding as long as an appeal may be filed to a "Higher Arbitral Tribunal". Whether a claim for reviewing an arbitral award was submitted by a (legally) competent person must solely be considered by the "Higher Arbitral Tribunal". Hence, the prerequisite of Article V (1) (e) NYC is fulfilled in the present case, because the arbitral proceeding is not concluded as long as the "Higher Arbitral Tribunal" has not decided on the matter.

C. Additional Remarks

This decision of the Austrian Supreme Court is in line with the rulings of the German Supreme Court, which – back in 1990 – also ruled that if one party appealed to an agreed "Higher Arbitral Tribunal", the arbitral award could not be considered binding.[15]) A "first instance arbitral award" can become binding only

[15]) BGH, Jan 1, 1990, docket no. III ZR 269/88 (Germany), which refers to BGH, May 10, 1984, docket no. III ZR 206/82 (Germany).

if the parties explicitly agreed that such appeal has no suspensive effect.[16]) In general, the "binding effect" of an arbitral award does not require a declaration of enforceability by a state court (so-called "double exequatur"); instead, it means that there is no further remedy on the merits.[17])

A partial award is only binding if it both finally concludes a part of the proceeding and has the quality of a partial court decision.[18]) Interim decisions and interim awards never have separate binding effect[19]) since the arbitration proceeding regularly continues and leads to a final award.[20])

Another important issue addressed by the Austrian Supreme Court concerns the question at which point of time an arbitral award can be considered binding. This issue relates to a time-wise reflection of the binding nature of an award. In his commentary on the New York Convention, Albert Jan Van den Berg advocated in favor of an **autonomous** interpretation regarding the moment when an award gains binding nature. Hence, an award can be enforced under the NYC once it is rendered.[21]) On the other hand, several scholars advocate that an arbitral award is only binding when it fulfills all requirements to be enforced under the law applicable to the arbitration proceeding.[22])

The Austrian Supreme Court has left the latter question unsolved, as it was not relevant to the court's decision in the current case.

III. Interpretation of an Arbitration Clause[23])

A. Facts of the Case

Claimant and Respondent were parties to a service contract. Claimant demanded payment of his wage under the contract. The service contract itself contained a clause according to which all disputes arising out of the contract should be settled by an arbitral tribunal acting under the arbitration rules of the Austrian Code of Civil Procedure (ACCP) (especially sec 577 *et seqq.* ACCP). This clause also expressly stated that its purpose was to exclude proceedings before a municipal court. The same contract also included a jurisdiction clause according to which all disputes arising out of or in the context of the contract should be decided by the competent state court.

[16]) Dietmar Czernich, New Yorker Schiedsübereinkommen Art V NYC mn 48 (2008).

[17]) Barbara Steindl, *Durchsetzung ausländischer Schiedssprüche*, in Schiedsgerichtsbarkeit-Praxishandbuch 245, 265 (H. Torggler ed., 2007).

[18]) OGH, June 25, 1992, docket no. 7 Ob 545/92 (Austria).

[19]) Dietmar Czernich, *supra* note 16, Art V NYC mn 50.

[20]) OGH, June 25, 1992, docket no. 7 Ob 545/92 (Austria).

[21]) Albert Jan Van den Berg, The New York Arbitration Convention of 1958 345 (1981).

[22]) Dietmar Czernich, *supra* note 16, Art V NYC mn 47.

[23]) OGH, May 7, 2013, docket no. 2 Ob 65/13t (Austria).

Both, the Court of First Instance and the Court of Appeal dismissed the claim due to lack of jurisdiction in view of the contractual arbitration clause.

B. Decision of the Supreme Court

The Supreme Court had to take a decision about which of these colliding clauses prevailed. The Court decided in favor of the arbitration clause.

In line with the decision of the Court of Appeal and scholarly writing, the Supreme Court found that a contractual arbitration clause could not be overruled by a – non-exclusive – jurisdiction clause included at a later point in time. Even where the parties agreed on an arbitration clause there would remain several opportunities to involve a municipal court, i.e. the issuance of an interim injunction (sec 595 ACCP) or the declaration whether or not a valid arbitration clause exists.

C. Additional Remarks[24])

If the wording of an arbitration clause leads to two equal results, the result supporting the validity of the arbitration clause must be preferred over the other result.[25]) Although arbitration agreements are considered procedural contracts, civil law regulations and thus the rules applicable to interpreting contracts must be taken into account.[26]) Hence, a jurisdiction clause can only prevail over an arbitration agreement if it was concluded with the parties' **clear intent** to waive the arbitration clause. In all other cases, a jurisdiction clause is only applicable where domestic courts can be seized in assistance to an arbitration or else.

[24]) For a detailed approach of this issue, *see* Gerold Zeiler, *supra* note 8, Sec 581 item 42–92.

[25]) Hans W. Fasching, Schiedsgericht und Schiedsverfahren im Österreichischen und im Internationalen Recht 31 (1973).

[26]) Gerold Zeiler, *supra* note 8, at Sec 581 item 50.

The Enforceability of Emergency Arbitrators' Decisions

Rainer Werdnik

I. Introduction

Parties, either in litigation or arbitration, often need urgent interim or provisional measures.[1]) As these measures can have a crucial effect on the outcome of the arbitration proceedings[2]), there is an increasing trend for seeking such arbitral interim measures.[3]) Without an interim measure, *e.g.*, to safeguard the disputed assets, an arbitral award might be pointless: "a winning party might obtain only a Pyrrhic victory, as the assets for satisfying the award could have disappeared in the interval".[4]) When deciding whether to apply for the respective measure with the national court or the arbitral tribunal, parties have to take into account many factors.[5]) Regarding arbitration proceedings it can, for different reasons, take a long time until the arbitral tribunal is constituted.[6]) Before the constitution of the arbitral tribunal, parties either have to wait with the application for interim measures until the arbitral tribunal is constituted or, where permitted by the applicable ar-

This article is based on the dissertation submitted for the LL.M. studies at the University of Edinburgh in 2012.

[1]) Patricia Shaughnessy, *Pre-arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules*, 27 J. Int'l Arb. 337 (No. 4, 2010); Kah Cheong Lye & Chuan Tat Yeo & William Miller, *Legal Status of the Emergency Arbitrator under the SIAC 2010 Rules*, 23 SAcLJ 94, at para. 1 (2011); Marc Blessing, *Introduction to Arbitration – Swiss and International Perspectives, in* International Arbitration in Switzerland, at para. 832 (V Berti et al. eds., 2000).

[2]) *See, e.g.*, Robert B von Mehren, *Rules of Arbitral Bodies Considered from a Practical Point of View*, 9 J. Int'l Arb. 105, 107 *et seq.* (No. 3, 1992).

[3]) Raymond J. Werbicki, *Arbitral Interim Measures: Fact or Fiction?, in* AAA/ICDR Handbook on International Arbitration and ADR, 89 (2nd ed., 2010); Blackaby et al., Redfern and Hunter on International Arbitration, at para. 7.05 (5th ed., 2009); Lye, Yeo & Miller, *supra* note 1, at para. 4; David E Wagoner, *Interim Relief, in* AAA Handbook on International Arbitration and ADR, 145 (Carbonneau & Jaeggi eds., 2006).

[4]) Albert Jan Van Den Berg, The New York Arbitration Convention of 1958, 143 (1981).

[5]) Peter Vcelouch, *Interim and Protective Measures Under the New Austrian Arbitration Act, in* Austrian Arbitration Yearbook 2007, 163, at 174 (Klausegger et al. eds., 2007)

[6]) Blackaby et al., *supra* note 3, at para. 4.02; Shaughnessy, *supra* note 1, at 337; Lye, Yeo & Miller, *supra* note 1, at para. 3; Vcelouch, *supra* note 5, at 173; Mark Kantor, *The ICC Pre-Arbitral Referee Procedure: Momentum for Expanded Use*, 20 Mealey's 31 (No. 9, 2005).