11th
Edition

2017-2018

The
Baker McKenzie
International
Arbitration Yearbook

Austria

Austria

Filip Boras[1] and Florian Ettmayer[2]

A. Legislation and rules

A.1 Legislation

International arbitration in Austria continues to be governed by Sections 577 to 618 of the Austrian Code of Civil Procedure, to which no legislative amendment has been made since 2013.

However, due to an amendment of the Chamber of Commerce Act passed on 19 June 2017, the Vienna International Arbitral Centre (the "VIAC") can now also administer purely domestic arbitrations. Prior to this amendment, these arbitrations had to be administered by the Regional Chambers of Commerce.

A.2 Institutions, Rules and Infrastructure

The arbitration rules of the VIAC (the "Vienna Rules") were last amended in 2013. Another amendment is planned for early 2018. The following points highlight the main changes that are still subject to formal approval of the Extended Board of the Austrian Chamber of Commerce.

First, the arbitration and mediation rules of the VIAC will form one set of rules. The arbitration rules will form Part I and the mediation rules will form Part II. This change is meant to reflect the equal relevance of both sets of rules.

Second, the arbitration rules will take account of the new competence of the VIAC to administer domestic arbitrations.

---

[1] Filip Boras leads the arbitration practice in Baker McKenzie's Vienna office. Filip is recognized by Chambers Europe and Chambers Global as a leading lawyer for dispute resolution in Central and Eastern Europe and is also the co-chair of Young Austrian Arbitration Practitioners.

[2] Florian Ettmayer is a junior associate in Baker McKenzie's Vienna office. Florian's practice focuses on international arbitration and commercial litigation.

Third, the members of the VIAC Board will be appointed for terms of five years, with possible reappointment.

Fourth, there will be additional emphasis on efficient and cost-saving conduct of the parties, especially with regard to recoverable costs.

Fifth, the tribunal will, at the request of the respondent, be able to order the claimant to provide security for costs if the respondent shows cause that the recoverability of a potential claim for costs is, with a sufficient degree of probability, at risk. If the claimant fails to comply with such an order, the tribunal will be able to suspend or terminate the proceedings upon request.

Sixth, the Secretary General of the VIAC will be able to terminate the proceedings if advances on costs are not paid.

Seventh, the Secretary General of the VIAC will enjoy additional flexibility in determining the arbitrators' fees.

Eighth, there will be revised versions of the model arbitration and mediation clauses.

Ninth, the registration and administrative fees will be amended and will be the same for arbitrations and mediations. The administrative fees for small disputes will be lowered, whereas if the amount in dispute exceeds EUR 1 million, administrative fees will be increased. The total cap for administrative fees will be increased to EUR 75,000.

B. Cases

Among the cases decided last year, two decisions of the Austrian Supreme Court (the "OGH") are of particular practical relevance. First, it ruled that an award cannot be set aside if it is clear from the reasoning of the award that the violation of the right to be heard or the procedural *ordre public* was irrelevant to the outcome of the decision (B.1 below). Second, it ruled that an arbitration agreement is ineffective if the tribunal constituted under this agreement will not

give effect to the mandatory rights enjoyed by a self-employed commercial agent who operates in the European Union (B.2 below).

B.1 Right to be heard

The decision of the OGH of 6 December 2016[3] dealt with the following facts:

The defendant sold shares in a construction company for EUR 53 million to the plaintiff. The company became insolvent. In arbitration proceedings, the defendant claimed the outstanding purchase price of EUR 3.7 million. The plaintiff challenged the purchase agreement arguing, among other things, that it was deceived by the defendant.

The arbitral tribunal granted the claim. While accepting that the defendant had concealed certain irregularities, the arbitral tribunal found that the plaintiff would also have concluded the agreement if it had been fully informed. The arbitral tribunal found that when concluding the agreement, the plaintiff was aware that the defendant had twice been convicted for bribery and that, therefore, knowledge of the other irregularities would not have changed anything.

The plaintiff requested to set aside the award. It argued that the defendant only invoked the plaintiff's knowledge of the convictions in its post-hearing brief and that this was too late since the arbitral tribunal had set an earlier cut-off date for such arguments. By basing its decision on this factual argument without offering the plaintiff the opportunity to comment, the arbitral tribunal violated the plaintiff's right to be heard as well as the procedural *ordre public*.

The OGH dismissed the claim and upheld the award. The most important point that the OGH made is that although under Austrian law, in principle, a violation of the right to be heard or the procedural *ordre public* results in an automatic setting aside of the award, an award cannot be set aside if it is clear from the reasoning of the award that the violation was irrelevant to the outcome of the decision.

[3] OGH, 6 December 2016, docket no. 18 OCg 5/16h (published on 30 January 2017).

In this case, the arbitral tribunal also based its decision to grant the claim on a second reason, independent of the first. It found that the plaintiff would have, in any event, concluded the agreement (even if it had known of the irregularities) due to internal company guidelines.

It was therefore clear to the OGH that the award itself showed that any violation of the right to be heard or the procedural *ordre public* could not have had any bearing on the outcome of the decision itself because the arbitral tribunal would have made the same decision.

B.2 Invalidity of an arbitration agreement due to a possible violation of the EU Directive on Self-Employed Commercial Agents

In its decision of 1 March 2017,[4] the OGH held that an arbitration agreement is ineffective if the tribunal constituted under the agreement does not give effect to the mandatory rights enjoyed by a self-employed commercial agent who operates in the European Union.

In state court proceedings, the plaintiff, a commercial agent based in Vienna, requested compensation pursuant to Section 24 of the Austrian Commercial Agents Act because the agency agreement with the defendant, which was governed by New York law, had been terminated by the defendant.

The defendant objected to the Austrian court's jurisdiction, arguing that the parties had agreed on arbitration. Arbitration had already been initiated by the defendant against the plaintiff before an arbitral tribunal seated in New York and the arbitral tribunal had already rendered a partial award.

The lower courts rejected the claim, reasoning that they lacked jurisdiction because of the agreement to arbitrate. The OGH overturned these decisions and found that the state court had jurisdiction for the following reasons.

[4] OGH, 1 March 2017, docket no. 5 Ob 72/16y.

Pursuant to Article II(3) of the New York Convention, a court must refer parties to arbitration if the matter is subject to an arbitration agreement unless the arbitration agreement is null and void, inoperative or incapable of being performed. A court may fully review the validity and effectiveness of an arbitration agreement and is not limited to a *prima facie* review. The corresponding provision in Austrian law (Section 584(1) sentence two of the Austrian Code of Civil Procedure) stipulates that a claim may not be rejected if the court finds that the alleged arbitration agreement is ineffective. An arbitration agreement may be considered ineffective if the parties' intention was to exclude the application of mandatory procedural or substantive provisions.

The OGH referred to the case law of the Court of Justice of the European Union, according to which apparent violations of fundamental EU law provisions constitute an *ordre public* violation. The CJEU in *Ingmar*[5] ruled that the EU Directive on Self-Employed Commercial Agents, which is implemented by the Austrian Commercial Agents Act, is applicable irrespective of the parties' choice of law if the underlying facts have a strong EU connection. It is generally understood that the CJEU classifies certain rights of commercial agents as being internationally mandatory in character. Parties cannot exclude these rights by agreement and they apply even if such rights are unknown under the applicable law.

However, the arbitral tribunal seated in New York had already expressed in its partial award that it would not give effect to those rights as they are unknown under New York law. Since the plaintiff's mandatory right to compensation would not be recognized by the arbitral tribunal, the OGH declared the arbitration agreement ineffective.

[5] Case C-381/98.

C. Funding in international arbitration

Neither Austrian arbitration legislation nor institutional rules address third-party funding. Furthermore, the OGH has not yet commented on this issue.

There is controversial discussion in legal literature as to whether third-party funding agreements violate Section 879 paragraph 2(2) of the Austrian Civil Code (prohibition of *quota litis* arrangements, ie any arrangement under which the lawyer's remuneration depends on the results of the case), and are therefore null and void. This provision prohibits any form of contingency fee arrangements with attorneys. The reason for this is to protect the client, who usually cannot assess the chances of success.[6] However, it is unclear whether the *quota litis* prohibition could also apply to third-party funders who do not provide legal services, but fund the litigation.

The Vienna Commercial Court in a decision of 7 December 2011 found that Section 879 paragraph 2(2) of the Austrian Civil Code does not apply to third-party funders.[7] The OGH left the issue open since the appeal could be dismissed without engaging in this question.[8] Yet, the OGH did state that even if the agreement with the third-party funder violated the *quota litis* prohibition, the invalidity would only concern the compensation arrangement. Therefore, the OGH decided that even in case of such invalidity, the plaintiff would still have standing in the proceedings.[9]

Against this background, and although many important questions remain unresolved, third-party funding can, in principle, be regarded as a valid practice in Austria, including with regard to arbitration.

[6] See *Zib* in *Fasching/Konecny*[3] II/1 §§ 31, 32 ZPO for references.
[7] Vienna Commercial Court, 7 December 2011, docket no. 47 Cg 77/10 s.
[8] OGH, 27 February 2013, docket no. 6 Ob 224/12b.
[9] OGH, 27 February 2013, docket no. 6 Ob 224/12b.