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Vienna Perspective – 2024

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Commentary

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Introduction

The following article presents a commentary on recent arbitration-related decisions by the Austrian Supreme Court.

The focus of this commentary lies on a decision dealing with the setting aside of an arbitral award based on a violation of the right to be heard because a party's request for an oral hearing had been dismissed. We analyze the previous case law by the Austrian Supreme Court and explain how the Court's understanding of the necessity of oral hearings has developed since the entry into force of the Arbitration Reform Act 2006.

Other decisions in our overview section address virtual hearings, challenges of arbitrators, whether a set aside award may be enforced, whether a decision on jurisdiction may be set aside, until when arbitration proceedings are considered to be still pending and the scope of arbitration clauses in private foundation deeds.

Focus: No Setting Aside Of Award • Right To Be Heard • No Hearing Despite Request

In its decision docket No. 18 OCg 10/19y[1] the Supreme Court had to deal with an application for setting aside of an award, based on an alleged violation of Claimant's right to be heard because a request for an oral hearing had been ignored by the tribunal.

The Claimant in the arbitration and the setting-aside procedure was a seller of pharmaceutical products manufactured in-house and by third parties. For the manufacture of the products Claimant required a certain ingredient. Respondent was the manufacturer of this ingredient.

In a supply agreement from 2013, the parties agreed on the continuous supply of the ingredient by Respondent to Claimant. The agreement contained a provision for the annual adjustment of the supply price, which would vary according to the package size bought. In 2014, 2015 and 2016, the parties had adjusted the prices by mutual agreement in each case. An amicable adjustment of the price for 2017 and the subsequent years, however, failed.

This dispute (following injunction proceedings and an interim agreement regarding the fulfilment of the contract until the rendering of the arbitral award) led to arbitration proceedings administered by the International Chamber of Commerce (ICC).

The proceedings were commenced by Claimant in March 2018 followed by Respondent filing a counterclaim. After the oral hearing was held in December 2018 both parties modified and extended their requests also including the determination of the supply price for the year 2019.

Following up on this extension, Claimant requested that another oral hearing shall be held dealing with the new or updated requests. In a procedural order, the arbitral tribunal rejected Claimant's request and closed the proceedings. In its arbitral award the arbitral tribunal decided on all requests, including those submitted after the oral hearing in December 2018.

Claimant challenged the award based – among other grounds - on a violation of the right to be heard pursuant to Section 611 (2) No. 2 of the Austrian Code of Civil Procedure.

The Supreme Court dismissed the claim. The Court stated that in general an arbitral tribunal indeed has a duty to hold an oral hearing pursuant to Section 598 sentence 2 of the Austrian Code of Civil Procedure if the hearing has not been excluded by mutual agreement by the parties and provided that a party submitted a respective request to hold such hearing. The Supreme Court, however, also emphasized, that the failure to hold a requested hearing does not necessarily lead to a successful challenge of an award. Besides the timeliness of such request, also the purpose of an oral hearing must be considered when determining whether the right to be heard has been violated.

In the specific case, the Supreme Court held that the purpose of the requested hearing did not require an oral hearing. The party requesting the setting aside of the award (i.e., the Claimant) had expanded its claim in the course of the arbitration proceedings and requested that an oral hearing shall be held. However, the basis for the decision relevant for the assessment of the claim had already been the subject of an oral hearing at that time. Since the Claimant had not submitted any substantiated arguments on the expediency of a second hearing despite a respective request from the arbitral tribunal, the Supreme Court concluded that the tribunal's denial to hold a further hearing had been justified and dismissed the request to set aside the award.

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The significance of the decision arises mainly from the development of the Supreme Court's case law over the course of the previous years.

Beginning with the decision docket No. 7 Ob 111/10i[2] the Court developed a more and more nuanced view on the question whether the denial of an oral hearing shall result in an annulment of an arbitral award.

Before the above-mentioned decision, more particular, before the entry into force of the Arbitration Reform Act 2006, an arbitral tribunal could refuse to hold an oral hearing within the scope of its discretionary powers pursuant to Section 587 (1) sentence 2 of the Austrian Code of Civil Procedure (in its previous version) despite a corresponding request by a party.

In its decision docket No. 7 Ob 111/10i, the Supreme Court for the first time dealt with the new (and currently applicable) *lex arbitri* and held that an oral hearing at the request of a party must be held at an appropriate stage of the proceedings. The Court based its conclusion on the parties' right to be heard as stipulated in Section 594 (2) sentence 2 of the Austrian Code of Civil Procedure. The Court further explained that the right to be heard is not satisfied by the mere possibility of a written statement. Therefore, failure to comply with a request to hold an oral hearing must – according to the Supreme Court – "*regularly*" constitute a ground for annulment within the meaning of Section 611 para. 2 no. 2 of the Austrian Code of Civil Procedure.

This seemingly broad understanding of Section 594 (2) of the Austrian Code of Civil Procedure has been specified further by the Supreme Court in its decision docket No. 18 OCg 9/19a[3]. In this decision the Court emphasized that the failure to hold a requested hearing does "*not necessarily have to lead to a setting aside*". The Court stated that a setting aside was not necessary if the request was made at a time that was no longer appropriate. It also declared the purpose of the requested hearing to be another decisive factor. According to the Supreme Court an oral hearing should enable the parties to present their positions orally and, if necessary, also serve the purpose of taking evidence. If none of these purposes are fulfilled, holding the hearing would be a mere "*formal*

act", which cannot be intended by the law. Since in this particular case it had been clear that none of the parties would actually participate in the oral hearing, the lack of purpose of the hearing was obvious and did not need further explanation. Consequently, the Supreme Court did not have to further elaborate under which circumstances a hearing (at which the parties actually participate) would constitute such an unnecessary formality. As a result, the Court could only provide general guidance.

This possibility to further elaborate, however, has been given to the Supreme Court only one year later in the decision at hand (docket No. 18 OCg 10/19y). This case essentially dealt with the adjustment of a delivery price based on a contractually agreed mechanism. In the first rounds of submissions the parties requested a price adjustment for the years 2017 and 2018. Consequently, an oral hearing was held in December 2018 dealing only with the prices for these years. Following the hearing, the parties also requested a price adjustment for 2019. To this end, Claimant requested that a further oral hearing shall be held. The arbitral tribunal denied this request and in its final award adjusted the price also for 2019. The Claimant then proceeded to challenge the award before the Austrian Supreme Court arguing a violation of the right to be heard.

In its judgment the Supreme Court confirmed the decision of the tribunal and thereby for the first time provided a specific example for when an oral hearing shall be understood merely as a "*formal act*". The Supreme Court stated that a hearing is not necessary when no further value (beyond the results already obtained in the proceedings) is to be expected from holding the requested hearing. Considering the facts of the case, the Supreme Court explained that the parties had already been heard orally on the modalities and conditions for a price adjustment. Hence, the "how to" had already been discussed. The Supreme Court further explained that the requested second hearing aimed at discussing only the application of these modalities and conditions on the price for the year 2019. Since there had been an exchange of written submissions on the price for 2019, the Supreme Court considered that an oral hearing on that matter would have been of no further value. In support of its argumentation, the Supreme Court also mentioned that the Claimant also failed to explain the necessity of such hearing despite an opportunity to do so.

This decision of the Supreme Court is to be welcomed. With this line of judgments, the Supreme Court has significantly strengthened Austria as a location for arbitration proceedings and clearly rejected delaying tactics consisting of (belatedly) requesting hearings. It goes without saying that (against the background of previous case law) it had been a popular tactic to submit new evidence or to assert new claims, which were then to be heard orally. The hurdle for arbitrators to refuse such hearings and the risk of having the award being set aside was correspondingly high. In this respect, this judgment substantially expands the arbitrators' decision-making powers.

Nevertheless, despite its positive effects, this judgment at hand does not give tribunals a "*carte blanche*" and a refusal of an oral hearing must still be carefully considered as the facts of the case in question were quite unique. The Supreme Court, for example, would have very likely taken another stance if the Claimant did not receive any chance either to present its case orally or to substantiate its request for another hearing.

Consequently, the value of an additional hearing should therefore always be thoroughly argued. This applies particularly to arbitrators refusing such a hearing as well as party representatives requesting one.

Overview

Right To be Heard • Virtual Hearing • Unfair Treatment

In case docket No. 18 ONc 3/20s[4] the Supreme Court decided (as one of the first national courts worldwide) on the question of the admissibility of remote hearings despite one's party's objection.

The background of the proceedings before the Austrian Supreme Court was an arbitration seated in Vienna, pending since 2017 and governed by the Vienna Rules 2013. The respondents in the arbitration and the subsequent applicants in the court proceedings were seated in the US, their opponent was based in Austria. In the arbitration an in-person evidentiary hearing was originally scheduled to take place on 15 April 2020, at 10:00 a.m. CET in Vienna. At this hearing, respondents' witness who was domiciled in Los Angeles was to be examined.

However, due to the pandemic, travel restrictions were imposed worldwide, including in Austria, as of

middle of March 2020. Consequently, a case management conference was held on 19 March 2020 to discuss the impact of the restrictions on the upcoming hearing and possible solutions. In a submission dated 2 April 2020, the respondents opposed holding a remote hearing by videoconference. On 8 April 2020, the tribunal ordered that the hearing will take place as envisaged on 15 April 2020. However, due to the pandemic, it decided that the hearing shall be held via videoconference and changed the time to 3:00 p.m. CET, respectively 6:00 a.m. PST.

Dissatisfied with the tribunal's decision, the respondents filed a challenge against all three arbitrators with the VIAC Board on the grounds of impartiality. Respondents based their challenge on three claims: First, they described the conduct of the tribunal as vexatious. They claimed that they were not given appropriate time to prepare for the hearing because (counting from the release of the procedural order) only three full working days were available. Second, respondents alleged that they were treated unequally by the tribunal because for them the hearing began at a much earlier time in the day than for the other party. Lastly, respondents claimed that by deciding to conduct the hearing via videoconference the tribunal generally violated the parties' right to be heard and right to fair trial because it did not take any measures to prevent witness tampering. Respondents argued that in a remote setting it could not be verified which documents the witness would have access to, if any other person would be present in the room with the witness, or if the witness received chat-messages during the hearing. The VIAC Board rejected the challenge. The respondents then filed their challenge of the tribunal with the Supreme Court, which decided as follows:

On the alleged unfair conduct and unequal treatment, the Supreme Court concluded that the tribunal's conduct did not constitute an unfair treatment as set forth in Section 594 (2) of the Austrian Code of Civil Procedure. The tribunal thus acted within its discretion enshrined in Art 28 (1) sentence 1 of the Vienna Rules 2013.

On the one hand, the Supreme Court reasoned that as the hearing had been scheduled for months the parties were given enough preparation time and could not have been surprised by the fact that the hearing took place at the envisaged date. On the other hand, the Supreme Court considered that the time difference between the parties and the respective different starting times did not lead to unfair or unequal treatment. Rather, for both parties the hearing took place outside their typical office hours. Also, by agreeing on the arbitral seat in Vienna, the parties deliberately accepted the drawbacks associated with the city's geographical location, such as time differences or travel requirements. The court added that the starting time at 6:00 a.m. also meant a significantly lower interference with a typical daily routine compared to travelling to another continent.

On the general permissibility of remote hearings, the Supreme Court considered holding a remote evidentiary hearing despite one party's objection to be in line with Art 6 ECHR. This provision forms part of the Austrian Constitution and does not only include the right to be heard, but also the right to access to justice. The Supreme Court held that when a stagnation of proceedings is imminent, remote hearings can provide a lawful possibility to combine both of these rights. Consequently, it dismissed the applicants' concerns regarding the abstract possibility of witness tampering and stated that this risk could not be fully excluded in physical hearings either. On top of that, the Supreme Court elaborated that in general a tribunal has possibilities to prevent misuse, e.g., by asking witnesses to look directly into the camera, make their hands visible during the examination, or pan the camera to see the entire room. Also, technology would allow tribunals to get an even better look at witnesses by observing them via an enlarged view and by recording the examination. Thus, the Supreme Court dismissed the challenge of the tribunal in its entirety.

Impartiality of Arbitrators • Challenge Due To Improper Procedural Conduct

Arbitration proceedings had been pending between the parties since June 2019. In a total of five submissions to the tribunal, respondent, who was not represented by a lawyer, filed motions to challenge the entire arbitral tribunal. In summary, respondent based its motions on procedural failures of the tribunal regarding questions on (i) how communication shall be exchanged with the parties, (ii) the tribunal's duty to instruct the parties and (iii) the formal conduct of proceedings. In particular, respondent accused the tribunal of failing to comply with the statutory formal requirements by communicating with the parties (only) via email.

In its procedural orders dated 12 November 2020 and 23 November 2020, the arbitral tribunal rejected these motions. It did not find any procedural violations and any favorable or unfair treatment of one of the parties. The respondent then proceeded to challenge the tribunal before the Austrian Supreme Court.

The Supreme Court in its decision docket No. 18 Onc 5/20k[5] confirmed the decision of the tribunal and rejected the challenge. In its reasoning the Court explained that even if respondent's statements were assumed to be correct, this would not imply any bias on the part of the arbitral tribunal. Under the Austrian *lex arbitri* an arbitrator can only be challenged if there are circumstances that give rise to justified doubts as to his or her impartiality or independence, or if he/she does not fulfill the requirements agreed between the parties (Section 588 (2) of the Austrian Code of Civil Procedure).

Dealing with the allegations at hand, the Supreme Court, however, elaborated that improper conduct of the proceedings and procedural errors do not *per se* give rise to the justified assumption of a bias. Even if the procedural decisions or orders of the tribunal addressed by the respondent were actually to be regarded as incorrect or improper, such circumstances would therefore not (in itself) justify a challenge. Circumstances that would give rise to justified doubts as to the impartiality or independence of a tribunal would have to consist of serious procedural violations or a (permanent and substantial) favorable or unfair treatment of one of the parties.

However, the court was unable to confirm such circumstances in the case at hand. In particular, it could not find any bias in the fact that the tribunal communicated with the applicant via email and via an email address provided to the tribunal by respondent itself. As the respondent especially did not claim that it was excluded from communications as a result of this form of communication, the Supreme Court could not find any ground for a justified challenge of the tribunal.

Enforcement Despite Setting Aside of Award • *Ordre Public*

In case docket No. 3 Ob 2/21x[6] the Supreme Court dealt with the recognition of a foreign arbitral award.

Initially, the Court of First Instance decided to declare an arbitral award of the International Arbitration Court at the Belarusian Chamber of Commerce and Industry rendered in 2019 enforceable in Austria and initiated enforcement proceedings. The debtor, on the other hand, invoked a ground for refusal under Article 5 (2) (b) of the New York Convention, relying on an arbitral award rendered in 2014 in proceedings between the same parties, in which the debtor had won and was awarded a payment claim against the applicant, a Belarusian state-owned entity.

However, this earlier arbitration award was overturned by the Supreme Court of the Republic of Belarus due to the incorrect spelling of the name of one of the three arbitrators, and the fact that the applicant had not been notified of the decision by which the arbitrators had corrected this spelling mistake.

For this reason, the debtor had claimed the same amount again before the arbitration court, whereupon the applicant, who had initially paid to the debtor the amount awarded in the first arbitral award, filed a counterclaim for recovery of this payment.

The debtor appealed against the decision of the Court of First Instance, arguing that the setting aside of the first arbitral award was incompatible with the fundamental values of the Austrian legal system.

The Court of Appeals found that the subject matter of the arbitration was the same in both proceedings and, thus, the second award constituted a violation of the *res judicata* principle. It further stated that the setting aside due to an incorrect spelling of a name was arbitrary.

The Supreme Court emphasized that apart from the allegation that the arbitral tribunal had been incorrectly composed, no reason for refusal of recognition of the first award was apparent. If the setting aside of the first arbitral award was made only based on the incorrect spelling of the name of one arbitrator, this is to be considered an obvious distortion of justice in favor of the Belarusian state-owned applicant. This would not be compatible with the fundamental values of the Austrian legal system and therefore the first arbitral award would continue to be recognizable in Austria. The Supreme Court, therefore, confirmed that the matter shall be remitted to the Court of First Instance for further assessment on whether the first arbitral award was indeed to be recognized in Austria

and, thus, whether the recognition and enforcement of the second award should be refused.

No Setting Aside of Mere Decision on Jurisdiction

In the proceedings concerning docket No. 18 OCg 4/21v[7], the Supreme Court dealt with the claim for the setting aside of an alleged arbitral award by which the arbitral tribunal had declared itself competent to decide on the substance of the matter.

The arbitral tribunal reserved its reasoning regarding its decision on jurisdiction to the arbitral award on the merits. The Claimant submitted that, due to the lack of a reasoning, the award on jurisdiction violated fundamental procedural principles and is therefore null and void and must be set aside. In addition, the three arbitrators were allegedly biased as they did not sufficiently guide the applicant and did not treat the requests of the applicant for evidence fairly.

The Supreme Court emphasized that the prerequisite for an action for setting aside pursuant to Section 611 (1) of the Austrian Code of Civil Procedure was that an arbitral award existed at all. However, the relevant decision on jurisdiction was neither to be understood as an arbitral award according to its objective declaratory value, nor did it fulfil the formal requirements for such an award. The challenged statement of the arbitral tribunal clearly only served to explain the subsequent order for an exchange of pleadings on the substantive issues of the case and the announcement of the date for the oral hearing. The Supreme Court could not discern any recognizable intention on the part of the arbitral tribunal to formally rule separately on the question of jurisdiction by award. Moreover, this procedural order had only been signed by the chairperson and thus did not have the signatures of at least the majority of all members of the arbitral tribunal, as required under Section 606 (1) of the Austrian Code of Civil Procedure. Thus, the decision in question was not an arbitral award and, thus, could not be the subject of an action for setting aside pursuant to Section 611 of the Austrian Code of Civil Procedure.

Involvement of third party • objection of arbitration pendency

In case docket No. 7 Ob 79/22a[8], the Supreme Court addressed a plaintiff's appeal on the question whether an arbitration was still pending and, thus, state court proceedings are precluded.

The plaintiff had concluded a purchase agreement with a third party for 1 million FFP3 masks. Instead of the agreed FFP3 masks, he received inferior simple mouth-nose protection masks, which allegedly led to damages. The defendant was an insurance company that insured the transportation of the masks by the shipping company. Although the plaintiff did not have a direct contractual relationship with the defendant, the plaintiff argued that it suffered economic loss because it paid the full purchase price but did not receive the agreed goods. The damages occurred in November 2020, when only simple mouth-nose protection masks were delivered instead of the agreed FFP3 masks.

Arbitration proceedings were initiated in relation to the original purchase agreement, in which the plaintiff also requested the inclusion of the defendant of the present case. This application to include the defendant was later withdrawn, but the proceedings were not formally terminated.

The defendant claimed that the arbitration proceedings were still pending, as no declaration of termination had been made. It invoked the pendency of the arbitration and requested that the statement of claim be dismissed on this ground.

The Court of First Instance dismissed the statement of claim on the grounds of arbitration pendency. It argued that the decisive factor for arbitration pendency is that the statement of claim or a notice initiating the arbitration proceedings has been served on the defendant and that the defendant has thus gained knowledge of the arbitration. This was undisputedly the case, as arbitration proceedings were pending before the Vienna International Arbitral Centre ("VIAC") with the plaintiff as plaintiff regarding the same claim as in these state court proceedings. The plaintiff had applied for the inclusion of the defendant in the arbitration proceedings and the defendant had received the notice in which it was requested to participate in the appointment of the arbitrators, as a result of which the arbitration pendency had occurred.

The Court of Appeal confirmed this decision and stated that as long as arbitration proceedings were pending, this prevented the commencement of state

court proceedings. It is only possible to commence proceedings before a state court or another arbitration court after the arbitration pendency has ended. According to Section 608 of the Austrian Code of Civil Procedure and the Vienna Rules, the termination of the arbitration proceedings requires either an arbitral award, a decision by the arbitral tribunal or a declaration by the Secretary General of the VIAC that the arbitration proceedings have ended. None of the parties had asserted this in the first instance. In his appeal, the plaintiff argued for the first time that on December 29, 2021, i.e. after the end of the hearing at first instance, the application for inclusion was declared terminated by the Secretary General of the VIAC. The Court of Appeal found however that this submission constituted an inadmissible new fact.

The Supreme Court referred to Section 233 (1) of the Austrian Code of Civil Procedure, which states that no legal action may be brought before the same or another court during the pendency of the dispute. An action that is filed during the pendency of the dispute based on the same claim must be dismissed on application or *ex officio*. A claim is regarded as the same claim if not only the parties are identical, but also the procedural claim asserted in the new action is identical to that of the previous action both in terms of the request and the legally relevant facts. Filing of the action and service of the action on the defendant results in the pendency of the dispute.

In analogy to the pendency of a dispute in state court proceedings, a statement of claim or a notice initiating arbitral proceedings must be served on the defendant and the defendant must thus become aware of the proceedings. In the specific case, the arbitration pendency occurred with the service of the application for inclusion together with this arbitration's statement of claim on the defendant. Pursuant to Article 34 of the Vienna Rules, the termination of the arbitration proceedings as a result of the withdrawal of the request for arbitration requires either a formal decision of the arbitral tribunal or an express declaration by the Secretary General of the VIAC that the arbitration proceedings have ended.

At the time of the hearing, there was neither a decision of the arbitral tribunal nor a declaration by the Secretary General pursuant to Article 34 Vienna Rules yet issued.

The claimant's assertion, made for the first time in the appeal, that the application for inclusion in the arbitration proceedings was declared terminated on December 29, 2021 constitutes an inadmissible new fact and was furthermore not sufficiently substantiated. The cessation of the procedural obstacle of arbitration pendency was thus not proven.

The Supreme Court concluded that according to Section 584 (3) sentence 1 of the Austrian Code of Civil Procedure, if arbitration proceedings are pending, no further litigation may be conducted before a state court or arbitration tribunal on the same claim asserted; an action brought on the same claim must therefore be dismissed. Section 584 para. 3 no. 1 of the Austrian Code of Civil Procedure does not apply pursuant to section 584 para. 3 no. 2 of the Austrian Code of Civil Procedure only if the lack of jurisdiction of the arbitral tribunal was objected to by the arbitral tribunal at the latest with the submission of the case and a decision of the arbitral tribunal on this cannot be obtained within a reasonable period of time.

In the present case, the plaintiff had neither pleaded in the first instance proceedings that the Secretary General's declaration could not be obtained within a reasonable period of time, nor had it made any factual allegations that could support this assumption. As a result, the Supreme Court confirmed the decisions of the lower instances and dismissed the appeal.

Scope of Arbitration Clause • Private Foundation • Lack of Jurisdiction of Arbitral Tribunal

Respondent in the proceedings before the Supreme Court as well as in the arbitration was a private foundation pursuant to Section 1 of the Austrian Private Foundation Act whose founder died in 2009.

Claimant was a beneficiary of the foundation and (based on this legal position) asserted a claim against the respondent before an ad hoc arbitral tribunal. As regards the jurisdiction of the arbitral tribunal, claimant relied on point 10 of the previous version of the foundation's supplementary deed of 29 January 2007, which reads as follows:

"*After the death of the founder, legal disputes between the foundation and the beneficiaries regarding claims based on provisions of the foundation deed or the supplemen-*

tary foundation deed shall be decided by a court of arbitration, whereby the parties to the dispute shall submit to this court of arbitration, failing which their claims shall be forfeited. […]."

Following the respondent's objection to the tribunal's jurisdiction, the tribunal in a first step limited the subject matter of the arbitral proceedings to the question of jurisdiction. In a (final) award, the arbitral tribunal then ruled that it did not have any jurisdiction in the matter at hand and dismissed the claim in its entirety. The tribunal held that the new version of the foundation's supplementary deed from 2017 did not contain an arbitration clause prohibiting any ruling by the arbitral tribunal on the asserted claim by the beneficiary.

Claimant challenged the award before the Austrian Supreme Court and argued that the deletion of the arbitration clause in the new supplementary deed could only relate to the beneficiary claims newly regulated in 2017, but not to the claim in question, which was based on the previous version of the supplementary foundation deed.

In decision docket No. 18 OCg1/21b[9] the Supreme Court held that the scope of an arbitration clause must in principle be determined on the basis of its content, which must be interpreted. A foundation deed as the legal basis of a private foundation in its nature equals bylaws of an incorporation. The provisions in the supplementary deed (including the arbitration clause) are therefore not to be interpreted as party agreements (hence subjectively) but rather objectively as general norms (pursuant to Sections 6 and 7 of the Austrian Civil Code). In this regard, the Austrian Supreme Court further emphasized that general norms are always to be applied in accordance with their latest version, unless the legislator expressly states otherwise.

Examining the objective meaning of the supplementary deed at hand, the Austrian Supreme Court did not raise any objections against the arbitral award. Rather, the Supreme Court explained that the previous supplementary deed ceased to have effect once the legally binding amendment of the new supplementary deed came into force which ultimately resulted in the invalidity of the arbitration clause. Since claimant could not prove that the new supplementary foundation deed contained an arbitration clause or a transitional provision according to which the arbitration clause of the previous version would apply to "old claims", the Supreme Court found itself unable to find any grounds for the setting aside of the award.

Endnotes

1. Oberster Gerichtshof [OGH] [Supreme Court] March 2, 2021, docket No. 18 OCg 10/19y; see also Herbert Painsi, Case Comment, *Schiedsgericht: Grenzen der Entscheidungskompetenz und Verhandlungspflicht*, 2021 EvBl 790; Christian Hausmaninger/ Oliver M. Loksa, Case Comment, *OGH: Weitere Ausnahme von der Notwendigkeit der Durchführung einer Schiedsverhandlung* , 2021 ÖJZ 809; Désirée Prantl/ Stephanie Rohmann/ Paul Adelt, Case Comment, *Die Rechtsprechung des OGH zur Aufhebung von Schiedssprüchen seit dem SchiedsRÄG 2013*, 2023 ecolex 559.

2. Oberster Gerichtshof [OGH] [Supreme Court] June 30, 2010, docket No. 7 Ob 111/10i; *see also* Christian Dorda/ Veit Öhlberger, Case Comment, *Vienna Perspective – 2011*, 26/4 Mealey's International Arbitration Report 21 (2011); Christoph Stippl, Case Comment, *Schiedsspruchaufhebung mangels Durchführung einer mündlichen Verhandlung*, 2010 ecolex 1159; Martin Platte, Case Comment, *Schiedsspruch mangels mündlicher Verhandlung aufgehoben*, 2010 ÖJZ 1017; Alfred Siwy, Case Comment, *Supreme Court strengthens the right to be heard*, http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=39c9a582-deba-4027-87f4-a321de957097.

3. Oberster Gerichtshof [OGH] [Supreme Court] January 15, 2020, docket No. 18 OCg 9/19a; see also Herbert Painsi/ Christian Hausmaninger/ Oliver Loksa, Case Comment, *Verhandlungspflicht im Schiedsverfahren*, 2020 EvBl 839.

4. Oberster Gerichtshof [OGH] [Supreme Court] July 23, 2020, docket No. 18 ONc 3/20s; see also Herbert Painsi/ Christian Hausmaninger/ Oliver Loksa, Case Comment, *Schiedsverfahren: Videokonferenz als Ablehnungsgrund?,* 2021 EvBl 146; Ingeborg Edel/ Anna Förstel-Cherng/ Marija Dobric, Case Comment, *Ablehnung von Schiedsrichtern im Lichte der jüngsten OGH-Judikatur*, 2021 RdW 101; Anna Förstel-Cherng/ Elisabeth Tretthahn-Wolski, Case Comment, *Ein Durchbruch für mehr Nachhaltigkeit*

in Schiedsverfahren – OGH stärkt die Möglichkeit, Schiedsverhandlungen per Videokonferenz durchzuführen, 2021 NR 88; Severin Glaser/ Matthias Neumayr/ Roland Winkler, Case Comment, *Leitentscheidungen der österreichischen Höchstgerichte zur Europäischen Menschenrechtskonvention im Jahr 2020*, 2021 ZöR 1423.

5. Oberster Gerichtshof [OGH] [Supreme Court] January 19, 2021, docket No. 18 ONc 5/20k; see also Leonie Liebenwein, Case Comment, *Keine berechtigten Zweifel an der Unparteilichkeit eines Schiedsgerichts bei Kommunikation via E-Mail*, 2021 ecolex 324.

6. Oberster Gerichtshof [OGH] [Supreme Court] March 24, 2021, docket No. 3 Ob 2/21x; see also Leonie Liebenwein, Case Comment, *Keine Versagung der Anerkennung bzw Vollstreckbarkeit eines aufgehobenen Schiedsspruchs bei Verstoß gegen den ordre public*, 2022 ecolex 139; Pepita Fallmann/ Florian Stefan, Case Comment, *Die schiedsrechtliche Rechtsprechung des OGH seit dem SchiedsRÄG 2013*, 2023 ecolex 555.

7. Oberster Gerichtshof [OGH] [Supreme Court] September 22, 2021, docket No. 18 OCg 4/21v; see also Wolfgang Kolmasch, Case Comment, *Keine Aufhebungsklage gegen Nicht-Schiedsspruch*, 2022 Zak 139.

8. Oberster Gerichtshof [OGH] [Supreme Court] June 29, 2022, docket No. 7 Ob 79/22a; see also Hubertus Schumacher, Case Comment, *Schiedsanhängigkeit und Zurückziehung der Schiedsklage*, 2022/668 RdW 831; Sabine Kriwanek/ Barbara Tuma, Case Comment, *Schiedsanhängigkeit gemäß Wiener Regeln – „zusätzliche Partei"*, 2022 RdW 846; Jörg Ziegelbauer, Case Comment, *Zurücknahme der Schiedsklage und Zulässigkeit des Rechtswegs*, 2023 EvBl 110.

9. Oberster Gerichtshof [OGH] [Supreme Court] April 14, 2021, docket No. 18 OCg 1 /21b; see also Gernot Murko, Case Comment, *Zur Schiedsklausel in einer Stiftungserklärung*, 2021 PSR 139; Sixtus-Ferdinand Kraus, Case Comment, *Zuständigkeit eines Schiedsgerichtes; Auslegung Stiftungserklärung; Aufhebung Schiedsspruch*, 2021 wbl 717; Martin Schauer, Case Comment, *Stiftungserklärung fällt unter den Begriff der Statuten iSd § 581 Abs 2 ZPO*, 2021 ecolex 924; Dietmar Czernich, Case Comment, *Schiedsgerichtsbarkeit bei Privatstiftungen: Grünes Licht oder Versehen des OGH?*, 2022 JEV 12. ■

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