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Austria

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A. Legislation and rules

A.1 Legislation

The preceding decade saw two major legislative changes with respect to arbitration. First, the Austrian legislature clarified that the commercial power of attorney issued by a business person under Austrian law (*Handlungsvollmacht*) also covers the authority to conclude an arbitration agreement. Second, since 1 January 2014, the Austrian Supreme Court ("OGH") has effectively been the only and final venue for the setting aside of arbitral awards.

A.1.1 Commercial power of attorney and arbitration agreements

Generally, statutory representatives of corporate entities (such as directors of a stock corporation or a limited liability company), statutory representatives of private foundations or associations, and *Prokuristen* may validly enter into arbitration agreements for their respective entities.[3] As to other proxies, Austrian law contains a particularity that often led to unpleasant surprises for foreign users of arbitration in the context of Austrian law. According to Section 1008 of the Austrian Code of Civil Law ("ABGB")[4], as interpreted by case law, a proxy can only validly conclude an arbitration agreement if they are vested with a so-called special power of attorney, which calls for high formal requirements. Though a well-known problem for

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[3] *Prokuristen* are holders of a special statutory power (*Prokura*) granted by a business person under the provisions of the Austrian Business Act ("UGB"), which must be recorded in the commercial register.
[4] Section 1008 of the ABGB stipulates that: "The following transactions… require a special … power of attorney. (…) the right to choose an arbitrator…"

foreign users, interestingly, this issue was not addressed during the revision of the Austrian Arbitration Act of 2006. Rather, the Austrian legislature chose to amend the Austrian Business Act ("UGB") in 2007. Section 54 of the UGB, which entered into force on 1 January 2007, clarifies that one specific power of attorney, namely the power of attorney issued by a business person (*Handlungsvollmacht*) also covers the authority to conclude an arbitration agreement. Thereby, the requirement of a special power of attorney no longer poses a practical problem for companies when entering into arbitration agreements. Notably, the reference to arbitration in Section 1008 ABGB still exists, so that the special power of attorney remains of relevance in limited cases, such as where public entities to which the UGB does not apply act through proxies. Furthermore, economically independent lawyers arguably must be vested with a special power of attorney when concluding arbitration agreements in the name of their client. Because of the remaining legal uncertainty, it has been suggested that the reference to arbitration in Section 1008 ABGB be deleted entirely.[5]

A.1.2 The OGH as the only and final venue for the setting aside of arbitral awards and other arbitration-related proceedings

A long-requested revision of the procedure to set aside an arbitral award was adopted by the Austrian parliament in June 2013 and entered into force on 1 January 2014. The former legal framework required parties that seek to set aside an arbitral award in Austrian courts to run through three court instances in order to obtain a final and binding decision by the OGH. This was considered a substantive burden of time and costs and a competitive disadvantage of Austria as place of arbitration. In other jurisdictions, there are only two instances or even a single direct action to the highest court.

[5] *Koller*, ecolex 2011, 878.

Since 1 January 2014, the Austrian OGH has effectively[6] become the only and final venue for setting aside arbitral awards. The proceedings before the OGH follow the regular rules of civil procedure so that the OGH is also entitled to conduct evidentiary hearings. The concentration of the challenge procedure required an adjustment to the court fees, which are now fixed at 5% of the amount in dispute as indicated in the relevant arbitral award.[7]

Also, proceedings on the declaration of the existence or non-existence of an arbitral award and proceedings on the constitution of an arbitral tribunal now fall within the sole jurisdiction of the Austrian OGH.

A.2 Institutions, rules and infrastructure

A new version of the arbitration rules of the Vienna International Arbitral Centre (VIAC) was adopted and came into force on 1 July 2013 ("Vienna Rules 2013").[8] For more than a year, a group consisting of both practitioners and academics worked on revising the existing rules. Their main aim was to expedite the proceedings and to address cost-related issues. On 8 May 2013, the draft of the Vienna Rules 2013 was approved by the Austrian Federal Economic Chamber.

The most important changes are briefly summarized below:

A.2.1 Joinder of third parties

The 2006 version of the Vienna Rules did not regulate the joinder of third parties in arbitration proceedings. According to Article 14 of the Vienna Rules 2013, a joinder of third parties is now generally possible in various shapes and forms. The arbitral tribunal decides on the joinder after considering all the relevant circumstances and after having heard all parties. It is basically left to the discretion of the

[6] The Austrian legislature made an exception for consumer and employment disputes. In these disputes, the three instances remain.
[7] The minimum amount to be paid is fixed at EUR 5,253.
[8] http://www.viac.eu/en/arbitration/arbitration-rules-vienna.

arbitral tribunal to decide which circumstances are relevant, thus, whether a party should be joined or not.

A.2.2 Consolidation of arbitral proceedings

According to Article 15, two or more arbitration proceedings can be consolidated upon the request of a party, if the parties agree to the consolidation or if the same arbitrator(s) was/were nominated or appointed. Additionally, the place of arbitration for all of the arbitration agreements on which the claims are based must be the same. The decision is taken by the Board of the VIAC.

A.2.3 Constitution of the arbitral tribunal in multiparty proceedings

Although there is no express rule on the admissibility of multiparty arbitrations under the Vienna Rules 2013, it is acknowledged that multiparty proceedings are admissible. The appointment of arbitrators in such proceedings is now expressly regulated in Article 18. Where the dispute is to be resolved by a sole arbitrator and the parties do not jointly nominate this arbitrator within 30 days, the arbitrator is appointed by the Board of the VIAC.

Where the dispute is to be resolved by a panel of arbitrators, the parties on each "side" have to jointly nominate an arbitrator "for their side" within 30 days. While the joint nomination of parties "on one side" is the standard rule, there is of course the possibility that the parties "on one side" cannot agree on an arbitrator; in this case, this arbitrator is appointed by the Board of the VIAC. Generally, the nomination of the arbitrator by the other party/parties remains untouched. However, as was the issue in the *Dutco* decision, such an arrangement may lead to unequal treatment between the parties, because the parties on one side may be considered to have influenced the constitution of the tribunal to a greater extent. Article 18 paragraph 4 takes account of these instances by granting the Board of the VIAC the power to appoint all arbitrators of the panel and even to revoke previous appointments in exceptional cases.

A.2.4 Expedition of the proceedings

Article 45 aims to accelerate the arbitration proceedings. Unlike similar provisions in other institutional arbitration rules, it does not link the possibility of accelerating the proceedings to the amount in dispute. Article 45 only applies if the parties have agreed on its application in the arbitration agreement, or at an early stage of the arbitration. The rules on expedited proceedings provide, for instance, for the possibility of shortening different time limits, to have the case decided by a sole arbitrator, to have fewer written submissions and to have a time limit for the rendering of an arbitral award.

B. Cases

B.1 Actions for nullification of a resolution of a limited liability company in arbitration

In its decision of 19 April 2012,[9] the OGH examined whether actions for nullification of a resolution of a limited liability company ("GmbH") are arbitrable. The OGH also examined whether – and under which circumstances – arbitral awards on such matters have an effect on non-shareholders.

In 2011, S GmbH signed a contract with the non-shareholder I GmbH for the construction of a building. The majority of the shareholders of S GmbH voted for the conclusion of this contract at a shareholder meeting. One shareholder, who had voted against the conclusion of the contract, brought an action for the nullification of the shareholder resolution against S GmbH. He argued that one shareholder of S GmbH had not been entitled to vote at the shareholder meeting. The articles of association of S GmbH included an arbitration agreement for all disputes between the company and its shareholders. However, the claimant argued that the claim could not be referred to arbitration since the claim was not arbitrable. He argued that the shareholder resolution in question exceptionally had an external effect on the validity of the construction contract between S GmbH and I GmbH.

[9] OGH 6 Ob 42/12p.

Thus, an arbitral award in this matter would potentially interfere with the rights of the non-shareholder I GmbH, which – because it was not a party to the arbitration agreement – would not be granted the right to be heard in the arbitration, whereas it would be accorded this right in state court proceedings.

Both the court of first instance and, on appeal, the court of second instance dismissed the claimant's action. They held that the claim was arbitrable and thus declined jurisdiction. The court of second instance clarified that the question of the arbitral award's effect on I GmbH did not concern the courts' jurisdiction, but that anyway, I GmbH would have to be granted the right to be heard in the arbitration if the award was to have any effect on it. The Supreme Court confirmed that the claim was arbitrable. However, contrary to the court of second instance, the Supreme Court held that I GmbH did not have the right to be heard in the arbitration on the nullification of the shareholder resolution. The Supreme Court reasoned that I GmbH did not have the right to participate and vote in the shareholder meeting. Thus, the Supreme Court saw no reason to grant I GmbH this right in an arbitration on virtually the same matter. The Supreme Court stated that even if the shareholder resolution exceptionally had an external effect and was thus decisive for the validity of the contract between S GmbH and I GmbH, the arbitral award on the validity of the shareholder resolution would, in any event, only have "reflex effect" (*Tatbestands- oder Reflexwirkung*) on I GmbH. According to the OGH, such "reflex effect" ordinarily does not entail the right to be heard in an arbitration.

The Supreme Court thus departed from its previous case law in which it required that a third party must be granted the right to be heard in an arbitration in order for the arbitral award to have "reflex effect" on that third party.[10]

[10] OGH 6 Ob 170/08f.

B.2 The consumer in Austrian arbitration

In its decision of 16 December 2013,[11] the OGH decided that Section 617 of the Austrian Code of Civil Procedure (ACCP), which is a consumer protection provision and sets out several conditions under which consumers may enter into arbitration agreements, may be applicable to joint venture agreements. The OGH used this opportunity to clarify certain aspects of Section 617 ACCP, in particular, that it may apply to arbitrations in the context of corporate law.

The parties to the joint venture agreement (containing the arbitration agreement) were one individual, a Liechtenstein establishment, an English private equity fund and a Cypriot holding. The English private equity fund commenced arbitration proceedings against the individual and the Liechtenstein establishment. The respondents objected to the jurisdiction of the arbitral tribunal based on the argument that the respondents were consumers and that the arbitration agreement did not comply with Section 617 of the ACCP, which says that: "An arbitration agreement between a consumer and a business person may only be validly concluded for disputes that have already arisen." However, the arbitration agreement in the joint venture agreement was worded to also apply to future disputes. The claim of the English private equity fund concerned such a future dispute.

The OGH ruled that Section 617 ACCP is applicable to arbitration proceedings where the seat of the arbitral tribunal is in Austria. According to the OGH, Section 617 ACCP also applies to foreign individuals. The OGH clarified that Section 617 ACCP may apply, irrespective of the fact that the case concerns a corporate law dispute.

The consumer status pursuant to Section 617 ACCP has to be assessed on a case-by-case basis and according to Austrian law. Whether a shareholder is indeed deemed a consumer or a business person has to be assessed from a commercial perspective. The decisive factor is

[11] OGH 6 Ob 43/13m.

whether the shareholder can exercise control over the decisions of the directors.

B.3 Relevance of failure to disclose

In its two (almost identical) decisions of August 5, 2014,[12] the OGH, for the first time, decided whether the failure to disclose facts, possibly giving rise to a challenge of an arbitrator, might itself constitute a ground for challenge (even if the undisclosed facts would not constitute a ground for challenge).

The counterparties of the disputes were, on one side a former shareholder of a company, and on the other side the remaining shareholders of that company (and in one case, the company itself). In both underlying arbitrations, the same arbitrator was appointed. In both arbitrations, this arbitrator was challenged by the former shareholder for the same reasons. The former shareholder, *inter alia,* asserted that the arbitrator did not disclose that he was a member of the advisory board of a fund established by the arbitrator and that a prominent member of the law firm that represents the remaining shareholders and the company in the arbitration was also a member of this advisory board.

According to the OGH, the connection between the weight of the failure to disclose and the likelihood that the disclosed circumstances will constitute a ground for challenge need to be assessed on a case-by-case basis. Whether the arbitrator has deliberately concealed these circumstances in order to avoid a possible challenge needs to be established. It has to be considered that it is not always entirely clear what facts have to be disclosed and not every detail that has not been disclosed leads to the reasonable assumption that the arbitrator is not impartial and independent. In the present case, the OGH held that despite the fact that the arbitrator had violated the duty of disclosure by not revealing the above-mentioned fact, it could not be assumed

[12] OGH 18 ONc 1/14p; 18 ONc 2/14k.

that the arbitrator had concealed this fact to avoid a challenge. Thus, the challenge was dismissed.

B.4 EU Competition Law Rules form part of the national *ordre public*

In its decision of 18 February 2015,[13] the OGH, relying on its previous decision of 23 February 1998[14] and referring to the ruling of the European Court of Justice in *Eco Swiss*, confirmed that Articles 101 and 102 of the Treaty on the Functioning of the European Union generally form part of the national *ordre public* of member states of the European Union. The OGH also affirmed that a challenge based on a violation of Austrian public policy pursuant to Section 611 para. 2 no. 8 ACCP is only permitted if the outcome of the award (and not "merely" its reasoning) conflicts with fundamental values of the Austrian legal system.

B.5 Effect of a party's insolvency on pending arbitration proceedings

In three similar decisions of 17 March 2015,[15] the OGH held that Section 7 of the Bankruptcy Act, which stipulates that all pending proceedings in which the debtor is claimant or respondent are automatically stayed upon the commencement of bankruptcy proceedings, also applies to arbitration proceedings. The OGH further determined that proceedings are considered pending when the first procedural step to assert a claim has been taken. What counts as the first procedural step depends on the arbitration agreement and the applicable rules of the ACCP. In these cases, the arbitration agreement provided for three arbitrators, but did not provide for an appointment procedure. In accordance with Section 587 para. 2 no. 4 ACCP, the claimant requested each respondent to appoint an arbitrator. This was held to be the first procedural step to assert the claim.

[13] OGH 2 Ob 22/14w.
[14] OGH 3 Ob 115/95.
[15] OGH 18 ONc 6/14y; 18 ONc 7/14w; 18 ONc 1/15i.

C. Trends and observations

On 1 January 2016, the new Vienna Mediation Rules[16] entered into force. They replace the Rules of Conciliation, which date from 1975. VIAC administrates all proceedings in the field of amicable dispute resolution, supported by a neutral third party under the new rules. These are framed not only to cover mediation proceedings but ADR proceedings generally. An overriding principle of the new Vienna Mediation Rules is party autonomy. However, if the parties have not jointly determined the cornerstones for the conduct of their proceedings, a procedural framework with minimal procedural standards is put in place. In addition, users are made aware of certain issues to be considered when drafting multitier dispute resolution clauses. The aim was to create a one-stop-shop solution, making ADR proceedings particularly compatible with arbitration.

[16] http://www.viac.eu/en/mediation-en/mediation-rules-en.