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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 (VIAC) can now also administer purely domestic arbitrations. Prior to this amendment, these arbitrations had to be administered by the Regional Chambers of Commerce. This is now also reflected by the new amendments of VIAC Rules in 2018.

A.2 Institutions, rules and infrastructure

The new VIAC Rules of Arbitration and Mediation, which came into force on 1 January 2018 ("Vienna Rules"), contain several other amendments. The new Vienna Rules apply to all proceedings that commenced after 31 December 2017.

The VIAC Rules have three parts: Rules of Arbitration (part I), Rules of Mediation (part II) and Annexes (part III). By equaling the positions of arbitration and mediation in the Vienna Rules, VIAC now supports a wider range of alternative dispute resolutions. Registration fees and administrative fees for proceedings pursuant to the Rules of Mediation have been aligned with those of the Rules of Arbitration.

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The combination of mediation and arbitration at VIAC now provides cost advantages for the parties.

The following highlights the most important changes of the Vienna Rules 2018:

The most significant change, as mentioned above, is that the Vienna Rules now allow VIAC to administer purely domestic arbitrations (in accordance with the amendment of the Chamber of Commerce Act passed on 19 June 2017), which was not possible until then. This constitutes a major change for Austrian based parties, which can now also use VIAC's institutional infrastructure and expertise for their disputes rather than using ad hoc tribunals or other institutions.

The Vienna Rules now expressly give the respondent the possibility to request security for costs from the claimant under certain circumstances. Although granting security for costs was also possible in the past under the broad discretion of the tribunal to grant interim measures, this provision is new in the Vienna Rules and brings clarity. The general aim is to prevent possible discrimination against the respondent, who normally cannot choose when and by whom it is sued. This new provision clarifies that the respondent can obtain security upon request so that it can actually enforce its potential claim for reimbursement of party costs and procedural costs if it wins. In order to obtain the security for costs, the respondent must demonstrate "with a sufficient degree of probability" that there is a risk that a possible claim for reimbursement of costs will be irrecoverable otherwise. Both parties need to be heard before granting security for costs. If the claimant fails to comply with an order by the arbitral tribunal to provide security for costs, the arbitral tribunal may, at the request of the respondent, suspend or terminate the proceedings in whole or in part.

The use of tribunal secretaries is another established practice in the work of tribunals that has now been put in writing. The work of tribunal secretaries has been a highly debated topic amongst arbitration practitioners. It is therefore important that their work has

now been subjected to clear rules concerning both costs and competencies: Travel expenses of the administrative secretary are now expressly listed as "reasonable expenses" in article 44, paragraph 1 of the Vienna Rules. However, no fees or other costs or expenses can be charged to the parties for the work of the administrative secretary. VIAC's Guidelines for Arbitrators contain further details regarding the appointment of the administrative secretary: for example, the arbitral tribunal shall inform the parties (and VIAC Secretariat) of the intention to appoint an administrative secretary. The arbitral tribunal shall submit the name, the contact details, a curriculum vitae as well as a declaration of impartiality and independence of the intended administrative secretary. The parties shall be given the opportunity to comment. The Guidelines for Arbitrators emphasize that the arbitral tribunal must not delegate any duties to the administrative secretary that are genuinely reserved to the arbitral tribunal, in particular, the decision-making authority.

Another significant change is the increase of flexibility given to the Secretary-General when determining the arbitrators' fees. Besides now explicitly specifying that arbitrators and parties, as well as their representatives, shall conduct the proceedings in an efficient and cost-effective manner, this may also be taken into consideration by the Secretary-General when determining the arbitrators' fees. The Secretary-General may, on a case-by-case basis, decrease the fees by a maximum total of 40% for inefficient conduct of the proceedings. The fees may also be increased by the same amount where appropriate.

Although the changes in the Schedule of Fees are not significant, they are worth mentioning as they are another improvement of VIAC's already existing cost advantage when compared to other leading institutions. The Registration Fees and Administrative Fees for low-value disputes have been staggered in a new way and thereby reduced. Simultaneously, the Administrative Fees for very high-value disputes have been slightly increased, but according to VIAC they are still very moderate in comparison to other institutions. In combination, these

three adaptations give VIAC a cost advantage in relation to many other leading arbitral institutions.

With the changes, VIAC also introduced a new electronic case management system. All filings and communications from 2018 on are made only electronically. Only the Notice of Arbitration (including exhibits thereto) remains an exception to the rule and still has to be filed also in hard copy because it needs to be served on the respondent.

B. Cases

The Austrian Supreme Court (OGH) is the only court which hears setting aside proceedings, which generally leads to swift decisions. A specific senate at the OGH deals exclusively with arbitration matters, which ensures that the decisions are well reasoned. Among the cases decided in by the OGH in setting aside proceedings in 2018, two decisions are of particular practical relevance: First, the OGH ruled that an arbitral tribunal does not overstep its competence by wrongly applying foreign law and the award can only be set aside if the application of foreign law would in its result violate fundamental principles of the Austrian legal system, as detailed in section B.1 below. Second, the OGH ruled that the defendant has no opportunity to make a statement in the case of an interruption of proceedings where the interruption happens before the defendant was informed by the OGH of the pending claim. This does not conflict with a party's right to be heard, as detailed in section B.2 below.

B.1 By wrongly applying foreign law the arbitral tribunal does not overstep its competence

The decision of the OGH of 20 March 2018[3] dealt with the following facts:

In 2009 the plaintiff purchased an airplane, which the defendant managed and operated on behalf of the plaintiff. Due to financial

[3] OGH, 20 March 2018, docket no. 18 OCg 1/17x (published on 06 April 2018).

difficulties, the plaintiff decided to sell the airplane to the defendant but the defendant was still asked to manage and operate the airplane for the plaintiff. Hence, on 17 December 2013, the parties signed a purchase agreement of USD 33,500,000 for the airplane and a Flight Service Agreement (FSA).

The FSA obliged the defendant to perform 1,000 flight hours at a reduced charter price for the plaintiff within the following five years. The arbitration agreement in the FSA determined that any disputes arising out of the FSA should be dealt with by an arbitral tribunal seated in Austria. The dispute should be governed by German law.

In August 2015, the defendant sold the airplane to another company and was not able to perform the remaining 645 flight hours under the FSA. However, the defendant argued that the new owner of the airplane was able to perform the remaining 645 flight hours. The plaintiff sued for damages on the basis of article 7.3 of the FSA, which provided for liquidated damages in the event that one party did not perform in accordance with the FSA.

The arbitral tribunal granted the plaintiff damages in the amount of USD 4,756,629 plus interest. It decided that due to the sale of the airplane the defendant was not able anymore to perform the remaining 645 flight hours in accordance with the FSA.

The defendant requested to set aside the award. It argued that the award violated the substantive *ordre public* since the tribunal arbitrarily interpreted article 7.3 of the FSA. Moreover, it argued that the tribunal used an ordinary dictionary to interpret the FSA and that it ignored the application of German law. Hence, the defendant argued that the award also violated the procedural *ordre public* and that the tribunal overstepped its competence.

The OGH dismissed the claim and upheld the award. It first made clear that an award only violates the *ordre public* if it conflicts with the fundamental principles of the Austrian legal system and hence leads to an unjustifiable result. For the OGH it was clear that neither

the tribunal's interpretation of article 7.3 of the FSA nor its usage of an ordinary dictionary constituted any violation of the *ordre public*. The tribunal's decision and its reasoning were comprehensible and coherent. Whether the tribunal came to the right conclusion or not is not for the OGH to decide since this would constitute an inadmissible *révision au fond*.

The most important point the OGH made is that, even if the tribunal had wrongly applied German law, it would not have overstepped its competence. Additionally, the OGH stated the tribunal's competence was derived from the arbitration agreement of the FSA and hence a revision by the OGH in this point would again constitute an inadmissible *révision au fond*.

B.2 No possibility for the defendant to make a statement in the case of interruption before lis pendens

The decision of the OGH of 21 August 2018[4] dealt with the following facts:

The plaintiff and the five defendants initiated arbitration proceedings before an "arbitral tribunal" in Baden, Austria. The arbitral tribunal, which consisted of two arbitrators, both engineering experts, had to determine the damage at a construction site, where all parties were involved, and who was responsible for the damage. It came to the conclusion that the plaintiff was responsible for 40 % of the damage, the second defendant for 40 % and the third defendant for 20 %. The arbitral tribunal's final decision was titled "arbitration opinion" ("*Schiedsgutachten*").

The plaintiff requested to set aside the decision. It argued that the arbitration opinion constituted an award, which violated the procedural *ordre public* for multiple reasons: breach of the right to be heard, no or insufficient reasoning of the award, arbitrary application

[4] OGH, 21 August 2018, docket no. 18 OCg 4/18i (published on 11 September 2018).

of the law and breach of the principle that there should be an odd number of arbitrators.

However, one day after this request, the third defendant initiated parallel setting aside proceedings against the plaintiff and the other defendants, in which it argued that the "arbitration opinion" does not constitute an arbitral award.

The plaintiff informed the OGH that it did not object to a stay of the proceedings at hand.

The OGH decided to stay the proceedings, which depended on the preliminary question of the other proceedings, namely whether the "arbitration opinion" constitutes an arbitral award in the first place. Since the action to set aside the award was not yet delivered to the defendants, the OGH stayed the proceedings without giving the defendants any possibility to comment.

The OGH ruled that the Austrian Civil Procedure Code does not contain a provision according to which the prerequisite for a stay is the conduct of an oral hearing. Moreover, given that a stay can also be decided before the dispute is pending, i.e. before the defendant is informed of the claim, there is no need for service of process on the defendant. Accordingly, there is also no obligation to give the defendant the opportunity to make a statement on the intended stay. Since the defendant has not participated in the proceedings yet, it does not possess *gravamen* and hence it lacks a prerequisite for an appeal or statement. This does not conflict with a party's right to be heard.

C. Diversity in arbitration

In the interest of gender diversity, the new Vienna Rules now explicitly define that, in practice, the terms in the Vienna Rules shall be used in a gender-specific manner to represent the importance of this topic. Since 1 January 2018, both the secretary general (Alice Fremuth-Wolf) and the deputy secretary general (Elisabeth Vanas-Metzler) of VIAC are women. This unique leadership duo will place

particular emphasis on promoting the role of women in arbitrations administered by VIAC and in the CEE arbitration community as a whole. According to the annual report 2017 of VIAC, the number of women acting as arbitrators in VIAC proceedings has increased steadily in the past years even though there is still room for much improvement. While 50% of co-arbitrators appointed by VIAC were women, the parties lag significantly behind those numbers by appointing women only in only two out of the 17 cases filed in 2017. In total, women accounted for 17 % of arbitrators acting before VIAC, including a first all-woman tribunal.[5]

[5] Vienna International Arbitral Centre of the Austrian Federal Economic Chamber (ed), Annual Report 2017, available at: http://www.viac.eu/en/service/annual-reports.