



*Graf & Pitkowitz Arbitration Newsletter – 29 October 2020*

## Supreme Court scrutinises admissibility of videoconference hearings

### Introduction

The COVID-19 pandemic has forced many business areas to make significant adjustments to the way in which they operate. In arbitration, the restrictions relating to the pandemic have mainly affected the conduct of hearings. Due to travel restrictions and social distancing measures, in-person hearings have become less feasible if not impossible. As such, remote hearings (via videoconferencing) have been widely used. However, their admissibility is heavily debated in the academic world and, given their novelty, virtually no supreme court case law from Austria or abroad addressing this issue exists.

In a landmark decision of 23 July 2020 (Docket 18 ONc 3/20s), the Supreme Court determined the admissibility of conducting an arbitral hearing by means of videoconference in the context of challenge proceedings. The court held that even where one party opposes, ordering a remote hearing in arbitration is admissible and will not constitute a reason to challenge the arbitral tribunal. The court also provided practical guidance on conducting such a videoconference hearing to prevent the unlawful influencing of the participants during the hearing.

### Facts

The Supreme Court discussed the legality of conducting a hearing by means of videoconferencing technology in connection with a party's challenge of an arbitral tribunal under the rules of the Vienna International Arbitral Centre. The applicants, having objected to a videoconference hearing, claimed that the arbitral tribunal's unfair conduct of the arbitration had led to the unequal treatment of the applicants.



The court rejected the applicants' challenge as, according to the court, the applicants' allegations (including those relating to the conduct of a videoconference hearing) could not constitute a bias of the arbitral tribunal, even if this was assumed to be true.

### **Arguments**

The applicants based their challenge on several arguments, but this article focuses on those relating to the videoconference hearing. The applicants claimed that videoconference hearings violate the principles of a fair trial and the right to be heard.

The applicants in particular claimed that videoconference hearings do not comply with the principles of a fair trial as it cannot be ensured:

- which documents the person being examined uses; and
- that no other person is present in the room for the entire hearing.

The applicants further deemed the arbitral tribunal to be biased as it had not ordered any measures to protect the witnesses from unlawful influence during the hearing, especially since the videoconferencing software used by the arbitral tribunal (WebEx) allowed the participants to receive messages unnoticed (via the chat function).

### **Decision**

The Supreme Court elaborated on the general principles of challenging an arbitrator under Austrian law. Pursuant to Section 588, Paragraph 2 of the Code of Civil Proceedings, arbitrators may be challenged only if:

- circumstances exist which give rise to justifiable doubts as to their impartiality or independence; or
- they do not meet the qualifications agreed by the parties.

The reasons for challenging state judges will be used as guidelines – with special consideration of the particularities of arbitration.

The court emphasised that improper conduct of the proceedings and procedural errors do not in themselves establish the appearance of bias. Therefore, even if the procedural decisions or orders in question are regarded as incorrect or the conduct of the proceedings as improper, this in itself will not justify a challenge. This assessment will be different only in cases of serious



procedural violations or (permanent and significant) preferential or disadvantageous treatment.

Further, the court highlighted that the use of videoconferencing technology is widespread and recognised in judicial proceedings for hearings or the taking of evidence, and that this practice radiates into arbitration proceedings. During the course of the COVID-19 pandemic, videoconferencing was (further) promoted as a means of maintaining court operations, which largely came to a standstill.

The use of videoconferencing technology does not constitute a violation of Article 6 of the European Convention on Human Rights (even if one party does not agree with holding a videoconference hearing) as Article 6 provides for not only the right to be heard, but also for access to justice, which is closely linked to the right to effective legal protection. Hence, the court must also ensure that the parties can effectively enforce or defend civil rights claims. Particularly in the event of an impending standstill of the administration of justice in the course of a pandemic, videoconferencing technology offers a possibility to harmoniously unite the effective enforcement of rights and the right to be heard.

The court established that the use of videoconferencing technology is generally uncritical. The applicants' generic reference to the possible misuse of videoconferencing technology with regard to witness evidence cannot change this assessment. Such misuse (eg, influencing a witness) by means of modern technology, conventional agreements or one of the parties informing a witness who has yet to be heard about the results of the proceedings also cannot be ruled out in in-person hearings.

A witness examination by means of a videoconference offers control mechanisms against abuse. Some of these mechanisms go beyond those in an in-person hearing as all participants have the (technical) possibility of:

- observing the person being examined front on and close up; and
- recording the examination.

Moreover, the court provided examples of measures to prevent the influencing of a person under examination. For example, they can be asked to:

- look directly into the camera if there is a risk that they might receive chat messages on their screen;



- zoom out and swipe the room with the camera in case of suspected interference by third parties; and
- keep their hands visible at all times.

Finally, the court concluded that conducting a hearing by means of a videoconference is not a severe procedural violation that may constitute bias or a violation of the principles of a fair trial.

### **Comment**

The conduct of remote arbitration hearings has become a hot topic during the COVID-19 pandemic. This decision must be regarded as a precedential landmark decision as it appears to be the first decision of any supreme court worldwide to tackle this issue and has thereby – at least for Austria - paved the way to videoconference hearings in arbitration proceedings in future. This decision also helps to establish legal certainty on some essential questions regarding videoconference hearings. By giving practical guidance on such hearings, the court even appears to be encouraging them.

Even though the decision was rendered in the context of challenging, it will certainly also have an impact on possible set aside proceedings in connection with the conduct of videoconference hearings. The Supreme Court expressed a strong approval of videoconference hearings stating that they do not violate the principles of a fair trial and that they are "generally uncritical". No doubt, these precedent-setting views must also be considered in set aside proceedings on the grounds of conducting a videoconference hearing.

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