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Supreme Court approves detour for setting aside proceedings

In its May 30, 2017 decision (Docket 4 Ob 92/17h) the Austrian Supreme Court considered whether proceedings (wrongly) commenced before a district court to set aside an arbitral award could nevertheless be continued.

Following the 2013 amendment to the Arbitration Act, as of January 12014, proceedings to set aside arbitral awards now fall within the exclusive jurisdiction of the Supreme Court as the first and final-instance court (Section 615 of the Code of Civil Procedure). The Supreme Court is also exclusively competent to determine the existence of an arbitral award. Further, it has jurisdiction over judicial measures accompanying arbitral proceedings, such as the appointment of substitute arbitrators.

Notwithstanding the Supreme Court's exclusive jurisdiction regarding the setting aside of arbitral awards, the unusual facts of the case at hand led to the creation of an additional channel of appeals not provided for in the law.

1. Facts

The parties to the dispute were both attorneys at law and shareholders of a law firm in liquidation. The law firm's articles of association required that any dispute between the parties be settled by an arbitral tribunal composed of three attorneys at law under the Arbitration Act.

The parties concluded a conditional settlement agreement on January 28 2015, which set out that a sole arbitrator, whose name was mentioned in the settlement agreement, would decide on any dispute arising out of the open points of the settlement. Subsequently, a dispute arose between the parties regarding the question of whether the respondent (in the annulment proceedings) could claim certain fees paid by a former client to the claimant (in the annulment proceedings). In order to resolve this dispute, the respondent (in the annulment proceedings) turned to the sole arbitrator who subsequently issued an arbitral award without involving the claimant (in the annulment proceedings).

The claimant then sought to annul the arbitral award and filed a complaint with the Vienna Commercial Court. The claimant argued that the commercial court was competent to decide this matter according to Section 617(9) of the Code of Civil Procedure, stipulating that the jurisdiction in consumer matters continues to run over three instances. The respondent, conversely, challenged that the commercial court lacked factual jurisdiction; however, the respondent did not argue that the commercial court lacked functional jurisdiction. The commercial court, acting as the first instance court, annulled the award and rejected the respondent's objection regarding its jurisdiction.

The respondent then appealed to the Higher Regional Court of Vienna as the competent appeals court. The appeals court referred the case to the Supreme Court, as it was the competent court to decide the matter in the first place.

According to the appeals court, Section 615 of the Code of Civil Procedure specifies the mandatory territorial, factual and functional jurisdiction of the Supreme Court. The fact that the Vienna Commercial Court issued a judgment in this matter, despite lacking competence to do so, cannot be resolved according to Section 104(3) of the Court Jurisdiction Act, because this rule applies only to factual and territorial jurisdiction rules and not functional ones. Consequently, the absolute lack of jurisdiction of the first-instance court resulted in the invalidity of the judgment, as well as the whole proceedings before the first-instance court pursuant to Sections 477(1) and (3) of the Code of Civil Procedure.

The appeals court allowed the appeal to the Supreme Court because of a lack of case law regarding the legal qualification of Section 615 of the Code of Civil Procedure and the remedy for an infringement of this rule.

The claimant appealed against the second-instance decision and the Supreme Court concluded that the claimant's appeal was justified.

2. Decision

The Supreme Court first clarified that a court lacking jurisdiction could become competent if the respondent submits (oral) arguments on the merits without raising the objection that the court lacks factual or territorial jurisdiction pursuant to Section 104(3) of the Court Jurisdiction Act.

The Supreme Court also followed the appeals court's reasoning, according to which a lack of jurisdiction cannot be cured pursuant to Section 104(3) of the Court Jurisdiction Act if the infringed rule determines a functional jurisdiction. However, the Supreme Court clarified that Section 615 of the Code of Civil Procedure does not specify the functional jurisdiction of the Supreme Court, but merely its factual and territorial jurisdiction. Accordingly, an infringement of the jurisdiction stipulated in Section 615 of the Code of Civil Procedure can generally be cured pursuant to Section 104(3) of the Court Jurisdiction Act.

Further, the Supreme Court's conclusion cannot be undermined by the (hypothetical) argument that it would enable the parties to create a channel of appeals not provided for in the law, because each court has the general obligation to assess its own competence (or lack thereof) pursuant to Section 43(1) of the Court Jurisdiction Act. Only if a court overlooked the fact that it lacked jurisdiction and thus (wrongfully) refrained from declaring itself incompetent could this lapse be resolved pursuant to Section 104(3) of the Court Jurisdiction Act. This results from considerations regarding procedural economy (ie, attempting to minimise the elimination of previous procedural efforts). Even if the law excludes the parties' disposition regarding jurisdiction, a lack of factual and territorial (or individual) competence can still be resolved pursuant to Section 104(3) of the Court Jurisdiction Act; an exception to this general rule is not provided for in Sections 615 and following of the Code of Civil Procedure.

The Supreme Court held that the respondent submitted written arguments on the merits and participated in the oral hearing without raising the objection that Section 615 of the Code of Civil Procedure was being infringed. The first instance court's lack of competence was thus resolved pursuant to Section 104(3) of the Court Jurisdiction Act and, as a result, the appeals court wrongly considered the respondent's plea for annulment pursuant to Sections 477(1) and (3) of the Code of Civil Procedure.

3. Comment

The underlying facts in the present Supreme Court decision are quite unusual, because both the first-instance court and the parties failed to assess or reprimand the first-instance court's lack of jurisdiction correctly. This led to the extraordinary situation which allowed a separate channel of appeals not provided for in the law to be accidentally made available, even though the Supreme Court would have been the competent court to decide on the setting aside of the arbitral award pursuant to Section 615 of the Code of Civil Procedure.

The Supreme Court’s decision gives rise to ambivalent reactions.

On the one hand, the Supreme Court's decision is tenable from a legal perspective, considering the rather unusual facts of the case at hand and the law's wording. However, this decision should not be treated as a basis for establishing general rules, because decisions relating to the assessment of a court's jurisdiction must always be taken on a case-by-case basis.

On the other hand, the following point of criticism remains. Proceedings to set aside arbitral awards fall within the exclusive jurisdiction of the Supreme Court, which serves as the first and final-instance court following the introduction of the 2013 amendment of the Arbitration Act. According to the explanatory notes to the 2013 amendment, one of the main reasons for the revision was to reduce the number of judicial instances involved in the setting aside of arbitral awards. Until the revision, the setting aside of arbitral awards issued by arbitral tribunals seated in Austria involved three judicial instances.

In the case at hand, the Supreme Court argued that the underlying thought behind the remedy stipulated in Section 104(3) of the Court Jurisdiction Act was the concept of procedural economy, which is plausible. However, the Supreme Court ignored that the reduction of the number of judicial instances involved in the setting aside of arbitral awards is also an expression of the procedural economy concept. It remains unclear why the Supreme Court would accept the (accidental) creation of a channel of appeals not provided for in the law on the grounds of procedural economy, when one of the reasons that this channel of appeals was not provided for in the law was the procedural economy concept, among others. The wording of the law is thus in stark contrast to the end goal of the 2013 amendment.

Nevertheless, the Supreme Court correctly pointed out that a rule preventing the application of the remedy set out in Section 104(3) of the Court Jurisdiction Act on infringements of the Supreme Court's jurisdiction stipulated in Section 615 of the Code of Civil Procedure is not explicitly specified in the law. The Supreme Court thus subtly pointed to a legal loophole which in essence contravenes the

purpose of Section 615 of the Code of Civil Procedure to establish the Supreme Court as the first and final-instance court in setting aside arbitral awards.

In conclusion it must be welcomed that the Supreme Court permitted the annulment of an award which clearly deserved to be annulled (as it was rendered *ex parte*) and interpreted the law in a way which permits parties to take a procedural detour.

For further information on this topic please contact Nikolaus Pitkowitz at Graf & Pitkowitz by telephone (+43 1 401 17 0), fax (+43 1 401 17 40) or email (n.pitkowitz@gpp.at). The Graf & Pitkowitz website can be accessed at www.gpp.at.