Supreme Court takes strict stance on conflict of interest

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Introduction

In a recent decision (15 May 2019 Docket 18 ONc 1/19w), the Supreme Court considered whether the fact that an arbitrator and a party counsel in one arbitration act as co-counsel in another unrelated arbitration (Point 3.3.9 of the Orange List of the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration (the IBA Guidelines)) cast doubt on the arbitrator's independence and impartiality and thus disqualified him from acting as arbitrator in the arbitration under review.

Facts

On 24 January 2019, in an early phase of the arbitration, the arbitrator jointly appointed by the six respondents disclosed that his law firm and counsel for two of the respondents had been retained as co-counsel in another unrelated arbitration. The retention in the other matter had not been based on a joint proposal but rather on the client's wish to engage two law firms. Before the retention, neither of the two law firms had been consulted about the involvement of the arbitrator's firm. The challenged arbitrator confirmed his full independence and impartiality.

Following this disclosure, the claimants filed a challenge against the arbitrator. As the proceedings were *ad hoc*, the challenge was filed with the arbitral tribunal within the four-week statutory period. The claimants submitted that the scenario fell under Point 3.3.9 of the Orange List of the IBA Guidelines and, as such, raised justifiable doubts as to the arbitrator's independence and impartiality. The claimants further argued that acting as co-counsel in another arbitration implied coordinated and intensive cooperation between the challenged arbitrator and counsel for two of the respondents.

Arbitral tribunal decision

On 28 February 2019 the arbitral tribunal rejected the challenge as unfounded. The tribunal referred to the (then prevailing) Supreme Court case law which generally relied on the grounds for challenge applicable to civil court judges (Sections 19 and 20 of the Jurisdiction Act) and referred to the IBA Guidelines for guidance purposes only.

The arbitral tribunal held that as the Austrian arbitration scene is small and comprised of a limited number of professionals, which regularly meet in different forums either as counsel or arbitrators or at different seminars and congresses to discuss arbitration-related issues and promote the arbitration community's interests. In the tribunal's view, such circumstances and case-related cooperation were part of the financial and professional reality of the arbitration scene and do not raise justifiable doubts as to arbitrator impartiality. The disqualification of an arbitrator for lack of impartiality would require additional circumstances which were neither alleged by the claimants nor found by the tribunal. For these reasons, the challenge was dismissed.

Appeal

On 6 March 2019 the claimants appealed directly to the Supreme Court, which has been competent to decide all arbitration-relevant issues (including annulments) at first and final instance since 2014.

The claimants essentially repeated their earlier arguments but reinforced that the circumstances fell under Point 3.3.9 of the Orange List of the IBA Guidelines and that acting as co-counsel in another arbitration implies coordinated and intensive cooperation. The claimants argued that this:

- violates Section 588 of the Code of Civil Procedure;
- violates due process under Article 6 of the European Convention on Human Rights; and
- raises justifiable doubts as to arbitrator impartiality from the perspective of a reasonable third person.

The claimants further held that this cannot be justified by the financial and professional reality of the Austrian arbitration scene.

Supreme Court decision

While Section 588 of the Code of Civil Procedure regulating grounds for challenge no longer (as the previous version of Section 586 of the Code of Civil Procedure had) refers to the reasons for challenges of state court judges (Sections 19 and 20 of the Jurisdiction Act), the Supreme Court clarified that, nevertheless, these reasons remain relevant parameters in challenge proceedings, considering the particularities of arbitration.

The Supreme Court underlined the importance of trust in the independence and impartiality of state court judges and therefore in the whole judicial system. In order to realise this objective, a strict approach on independence and impartiality issues must be adopted. In the court's view, this aim is realised by applying rigorous standards. Moreover, the court emphasised the well-known principle that justice must not only be done, it must also be seen to be done.**(1)**

The Supreme Court held that the same high standards must be applied to arbitral challenge proceedings for the same reasons. In addition, the IBA Guidelines – despite the lack of normative character – can serve as guidance.

According to the Supreme Court, contact between an arbitrator and counsel which is peripheral in nature and does not go beyond the professional relationship does not raise justifiable doubts over arbitrator impartiality. The court acknowledged that there are frequent contacts between arbitration practitioners and that they are determined by the arbitration scene's financial and professional reality. The reality of the arbitration community does not *per se* justify the removal of an arbitrator; if this were the case, arbitration in Austria would be almost impossible.

However, according to the Supreme Court, acting as co-counsel on behalf of the same party in an arbitration case does not constitute contact of a peripheral nature. From a reasonable third party's perspective, acting as co-counsel implies an intense collaboration (both in terms of time and content).

Further, the Supreme Court referred to Point 3.3.9 of the IBA Guidelines, under which acting as co-counsel currently or in the past three years (depending on individual circumstances) could raise justifiable doubts as to an arbitrator's independence and impartiality. While it considered previous acting as co-counsel as unproblematic, the court considered the circumstances different in a case of current co-counselling.

The Supreme Court concluded that, in light of preserving arbitration as a method of dispute resolution, if an arbitrator and a counsel act as co-counsel in an unrelated case, such circumstance – in themselves – raise justifiable doubt as to the arbitrator's independence and impartiality. Thus, the court decided that the challenged arbitrator should be removed from the tribunal.

Comment

The Supreme Court applies a rigorous standard which, on its face, reaches beyond even the IBA Guidelines. Circumstances listed in the Orange List require disclosure under General Standard 3(a) (as was made here) but by themselves do not justify a removal (other than those circumstances listed on the Red List).**(2)** An arbitrator should be removed only if, from the perspective of a reasonable third party having knowledge of the relevant facts, circumstances exist which raise justifiable doubts (General Standard 2 of the IBA Guidelines). Clearly, this objective test for removal is much stricter than the subjective test for disclosure.

The Supreme Court correctly acknowledged the reality of the Austrian arbitration scene, which comprises a limited number of highly specialised practitioners and a limited market size, resulting in frequent contact between practitioners. It even conceded that the past joint collaboration as co-counsel (equally listed in Point 3.3.9 of the Orange List if within the past three years) would be unproblematic. However, it took a different approach on a concurrent collaboration.

The principal grounds on which the Supreme Court based this decision are the confidence and trust

in arbitration from the perspective of a third party. The court rightly concluded that this foundation must be safeguarded by a rigorous approach towards challenges. While it can certainly be argued that the Supreme Court in this specific case went too far, as it applied a stronger standard than the IBA Guidelines, arguably this strict approach is preferable compared with a too lenient one. The court's decision must also be compared with previous decisions which applied a more lenient approach and were criticised (for further details please see "Arbitrators beware! No such thing as a free lunch").

This decision must therefore be applauded, especially because it applied a rigorous standard and thus strengthens confidence in arbitration as a method of dispute resolution.

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Endnotes

(1) Austrian Supreme Court RS0109379 [T4], RS0046052 [T15], with further reference to European Convention on Human Rights case law.

(2) According to Part II.3 of the IBA Guidelines, the Orange List is "a non-exhaustive list of specific situations that, depending on the facts of a given case, may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality and independence".
