



## *Arbitration Newsletter – January 23, 2017*

### **Supreme Court sets aside arbitral award for defective reasoning**

In a recent decision, the Austrian Supreme Court considered if and under what circumstances defective reasoning of an arbitral award may lead to its annulment under the Arbitration Law.<sup>(1)</sup> In a deviation from previous case law<sup>(2)</sup> and views expressed by the majority of Austrian legal scholars, the court held that the requirement of sound reasoning is a fundamental principle of the Austrian legal system, and thus an arbitrator's failure to comply with this constitutes a violation of procedural public policy.

#### **1. Facts**

The underlying dispute stemmed from a consultancy agreement which provided for commission in the case of successful brokerage of sales of heat exchangers. The scope of businesses that triggered commission was broadly defined. The claimant in the arbitration (and subsequent annulment proceedings) requested that the respondent accounts for concluded sales include four specific projects and "all other deals" of a certain period, so that the basis for the commission claim could be assessed. The arbitral tribunal rendered an interim award in which both claims were dismissed. The tribunal found that the four specific projects under the first demand did not fall under the scope of the consultancy agreement and explained its legal view on this matter. It also rejected the second claim "due to a lack of specificity" and because its wording was "too broad"; however, it provided no additional reasoning.

The claimant subsequently appealed to the Supreme Court in order to have the award partly set aside.

#### **2. Arguments**

In the annulment proceedings, the claimant raised the following arguments:

- Violation of substantive public policy – the claimant argued that the rejection of both claims amounted to a violation of the EU Commercial Agents Directive (86/653/EEC), as EU law must be seen as part of Austrian public policy and its breach must to be considered by the national courts in the course of annulment proceedings. The claimant thereby relied on Supreme Court case law annulling awards for their failure to consider EU law.
- Violation of the right to be heard (surprise decision) – the claimant alleged that the award violated the right to be heard. During the proceedings neither the respondent nor the tribunal had argued that the second claim lacked specificity. Thus, the claimant was deprived of the possibility to clarify the demand and to comment on the legal point of view of the tribunal. Therefore, the award must be seen as a surprise decision. The claimant argued that the rule prohibiting surprise decisions in court litigation<sup>(3)</sup> is a fundamental value of the Austrian legal system.



### 3. Decision

The Supreme Court rejected the claimant's arguments, but nevertheless partially annulled the award.

#### 3.1. *Partial annulment*

The Supreme Court first clarified that an annulment request aimed at the annulment of only part of an award is admissible.

#### 3.2. *Violation of procedural public policy*

The Supreme Court granted the annulment of the arbitral award for violation of procedural public policy in regard to the second claim for accounting of "all other deals" while dismissing the other annulment request. Even though the claimant had not argued a violation of procedural public policy, the Supreme Court found that it was not limited in its review to the legal evaluation by the claimant, as long as the claimant did not expressly request such a limitation.

Deviating from previous case law and the majority of legal scholars, the court found that sound reasoning ranks among the fundamental values of the Austrian legal system and that its absence constitutes a violation of the procedural public policy. It thereby relied on the views of the sole Austrian voice<sup>(4)</sup> arguing that lack of reasoning constitutes a violation of procedural public policy and German case law and scholars.

The court concluded that defective reasoning justifying an annulment could be given if:

- an arbitral award entirely lacks reasons on a major issue of dispute; or
- an award's reasoning is unsound and based only on empty phrases.

As regards the depth of the reasoning, the court held that it is necessary to distinguish between the following cases:

- If the arbitral tribunal follows the opinion of one of the parties, or if it discussed its views in the course of proceedings, a mere reference may constitute compliance with the obligation to state reasons.
- If, on the other hand, the arbitral tribunal bases its award on considerations which have neither been put forward by the parties nor discussed in the proceedings, it will have to elaborate on its reasons in greater detail in the decision.

#### 3.3. *Two qualifications*

The Supreme Court made two qualifications for cases when defective reasoning may not permit an annulment:

- The first case is evident: the parties can expressly waive their right to receive a reasoned award as expressly contemplated by the law.<sup>(5)</sup>
- The second case is less obvious and may serve as a potential pitfall: the Supreme Court held that a party is precluded from requesting the setting aside of an award for defective reasoning if it failed to submit a request for interpretation of the award, provided that such possibility had been agreed on.<sup>(6)</sup>



It thereby relied on the general rule obliging a party to notify any procedural deficiencies without delay<sup>(7)</sup> and qualified the request for interpretation of an award as a notice of defective proceedings. The admissibility to a request for interpretation depends on a corresponding agreement between the parties. The present case was brought under the Vienna Rules 2006 which – contrary to the existing Vienna Rules 2013 – did not contain a provision on the interpretation. Thus, the claimant was held not to be precluded from challenging the award.

### ***3.4. Three-month deadline***

The Supreme Court noted that, as prescribed by law, the three-month deadline following an award within which an annulment request must be filed also requires that grounds for annulment be raised and specified within that deadline. The court therefore dismissed the argument that the chair of the tribunal had deviated in the award from a position expressed during the hearing, as this argument was raised after the three-month deadline had lapsed.

### ***3.5. Infra petita***

The Supreme Court also dismissed the annulment for lack of dealing with all requests, as it noted that it was only a partial award and that the claimant could still raise additional requests during the continued proceedings. It also noted that Austrian law contains a provision permitting a party to notify that as a procedural defect.<sup>(8)</sup>

### ***3.6. Violation of right to be heard***

The court dismissed the argument that the right to be heard had been violated and noted that this would be relevant only if it reached a level corresponding to nullity of court judgments under Austrian law. While the court noted that this could be the case if the tribunal deviated in the award – with no debate – from a legal view expressed during the proceedings, it found that this was not the case here.

## **4. Comment**

This case is unique in several aspects. First, out of the 12 annulment claims filed in the past three years with the Supreme Court, this is the first case in which an annulment request was accepted.

Second, the decision deviates from views expressed by several scholars (see above) and rightfully obligates the arbitral tribunal to submit a sound reasoning in its awards. As this should be a matter of course, the decision will certainly also help to strengthen the presently much-debated legitimacy of arbitration. Regrettably, the Supreme Court has made the qualification that the timely filing of an interpretation request a prerequisite for annulling an award on the grounds of defective reasoning. This poses a difficult burden on the party seeking annulment.

Third, the decision clarifies that the party (and thus counsel) must not specifically articulate the legal rule on which annulment is based; instead, it is sufficient to outline the grounds within the three-month deadline of receipt of the award.

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## Endnotes

- (1) Supreme Court, September 8 2016, Docket 18 OCg 3/16i.
- (2) Supreme Court, December 4 1931, Docket 3 Ob 847/31.
- (3) Article 182a of the Civil Procedural Code (ZPO).
- (4) Nikolaus Pitkowitz, *Die Aufhebung von Schiedssprüchen [Setting Aside Arbitral Awards]* (2008), mn 325.
- (5) See Section 606(2) of the Civil Procedural Code: "*Unless the parties have agreed otherwise, the award shall state the reasons upon which it is based.*"
- (6) See Article 33(1)(b) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Arbitration and Article 610(1)(2) of the Civil Procedural Code: "*Unless another period of time has been agreed upon by the parties, each party may within four weeks of receipt of the award request the arbitral tribunal, to... 2. if so agreed by the parties, to give an interpretation of certain parts of the award.*"
- (7) See Section 579 of the Civil Procedural Code: "*Where the arbitral tribunal has not complied with a procedural provision of this chapter from which the parties may derogate, or with an agreed procedural requirement of the arbitral proceedings, a party shall be deemed to have waived his right to object if he does not object without undue delay after being informed, or within the provided time limit.*"
- (8) See Article 33(3) of UNCITRAL Model Law on International Arbitration or Article 610(1)(3) of the Civil Procedural Code: "*Unless another period of time has been agreed upon by the parties, each party may within four weeks of receipt of the award request the arbitral tribunal, to... 3. to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.*"