Arbitration - Austria

Supreme Court sets requirements for arbitrability of corporate disputes

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The Supreme Court recently handed down a decision relating to the arbitrability of shareholder disputes in which it generally confirmed their arbitrability, but declared them to be subject to certain criteria.

Facts

In 1995 five shareholders founded a joint venture for the establishment and operation of a mobile telephone enterprise in Central Europe in the form of a limited liability company. When the company was founded the shareholders concluded a deed of formation and a shareholders' agreement. All disputes arising out of the two agreements were made subject to arbitration proceedings before the International Arbitral Centre of the Austrian Federal Economic Chamber.

According to the shareholders' agreement, under certain conditions a call option could be exercised entitling a shareholder to acquire the shares of one or more other shareholders. Relying on this provision, one shareholder commenced arbitration proceedings against another shareholder, seeking a declaratory award that it was entitled to exercise the call option. The other three shareholders were not included in the arbitration.

In the arbitration proceedings the shareholder against whom the declaration was sought argued that the arbitral tribunal lacked jurisdiction on the grounds that the subject matter of the proceedings was of a corporate law nature, and thus mandatorily required involvement of all shareholders in the proceedings. It argued that the matter otherwise lacked objective arbitrability.

By a partial award on jurisdiction the arbitral tribunal dismissed the plea of a lack of jurisdiction. The arbitral tribunal's position was that the object of the dispute was of a purely contractual nature rather than a corporate law nature, and therefore was arbitrable even without involving all the shareholders. This jurisdictional award was subsequently subject to annulment proceedings before the courts.

Decision

The Supreme Court upheld the arbitral award but issued important instructions regarding the arbitrability of corporate disputes.(1)

In its decision the court considered why, in its view, the grounds raised for annulment were invalid. This permits the conclusion that if these grounds had been given, the court would have seen the matter differently. On that basis the following (indirect) conclusions can be drawn.

First, the court confirmed that in general, corporate disputes are arbitrable provided that all shareholders are made party to the arbitration agreement. Furthermore, from the court's decision it can be understood that it is unnecessary to conclude specific arbitration agreements (eg, tailor-made arbitration agreements for shareholder disputes) as a prerequisite to the arbitrability of corporate disputes.

Second, the court acknowledged that in cases where a decision may have a (statutory) effect beyond the parties to the proceedings, the need to involve all the shareholders (and the company) in the arbitration proceedings may arise as a prerequisite. For example, this could be the case if a shareholders' resolution is contested, or if a shareholder should be excluded. In both cases the award would necessarily be binding on all the shareholders (and the company), which mandates their inclusion.

Third, the court recognised that there may also be a need to involve all shareholders in arbitration proceedings based on the substantive nature of the claim. This may occur if an award can be made only either against or in favour of all participants, because otherwise insoluble complications could arise from divergent decisions in separate proceedings. In the court's view, whether such a case exists depends on the substantive law assessment of the object of the dispute – namely, whether it requires a single decision. If not all the parties are involved in the proceedings, the claim will be dismissed on the merits (rather than due to a lack of jurisdiction of the arbitral tribunal). Thus, this question is reserved for decision by the arbitral tribunal on the merits, rather than a jurisdictional one.

Comment

The decision is in line with the general approach to uphold arbitral awards taken by the Supreme Court in its long line of decisions since the introduction of the arbitration law. In fact, only in very rare cases has the court set aside arbitral awards.

Furthermore, the decision documents the liberal view of the court towards arbitration. It has generally accepted the arbitrability of shareholder disputes. The court has taken a path different to that of the German Supreme Court, which has already handed down two decisions on the objective arbitrability of shareholder disputes.(2) As a consequence of these two decisions, the German Institute of Arbitration introduced supplementary rules for corporate disputes. Such a need does not appear to arise from the Austrian decision provided that the practical requirements are complied with.

The single most important, minimum requirement established by the Supreme Court for shareholder disputes is the inclusion of all shareholders in both the arbitration agreement and the proceedings in cases where the award may have effects beyond the parties. This is a logical consequence given that a mere submission by a shareholder under an arbitration agreement cannot substitute its involvement in proceedings. The court did not discuss the degree of inclusion in the proceedings. However, it seems that inclusion should comprise several elements in order to avoid the risk of annulment and the need to grant each shareholder full party status:

- notification of the commencement of the arbitration proceedings;
- participation in the composition of the arbitral tribunal; and
- participation in the proceedings as a party.

The court did not address the question of whether the company must also be made a party to the proceedings. After all, the company may also be bound by the decision. In a ruling of April 6 2009 the German Supreme Court held that the company must be granted the opportunity to participate in the proceedings, as an intervenor at the very least.

Provided that the necessary parties are (sufficiently) included, there can be little doubt that under Austrian law the matter will be arbitrable. As a practical consequence, in cases of doubt all shareholders and the company should be included.

The decision demonstrates the Supreme Court's confidence in the competence of the arbitral tribunal by acknowledging that, apart from in cases of extended legal effects, the decision of whether to involve all shareholders is left to the arbitral tribunal. Clearly, multi-party cases and cases where - for tactical or other reasons - several different claims are asserted constitute a great challenge to arbitration. It might have simplified matters if the court had elected to apply an (*ex ante*) policing power in connection with jurisdiction, rather than leaving that issue to a possible challenge of the decision on the merits for public policy reasons. However, the court deliberately chose - in line with prior case law - to limit its control of arbitral awards (and thus its inteference with arbitrations) to a minimum.

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Endnotes

(1) Supreme Court, October 22 2010, docket 7 Ob 103/10p.

(2) German Supreme Court, March 29 1996, II ZR 124/95 "Arbitrability I" and April 6 2009, II ZR 255/08 "Arbitrability II".

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