International Arbitration

Austria – Trends & Developments
Contributed by
Vavrovsky Heine Marth Rechtsanwälte

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TRENDS AND DEVELOPMENTS:  

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The ‘Trends & Developments’ sections give an overview of current trends and developments in local legal markets. Leading lawyers analyse particular trends or provide a broader discussion of key developments in the jurisdiction.
Trends and Developments

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Austria has a reputation for solving legal disputes in a quick and fair manner. This is not only true for traditional disputes handled by state courts, but also for arbitral proceedings, which have a long-standing tradition in Austria, with relevant legislation dating back to the 19th century. Austria’s ratification of many international arbitration-related conventions as early as the early 1960s (New York Convention and European Convention), 1970s (ICSID Convention), and 1990s (Energy Charter Treaties) underscores a long tradition of arbitral culture. Moreover, Austria’s political and social stability, accessible location in the heart of Europe, and modern infrastructure make Vienna an attractive arbitral venue.

Recent legislative developments
Recent amendments in 2006 and 2013 to the respective sections of the Austrian Code of Civil Procedure (Zivilprozessordnung – “ZPO”), have further strengthened Austria’s strong legislative basis for swift and fair arbitral decisions. Such proceedings were simplified significantly by the Supreme Court (Oberster Gerichtshof – “OGH”) becoming the first and — more importantly — only instance for challenging an arbitral award in commercial matters. Moreover, the OGH set up a senate for dealing with setting-aside claims. As welcome as recent reforms of the ZPO certainly are, they did not address important questions regarding issues raised in multi-party disputes, such as the consolidation of separate arbitral proceedings and the joinder of additional parties — areas very well covered by the Rules of Arbitration of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna amended in 2013 (VIAC and the Vienna Rules).

Authors

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VIAC and the Vienna Rules 2013
With its own arbitral institution, VIAC, Austria has a strong institutional basis towards arbitral proceedings. In 2015, 40 new cases were submitted to VIAC, which led to 55 pending cases with an aggregated amount in dispute of EUR1.32 billion. More than half of the parties originated from outside of Austria (predominantly from Germany, Russia, Slovakia and the Czech Republic). VIAC’s Rules of Arbitration — the so-called ‘Vienna Rules’ — were subject to a substantial modification in 2013: the new Vienna Rules 2013 provide...
for a modern, yet thorough set of provisions for arbitral proceedings. They now also contain rules for the joinder of third parties, the consolidation, the constitution of Tribunals in multi-party disputes, and an expedited procedure.

On a national level: the OGH’s positive approach towards arbitration matters

When Austrian state courts are involved in cases relating to arbitration, they tend to interfere with arbitral matters as little as possible. The OGH traditionally applies a strict standard for setting aside an arbitral award and does not demand high formal requirements for the validity of an arbitral agreement. Two recent decisions of the OGH reflect this continuing trend.

The OGH’s strict doctrine for successfully challenging an arbitral award

For the first decision (23 February 2016, docket no. 180CG3/15p), it is important to know that the challenge of an arbitral award before the OGH will only be successful if the award infringes one of the criteria set out in art. 611 para. 2 ZPO. This may be the case, for example, if a party was unable to present its means of attack and defence (no. 2 leg cit) or if the arbitral proceeding itself or the arbitral award are in conflict with the fundamental values of the Austrian legal system (ordre public, no. 5 and 8 leg cit). In the cited decision, the claimant argued that, amongst other things, the arbitral tribunal (a sole arbitrator) had not discussed the grounds for his judgment with the parties before determining the award, and that the parties had not presented them in their reasoning. In the claimant’s opinion, such a “surprising” decision of the arbitrator had violated pillars of Austrian procedural ordre public. The OGH did not follow the claimant’s arguments, but stated that a procedural error cannot constitute a violation of art. 611 para. 2 no.2 and no.5 ZPO if the same procedural error would not lead to the invalidity of the decision before an Austrian state court. The OGH further affirmed that the ground of violation of the Austrian ordre public needs to be interpreted narrowly, and a claim for the abolition of an arbitral award will only be successful in the event that the arbitral award (and not merely its reasoning) violates the core values of Austrian law in an “intolerable way”. Lastly, the OGH made clear that his review of an arbitral award should not lead to a révision au fond of the arbitral decision.

The OGH’s favourable doctrine regarding the validity of arbitration agreements

Another decision of the OGH from 2016 (14 June 2016, docket no. 3Ob90/16f) consolidates the OGH’s tendency to rule in favour of arbitration agreements. In that case, the claimant and the respondent had concluded multiple agreements, including a bank account agreement (without an arbitration agreement), a pledge agreement and an escrow agreement (both including arbitration agreements). Even though the OGH rejected the claimant’s extraordinary appeal for formal reasons (the case did not raise a “substantial legal issue”, a prerequisite for the admission of an extraordinary appeal), the OGH with an obiter dictum stated that, despite the broad wording used by the parties, it was clear that all disputes arising in connection with the escrow agreement should be subject to arbitration. As the escrow agreement was concluded at a later point in time, and as parties may agree on arbitration regarding already-existing contractual relationships, the OGH held that the first and second instance had rightly dismissed the claim due to a valid arbitral agreement.

On a European level: Austria (amongst others) put forward a non-paper on intra-EU investments — and a respective settlement mechanism

On a European level, Austria — together with Finland, France, Germany and the Netherlands — gained the attention of EU legislation by submitting to the Trade Policy Committee of the Council of the European Union a non-paper regarding intra-EU investment treaties (also called “intra-EU BITs”) in April 2016. The main aim of the delegations submitting this non-paper was to reach a compromise solution for the termination of intra-EU BITs (of which there exist a large number, in the range of a few hundred) by concluding one unilateral agreement between the Member States. Of particular interest in this context is the idea of the delegations that — even though procedural protection in investment disputes should usually be subject to the Member States — alternative mechanisms shall be provided in case a dispute cannot be solved through national litigation or in the event that an out-of-court settlement would be “more suitable”. Therefore, the delegations promote the institution of an appropriate ad hoc ‘investor-to-State mediation scheme’, for example by setting up a mediation board with a list of mediators approved by the Member States. More importantly, the delegations consider that setting up a binding and enforceable settlement mechanism for investment disputes is necessary – ‘as a last resort to mediation and domestic litigation’. As a first proposal, the non-paper sets out three potential options for such an investment dispute settlement mechanism:

- to confer jurisdiction to the European Court of Justice;
- to model the system on the Unified Patent Court; or
- to rely on the Permanent Court of Arbitration (in a similar way as drafted in TTIP).

Of course, these options and their potential implications need further assessment, and the delegations conclude the non-paper by stating that they would highly welcome a further technical meeting and be ready to participate in the drafting of a respective legal text. It will be interesting to keep an eye on the respective developments and further efforts of Austria and the other delegations over the next few years.
Final note
The liberal approach of Austrian courts and politics towards arbitration remains unchanged. Many interesting and innovative ideas in the field of arbitration are discussed within the arbitration community. The topics covered centre around the evermore complex nature of controversies. Possibly in the future, areas of interest will include arbitration applications to be dealt with by state courts in relation to cases where the subject matter relates to technology or construction in analogy to respective provisions in the English Civil Procedure Rules.