

Kluwer Arbitration Blog

No Deliberations, No Enforcement in Austria: Different Reasoning by the Supreme Court, Same Result?

Maximilian König (Bitterl König Attorneys-at-Law) · Thursday, May 14th, 2020

In a recent [decision](#) of November 2019 the Austrian Supreme Court (“OGH” in German) considered whether an arbitral award rendered by the Chamber of Industry and Commerce of Belarus shall be declared enforceable and emphasized the importance of deliberations in the context of the *ordre public* standard to reach an enforceable award.

In a nutshell, the Supreme Court held that excluding a co-arbitrator in fact from the deliberations and general decision-making process, thereby also preventing her/him from influencing the decision-making of the other arbitrators, infringes the procedural *ordre public*, i.e. the body of principles that underpin the operation of the legal system in Austria.

Facts of the Case: Arbitrator Excluded from Deliberations

The following facts are known from the Supreme Court’s decision: The claimant sought to obtain a declaration of enforceability for Austria regarding an arbitral award rendered on April 15, 2015 by the Chamber of Industry and Commerce of Belarus. The arbitral tribunal consisted of three arbitrators: two party-appointed arbitrators and one presiding arbitrator, Mr. A.¹⁾

After the evidentiary proceedings were concluded, an initial meeting between the three arbitrators was scheduled. However, the meeting ended without a decision on the merits of the case. The arbitrator nominated by the respondent, Mr. R., was thus given the prospect of additional meetings in order to come to a decision. Yet, Mr. A. took it upon himself to subsequently draft an award without contacting, informing or discussing the draft with Mr. R.

Mr. A. then requested Mr. R. to sign the draft award he had prepared and which in the meantime had already been signed by Mr. A. and the arbitrator nominated by the claimant. While studying the signed draft award Mr. R. noticed that the award also covered requests submitted by the parties after the evidentiary proceedings were concluded (including but not limited to a request to reopen the procedure). And while Mr. R. was favorable to these requests, Mr. A. quashed them in his draft award.

Mr. R. thus raised his concern that the three arbitrators neither had a concluding discussion regarding the main issues of the case nor had there been a discussion involving Mr. R. regarding

the requests submitted by the parties after the evidentiary proceedings' conclusion. In his response, Mr. A. merely referred Mr. R. to the possibility of a dissenting opinion.

Considering these facts, the lower instances rejected both the claimant's application for declaration of enforceability and the applications to grant enforcement.

Decision of the Austrian Supreme Court

Generally, the Austrian Supreme Court deals with remedies against the judgement of the Courts of Appeal in civil matters and is the first and final instance in annulment claims regarding arbitral awards and proceedings in connection with the constitution of arbitral tribunals, amongst others.

Access to the Supreme Court is limited in two ways: by considering the value of the dispute and by restricting access to the Court to matters which raise a substantial question of legal relevance. A legal issue is considered to raise a substantial question of legal relevance if the lower court's decision departs from the relevant rulings of the Supreme Court, if there is no case law on the issue in question, or if this issue has not been dealt with consistently in the Court's past rulings.

In the case at hand, the Supreme Court noted the lack of a substantial question of legal relevance and largely followed the lower instances' reasoning.

The Court confirmed the decision of the lower court in that it is preferable for all arbitrators to be physically present during the deliberations regarding the merits of the case, especially if the award is subject to a majority vote. Yet, the deliberations between the arbitrators may also be conducted via phone, videoconferencing or in writing.

Bilateral deliberations between two arbitrators are even acceptable according to the Supreme Court, as long as these deliberations do not lead to the factual exclusion of a third arbitrator from the decision-making process.

An arbitrator, who is overruled by his colleagues, must have had the chance to present his opinion to his colleagues and thus to influence the decision-making of the other arbitrators. However, if the arbitrator, who was overruled by his colleagues, is presented with his colleagues' finalized opinion, the decision-making process leading to the arbitral award is severely tainted.

The Supreme Court upheld the decision of the lower court in considering that Mr. R. was indeed confronted with a finalized opinion by his colleagues, which essentially constituted Mr. R's factual exclusion from the decision-making process and effectively barred him from the possibility to influence the decision-making of his colleagues.

This, as per the Supreme Court, infringes the procedural *ordre public*. It is interesting to note, however, that the Supreme Court did not refer to the public policy exception found in the [Convention on the Recognition and Enforcement of Foreign Arbitral Awards](#) ("New York Convention"). Instead, it simply upheld the lower-instances' decisions and stated that enforcing the arbitral award infringes the Austrian *ordre public*.

The Supreme Court also noted that, contrary to the claimant's view, the lower instances are not "sweeping aside" the judicial decisions taken in a Belarusian annulment proceedings, because the

relevant evaluation criterion in the case at hand is the Austrian legal order, which has not yet been evaluated. The legal view taken by the lower instances moreover does not mean that unanimity is ultimately required if the arbitrators have dissenting opinions, because the matter to consider is a fair and correct decision-making process.

Analysis of the Supreme Court decision – Emphasizing the Importance of Deliberations

In practice, objections to the enforcement of arbitral awards based on an infringement of the *ordre public* are fairly common, but very rarely successful. This is partly due to the narrow definition of the *ordre public* standard according to the Supreme Court's case law.

Austria has ratified the New York Convention conceived to facilitate the recognition and enforcement of foreign arbitral awards in the member states of the convention. The relevant Austrian procedural provisions on the enforcement of arbitral awards are found in the Austrian Code of Civil Procedure (*Zivilprozessordnung*) and the Austrian Enforcement Act (*Exekutionsordnung*).

And while the New York Convention basically banished the so-called “double-exequatur” proceedings requiring applicants to get an arbitral award rendered enforceable in both the country where the award was issued and the country where enforcement was sought, trying to get foreign arbitral awards recognized and enforced in Austria occasionally still is an uphill battle.

This is due to the Austrian courts' interpretation of the form requirements provided for in Article IV New York Convention.

The decision at hand is an exceptional case, because it does not concern the form requirements stipulated in the New York Convention, which are typically the basis for rejecting an application for declaration of enforceability; rather, the Supreme Court refers to an infringement of the procedural *ordre public* when rejecting the claimant's applications.

Indeed, the fact that an arbitrator was objectively excluded from the deliberations and then confronted with a finalized opinion by his colleagues constitutes a major flaw preventing a fair and correct decision-making process according to Austrian law. The decision of the Supreme Court reflects what seems to be an international consensus regarding the importance of deliberations in arbitration.

The Supreme Court stated that it is not *per se* improper for two arbitrators to deliberate amongst themselves, provided that the deliberations do not reach an intensity which would effectively exclude the third arbitrator. This approach is also adopted by German law.²⁾

Similarly, the lack of proper deliberations on contentious issues has been relied upon as a ground for annulment in Sweden as early as 1924 (*see* Årsbackaträvaruaktiebolag v. E. Hedberg, NJA 1924 p. 569).

In a more recent case, an arbitral award rendered by a tribunal in Spain was set aside because one of the arbitrators was excluded from deliberations. Namely, in the now infamous *Puma Case*, the chairman and one co-arbitrator held the final part of the deliberations without informing the third one, changed the previously agreed content of the award, signed the award and even notified the

parties on the same day.

The Supreme Court's decision also (implicitly) confirmed the importance of the principle of collegiality for the deliberative process; a similar stance was taken in the annulment of the award rendered in the *Guangying Costumes v. Eurasia* case, in which an arbitrator was *de facto* excluded from the deliberation process.

Apart from infringing the *ordre public* in most jurisdictions, the fact that an arbitrator is effectively excluded from the opportunity to deliberate and to convey his or her opinion on the final draft of an award, the arbitral award itself is also at risk of annulment.

This decision should serve as a sharp reminder to arbitrators and counsels alike, not to overlook the *ordre public* of the state in which the arbitral award will be enforced, when conducting the proceedings and issuing an award.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



 Wolters Kluwer

The graphic features a black background with white text and a circular icon. The icon depicts a group of stylized human figures, with one figure in the center being magnified by a magnifying glass. The background is accented with horizontal lines in blue and green.

References

?1 The author is not aware of the parties' names. The abbreviations used only serve the purpose to enhance the article's readability.

?2 See *Schlosser in Stein/Jonas*, dZPO²³ § 1052 Rz 2.

This entry was posted on Thursday, May 14th, 2020 at 8:00 am and is filed under [Austria](#), [Deliberations](#), [Enforcement](#), [Ordre Public](#), [Supreme Court](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.