

Austrian Supreme Court on the Lack of Impartiality and Independence of Arbitrators Discovered Ex Post

Kluwer Arbitration Blog

March 12, 2020

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Please refer to this post as: Tamara Manasijević, 'Austrian Supreme Court on the Lack of Impartiality and Independence of Arbitrators Discovered Ex Post', Kluwer Arbitration Blog, March 12 2020, <http://arbitrationblog.kluwerarbitration.com/2020/03/12/austrian-supreme-court-on-the-lack-of-impartiality-and-independence-of-arbitrators-discovered-ex-post/>

Like virtually all arbitration laws, the Austrian Arbitration Act is silent on whether the lack of impartiality and independence of an arbitrator may be invoked for the first time in setting aside proceedings in cases where a party becomes aware of the relevant circumstances only after the award was rendered. The Austrian Supreme Court has, however, permitted such challenges provided that a party can prove that it was prevented from challenging an arbitrator during the arbitration (because it was unaware of the arbitrator's alleged lack of impartiality or independence).

In a decision rendered on 1 October 2019 (No 18 OCg 5/19p), the Austrian Supreme Court abandoned its long-standing position that, in such cases, only "*blatant*", *i.e.*, gross partiality of an arbitrator, warranted the setting aside of an arbitral award. It has now been established that any lack of impartiality and independence of an arbitrator constitutes a ground for setting aside if a party was unaware of such lack of impartiality or independence during the proceedings.

Background

The underlying arbitration was initiated against an Austrian cooperative by a former member who sought annulment of the management's resolution to exclude him from membership. The five-member arbitral tribunal, which was appointed in accordance with the cooperative's articles of association, dismissed the claim.

The claimant moved to set aside the award, *inter alia*, on the basis of the improper composition of the arbitral tribunal under section 611 para. 2, line 4 of the Austrian Arbitration Act. He argued that the arbitral tribunal was improperly composed because one arbitrator (that he himself had appointed) was a state court judge, despite the fact that Austrian state court judges are prohibited from acting as arbitrators. The claimant asserted that he had not been aware of this prohibition and had therefore been unable to challenge the arbitrator during the arbitration. In addition, he argued that two arbitrators were not impartial due to their close relationship with the management of the respondent (*i.e.* the cooperative).

Decision

The Supreme Court dismissed the challenge and upheld the arbitral award holding, in respect of the alleged improper composition of the tribunal, that:

- the violation of the official duty of judges (such as accepting to act as arbitrators) does not lead to a deficiency in the arbitral process and therefore does not constitute a ground for setting aside the award;
- the claimant did not argue that he had been prevented from challenging the two arbitrators whom he considered biased and "*apart from that, there [wa]s in any case no doubt that the claimant as a long-standing official knew of the close relationship between both arbitrators characterized as partial and the respondent*".

Even though the challenge was dismissed, two aspects of the Court's reasoning merit special attention.

First, the Court seized the opportunity to correct what it considered to be a wrong standard set by its previous case law. According to two decisions from 2013, the setting aside of an award for an arbitrator's lack of impartiality was justified only

“in blatant cases”, i.e., if the degree of partiality discovered *ex post* was extreme (decisions No 2 Ob 112/12b dated 17 June 2013 and No 2 Ob 155/13b dated 27 November 2013). The Court held (at the time) that, in a situation when the award had already been rendered, the limitation to *“blatant cases”* was justified by the principles of legal peace and legal certainty.

In the decision at hand, the Court expressly joined the opinions of the authors who criticised its previous stance and found that any lack of impartiality of arbitrators – whether *“blatant”* or not – renders the composition of the tribunal improper.

Second, the Court highlighted that doing away with the limitation to *“blatant cases”* would not impair legal certainty because a challenge is only admissible if brought within the prescribed three-month time limit (save in cases of criminal offences, which, however, need to be proven by way of a final court decision).

Comment

The Supreme Court’s decision marks an important and most welcomed turnaround in relation to setting aside an award on the grounds of an arbitrator’s lack of impartiality discovered *ex post*.

At the same time, the Court seems to suggest that it would not allow exceptions even if a party was able to show that it discovered an arbitrator’s lack of impartiality only after the time limit for a set-aside action. It is, however, quite conceivable that circumstances giving rise to doubts as to an arbitrator’s impartiality are revealed many months after the award was rendered. Let us consider, for instance, the scandal in the arbitration between Slovenia and Croatia that shook the arbitration community in 2015 and imagine that the transcripts of the *ex parte* conversations were revealed much later, after the time limit for annulment expired. It would certainly be frustrating and far from legal certainty if there could be no remedy against such an award.

In addition, no time limit exists under the New York Convention (NYC) for invoking the grounds for refusal to enforce awards. The Austrian Supreme Court has still not had the chance to address a case where a party opposed enforcement based on an arbitrator’s partiality discovered *ex post*, but it did rule in 2005 that a party is not precluded from invoking a ground for refusing recognition and enforcement even if

it did not challenge the award in the place of arbitration or if any such challenge was not successful (decision No 3 Ob 221/04 b dated 26 January 2005).

There seems to be no justification or logic, in the author's view, that the reliance on a lack of impartiality discovered *ex post* is subject to a preclusive time limit for challenging an award, when no such time limit exists for invoking the same ground in enforcement proceedings under the NYC.

A possibility to extend the (relatively short) time limit for challenge would seem appropriate and necessary, at least in exceptional cases, when a party shows that it was not and could not have become aware of an arbitrator's lack of impartiality before the expiry of the time limit. The revision of arbitral awards that has been admitted in exceptional cases as an extraordinary remedy by the Swiss Federal Court is a good solution. The current draft amendment to the Swiss Private International Law Act even explicitly provides that a revision can be sought within 90 days of the discovery of new circumstances giving rise to doubts as to an arbitrator's independence or impartiality.

Arbitrators' impartiality and independence is a matter of public policy and is at the heart of the integrity of the arbitral process. If this integrity is compromised by an arbitrator's bias that was not disclosed by the respective arbitrator (and most likely also by one party), would legal certainty not mandate that the resulting award could be challenged even after the expiry of the time limit for (ordinary) challenge? In the author's view, the answer is a clear "yes".

It remains to be seen whether this concern will also motivate the Austrian legislator to intervene by providing for an appropriate legal remedy in the future.