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In a 'First' Worldwide, Austrian Supreme Court Confirms Arbitral Tribunal's Power to Hold Remote Hearings Over One Party's Objection and Rejects Due Process Concerns

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On 23 July 2020, the Austrian Supreme Court (*Oberster Gerichtshof*, OGH) rendered a decision examining whether conducting an arbitration hearing by videoconference over the objection of a party may violate due process (Case No. 18 ONc 3/20s). To the authors' knowledge, this decision, rendered in the context of the COVID-19 pandemic, is the first national supreme court's decision worldwide addressing this issue.[1)]

The Respondents in an arbitration seated in Vienna and administered by the Vienna International Arbitral Centre (VIAC) had challenged the arbitral tribunal over its decision to conduct an evidentiary hearing remotely by videoconference. After the VIAC had rejected the challenge, the case went to the OGH. The OGH held that arbitrator challenges based on allegations of procedural irregularity can only succeed under Austrian law if the tribunal's conduct of the proceedings were to result in serious procedural violations or in permanent and significant (dis)advantages to a party. The court found that holding a remote hearing against the objection of a party does not meet this high threshold. Specifically, the OGH confirmed that remote hearings are generally permissible under Austrian arbitration law, that the arbitral tribunal enjoys broad discretion as to the organization and conduct of the proceedings, and that the alleged inadequacies of remote hearings do not exist (or can be remedied). The OGH therefore rejected the Respondents' challenge.

This case is of particular interest for a number of reasons. It addresses the legal framework related to remote arbitration hearings, including the relevance of Article 6 of the European Convention on Human Rights (ECHR). In addition, the OGH provides useful guidance on practical questions as to whether a hearing should be postponed or proceed remotely if an in-person hearing is not possible, including: whether different time zones must be considered in organizing remote hearings, and how to address concerns that witnesses could be unduly influenced in a remote setting.

Facts of the case

The arbitration proceedings at issue had been pending since 2017 and a one-day evidentiary hearing was originally scheduled for March 2020. In mid-January 2020, the tribunal rescheduled the hearing for 15 April 2020, with a starting time at 10.00 am CEST. In a case management

conference call held in mid-March, the parties discussed the possibility of holding the hearing remotely in light of the outbreak of the COVID-19 pandemic and ensuing travel restrictions. The Respondents rejected this option and proposed that a hearing be conducted in person at a later point in time. On 8 April 2020, the tribunal decided that the hearing would proceed as scheduled, on 15 April 2020, and, due to the COVID-19 pandemic, by way of a videoconference. The start time was moved to 3.00 pm Vienna time. As the Respondents' counsel and one of their witnesses to be examined at the hearing were based in Los Angeles, California, this placed the beginning of the hearing at 6.00 am local time.

At the start of the hearing, the Respondents complained about the remote nature of the hearing and the early start. (The Respondents would later allege that the co-arbitrator appointed by Claimant rolled his eyes in response.) After the hearing, the Respondents filed a challenge with the VIAC Board against all three members of the tribunal and, subsidiarily, against the co-arbitrator appointed by Claimant alone. After the challenge was rejected by the VIAC Board, the respondents filed their challenge with the OGH (pursuant to Section 589(3) of the Austrian Code of Civil Procedure, ZPO).

The Respondents claimed that they were not given appropriate notice of, and could not adequately prepare for, the 15 April hearing, because the tribunal's decision not to postpone the date was issued only three business days before the hearing. In addition, they argued that the tribunal's decision to start the hearing at 3.00 pm Vienna time (the time zone of the Claimants) and 6 am Los Angeles time (the time zone of the Respondents' counsel and witness) amounted to an unequal treatment of the parties. Lastly, the Respondents argued that holding a remote hearing amounted to a violation of the tribunal's duty to treat the parties fairly because the tribunal did not put measures in place to prevent witness tampering. Specifically, the Respondents claimed that neither the tribunal nor the parties were able to ascertain which documents witnesses would have access to; whether there were other persons present in the witness's room; and whether witnesses would receive chat messages while being examined.

Decision

The Austrian Supreme Court rejected the Respondents' challenge. The court first established the applicable legal standard for the challenge of arbitrators, and then examined each ground raised by the Respondents in turn.

On the legal standard for the challenge of arbitrators

The court noted that under Austrian arbitration law (Section 588(2) ZPO) a challenge against an arbitrator is only successful if justifiable doubts exist as to his or her impartiality or independence. The statutory reasons for the challenge of state court judges serve as a guideline for this assessment and reflect "an exacting standard" to safeguard the reputation and authority of judicial decision-making. Still, the court held that an inappropriate conduct of proceedings and procedural errors by the arbitrators are not, as a general rule, enough to give rise to the appearance of prejudice. Rather, arbitrators can only be successfully challenged if their case management decisions result in a serious violation of fundamental procedural principles or in a permanent and significant (dis)advantage for a party. Specifically, when exercising its procedural discretion, the tribunal is

bound by the duty to treat the parties fairly during all stages of the proceedings (expressly codified in Section 594(2) ZPO for all arbitrations seated in Austria and in Article 28(1) of the 2013 Vienna Rules (Vienna Rules) for all arbitrations conducted under the auspices of the VIAC).[2)]

On the tribunal's decision not to postpone the hearing and to conduct it remotely

The OGH held, in line with established Austrian precedent, that the duty to treat parties fairly applies to all stages of the arbitral proceedings, including the determination of the date of the hearing and decisions on requests to postpone. This includes an obligation to ensure that both parties have a fair opportunity to participate in the hearing. However, the OGH ruled that in the circumstances of the case the tribunal's decision not to postpone the in-person hearing in light of the current COVID-19-related restrictions but to conduct the hearing remotely at the scheduled date did not amount to a breach of the tribunal's duty to treat the parties fairly.

In particular, the court rejected the Respondents' claim that they were not given appropriate notice. It held that the relevant time for this assessment was when the hearing date was originally communicated (i.e. 15 January 2020), and not when the tribunal decided on the Respondents' request to postpone the hearing (i.e. 8 April 2020). Parties must consider that the tribunal may not grant a request for rescheduling a set hearing date which had been known to both parties for months.

The fact that the tribunal decided that the hearing would be conducted remotely also did not violate the fundamental principle that both parties be treated fairly or their right to be heard. The OGH noted that videoconferencing technology (both for the taking of evidence and the conduct of hearings) is widely used in judicial proceedings before state courts (citing to a range of procedural laws on the domestic and European level) and that this is also relevant for arbitral proceedings. The OGH emphasized that the Austrian legislature has expressly promoted the use of videoconferencing technology during the COVID-19 pandemic to ensure that judicial proceedings could be advanced; and it recognized that commentators have similarly endorsed the use of remote hearings in arbitral proceedings during the pandemic.

Importantly, the OGH then expressly confirmed that, as a general rule, remote arbitration hearings are not only permissible if both parties agree, but also over the objection of one of the parties. For this, the court relied on Article 6 ECHR. Article 6 ECHR provides for a party's right to get effective access to justice and to be heard. In circumstances like the COVID-19 pandemic, in which insisting on an in-person hearing would lead to a standstill of proceedings, videoconferencing provides a useful tool to ensure both effective access to justice and the right to be heard. According to the OGH, this general conclusion in favor of remote hearings could only be reversed by sufficiently strong countervailing factual considerations in a particular case. The court did not find any in the case at hand.

On the issue of different time zones

With regard to time zones, the court considered that the time difference between Vienna and Los Angeles meant that the hearing could not take place during core business hours for all hearing

participants. The OGH held that by concluding an arbitration agreement providing for VIAC arbitration, an institution based in Vienna, the Respondents had, in principle, accepted the disadvantages resulting from the geographical distance to their place of business, including substantial travel and time differences. In addition, the court noted these disadvantages were not exacerbated by a remote hearing. To the contrary, the court took the view that starting a hearing at 6.00 am local time was less burdensome than having to travel from Los Angeles to Vienna for an in-person hearing.

On the fear of witness tampering

Finally, the court held that blanket allegations concerning the potential misuse of videoconferencing technology in examining witnesses could not render them inappropriate as such. As a preliminary matter, the OGH found that the risk of witness tampering also existed in in-person hearings (e.g. through influencing a witness's testimony prior to the hearing or feeding the witness information on other evidence adduced during the course of the hearing). The court then added that remote hearings allow for measures to control witness tampering that "partly go beyond these available at a conventional hearing". Such measures specific to remote witness testimony include

- the (technical) ability of all participants to observe the person to be examined closely and from the front;
- the possibility to record the evidence;
- the option to instruct the witness to look directly into the camera and keeping his or her hands visible onscreen at all times (making it impossible to read any chat messages); and
- showing the room in which he or she is testifying (ensuring that no other person is present).

Comment

The OGH's judgment is a landmark decision, as it appears to be the first decision by a national supreme court specifically addressing remote hearings in international arbitration.

Even though the decision was taken in the specific context of a challenge of an arbitral tribunal, it has broader significance. The standard that the OGH applied was whether the tribunal's decision to hold a remote hearing violated fundamental procedural principles: the parties' right to be heard and their right to be treated fairly. According to the OGH, as a general rule, there is no violation of these core due process rights if an arbitral tribunal decides to hold a hearing remotely, even over the objection of one of the parties. Such a decision will therefore neither endanger the tribunal nor the award – particularly in times of a global pandemic like COVID-19. This conclusion of the OGH rests on three main pillars.

First, it rests on the general principle under the Austrian arbitration law (and the Vienna Rules) that arbitral tribunals enjoy broad discretionary power in how to manage the arbitral proceedings and conduct hearings. A decision to hold a hearing remotely falls within this prerogative of an arbitral tribunal and thus generally rests on safe ground.[3)] This is a welcome confirmation exactly because of the widespread use of videoconferencing technology in arbitration proceedings.

Second, the OGH's decision is based on Article 6 ECHR, which is of constitutional rank in Austria and was the reason for Austria to adopt Article 18 of the UNCITRAL Model Law (the parties' right to "equal" treatment) in a broader way, providing for a fundamental right to "fair" treatment (Section 594(2) ZPO).[4] Notably, the OGH directly applied Article 6 ECHR in the present case and emphasized that this constitutional provision is designed to ensure both the parties' right to be heard and effective access to justice. Particularly in times of a global pandemic that makes in-person hearings impossible for an extended period of time, remote hearings offer a welcome alternative that allows arbitral tribunals ensure continued access to justice while also protecting the parties' right to be heard.

Third, under the OGH's test a party wanting to challenge a remote hearing must overcome a strong presumption that such remote form is legitimate. In this context, it cannot simply rely on blanket and generalizing allegations of factual or practical concerns. Rather, such a party would be required to clearly identify concrete circumstances that will likely result in substantial unfairness in a particular case. Moreover, the OGH takes the view that any such arguments are unlikely to succeed, at least if they relate to concerns on time zone differences or witness tampering, because these concerns are also a reality in traditional in-person hearings but can also be controlled in remote hearings.

With regard to the issue of time zone differences, the courts' general approach of highlighting the reduced effort and discomfort in accommodating somewhat usual hearing hours (within reasonable limits and at least for shorter hearings) compared to long travel and jet legs is powerful. The OGH's reasoning that the Respondents' consent to VIAC arbitration implied its acceptance of the disadvantages ensuing from the time zone difference to Vienna is less convincing. There is no need for in-person hearings to take place at the geographical location of the administering institution (and they often do not). Therefore, there is no reason to read any implied acceptances in parties' choice for one institution over another. If any legal construct can be considered in this regard, it would be the parties' choice of seat where remote hearings are regularly "presumed" to take place.

When summarizing the parties' positions, the court also mentioned that the tribunal in the underlying arbitration had issued a procedural order at the outset of the proceedings according to which witness evidence could be taken remotely. This is a useful reminder that arbitral tribunals can further diminish the (already small) likelihood that the decision for a remote hearing would cause any issues by expressly providing for this option in its first procedural order. Where arbitral tribunals clarify this at the outset, remote hearings cannot come as a surprise to parties and there is no room for tactical objections. At an even earlier stage, parties might want to consider adding relevant provisions on the possibility of remote hearings in their arbitration clauses.[5]

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References

?1 The German Federal Court of Justice (*Bundesgerichtshof*, BGH) issued a ruling on the same day that addresses discrete issues of the potential for witness tampering during the remote taking of witness evidence. See BGH, Beschluss vom 23. Juli 2020 – I ZB 88/19. For an analysis of further case law on remote hearings, see Maxi Scherer, 'The Legal Framework of Remote Hearings' in Maxi Scherer, Niuscha Bassiri and Mohamed S Abdel Wahab (eds), *International Arbitration and the COVID-19 Revolution* (Kluwer 2020).

?2 For an in-depth treatment of arbitrator challenges under the Vienna Rules and Austrian law, see Franz T Schwarz and Christian W Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria* (Kluwer 2009) ch 16; and for procedural fairness, at ch 20.

?3 On this point, see also Scherer (n 1) paras 3.2.2 and 5.

?4 Schwarz and Konrad (n 2) paras 20–019 and 20-064 et seq; Paul Oberhammer, *Entwurf eines neuen Schiedsverfahrensrechts* (Manz 2002) 92–93; Christian Hausmaninger, '§ 594 ZPO' in Hans W Fasching and Andreas Konecny (eds), *Kommentar zu den Zivilprozeßgesetzen (§§ 577 bis 618 ZPO)* (2nd edn, Manz 2007) paras 98–99.

?5 For samples clauses, see Scherer (n 1) para 6.1.

This entry was posted on Saturday, October 24th, 2020 at 9:05 am and is filed under Austria, COVID-19, Due process, Hearings
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