Austrian Supreme Court Establishes New Standards as Regards the Decisive Underlying Reasoning of Arbitral Awards

Kluwer Arbitration Blog
December 24, 2016

Sebastian Lukic (Schoenherr) and Anne-Karin Grill

Please refer to this post as: Sebastian Lukic and Anne-Karin Grill, 'Austrian Supreme Court Establishes New Standards as Regards the Decisive Underlying Reasoning of Arbitral Awards', Kluwer Arbitration Blog, December 24 2016, http://arbitrationblog.kluwerarbitration.com/2016/12/24/austrian-supreme-court-establishes-new-standards-as-regards-the-decisive-underlying-reasoning-of-arbitral-awards/

The decisive underlying reasoning (motifs, *Begründung*) is, without doubt, an essential part of any arbitral award and as such bears the potential of frustrating parties and arbitrators alike. On the one hand, elaborate reasoning in arbitral awards more often than not comes at the price of long waiting periods for the issuance of the awards, and periods of meticulous drafting on the part of the arbitrator(s). On the other hand, a lack of elaborate reasoning may likewise be a headache, since it exposes the arbitral award to setting aside.

From a practitioner's point of view, how do you reconcile the extremes? When can the decisive underlying reasoning of an arbitral award be considered sufficient against the background of possible setting aside proceedings? Clearly, these are questions that must be determined on a case-by-case basis. Further, any assessment will necessarily be informed by the relevant *lex arbitri*.

As for arbitral awards issued by tribunals seated in Austria, a key provision in this respect is Section 611(2) para 5 of the Austrian Code of Civil Procedure ("ACCP"). This provision states that arbitral awards shall be set aside if the arbitral proceedings were conducted in a manner that is in conflict with the fundamental values of the Austrian legal system (*procedural ordre public*). Prevailing scholarly opinion argues that procedural *ordre public* may only be invoked where severe breaches of procedural law have materialised.

Up until recently, scholarly opinion in Austria also supported the finding of the Austrian Supreme Court that the failure to include any decisive reasoning in the arbitral award whatsoever or to include only insufficient reasoning, did not constitute a violation of Austrian *procedural ordre public*. The most recent judgment on the subject matter issued by the Austrian Supreme Court stems from September 2016 and marks an important turnaround regarding the relevance of the decisive reasoning underlying arbitral awards (OGH 28.09.2016, 18 OCg 3/16 i). In the case at hand, the Austrian Supreme Court was called upon in connection with setting aside proceedings relating to an interim award (*Zwischenschiedsspruch*). One of the questions before it was whether the decisive reasoning underlying the interim award was "insufficient" to a degree rising to the level of a violation of Austria *procedural ordre public*. By reference to the amendments introduced to the Austrian Arbitration Act (*Schiedsrechtsänderungsgesetz* 2006), the Austrian Supreme Court overturned its longstanding jurisprudence on the setting aside of arbitral awards on the basis of violations of Austrian *procedural ordre public*, finding that non-adherence to certain standards applicable to the underlying decisive

reasoning in arbitral awards can be a ground for setting aside under Section 611(2) para 5 ACCP. According to the Austrian Supreme Court this is necessarily so in light of the fact that the standards applicable to arbitral awards are not the same as those applicable to judgements of civil courts. In this context, the Austrian Supreme Court called upon arbitral tribunals to strictly implement formal quality (*formale Qualität*) in their awards, especially in the absence of an appellate mechanism in the context of arbitration by which legal flaws in the decision – be them formal or material in nature – could be addressed. In particular, the Austrian Supreme Court held that

– arbitral awards are subject to setting aside pursuant to Section 611(2) para 5 of the ACCP if the decisive underlying reasoning consists merely of "meaningless phrases" (*inhaltsleere Floskeln*);

– if arbitral awards, in the decisive underlying reasoning section, make reference to the submissions of one party only, such reference does not imply "insufficiency" in the given context; and that

– an arbitral award is sufficiently reasoned (*ausreichend begründet*) if the arbitral tribunal discusses its own position in the course of the proceeding and, in the subsequent award, makes reference to this position.

The recent judgement of the Austrian Supreme Court is certainly to be welcomed. From both arbitrators' as well as counsels' perspective, it provides essential guidance: in the process of drafting their awards, arbitrators will forthwith have to bear in mind the minimum standards expressly determined by the Austrian Supreme Court. Counsels, on the other hand, in assessing the chances of success of potential setting aside proceedings in Austria, will be mindful that while the recent judgment may have opened a new door for setting aside in Austria, even awards that contain only insufficient reasoning will not be set aside by the Austrian state courts. This will be so in cases where (i) the parties expressly waived their right to receive a reasoned award (*Verzicht auf die Begründung des Schiedsspruchs*, Section 606(2) ACCP) or, more importantly, where (ii) the parties did not request an explanation of the award (*Erläuterungsantrag*, Section 610(1) para 2 ACCP). The latter, in particular, is a remedy that will have to have been exhausted before an application for the setting aside of the award may be lodged.

In conclusion, a word of reassurance may be in order. While the Austrian arbitration landscape is now richer in terms of grounds for setting aside, it is unlikely that we will see a surge in complaints as regards the quality of the decisive underlying reasoning in awards issued by arbitral tribunals seated in Austria. If anything, the change of direction regarding the jurisprudence of the Austrian Supreme Court will serve to improve the quality of Austrian arbitral awards even further.

**Anne-Karin Grill was recently named "Future Leader in Arbitration 2017" by Who's Who Legal.*