Does the right to be heard also extend to comments on cost submissions?

July 7, 2022

Introduction

In a recent decision,[1] the Austrian Supreme Court had to assess, with regard to a cost decision:

- whether not granting the party the opportunity to comment on the opponent's statement of costs, on which the tribunal bases its decision on costs, is in violation of the right to be heard and procedural public policy; and
- whether this amounts to a reason to set aside an arbitral award.

Facts

The subject matter of the multi-party arbitration was several post M&A claims arising from a transaction between one Chinese and three Croatian parties.

In its final award, the arbitral tribunal dismissed the first claimant's claims in full, but awarded the second claimant part of its claim for which it was awarded compensation. The tribunal also ordered the claimants to compensate the respondents for the procedural costs incurred.

The tribunal had closed the proceedings two days after the parties had submitted their cost submissions. By addendum, the arbitral tribunal denied a request by the claimants for correction, clarification and supplementation of the award. The tribunal declared the claimants' objections against the respondents' costs submission to be precluded, but nevertheless dealt with them in substance.

The claimants in the arbitration were not satisfied with the outcome and requested the Supreme Court to partially set aside the award.

Arguments

The claimants asserted several violations of due process during the course of the arbitration proceedings and, in particular, complained about the decision on costs in several respects:

- violation of the right to be heard under section 611(2) No. 2 and No. 5 of the Code of Civil Procedure (ZPO) – the claimants argued that the tribunal had violated their right to be heard as they had not been given the opportunity to comment on the respondents' cost submission on which the arbitral tribunal had based its cost decision. According to the claimants, the arbitral tribunal had closed the proceedings two days after the parties had submitted their cost submissions. Moreover, in the addendum to the award, the arbitral tribunal had declared the claimants' arguments to be precluded;
- violation of procedural public policy under section 611(2) No. 5 of the ZPO – the claimants also argued that the tribunal's decision on costs violated procedural public policy as its reasoning was defective. According to the claimants, the cost decision had not been reasoned in a comprehensible manner since it was unclear according to which applicable law the arbitral tribunal had determined the costs and why it had considered the awarded costs to be reasonable. Moreover, the tribunal had violated due process as it had not requested from the respondents any additional supporting document besides the fee agreement; and
- violation of substantive public policy under section 611(2) No. 8 of the ZPO – furthermore, the claimants deemed the decision on costs to be in violation of Austrian substantive public policy as they found the contingency fee agreement between the respondents and their representative, allowing them to litigate without any cost risk, to be void under Austrian law due to the prohibition of *quota litis*.[(2)]

Decision

The Supreme Court dismissed the action for annulment for the following reasons.

Right to be heard with regard to decision on costs

In line with its jurisprudence, the Supreme Court first reiterated its general restrictive position on section 611(2) No. 2 of the ZPO. Under this view, as a general rule, the right to be heard is only violated if the arbitral tribunal ignores or rejects requests for evidence or has otherwise incompletely determined the facts of the case. A violation of the principle of the right to be heard could only be found in the case of an arbitrarily incomplete or deficient determination of the facts of the case or incomplete consideration of legally relevant facts, or if the arbitral tribunal arbitrarily ignores, disregards or rejects requests for evidence.[(3)]

The Supreme Court did not find that the arbitral tribunal had violated the claimants' right to be heard by not providing the parties with the opportunity to comment on the cost submissions. In its reasoning, the Supreme Court referred to legal scholars who had addressed this issue but concluded that providing such an opportunity (although increasingly common and possibly desirable) is not required to conform with the parties' right to be heard. To underpin its opinion, the Court made reference to state court proceedings in which it is also not mandatory to allow parties to comment on the cost submissions.

Procedural public policy

With regard to the arbitral tribunal's reasoning in the cost decision, the Supreme Court found that the tribunal had a wide and free discretion when deciding on costs. For this reason, it found it not decisive for the tribunal to specify on which applicable law it had relied. Also, the fact that the arbitral tribunal had not relied on or even demanded any further evidence apart from the fee agreement did not violate fair proceedings.

Comment

In this decision, the Supreme Court had to consider, for the first time, whether an arbitral tribunal has to allow the parties to comment on each other's cost submission to safeguard the parties' right to be heard. While the Court shows a clear tendency to deviate from its lenient and repeatedly criticised[(4)] position, unfortunately, it decided not to go all the way.

In fact, there is no convincing reason why a lower standard with regard to the right to be heard should be applied when it comes to cost decisions. On the contrary, strong arguments mandate that a strict standard should be applied to safeguard the right to be heard in arbitration proceedings.[(5)]

First, the right to be heard (article 6(1) of the European Convention on Human Rights) is a fundamental procedural right with constitutional standing. It is also codified in the ZPO as a fundamental principle of arbitration proceedings (section 594(2)).

Second, in arbitration – unlike in state proceedings – there are only very limited possibilities of review. This must equally apply to cost decisions which, according to section 609(4) of the ZPO, must be rendered in the form of an arbitral award (section 606 of the ZPO) and thus are not subject to review by state courts but can only be challenged by means of an action for setting aside. In that sense, the Supreme Court's comparison with state court proceedings appears misguided.

Finally, the arbitral tribunal's cost decision is a discretionary one, as the Supreme Court has correctly pointed out. Such discretionary decision making, in general, is based on principles of equity. Many institutional rules even expressly provide that the arbitral tribunal's decisions on costs may sanction the parties for their behaviour or that of their authorised representatives.[(6)] As such, the decision on costs is largely based on the arbitral tribunal's sense of justice. All the more, a high standard must be applied with regard to the right to be heard.

In summary, it can be stated that precisely because the decision on costs in arbitration proceedings typically covers large amounts and the arbitral tribunal enjoys a wide margin of discretion, the parties must be given the opportunity to make full use of their means of challenge and defence.

Of course, if the parties do not comment on the cost submissions or do not raise any substantiated objections, it may be assumed that the parties agree with the amount of the costs claimed, and the arbitral tribunal may examine the reasonableness and award the costs solely on the basis of the cost table at its disposals. For this purpose, however, it must first allow the parties to comment on the opponent's cost submission.

In the case at hand, the proceedings were closed only two days after the submission of the statements on cost compilations had been submitted. On top of that, with the addendum to the arbitral award, the arbitral tribunal had declared the claimant's objections to be precluded. This effectively excluded the possibility for the claimants to present their arguments and thus to be heard by the arbitral tribunal.

Therefore, the Supreme Court's reasoning and conclusion on this point is not convincing.

At a positive and final note, it should be emphasised that the Court in its reasoning cited legal scholars and took note of the concerns and arguments raised with regard to this matter. However, although these scholars conclusively argue that the right to be heard should also extend to cost decisions, the Court pointed out that the cited sections only state that it would be desirable that a party is given the opportunity to object to its opponents' cost submission but that it is nowhere argued that a lack of such opportunity should also amount to a reason to set aside an award.

For one thing, this can be understood as an encouragement for legal scholars to revisit this issue; then again, it would have been desirable for the Court to rule in favour of the right to be heard which is fundamental at every stage of the arbitration proceedings.

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Endnotes

(1) Supreme Court,15 December 2021, Docket 18 OCg 5/21s.

(2) For further information on this decision, reviewing the claimant's arguments regarding quota litis which also prompted the Supreme Court to provide an obiter dictum statement on the admissibility of third-party funding in Austria, see "Austrian Supreme Court scrutinises admissibility of contingency fee arrangements and third-party funding".

(3) 18 OCg 10/19y Rz 80 f; 18 OCg 1/19z.

(4) Among others:

- Zeiler (2014) *Schiedsverfahren*, section 594 mn 18;
- Schumacher in Liebscher/Oberhammer/Rechberger (2016) *Schiedsverfahrensrecht II* mns 10/244-245;
- Pitkowitz in Nueber (2021) *Handbuch Schiedsgerichtsbarkeit und ADR*, L/80 with further references; and
- Pitkowitz (2008) *Die Aufhebung von Schiedssprüchen* mn 206 et seq.

(5) For further information on this decision, see Nikolaus Pitkowitz (2022) "*Fehlende Äußerungsmöglichkeit zum Kostenverzeichnis des Schiedsgegners kein Aufhebungsgrund*", ecolex 2022/254, p 367.

(6) For instance:

- article 38(2) of the Vienna Rules 2021;
- article 38 (5) of the International Chamber of Commerce Arbitration Rules 2021;
- article 28 of the London Court of International Arbitration Rules 2020; and
- rule 29 of the Judicial Arbitration and Mediation Services Rules 2021.