

Supreme Court scrutinises decision awarding costs to losing party

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- Introduction
- Facts
- Decision
- Comment

Introduction

In a 15 January 2020 decision (Docket 18 OCG 12/19t), the Supreme Court considered whether a final arbitral award on the reimbursement of costs violated Austrian public policy. The claimant had ultimately succeeded in the arbitration conducted under the rules of the International Court of Arbitration of the International Chamber of Commerce (ICC) (Case 22948/FS). Nevertheless, the cost decision ordered it to reimburse the respondent's costs. The Supreme Court dismissed the claimant's request to set aside the cost decision.

Facts

The underlying ICC arbitration claim was based on the claimant's request in two procedural phases in line with Section 254 of the Code on Civil Procedure. In the first phase, the claimant requested information (ie, disclosure of books and accounts) to establish the basis for its claim in order to then assert a specific payment claim in the second phase. In the arbitration proceedings, the claimant valued its entire claim at €150,000. In the first phase, the sole arbitrator issued a partial award obligating the respondent to supply the requested information. The respondent complied with this partial award, supplied the information and – voluntarily – paid the claimant the debt resulting therefrom, which was approximately €3 million. Consequently, the claimant withdrew its second phase payment claim and limited its claim to the reimbursement of its costs. However, the sole arbitrator found that the claimant rather than the respondent had to reimburse the other side's costs and ordered the claimant to pay the respondent approximately €260,000.

The claimant requested the Supreme Court to set aside the cost decision, alleging that it violated Austrian public policy. The claimant argued that the decision was contrary to the fundamental values of the Austrian legal system – in particular, the well-established case law of cost reimbursement in two-phase proceedings under Section 254 of the Code on Civil Procedure.

Decision

The Supreme Court dismissed the claim *a limine* (ie, without ordering any exchange of submissions and without conducting any further evidentiary proceedings) as it found that based on the facts presented by the claimant, there was no violation of Austrian public policy. The court reaffirmed that settled case law and literature considers, in particular, the basic principles of the Constitution, the European

Convention on Human Rights, criminal law, private law, procedural law and public law as fundamental values of the Austrian legal system. The Supreme Court noted that the object of protection is not the subjective legal position of a party to proceedings, but rather the Austrian legal system itself. The Supreme Court added that when examining a breach of these fundamental values, the result of an arbitral award, and not its reasoning, is decisive. However, the examination of whether there is such a fundamental violation must not lead to a *révision au fond* (ie, an overall review of the arbitral award's factual and legal aspects). Therefore, in general, wrong decisions must be accepted. However, the Supreme Court noted that this rule may not apply if the arbitral tribunal applied the law arbitrarily.

The Supreme Court affirmed the general principle that unless otherwise agreed by the parties to arbitration, the arbitral tribunal will decide on the parties' obligation to reimburse the costs of proceedings. In making this decision, pursuant to Section 609(1) of the Code on Civil Procedure, the arbitral tribunal has discretion to consider the circumstances of the case, especially the outcome of the proceedings. The obligation to reimburse costs may include all reasonable costs appropriate for bringing the action or defence. Nevertheless, the parties are free to conclude a different agreement on the bearing of costs of the arbitration proceedings (directly or by submitting to institutional rules) or in a separate procedural agreement.

The Supreme Court noted that under Article 38(5) of the ICC Rules of Arbitration, in making decisions as to costs, arbitral tribunals may consider all of the circumstances that they consider relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner. As a result, according to the Supreme Court, in principle, arbitrators have full discretion to decide on costs and need not orient themselves on the outcome of the proceedings but may also use other criteria, as long as their decision does not violate *bonos mores*.

The Supreme Court then considered the claimant's argument that, under application of Austrian law cost reimbursement principles, in the case of two-phase proceedings under Section 254 of the Code on Civil Procedure, the claimant was entitled to the full reimbursement of its costs. The court summarised the claimant's argument that the sole arbitrator:

- had failed to make independent cost assessments for each phase but had rather aggregated the percentages of success and loss for both phases; and
- had found that the claimant had excessively undervalued its claim.

The court found that the sole arbitrator had not been bound by Austrian procedural law cost reimbursement rules and that the cost decision was rendered well within the scope of discretion awarded to an arbitral tribunal in contrast to the strict rules applicable in state court proceedings.

In conclusion, the Supreme Court held that the arbitral award had not violated the fundamental values of the Austrian legal system and that the law had not been applied arbitrarily.

Comment

While the Supreme Court's decision confirms the wide discretion of arbitral tribunals in their cost decisions, it also makes evident that this can lead to unexpected consequences. It is a strong reminder for parties that arbitral tribunals seated in Austria – even when applying Austrian procedural law principles as for two-phase proceedings under Section 254 of the Code on Civil Procedure – are in no way bound by the Austrian law cost reimbursement rules.

The decision is also a reminder of the – arguably restrictive – Austrian case law on public policy, which makes it virtually impossible for a party to set aside an award for a violation of fundamental laws. The

Supreme Court has held that the public policy exception must be used only in extraordinary cases and not in cases of inequity of the result or the mere contradiction of mandatory provisions of Austrian law. The Supreme Court also emphasised the wide discretion granted under the ICC Rules of Arbitration. Clearly, as a result of this decision, ICC cost decisions will be difficult to contest. Therefore, parties that want to avoid surprises should add specific cost provisions to their arbitration agreements or bring cost reimbursement up as a procedural issue at the outset of arbitration proceedings.

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