

Supreme Court evaluates hybrid arbitration agreement

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Introduction

In its 21 August 2018 decision, the Supreme Court considered the validity of a hybrid arbitration agreement which provided for the formation of a tribunal under the International Chamber of Commerce (ICC) Rules of Arbitration (the ICC Rules) to arbitrate at the Vienna International Arbitral Centre (VIAC). In this context, the court also considered the consequences of violating procedural rules agreed by the parties and the tribunal's failure to issue a reasoned award.

The claimant's (ultimately unsuccessful) attempt to set aside the arbitral award also raised procedural questions relating to setting aside proceedings before the Supreme Court (as first and last instance).

Facts

In the setting aside proceedings, the claimant argued that the arbitration agreement had been contradictory and ambiguous and was therefore invalid.

The arbitration agreement had the following wording:

*Every dispute arising out of or in connection with this contract that cannot be solved amicably within 60 days shall be decided by an arbitral tribunal in accordance with the arbitration rules of the **International Chamber of Commerce** that were in force when this contract was signed. The tribunal shall consist of three arbitrators appointed according to these rules. The arbitral award shall be final and binding to the parties. The arbitral proceeding, including oral hearings and the issuance of the award shall take place at the **Vienna International Court of Arbitration in Vienna, Austria**. (Emphasis added.)*

In the relevant arbitration, the arbitral tribunal had been constituted and the proceedings had been conducted under the ICC Rules. The oral hearing was held at the offices of the presiding arbitrator in Vienna.

The claimant argued that the agreement had called for arbitration under the VIAC's rules, but instead, the arbitral tribunal had been formed and conducted the proceedings under the ICC Rules. The claimant also argued that the tribunal had failed to supply a proper reasoning for its jurisdictional decision.

On the procedural level, the claimant dealt with several (self-inflicted) obstacles. Setting aside proceedings fall within the Supreme Court's jurisdiction and proceedings in front of the Supreme Court

must be conducted by attorneys. However, the setting aside action was initially filed by the claimant's managing director. The Supreme Court requested a correction noting the need for an attorney and electronic filing.

The setting aside action was filed by an attorney on the last day of the three-month deadline. However, it was not filed via the mandatory electronic court filing system, but rather by regular mail. Following the Supreme Court's dismissal, the claimant filed electronically and applied for *restitutio in integrum* (ie, total reinstatement), arguing that the law firm's IT system had failed that day.

Decision

In its evaluation of the merits of the award's challenge, the Supreme Court analysed in detail whether the arbitration agreement had been contradictory or ambiguous. This analysis was based on the wording of the agreement, as the claimant had not argued that the parties had reached a consensus that deviates from the wording.

The court found that the clause contained three distinct provisions:

- the parties had agreed that an arbitral tribunal would decide their dispute;
- the tribunal would consist of three arbitrators and be constituted in accordance with the ICC Rules; and
- the proceedings would take place at the VIAC.

Analysing each of the provisions for possible contradictions and ambiguity, the Supreme Court found that they were not contradictory, as it was possible for an arbitral tribunal to be constituted according to the ICC Rules and to then conduct the proceedings at VIAC.

The court further held that the provisions were not ambiguous. The clause contained no clear designation of VIAC as the arbitral institution, but rather merely provided that proceedings would take place there. However, the court conceded that it was unclear whether the agreement required that the proceedings (and not only the constitution of the tribunal) were to be made under the ICC Rules or the VIAC's rules. However, such a decision must be made by an arbitral tribunal, which must in any case be constituted under the ICC Rules. As this provision's lack of clarity can be solved by interpretation (as demonstrated by the Supreme Court), it did not constitute an ambiguity which would permit the award to be set aside.

The Supreme Court held that even if the arbitration clause had called for conducting the proceedings under the VIAC's rules, the failure to do so would still not reach the level of procedural public policy. The court noted that, unlike Article 34(2)(a)(iv) of the United Nations Commission on International Trade Law Model Law and German law, Austrian law had not introduced the violation of agreed procedures as grounds for setting aside an award. In the court's opinion, that also applied to the application of 'wrong' (ie, VIAC instead of ICC) procedures. In addition, the application of different arbitration rules – resulting from a reasonable interpretation of the arbitration agreement – does not conflict with the fundamental values of the Austrian legal system. The court further noted that the claimant had not argued that the different venue for the hearing (ie, the law firm of the presiding arbitrator in Vienna) and the procedural steps under ICC Rules were unreasonable.

According to the Supreme Court, the tribunal's failure to provide a reasoned decision on its jurisdiction had not violated procedural public policy in this case – certain circumstances permit a tribunal to do so, as reflected in previous case law (for further details please see "Supreme Court sets aside arbitral award for defective reasoning"). However, the court also held that this is not the case if the missing

reasoning relates to circumstances which must nonetheless be independently evaluated by the Supreme Court during the setting aside procedure. This especially concerns the validity of the arbitration agreement (Section 611(1)(1)) and the constitution of the arbitral tribunal (Section 611(1)(4)). It would be a mere formality if, in such a case the setting aside is denied because the arbitration agreement is found to be valid or because the constitution of the tribunal is not found to be improper, the award would nevertheless be set aside for lack of proper reasoning.

The Supreme Court also addressed the tribunal's failure to send copies of the hearing protocol to the parties. It noted that even if this had violated the agreed rules of procedure, it had not violated public policy because the Code of Civil Procedure provides for protocol delivery only on express application by a party (Sections 212(5) and 212a(2) CPC). Parties do not need a protocol of a hearing to safeguard their rights, as they have taken part in it and should therefore know what happened. Thus, the failure to deliver a protocol could (if at all) constitute a ground for setting aside an award only if the claimant had unsuccessfully applied for such a delivery and been unable to challenge the award due to failed delivery. However, this had not happened in the present case.

On the procedural issues relating to the setting aside proceedings, the Supreme Court granted *restitutio in integrum* because the failure of the law firm's IT system was an unforeseeable event, due to which the timely electronic submission was impossible. It noted that if the claimant had mentioned the technical problems in its filing (which it had not) the postal submission would have been timely; however, the *restitutio in integrum* was still possible, as this only constitutes minor negligence.

Comment

This decision is another example of the Supreme Court's arbitration-friendly attitude. Its interpretation of the arguably hybrid arbitration clause was clearly driven from a *favor validitas* approach, approving the subsequently conducted proceedings (solely) under ICC Rules.

The Supreme Court's failure to take up violations of procedural rules, which is in line with its long-established case law, has been and still is subject to criticism. The court apparently took this criticism into consideration when relying not only on the law, but also on the rationale of its decision. Indeed, the failure to submit a protocol to a party can be tolerated when the party attended the hearing and should have been fully aware of its outcome. Also, the failure to provide a reasoning in the award can be tolerated, if the issue must nonetheless be scrutinised by the Supreme Court.

For further information on this topic please contact Nikolaus Pitkowitz at Pitkowitz & Partners by telephone (+43 1 413 01 0) or email (n.pitkowitz@pitkowitz.com). The Pitkowitz & Partners website can be accessed at www.pitkowitz.com.