Topics in our issue:

The new ICC Arbitration Rules

The revised Arbitration Rules of the International Chamber of Commerce in Paris (ICC) became effective on 1 March 2017. The most significant change concerns the introduction of an Expedited Procedure which is designed to accelerate arbitration proceedings and make them cheaper.

In arbitration proceedings, private legal disputes are resolved, under an arbitration agreement between the parties, by a non-government body rather than a state court. We distinguish between ad-hoc arbitral tribunals set up for a given dispute and institutional arbitration courts.

Especially in the world of international business, arbitration has become increasingly important as an alternative way of dispute resolution because of its many advantages. In contrast to state courts, arbitration proceedings are **not public**, which ensures higher confidentiality. Arbitration proceedings are **faster** as they usually do not provide for an appeal – appeals are allowed to a limited extent only. In addition, the parties to the dispute can choose their arbitrators themselves and thus select **experts well-versed in the particular problem**. Arbitration offers greater flexibility because parties are not bound to often cumbersome legal procedural rules and can choose the procedure, location and language of the arbitral proceedings themselves. As a result, dispute resolution can take place on "neutral ground" and in a neutral language.

One of the most significant advantages of arbitration is its **easier enforceability**. Because of the New York Convention of 1958, which has since been ratified by 157 states, arbitral awards can be enforced almost everywhere in the world.

Expedited Procedure

Many arbitration rules – such as the "Vienna Rules" of the Vienna International Arbitral Centre at the Austrian

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Federal Economic Chamber – already provide for an expedited procedure in low-value cases. The ICC court in Paris has now introduced its own rules for an expedited procedure for arbitration agreements concluded after 1 March 2017. According to Article 30 and Appendix VI of the ICC Arbitration Rules, the expedited procedure rules apply when the amount in dispute does not exceed US$ 2m. However, parties are free to apply the expedited procedure also in disputes over US$ 2m and to arbitration agreements concluded before 1 March 2017. Alternatively, parties may agree to opt out entirely.

A special feature of the new rules is that a dispute may be referred to a sole arbitrator even if the arbitration agreement provides for a three-member tribunal. Accordingly, enterprises wanting to avoid an award by a sole arbitrator will in the future have to pay close attention to the wording of their arbitration agreements. The arbitrator will be agreed by the parties or, if no agreement can be reached, the ICC court appoints a sole arbitrator.

To further simplify the expedited procedure, no terms of reference are required any more and the case management conference must be held within 15 days after the case files are referred to the tribunal. This provision favours claimants as they can prepare the proceedings at their discretion while respondents have to act rapidly because of the tight deadlines.

In drafting the request for arbitration the claimant needs to consider that after the arbitral tribunal has been constituted no new claims may be made unless authorised by the arbitral tribunal, which takes into account the nature of such new claims, the stage of the arbitration, cost implications and any other relevant circumstances.

A key new feature is that the arbitral tribunal may at its discretion decide not to allow requests for documents production or to limit the number, length and scope of written submissions and written witness evidence. After consultation with the parties, it may decide the dispute solely on the basis of the documents submitted by the parties unless any of the parties requests a hearing. The tribunal will have the authority to hold hearings not only in person, but also via telephone or video conference. In response to procedural economy considerations, the fees for arbitrators will be cut by about 20%.

In expedited procedures, the tribunal will be required to render its award within six months of the case management conference, unless this deadline is extended by the ICC court. Scrutiny of the award through the ICC court continues to be part of the expedited procedures.

Further changes

Changes have also been introduced for proceedings that do not fall under the expedited procedure rules which are designed to further procedural economy and transparency. Thus the deadline for issuing the terms of reference will be reduced to 30 days. Moreover, the ICC court now has the option to communicate the reasoning for its decisions on appointing, confirming, rejecting and replacing arbitrators.

Conclusion

From now on, in drafting arbitration clauses enterprises need to consider carefully whether or not to apply the expedited procedure. If the parties wish to opt out they need to explicitly specify its non-application.

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The Cartel Law Amendment of 2017 – changes that affect enterprises

The Amendment of the Acts Governing Cartels and Competition was passed by Parliament on 30 March 2017 and will, in parts, be retroactively effective as of 1 May 2017. It will have several consequences for enterprises.

The Amendment is primarily designed to transpose EU Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions. The object is to facilitate private enforcement of claims for damages under competition law for consumers and entrepreneurs and to achieve a balance between the private prosecution of a claim and public law enforcement. Key issues are:

- Every natural and legal person is entitled to full damages for an infringement of competition law, including abuse of a dominant market position, comprising both economic losses and lost profit plus interest as of the occurrence of such damage.
- In the case of cartels such a loss is assumed to occur except when disproved.
- The limitation period is at least five years and may be extended by specified proceedings, terminating not earlier than one year after conclusion of such proceedings.
- National courts may order defendants, third parties and competition authorities, upon threat of a fine, to disclose evidence if the plaintiff submits an application that convincingly supports the claim for damages. Complex rules are provided to protect the legal professional privilege and certain documents in government files (such as statements by witnesses for the prosecution).
- The (transitional) rules governing the entry into force of the transposition provisions in particular may well produce (legally) interesting constellations: The substantive rules must be applied to the compensation for losses occurred after 26 December 2016. The rules on the extended limitation period must be applied to all claims not yet time-barred on 26 December 2016 (i.e. which necessarily occurred before that date). The procedural rules, especially those on the bindingness of decisions made by the competition authorities and the rules on the disclosure and use of evidence, must be applied to proceedings commenced after 26 December 2016 which may obviously concern claims arising before that date.

Next to the transposition of the directive, the amendment includes some novelties:

- A 2015 judgment by the Federal Administrative Court made it clear that the Austrian Competition Authority is authorised to search external electronic records that can be accessed from the premises specified in the search warrant. In order to enforce such access, the cartel court may impose fines of up to 5% of the average daily sales reported in the previous business year for each day of default from the date defined in the judgment.
- The rules governing the monitoring of mergers added a purchase price threshold and reduced an existing (domestic) sales threshold. The new provision extends control to mergers that had not been affected before.
- A new provision added to the cartel law was rather unexpected: *"Of the fines, € 1.5m are to be dedicated annually to the purposes of the Austrian Competition Authorities and the Consumer Association VKI."*

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Update on labour law

Protection of older workers from dismissal relaxed

When it comes to challenging an employee's dismissal on the grounds of social incompatibility, the provision of Section 105 (3b) of the Austrian Industrial Relations Act (ArbVG) stipulates stricter rules to protect older workers. In their case, special consideration needs to be given to checking whether dismissal is socially unjustified and, in balancing social aspects, to the fact of the many years of uninterrupted employment and the age-related difficulties to be expected in reintegrating them in the labour market. Under current law, individuals who are aged 50+ upon being hired enjoy such protection after completing their second year of employment. In order to facilitate reintegration of over-50-year-olds, this protection has been slightly relaxed: an employment relationship commenced on or after 1 July 2017 is no longer subject to this special provision when the employee is 50 years old at the time of hiring (Federal Law Gazette 2017/37). For such older workers, protection from dismissal is thus harmonised with that accorded to younger employees.

Five-year term for all works council members

All works council members and other workers representatives (such as members of central and group works councils) who are appointed after 31 December 2016 have their term of office extended to five years. Similarly, the term served by disabled persons' representatives under the Disabled Persons Employment Act (BEinstG) was extended to five years. Moreover, works council members had their claim for a sabbatical leave under Section 118 ArbVG extended to three weeks and three working days within a given term of office; in companies that employ less than 20 employees on a permanent basis, each member of the works council may take such leave only without pay (Federal Law Gazettes 2017/12 and 2017/35).

For further information on the topic:
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P) Inside

Effective reinforcement for Preslmayr

Joining the Preslmayr team in the spring of 2017, Katharina Zehetner-Siquans and Valerie Bauer-Gauss have further boosted our legal forte. Ms Zehetner-Siquans came with years of experience in a reputed business law firm. Already in November 2016, Gregor Parzer relocated from the law department of Ottakringer Getränke AG to our firm. Another new member of our team is Marco Werner, who has been adding his knowhow since June 2017. We welcome all our new members to the team of Preslmayr Rechtsanwälte and look forward to working together as an efficient team.

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