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Austrian Supreme Court on due process in proceedings for preliminary injunction

GRAF ISOLA Rechtsanwälte GmbH | Litigation - Austria



JAKOB WIDNER

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The Supreme Court recently ruled⁽¹⁾ that a violation of the right to be heard in provisional proceedings is not a ground for nullity, but a mere procedural defect.

Facts

Two Austrian and two Italian construction companies were awarded the contract for a very large Austrian construction project as a bidding consortium and concluded a joint venture contract. This contract provided that a partner company could be excluded from further participation in the joint venture for certain reasons by a majority decision. Good cause for exclusion was defined as, among other things, a material breach of contractual obligations. The Italian partners of the joint venture held a total of 45% in the joint venture, the Austrian companies therefore had a majority of 55%.

The contracting authority for the construction works terminated the construction contract because it could not agree with the joint venture on technical issues about the implementation of the project. The Austrian partners of the joint venture therefore started to dismantle the construction site and requested the Italian main partner of the joint venture to pay a total of approximately €17 million as compensation for expenses. This payment was not made, but after some negotiations a smaller payment of approximately €8 million was made. This was because the demand for further payments was not based on comprehensible balance sheet plans and information. As a result, the Austrian majority shareholder of the joint venture convened a meeting of the venture partners to deal with the exclusion of the two Italian partners of the joint venture.

One of the Italian partners of the joint venture then sought an interim injunction and demanded that the Austrian majority shareholder refrain from initiating resolutions or other actions aimed at the exclusion of the Italian partner for failure to make the required payments. The reason given was that the Austrian partners in the joint venture were obviously pursuing the strategy of getting rid of the Italian partners. By being excluded from the joint venture, however, the plaintiff would lose its status as a partner, so that the Austrian partners could dispose of the assets of the joint venture without any control by the Italian partners. Notwithstanding this, the plaintiff would be liable to the client of the construction project and would have to finance the losses of the joint venture on a pro rata basis. The joint venture had sufficient liquidity, so this kind of arbitrariness was not justified.

The court of first instance issued the interim injunction without hearing the defendant.

The appellate court set aside the first-instance decision because the defendant had not been given the opportunity to be heard. The appellate court stated that since the decision of the European Court of Human Rights of 15 October 2009 in *Micallef v Malta*,⁽²⁾ article 6 of the European Convention on Human Rights (ECHR) is also applicable in provisional proceedings. The provision should be interpreted to the effect that the issuance of an interim injunction without hearing the opponent is only permissible in exceptional cases. Such an exceptional case did not exist, because at the time of the application for an interim injunction there would have been sufficient time until the venture partners' meeting for the defendant to file a reply – that is, to grant it the right to be heard. The defendant's statement would therefore have been required. Since this did not happen, article 6 of the ECHR was violated, which demanded nullity of the proceedings.

The appellate court allowed the case to go to the Supreme Court, because there was still no uniform case law on the question of whether a violation of article 6 of the ECHR constituted a ground for nullity and whether the granting of the right to be heard required that an oral hearing be scheduled or whether a written defence statement was sufficient.

Decision

The Supreme Court confirmed that according to the decision in *Micallef*, the procedural guarantees of article 6(1) of the ECHR also apply to provisional proceedings.

However, it does not follow that provisional proceedings have to be adversarial. Under exceptional circumstances, the trial court can hand down a preliminary injunction without hearing the defendant. This is particularly important when the effectiveness of the measure depends on a quick decision. The opposing party can then file an objection against this decision of the trial court, which would ensure due process and the right to be heard.

The question of the legal consequences of a violation of the right to be heard in preliminary proceedings is a different question, though. Even before the decision of the European Court of Human Rights in the *Micallef* case, the ex parte conduct of provisional proceedings did not result in nullity, because at that time the provisional proceedings were generally considered to involve only one party.

The Supreme Court first summarised the different opinions as follows:

- A minority of legal scholars plead for nullity because an objection against the decision issued by the trial court does not have a suspensive effect. Therefore, this legal remedy offers too little legal protection in the event that the court of first instance had wrongly assumed an exceptional case, which would warrant that the provisional proceedings at the trial court level only involve the plaintiff.

- However, the majority of legal doctrine holds that this is not a case for nullity. According to such doctrine, nullity only applies if the right to be heard is mandatory, which is not the case in provisional proceedings with exceptional circumstances that cannot tolerate undue delay.
- This prevailing opinion had already been endorsed recently by the Supreme Court of the Principality of Liechtenstein,⁽³⁾ whose decision was cited by the Austrian Supreme Court. Liechtenstein and Austrian procedural law are identical on this point. The Austrian Supreme Court followed the prevailing doctrine in Austria and the Liechtenstein Supreme Court and held that the violation of the right to be heard within the meaning of article 6 of the ECHR does not constitute a ground for nullity in provisional proceedings, but only a procedural error, and reversed the appellate court's decision.

Comment

The Supreme Court has clarified that since the decision in *Micallef*, provisional proceedings at first instance are not ex parte, but generally adversarial, involving both litigating parties. In exceptional cases (eg, where effectiveness depends on a quick decision), the issuance of an interim injunction can still take place without hearing the opponent. However, the unsuccessful opponent is insufficiently protected by the legal remedies available, if the trial court errs about those circumstances. This is because the opposition has no suspensive effect. Nor does a fully fledged appeal to the appellate court, unless either the court of first instance or the appellate court allows a suspensive effect on appeal. In addition, the defendant is barred from new assertions of fact on appeal. This is called an "interdiction of novation" and serves the plaintiff well, but leaves the defendant at the mercy of the courts as to whether it will grant a suspensive effect.

Following the minority opinion on the nullity argument would have avoided this procedural maze and introduced a clear-cut rule for an important pillar of the right to a fair trial.

Therefore, a procedural defect (subject to complaint) can only be asserted if the court of first instance erroneously assumes that an exceptional case exists which entitles it to unilaterally conduct the provisional proceedings.

Since *Micallef*, the legal protection in the provisional proceedings is better for the defendant than before, because since then the provisional proceedings are, in principle, two-sided. Nevertheless, the legal protection is worse than in the main proceedings, even in the case of serious procedural defects, if the court of first instance is mistaken about the existence of an exceptional situation.

For further information on this topic please contact [Jakob Widner](mailto:j.widner@grafisola.at) at GRAF ISOLA by telephone (+43 1 401 170) or email (j.widner@grafisola.at). The GRAF ISOLA website can be accessed at www.grafisola.at.

Endnotes

(1) OGH 29.09.2021, 6 Ob 145/21y.

(2) 17056/06.

(3) *Fürstlicher Oberster Gerichtshof*, Decision of 10 September 2021, 01 CG.2020.246.