Austrian Yearbook
on
International Arbitration 2019

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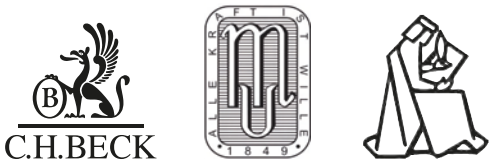

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Enforcement of Foreign Arbitral Awards in Austria and the Form Requirements under Article IV of the New York Convention

Veit Öhlberger/Alexander Karl

I. Introduction

A. History of the New York Convention and Purpose of this Article

Sixty years ago, on June 10, 1958, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") was signed in New York and, later, came into force on June 7, 1959. Initially, the New York Convention had 24 signatories. As of December 2018, the New York Convention has 159 members,[1]) making it one of the most important treaties in international law. In Austria, the New York Convention came into force on July 31, 1961.

The aim of the New York Convention is to facilitate the recognition and enforcement of foreign arbitral awards. In order to do so, the main innovation of the New York Convention was that – in contrast to its predecessor, the 1927 Geneva Convention – it is no longer necessary to enforce arbitral awards through a so-called "*double-exequatur*", proceedings where one had to get an arbitral award rendered enforceable in both the country where the award was made and then the country where enforcement was sought.

However, as shown in the past, the form requirements provided for in Article IV New York Convention can often lead to problems when trying to get foreign arbitral awards recognized and enforced in Austria. The purpose of the following article is to provide guidance on how to fulfil these form requirements, taking into account most recent Austrian case law.

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[1]) http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html, last visited January 6, 2019.

B. Scope of the New York Convention

The New York Convention applies to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such award is sought.[2]) Such awards are considered "*foreign awards*". The term "*foreign*" refers to the seat of the arbitral tribunal. Hence, arbitral awards, which were rendered by an arbitral tribunal seated within Austria, are considered domestic awards, whereas arbitral awards rendered by an arbitral tribunal seated outside of Austria are considered foreign awards.[3])

According to Article III New York Convention, the recognition and enforcement of foreign arbitral awards shall be granted in accordance with the rules of procedure of the territory where the award is relied upon. This refers to the national procedural law applicable in the contracting state, in which recognition and enforcement is sought.[4])

C. Basics on the Austrian Legal Framework for Enforcement of Foreign Awards

In Austria, the relevant procedural provisions on the enforcement of arbitral awards can be found in both the Austrian Code of Civil Procedure *(Zivilprozessordnung* – ACCP) and the Austrian Enforcement Act *(Exekutionsordnung* – AEA). Section 409 AEA stipulates which courts are competent to declare enforceability of a foreign title. Pursuant to this provision, the Austrian district courts (*Bezirksgerichte*) have jurisdiction *ratione materiae*, meaning that they are competent to decide on such category of decisions. As regards local jurisdiction (*rationae loci*), alternatively both the district court at which the debtor is domiciled or has its seat and the district court, which is competent for the execution of the enforcement actions to be initiated, are competent.[5])

It is permissible under Austrian law to combine both the application for declaration of enforceability and the application to grant enforcement.[6]) This is of course useful in order to save time. However, although courts must give

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[2]) Article I (1) New York Convention.

[3]) Christian Hausmaninger *in* Kommentar zu den Zivilprozessgesetzen § 614 ZPO para. 21 (Hans W. Fasching & Andreas Konecny eds., 3rd ed. 2016)

[4]) UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Art IV para. 83 (2016).

[5]) Michael Slonina *in* Kommentar zur Exekutionsordnung § 82 EO para. 1 (Peter Angst & Paul Oberhammer eds., 3rd ed. 2015); Christian Koller *in* Kommentar zur Exekutionsordnung Vor § 79 EO para. 565 (Peter Angst & Paul Oberhammer eds., 3rd ed. 2015).

[6]) Section 412 (1) AEA; Hausmaninger, *supra* note 3, at § 614 para. 48.

applicants the possibility to correct defects in their applications,[7]) there is a noteworthy exception to this general rule in the context of enforcement against real estate located in Austria: Pursuant to Section 82a (2) of the Austrian Land Registry Act (*Allgemeines Grundbuchsgesetz* – ALRA) only such documents can be submitted within the time set by the court to correct the application (and this period cannot be longer than one week), which already existed in the form required for the requested registration at the time of the court's receipt of the application. Thus, if a document still has to be created after the court's receipt of the application, the application must be rejected without giving the applicant a chance to correct its application.[8])

Furthermore, in the context of enforcement against real estate located in Austria another particularity of Austrian law needs to be considered: Austrian law prohibits entries in the land register in currencies of a third country (*i.e.*, a country that is neither a member of the European Union nor of the European Economic Area).[9]) Consequently, if the arbitral award is in a foreign currency of such third country, the applicant must convert the claim into Euros when applying for registrations of a forced lien *(zwangsweise Pfandrechtsbegründung)* or a forced auction *(Zwangsversteigerung).*[10]) The Austrian Supreme Court has confirmed that Austrian courts are not allowed to convert claims by themselves.[11])

D. Article IV of the New York Convention

Article IV New York Convention sets out the form requirements an applicant must meet in order to obtain recognition and enforcement of a foreign arbitral award under the New York Convention and provides as follows:

> "1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
>
> (a) The duly authenticated original award or a duly certified copy thereof;

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[7]) OGH, Feb 17, 2016, docket no. 3 Ob 208/15g, ecolex 2016/186 393 (2016) (Austria); legal proposition *(Rechtssatz)* RS0036183; Hausmaninger, *supra* note 3, at § 614 para. 52.

[8]) OGH, Oct 22, 2009, docket no. 3 Ob 155/09d, EvBl-LS 2010/34, *in* ÖJZ 233 (2010) (Austria); *see* Franz Mohr, *Die Verbesserung von Zwangsversteigerungen*, *in* ecolex 471 (2009).

[9]) Art I Section 5 (3) of the Federal Act Implementing Private Law Measures Accompanying the Introduction of the Euro *(Bundesgesetz, mit dem im Zivilrecht begleitende Maßnahmen für die Einführung des Euro getroffen werden).*

[10]) Koller, *supra* note 5, at Vor § 79 EO para. 566.

[11]) OGH, May 30, 2006, docket no. 3 Ob 98/06t, JBl 2007, 660 (2007) (Austria).

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for the recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent."

It is common understanding that national provisions are not allowed to set higher requirements than those stipulated in Article IV New York Convention.[12]) Thus, the documents required under Article IV are the only documents an applicant has to provide to obtain recognition and enforcement of an arbitral award[13]) and, hence, further proof may not be requested.[14]) As a result, it is – according to Austrian case law and literature – not necessary to *inter alia* submit the following:

- confirmation of legal effect and enforceability,[15])
- proof of service of the arbitral award,[16])
- signatory power of the person who acted on behalf of the contracting parties at the conclusion of the arbitration agreement,[17])
- a court order confirming the enforceability of an arbitral award.[18])

Nevertheless, to meet the requirements of Article IV New York Convention, as interpreted by the Austrian courts, can already in itself be sufficiently challenging. The following shall show were these challenges lie and how to deal with them.

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[12]) See, *e.g.*, Gary Born, International Commercial Arbitration 3396 (2nd ed. 2014).

[13]) UNCITRAL Secretariat Guide, *supra* note 4, at Article IV para. 10.

[14]) Christian Koller *in* Schiedsverfahrensrecht II 12/49 (Christoph Liebscher, Paul Oberhammer & Walter H. Rechberger eds., 2016); Hausmaninger, *supra* note 3, at § 614 para. 57; Dietmar Czernich *in* Internationales Zivilverfahrensrecht Art IV NYC para. 3 (Alfred Burgstaller et al. eds., 2008).

[15]) Legal proposition *(Rechtssatz)* RS0002515.

[16]) Legal proposition *(Rechtssatz)* RS0075358; Hausmaninger, *supra* note 3, at § 614 para. 57.

[17]) Koller, *supra* note 5, at Vor § 79 EO para. 569.

[18]) *See* Veit Öhlberger, *Vollstreckung ausländischer Schiedssprüche in Österreich und deren Formvoraussetzungen nach dem New Yorker Übereinkommen*, *in* SchiedsVZ 81, 82 (2007); Hausmaninger, *supra* note 3, at § 614 para. 57.

II. Article IV (1) (a) of the New York Convention – Arbitral Award

Pursuant to Section 614 ACCP, the recognition and enforcement of foreign arbitral awards shall be governed by the provisions of the AEA, unless otherwise provided by international law or by legal acts of the European Union. Hence, whenever the New York Convention is applicable, it takes precedence over the relevant domestic provision of the AEA. This has also been explicitly clarified in several rulings of the Austrian Supreme Court.[19])

Article IV (1) (a) New York Convention distinguishes between two form requirements: originals of arbitral awards have to be *"duly authenticated"* and copies thereof need to be *"duly certified"*. Neither the text of Article IV New York Convention itself nor the *travaux preparatoires* of this provision define the terms *"authenticated"* or *"certified"*.[20]) However, it seems to be common understanding that authentication means confirmation of the authenticity of the arbitrators' signatures[21]) and certification means confirmation that the document provided is a true copy of the original.[22])

A. Authentication of Arbitrators' Signatures

Pursuant to Austrian case law the said requirement of authenticated arbitrators' signatures would be met at least in the following instances:

- Authentication by an Austrian authority;[23])
- Authentication by an authority of the country of origin or under whose law the decision was made;[24])
- Authentication by arbitral institution.[25])

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[19]) OGH, Aug 24, 2011, docket no. 3 Ob 65/11x, EvBl 2012/9, *in* ÖJZ 69 (2012) (Austria); OGH, Feb 17, 2016, docket no. 3 Ob 208/15g, ecolex 2016/186 393 (2016) (Austria).

[20]) UNCITRAL Secretariat Guide, *supra* note 4, at Article IV para. 42.

[21]) UNCITRAL Secretariat Guide, *supra* note 4, at Article IV paras. 43, 44; legal proposition *(Rechtssatz)* RS0124091; Öhlberger, *Vollstreckung ausländischer Schiedssprüche, supra* note 18, at 78; Christian Dorda & Veit Öhlberger, *Vienna Perspective – 2012*, *in* 27/3 Mealey's Intl. Arb. Rep. 26, 29 (2012); Marike Paulsson, The 1958 New York Convention in Action 143 (2016).

[22]) UNCITRAL Secretariat Guide, *supra* note 4, at Article IV para. 43; Koller, *supra* note 14, at 12/51; Paulsson, *supra* note 21, at 143.

[23]) *See* Öhlberger, *Vollstreckung ausländischer Schiedssprüche, supra* note 18, at 78 with further references; Koller, *supra* note 14, at 12/52.

[24]) *See* below at II.A.1.

[25]) *See* below at II.A.2.

While, in practice, authenticating signatures by an Austrian authority will be the most cumbersome way,[26]) it does not raise any form questions. In contrast, the other methods of proving authenticity could indeed trigger form issues. On these in more detail in the following:

1. Authentication by an Authority of the Country of Origin or Under Whose Law the Decision Was Made

The Austrian Supreme Court has confirmed several times in the context of Article IV New York Convention that the applicant is not obliged to apply to the foreign representation of the country in which he intends to apply for recognition and enforcement.[27]) This is based on the fact that the New York Convention does not specify the competent authority that should perform the authentication or certification. During the drafting of the New York Convention, a proposal that the authority competent to authenticate an award should be the consulate of the country where the award is relied upon was not adopted.[28]) Therefore, the authentication pursuant to Article IV New York Convention may also be made in accordance with the law of the country where the award was made.[29])

However, the Austrian Supreme Court had also regularly pointed out that – in order to avoid difficulties – it is still recommended to obtain authentication from authorities of the country where enforcement is sought;[30]) otherwise, it would be left to the court to assess the evidential value of the submitted documents.[31])

In contrast, several courts of other countries interpret Article IV New York Convention more restrictively.[32]) For example, the German Higher Regional Court (*Oberlandesgericht* – OLG) Schleswig has taken the position that authentication shall be governed by the law of the country where enforcement is sought. Otherwise, a review by those courts would hardly be

[26]) Austrian authorities competent to authenticate signatures are Austrian notary publics, certain officers at Austrian courts and Austrian consular or diplomatic representations. Locations and opening hours of the latter, which are probably the most relevant option among Austrian authorities in the context of foreign arbitral awards, can be found at: https://www.bmeia.gv.at/en/embassies-consulates/search-for-austrian-representations/, last visited January 6, 2019.

[27]) Legal proposition *(Rechtssatz)* RS0075355; OGH, Feb 17, 2016, docket no. 3 Ob 208/15g, ecolex 2016/186 393 (2016) (Austria).

[28]) UNCITRAL Secretariat Guide, *supra* note 4, at Article IV para. 51.

[29]) Legal proposition *(Rechtssatz)* RS0109158

[30]) Legal proposition *(Rechtssatz)* RS0075355.

[31]) Öhlberger, *Vollstreckung ausländischer Schiedssprüche, supra* note 18, at 78 with further references at note 14.

[32]) UNCITRAL Secretariat Guide, *supra* note 4, at Article IV para. 48.

possible or would at least entail considerable difficulties.[33]) Similarly, the Italian Supreme Court decided that the formal requirements of authentication are governed by the applicable procedural rules of the country of enforcement.[34]) However, it has to be noted that, in general, German courts take a considerably more lenient approach in respect of authentication: According to German case law, an authentication of an arbitral award is not required when the authenticity of the award is not challenged.[35])

In order to avoid the possible evidential issues pointed out by the Austrian Supreme Court, it should be considered to super-legalize the actual authentication as follows:

- If certifications by a foreign authority are directly recognized in Austria based on bilateral or multilateral treaties,[36]) an authentication by such foreign authority must be sufficient without any super-legalization.
- An apostille[37]) should be obtained when the relevant countries are contracting states to the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents ("Hague Convention").[38])
- In respect of those member states to the New York Convention which have neither concluded a relevant bilateral or multilateral treaty with Austria nor acceded to the Hague Convention it must be decided – depending on the situation of the individual case at hand – whether a confirmation of the local authentication by formal diplomatic super-legalisation should be obtained.

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[33]) Oberlandesgericht Schleswig, Jul 15, 2003, docket no. 16 Sch 01/03, Y.B. Com. Arb. XXX 524 (2005) (Germany).

[34]) Corte di Cassazione, Oct 8, 2008, 24856 (Italy); UNCITRAL Secretariat Guide, *supra* note 4, at Article IV para. 48.

[35]) Oberlandesgericht Schleswig, Jul 15, 2003, docket no. 16 Sch 01/03, Y.B. Com. Arb. XXX 524 (2005) (Germany); Oberlandesgericht München, Dec 17, 2008, docket no. 34 Sch 18/08 (Germany); Oberlandesgericht München, Feb 27, 2009, docket no. 34 Sch 19/08 (Germany).

[36]) *E.g.*, pursuant to the legalization treaty between Austria and Germany signed on June 21, 1923 (Bundesgesetzblatt [BGBl] No. 139/1924) certifications by courts or administrative authorities or a notary public of one contracting state are recognized in the other contracting state without any need of super-legalization; similarly, the legalization treaty between Austria and Switzerland signed on August 21, 1916 (Reichsgesetzblatt [RGBl] No. 340/1917), which, however, does not recognize certifications by notary publics.

[37]) An apostille can usually be obtained easily and at no substantial costs. For an overview of the foreign authorities authorized to issue apostilles *see* https://www.hcch.net/en/instruments/conventions/authorities1/?cid=41, last visited January 6, 2019.

[38]) As of December 2018, the number of contracting parties to the Hague Convention is 117 (https://www.hcch.net/en/instruments/conventions/status-table/?cid=41, last visited January 6, 2019).

2. Authentication by Arbitral Institution

The Austrian Supreme Court confirmed in various judgments that an authentication by an official of an arbitral institution is sufficient, if the respective arbitration rules provide for such authentication.[39]) In most cases, this form of authentication should be the simplest and least expensive way.

Amongst others, the following arbitration rules explicitly provide for such authentication:

- Article 36 (4) Rules of Arbitration and Mediation of the Vienna International Arbitral Centre (VIAC) (2018): *"All original copies of the award shall be signed by the Secretary General and bear the VIAC stamp, which shall confirm that it is an award of the VIAC, rendered and signed by one or more arbitrators appointed under the Vienna Rules."*
- Article 26 (7) LCIA Arbitration Rules (2014): *"The sole or presiding arbitrator shall be responsible for delivering the award to the LCIA Court, which shall transmit to the parties the award authenticated by the Registrar as an LCIA award, provided that all Arbitration Costs have been paid in full to the LCIA in accordance with Articles 24 and 28."*
- Section 39 (3) Rules of the Arbitration Court attached to the Czech Chamber of Commerce and the Agricultural Chamber of the Czech Republic (2015): *"The arbitral award shall be co-signed by the President and Secretary of the Arbitration Court; they also verify the signatures of the arbitrators thereby."*

In order to avoid form issues, the applicant should check the relevant arbitration rules for an express power of the respective official before submitting an authenticated award.

B. Certified Copy of the Arbitral Award

If no original award can be submitted (*e.g.*, because the respective arbitral institution only provides the parties with copies), Article IV (1) (a) New York Convention requires the applicant to submit a "*duly certified copy*" of the award. The copy must contain the entire award.[40]) It is not necessary to submit a dissenting opinion.[41])

[39]) Legal proposition *(Rechtssatz)* RS0108580; OGH, Aug 24, 2011, docket no. 3 Ob 65/11x, EvBl 2012/9, *in* ÖJZ 69 (2012) (Austria); OGH, Sep 3, 2008, docket no. 3 Ob 35/08f, EvBl-LS 2009/17, *in* ÖJZ 138 (2009) (Austria); Hausmaninger, *supra* note 3, at § 614 para. 52.

[40]) Öhlberger, *Vollstreckung ausländischer Schiedssprüche*, *supra* note 18, at 79.

[41]) Koller, *supra* note 14, at 12/54.

As regards the method of certification, Austrian courts accept the three options of authentication listed above under II.A also for the certification of copies. Consequently, a certification that the copy of the award is a true copy of the original can be issued by an Austrian authority, by an authority of the country of origin or under whose law the decision was made or by an arbitral institution.

However, according to established case law of the Austrian Supreme Court, in case of a duly certified copy of an arbitral award the authenticity of the arbitrators' signatures must be at least indirectly confirmed too.[42] The latter has caused debates in the context of certified copies issued by arbitral institutions.

1. Certified Copy by Arbitral Institution – Additional Authentication Necessary?

In its decision 3 Ob 35/08f, the Austrian Supreme Court held that a certified copy of an arbitral award issued by an arbitral institution does not *per se* indirectly authenticate the signatures of the arbitrators. In this case, the Registrar of the LCIA – who was under the LCIA Rules applicable at that time neither expressly authorized to authenticate nor to certify copies of awards – only confirmed that the copy corresponded to the original award.[43]) Therefore, the Austrian Supreme Court concluded that this confirmation did not fulfill the requirements of Article IV New York Convention.[44])

Several commentators criticized this decision as too formalistic. One point of critique was that the Austrian Supreme Court required from the applicant an – at least indirect – authentication of the arbitrators' signatures although the opponent never disputed that the original, from which the submitted copy was made, was authentic.[45]) As the opponent simply invoked noncompliance with the certification requirements of Article IV (1) New York Convention, the Austrian Supreme Court reduced these formalities to an end in itself.

Another point of critique was that it would be wrong to conclude that a certified copy issued by an arbitral institution would not indirectly authenticate the arbitrators' signatures.[46]) On the latter, it was argued that almost all internationally relevant arbitration rules provide that the arbitral award shall

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[42]) Legal proposition (Rechtssatz) RS0124091.

[43]) The latest version of the LCIA Rules (the ones issued in 2014) expressly provide for an authentication of the award by the Registrar (Article 26 (7)).

[44]) OGH, Sep 3, 2008, docket no. 3 Ob 35/08f, EvBl-LS 2009/17, *in* ÖJZ 138 (2009) (Austria); Dorda/Öhlberger, Vienna Perspective – 2012, *supra* note 21, at 29.

[45]) Dirk Otto, *Formalien bei der Vollstreckung ausländischer Schiedsgerichtsentscheidungen nach dem New Yorker Schiedsgerichtsabkommen*, IPRax 362 (2009).

[46]) Veit Öhlberger, Case Comment, *Zu den Formvoraussetzungen der Vollstreckung ausländischer Schiedssprüche nach dem New Yorker Übereinkommen*, *in* JBl 65, 66 (2010).

be sent by the arbitral institution to the parties of the proceedings. This alone already confirms that the award was actually signed by the arbitrators appointed in the proceedings and thus the form requirements of Article IV (1) (a) New York Convention must be met. The arbitral institution is in regular contact with the arbitrators appointed or confirmed by them and can therefore easily determine (*e.g.*, by the sender data, a comparison of signatures or simply by following up with the arbitrators directly) whether the received award has been signed by them. It might be argued in cases in which the arbitral institution simply forwards the original award to the parties without adding a stamp of the institution or a signature of one of its officials to the award that the question could arise whether this is indeed the arbitral award rendered by the appointed arbitrators and forwarded by the arbitral institution. However, this must be sufficiently clear in case of a copy of the award issued and certified by the arbitral institution, as such certified copies always contain a stamp and/or a signature of an official of the arbitral institution. In this respect, a certified copy of an arbitral award issued by the arbitral institution does indeed always indirectly confirm the authenticity of the signatures of the arbitrators on the award. This becomes even clearer when looking at the relevant provisions of, for example, the ICC Rules: Pursuant to Article 35 (1) ICC Rules, the Secretariat shall, once an award has been made, send the parties "the text signed by the arbitral tribunal", an original being deposited with the Secretariat in accordance with Article 35 (4) ICC Rules. Additional copies of this original certified true by the Secretary General shall be issued to the parties upon their request (Article 35 (2) ICC Rules).[47]) Consequently, certified copies should always have been made from an original signed by the arbitral tribunal.

In its decision 3 Ob 65/11x[48]) the Austrian Supreme Court had the chance to revisit this issue. Taking into consideration the aforementioned critique, the Austrian Supreme Court changed its position and confirmed that a certified copy issued by an arbitral institution does indeed at least indirectly authenticate the arbitrators' signatures in the following two instances: (i) the applicable arbitration rules expressly stipulate such indirect authentication,[49]) or (ii) the applicable arbitration rules provide that the arbitral institution is responsible for notifying to the parties the award signed by the arbitral tribunal and that one original of this arbitral award remains deposited with the arbitral institution and that the certified copy is made from such deposited original.[50]),[51])

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[47]) A similar wording can be found, for example, in Article 32 (8) SIAC Rules.

[48]) OGH, Aug 24, 2011, docket no. 3 Ob 65/11x, EvBl 2012/9, *in* ÖJZ 69 (2012) (Austria).

[49]) *See*, *e.g.*, Article 36 (4) Vienna Rules.

[50]) Dorda/Öhlberger, Vienna Perspective – 2012, *supra* note 21, at 29; *see*, *also*, Veit Öhlberger, Case Comment, *Durch Schiedsinstitution beglaubigte Kopie des Schiedsspruchs genügt*, *in* ÖJZ 72 (2012).

[51]) *See*, *e.g.*, Article 35 (1), (2) and (4) of the ICC Rules.

2. Certified Copy by Arbitral Institution – Further Details

Having established that indirect authentication via certifying a copy of an award is possible, the Austrian Supreme Court, however, has also held that such a certification needs to bear a stamp of the arbitral institution and a signature of an authorized official of the institution including his or her function.[52]) This became a problem for the applicant in the most recent Austrian Supreme Court case dealing with Article IV New York Convention.[53]) In this case, the applicant submitted copies of a CIETAC arbitral award, which were certified to be true by a Chinese notary public. The certified copy showed that, in line with Article 47 (4) CIETAC Rules (2012), the original award bore the "seal" (stamp) of CIETAC. The debtors explicitly objected to the authenticity of the award. As the certified copy only showed the stamp of CIETAC but no signature of an official of the arbitral institution, the Austrian Supreme Court concluded that the applicant had submitted copies of the award, which did not contain a (sufficient) confirmation of the authenticity of the arbitrators' signatures.[54])

However, for those cases in which there is a signature of a competent official of an arbitral institution it has been clarified by the Austrian Supreme Court that a super-legalization of this signature is not required; this would only be necessary where the applicable arbitration rules explicitly request such super-legalization.[55])

Furthermore, the Supreme Court has held that, since the content of the applicable arbitration rules is relevant for determining whether the arbitral institution was authorized to authenticate and/or to certify copies of the award, the applicant must submit the applicable arbitration rules together with the certified copy of the award.[56])

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[52]) OGH, Aug 24, 2011, docket no. 3 Ob 65/11x, EvBl 2012/9, *in* ÖJZ 69 (2012) (Austria).

[53]) OGH, Feb 17, 2016, docket no. 3 Ob 208/15g, ecolex 2016/186 393 (2016) (Austria).

[54]) It is noteworthy that the Austrian Supreme Court insisted on a signature, despite the fact that the arbitration rules agreed upon by the parties provided in Article 47 (4) CIETAC Rules (2012) for a stamp only. Moreover, in China documents are regularly only stamped and not signed (*cf.*, *also*, Article 32 of the Contract Law of the People's Republic of China, which provides that written contracts are entered into when the contract is signed or sealed by the parties).

[55]) OGH, Aug 24, 2011, docket no. 3 Ob 65/11x, EvBl 2012/9, *in* ÖJZ 69 (2012) (Austria); Koller, *supra* note 14, at 12/52.

[56]) OGH, Aug 24, 2011, docket no. 3 Ob 65/11x, EvBl 2012/9, *in* ÖJZ 69 (2012) (Austria); despite an almost identical legal framework and essentially the same case law, the Supreme Court of Liechtenstein took a more liberal approach and held that it would be not necessary to submit the relevant arbitration rules because the court of

C. Other Methods of Authentication or Certification?

In one case, the Austrian Supreme Court had to decide over a case in which the applicant submitted a copy of an AAA-award together with a copy of an order of a US Court confirming the said award.[57]) Both copies were certified by a clerk of the US Court, which issued the confirming order. Although an (additional) authentication of the arbitrators' signatures on the award was apparently not submitted, the Austrian Supreme Court did not refuse enforcement due to lack of authentication. In Germany, the Higher Regional Court Hamburg had even confirmed that the submission of a declaration of enforceability by a court of the country of origin was sufficiently equivalent to a duly certified copy of the award as required by Article IV (1) (a) New York Convention.[58]) Consequently, however, as the reasoning of the Austrian Supreme Court decision does not specify whether the opponent challenged the authenticity or the certification of the copy of the AAA-award, it remains unclear whether the submission of a declaration of enforceability or another decision confirming the award in question by a court of the country of origin of the award would indeed satisfy the form requirements as interpreted by Austrian courts.

Generally speaking, there are good reasons for not being overly formalistic. The spirit of the New York Convention and also of Article IV thereof is to eliminate unnecessary formalism.[59]) A too strict interpretation of Article IV would undermine this goal.

For example, there are situations in which proof of authenticity is not available, in particular if an arbitrator has already passed away or refuses to participate in the authentication. However, at least in the latter case there are good arguments that a missing authentication of one out of three arbitrators' signatures should not hinder recognition and enforcement, if the applicable rules would allow a replacement method already for a refusal to sign the original award.[60])

Finally, some authors have argued that courts may exempt the applicant from complying with authentication and/or certification requirements of Article IV (1) on grounds of equity – even if the other party challenges the

enforcement should be able to easily determine the relevant rules via the internet (OGH Liechtenstein, Feb 6, 2015, docket no. OGH-2014.217).

[57]) OGH, Oct 23, 1991, docket no. 3 Ob 88/91 (Austria).

[58]) Oberlandesgericht Hamburg, May 21, 1969, II Y.B. Com. Arb. 236 (1977) (Germany).

[59]) *See*, *e.g.*, Albert van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation 256, 257 (1981).

[60]) *See*, *also*, Peter Schlosser in Kommentar zur Zivilprozessordnung 10 Anhang zu § 1061 para. 139 (Friedrich Stein & Martin Jonas eds., 23rd ed. 2014).

authenticity or the certification of the award.[61]) Methodically, this argument is based on qualifying Article IV (1) as a provision merely concerning evidence,[62]) as opposed to containing mandatory requirements for recognition and enforcement.[63]) However, it seems that Austrian courts have not made use of such equitable arguments (yet).[64])

III. Article IV (2) of the New York Convention – Translation of Award

If the arbitral award is not made in an official language of the country in which recognition and enforcement are sought, the applicant has to produce a translation of the award into such language.[65]) Such translation has to be provided in addition to the original documents.[66])

Pursuant to Article IV (2) New York Convention, the translation shall be certified by an official or sworn translator or by a diplomatic or consular agent. According to the case law of the Austrian Supreme Court, basically, the applicant is free to either refer to such translators or agents from the country in which the award has been rendered or the country in which enforcement is sought. Recently, the Austrian Supreme Court even confirmed that the wording of Article IV (2) New York Convention also allows that the translator or agent is seated in a third country.[67]) However, in all cases where the translator has its

[61]) Maxi Scherer *in* New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary, Article IV para. 31 (Reinmar Wolff ed., 2012).

[62]) Koller, *supra* note 5, at Vor § 79 EO para. 577.

[63]) That Article IV (1) is a provision merely concerning evidence seems to be the internationally prevailing view; however, Italy and Spain, for example, interpret Article IV as containing mandatory requirements for recognition and enforcement (*see* Scherer, *supra* note 61, at Article IV paras. 26–27).

[64]) It is questionable, if and to what extent the Austrian Supreme Court would be open to such arguments. The Austrian Supreme Court has held that the arguments in favor of Article IV (1) being a provision merely concerning evidence are not appropriate for Austria because proceedings declaring a foreign award enforceable in Austria are conduced *ex parte* (OGH, Aug 24, 2011, docket no. 3 Ob 65/11x, EvBl 2012/9, *in* ÖJZ 69 (2012) (Austria)). However, in light of Section 614 (2) ACCP (on this see further below) this seems not entirely convincing. In this context it is also noteworthy that in its most recent decision the Austrian Supreme Court included a reference to the possibility of qualifying Article IV as a provision merely concerning evidence (OGH, Feb 17, 2016, docket no. 3 Ob 208/15g, ecolex 2016/186 393 (2016) (Austria)).

[65]) Article IV (2) New York Convention.

[66]) UNCITRAL Secretariat Guide, *supra* note 4, at Article IV para 76; Koller, *supra* note 14, at 12/55.

[67]) The Austrian Supreme Court, for example, affirmed the admissibility of a translation by a German translator (admitted in North Rhine-Westphalia, Germany) with a reference to the principle of freedom to provide services on the one hand and the

seat outside of Austria, the applicant has to provide proof that the translator has been appointed by a court of his or her country of residence. If a translator appointed by a foreign court is chosen, the signature and appointment of the translator must also be certified.[68]) Hence, in order to avoid such additional steps, which would be time-consuming and would also produce extra costs, a translation by an Austrian sworn and certified translator is recommended.

Whereas in some jurisdictions it has been debated what kind of translators would amount to an "official or sworn translator" as provided for in Article IV (2) New York Convention,[69]) it is clear in Austria that all translators listed in Austria as court sworn translators (so called *"allgemein beeidete und gerichtlich zertifizierte Dolmetscher")*[70]) fulfil this requirement.[71])

As regards the scope of the required translation, the Austrian Supreme Court has held that the entire award must be translated.[72]) Courts of other countries have been less strict. The Swiss Federal Supreme Court, for example, has held that nowadays courts are generally not dependent on a translation of an arbitral award in English language. Thus, in that case a translation of only a

general facilitation of mutual recognition of judicial acts within the territory of the European Union on the other, as well as the purpose of the New York Convention to facilitate recognition and enforcement (OGH, Feb 17, 2016, docket no. 3 Ob 208/15g, ecolex 2016/186 393 (2016) (Austria)).

[68]) OGH, Feb 17, 2016, docket no. 3 Ob 208/15g, ecolex 2016/186 393 (2016) (Austria); OGH, Nov 29, 2002, docket no. 3 Ob 196/02y, RdW 2003/322 385 (2003) (Austria); Art IV p 117; Koller, *supra* note 14, at 12/55.

[69]) *See*, *e.g.*, OGH (Liechtenstein), Jun 7, 2013, docket no. EX 2012.6905, where the Supreme Court of Liechtenstein had to deal with the question whether a translation by a Swiss translation agency, which was then certified by a Swiss public notary was sufficient. The court held that, in general, an excessive formalism in respect of a translation of the award is to be avoided. However, the court stated that it is not permitted to deviate from the wording of Article IV (2) New York Convention where it is possible to provide an "official translation". In Liechtenstein, this requirement is fulfilled if either the translation of the award or a certification of the translation of the award is done by a person registered in the list according to Article 5 of the Liechtenstein Act of 26.11.1999 on the Admission of Interpreters and Translators to the Courts of Liechtenstein and Administrative authorities (LGBl 2000/15).

[70]) A list of such Austrian court sworn translators can be found at: http://sdgliste.justiz.gv.at/, last visited January 6, 2019.

[71]) *See*, *also*, OGH, Oct 23, 1991, docket no. 3 Ob 88/91 (Austria), where the Austrian Supreme Court rejected a translation by an Austrian academic translation agency, whose translator was not listed as court sworn translator in Austria.

[72]) OGH, Apr 26, 2006, docket no. 3 Ob 211/05h (Austria); Walter H. Rechberger *in* Kommentar zur ZPO § 614 para. 6 (Walter H. Rechberger ed., 4th ed. 2014); Koller, *supra* note 14, at 12/55.

part of the arbitral award was deemed as sufficient.[73]),[74]) Although the authors have experienced cases in which a partial translation of an award was accepted by Austrian courts, case law confirming such less strict approach for Austria seems to be not publicly available.

It should also be noted that any authentication or certification in a foreign language, like a confirmation added to the award that a copy was made from an original, must also be translated pursuant to Article IV (2) New York Convention.[75])

IV. Article IV (1) (b) of the New York Convention – Arbitration Agreement

Pursuant to Article IV (1) (b) New York Convention the applicant shall also supply the original agreement or a duly certified copy thereof. Contrary to the arbitral award, Article IV (1) (b) does not require an authentication for the arbitration agreement.[76])

However, Section 614 (2) ACCP provides for the following simplification of this general rule: "The production of the original or a certified copy of the arbitration agreement in accordance with Article IV (1) (b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards shall only be required upon demand by the court." It is the general understanding of this provision that production of the arbitration agreement shall only be required by the court if there is doubt about the existence of the arbitration agreement.[77]) It lies within the discretion of the competent court whether it orders such a submission. The court is not even obliged to issue such an order if the opponent expressly requests a submission.[78])

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[73]) BG, Jul 2, 2012, docket no. 5A 754/2011 (Switzerland); in this decision the Swiss Federal Supreme Court referred to the Austrian case law as too formal and emphasized that an overly formalistic application of Article IV New York Convention is to be avoided.

[74]) In Denmark, Norway and Sweden, for example, translations of awards are not required if they are in English or in another Scandinavian language (Gerold Hermann, Implementing Legislation – The IBA/UNCITRAL Project, *in* ASA Special Series No. 9, The New York Convention of 1958 135 (143) (1996)).

[75]) OGH, Nov 28, 2002, docket no. 3 Ob 196/02y, RdW 2003/322 385 (2003) (Austria); Koller, *supra* note 14, at 12/55.

[76]) UNCITRAL Secretariat Guide, *supra* note 4, at Article IV para. 73.

[77]) ErläutRV 1158 BlgNR 22. GP 29; Hausmaninger, *supra* note 3, at § 614 para. 93.

[78]) OGH, Sep 3, 2008, docket no. 3 Ob 35/08f, EvBl-LS 2009/17, *in* ÖJZ 138 (2009) (Austria); Rechberger, *supra* note 72, at § 614 para. 5; despite the aforementioned Supreme Court decision, some commentators are still of the opinion that the arbitration agreement needs to be produced if the opponent appeals against the declaration of enforceability on grounds concerning the arbitration agreement (*e.g.*, Hausmaninger, *supra* note 3, at § 614 para. 95).

The reason for this simplification of form was the avoidance of problems associated with the requirements of Article IV (1) (b) New York Convention, for example in cases in which the jurisdiction of the arbitral tribunal was established by the defendant not objecting to it or by its express recognition of jurisdiction.[79])

If the arbitration agreement needs to be provided, the same principles as explained with regard to the translation of the award apply (*see* III. above).

V. Concluding Remarks

Austrian courts are comparably formalistic when it comes to enforcing foreign arbitral awards in Austria under the New York Convention. Whereas Section 614 (2) ACCP simplifies the requirements of the New York Convention with regard to the arbitration agreement, the real issues lie with the form in which the arbitral award is to be submitted. In many cases the production of a copy of the award certified by the arbitral institution will be the simplest and least time- and cost-consuming option. However, special attention has to be paid to the applicable arbitral rules to ensure that these contain sufficient authorizations for authenticating awards and certifying copies. The past years have seen several cases in Austria in which the enforcement of foreign arbitral awards was either refused or at least substantially delayed due to form issues. In most cases these problems could have been avoided. It is hoped that this article will help avoiding such problems in the future.

[79]) Paul Oberhammer *in* Entwurf eines Neuen Schiedsverfahrens 148 (Walter H. Rechberger ed., 2002).