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Vienna Perspective – 2012

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Commentary

Vienna Perspective – 2012

By
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Introduction

The following article presents a commentary on recent arbitration-related decisions by the Austrian Supreme Court and is the third of an annual contribution¹ that provides readers with a “Vienna Perspective” on issues relevant for international arbitration.

This year we focus on a judgment dealing with the arbitral tribunal decision making process. The Supreme Court clarified the standard applicable to evaluate the sufficiency of deliberations among the arbitrators, the issues to be observed when one arbitrator refuses to sign the award and the consequences of dissenting opinions for the enforcement of the award. In our overview section, we revisit questions of form under Art. IV of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) and can report that the critique voiced in our “Vienna Perspective – 2010” commentary has led to a change in case law. Other decisions in our overview section address questions of delineation between an arbitration agreement and, in one case, an agreement to mediate and, in another case, an agreement on expert

determination as well as the feasibility of an arbitration agreement in which the parties chose an arbitral institution that meanwhile ceased to exist.

Focus: Enforcement Of Foreign Award • Standard For Deliberations Among Arbitrators • Missing Signature On The Award • Dissenting Opinion

In its decision docket No 3 Ob 154/10 h² the Supreme Court dealt with an application to declare enforceable and enforce an arbitral award of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation. The court of first instance declared the award enforceable and granted the Plaintiff the right to enforce the award against receivables and moveable property. The appeal of the Defendant was rejected. The court of appeal held that the grounds for refusing enforcement under Art. V of the New York Convention were not met. In its appeal for review on legal grounds to the Supreme Court the Defendant argued that the signature of an arbitrator missing on the arbitral award would have required a *prima facie* review on the reasons for this omission, which would have led to the enforcement being refused. Also, the lack of a written explanation by the chairman of the arbitral tribunal as to why the third arbitrator's signature was missing should not be subsumed within Art. 39(3) of the applicable arbitration rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation.³ Furthermore, the submitted award did not, it was argued, fulfill the form requirements of Art. IV(1) of the New York Convention as the Claimant did not enclose the dissenting opinion.

When examining the case, the Supreme Court also dealt with arguments stated in the dissenting opinion according to which a meeting of the arbitrators to deliberate did not take place and that in the drafting of the arbitral award the opinion of the out-voted arbitrator was ignored.

The Austrian Supreme Court, however, dismissed the appeal for review on legal grounds.

Regarding the argument that there had been insufficient deliberation among the arbitrators, the Supreme Court emphasized that there are no strict standards on how to conduct deliberations. Unless provided otherwise by the applicable arbitration rules, deliberations can be conducted orally, by telephone, with the help of a video-conference or in written form. Like in state court proceedings, it suffices that a matter was considered and voted upon in principle; there does not have to be a written draft of the award. The Supreme Court refers also to previous case law in which it had held that the chairman of the tribunal consulting the co-arbitrators separately via telephone, is not sufficient grounds to refuse recognition and enforcement pursuant to Art. V(1)(d) of the New York Convention.⁴ Even a bilateral pre-understanding of two arbitrators would not be forbidden, as long as this does not lead to a factual exclusion of the third arbitrator. The Supreme Court concluded that neither from the Defendant's submission nor from the dissenting opinion it could be inferred that the dissenting arbitrator was factually prevented from explaining his thoughts on the draft decision and prevented from contacting his co-arbitrator or the chairman in order to influence the decision making process. Therefore, the Supreme Court rejected the argument that there had been insufficient deliberation among the arbitrators.

Concerning the missing signature the Supreme Court confirmed the principle of majority vote as provided for under Austrian arbitration law and explicitly referred to Sec. 606(1) of the Austrian Code of Civil Procedure (*Zivilprozessordnung – ZPO*), which stipulates that the majority can sign the award as long as the chairman or a co-arbitrator notes in the award why the third arbitrator did not sign the award. The Supreme Court emphasized that in addition to applying to cases of physical obstacles this provision seeks to protect against an obstructive arbitrator and included in its scope is also the situation where an arbitrator simply refuses to sign

an award. The Supreme Court concludes that the lack of one arbitrator's signature, when there was a tribunal, does not violate public policy, as long as the reason for the missing signature is noted in the arbitral award. As the award in question contained a note that the third arbitrator did not sign the award because he did not agree with the content of the decision, the Supreme Court also rejected this argument.

As regards dissenting opinions the Supreme Court confirmed that they are not part of an arbitral award and, therefore, Art. IV(1)(a) of the New Yorker Convention does not require their submission together with an application for enforcement of a foreign arbitral award.

* * *

This Supreme Court decision deals with three essential topics of the decision making of arbitral tribunals: The standard for deliberations, the signatures on the award and dissenting opinions. In its legal reasoning the Supreme Court outlined the possible effects of these topics on the enforcement of a foreign arbitral award in Austria on the basis of the New York Convention. The Supreme Court confirmed once again that the ground for refusing recognition and enforcement of a foreign arbitral award of Art. V(2)(b) of the New York Convention is applied only in truly exceptional cases.

Regarding the missing signature of one of the co-arbitrators the Supreme Court confirmed that a missing signature of only one out of three arbitrators does not amount to a violation of *ordre public*. This is a result of the principle of majority vote generally applicable to arbitral tribunals, which is not only an international standard but also explicitly provided for in Sec. 604 and Sec. 606 of the ZPO.⁵

Questionable in this context, however, is the reservation made by the Supreme Court that this would only be true "as long as the chairman or a co-arbitrator notes in the award why the one arbitrator did not sign the award". This could open the door to the conclusion that any missing signature without a note on the reason why it is missing would amount to an *ordre public* violation. Such a conclusion would be wrong because the underlying aim for requiring a note on the reason for the missing signature is to clarify that the decision is a final award and not simply a draft.⁶ However, in the case at hand, there could have been no doubt about the decision being a final award even if a note on the reason

why the signature is missing had been omitted. Furthermore, the Supreme Court confirmed that a review by a court of whether the explanation given for the missing signature is justified is neither possible nor necessary. As a result of this, it can be assumed that the prevailing view concerning German arbitration law, that the validity of the award is not affected even if the reason given in the award subsequently proves to be inaccurate,⁷ is also accepted under Austrian arbitration law. The mere fact that a note on the reason why the dissenting arbitrator did not sign the award is missing should, therefore, not *per se* amount to an *ordre public* violation unless additional issues pointing to an *ordre public* violation should arise.⁸ To assume an obligation for the court to search for such additional issues *ex officio* in case of such a missing note (as one could arguably deduce from the last sentence of item 4 of the legal reasoning of this decision) would in our opinion not be justified by Art. V(2) of the New York Convention.⁹

With regard to the dissenting opinion, the Supreme Court confirmed that a dissenting opinion is not an essential element of an arbitral award and, therefore, there exists no obligation to submit a written dissenting opinion together with the arbitral award in enforcement proceedings. This is in line with the general understanding of dissenting opinions and with the prevailing interpretation of Art. IV(1)(a) of the New York Convention.¹⁰

Interesting in this context is that the Supreme Court, as already in its only other decision concerning dissenting opinions to arbitral awards,¹¹ did not address the question of whether a dissenting opinion is permissible under Austrian arbitration law and whether the existence of a dissenting opinion or its submission to the parties could hinder the enforcement of an arbitral award. Some authors have argued that the latter would indeed be the case and based this opinion on the argument that a dissenting opinion would violate the secrecy of deliberations.¹² The fact that the Supreme Court does not address this issue allows concluding that the existence of a dissenting opinion or its submission to the parties does not *per se* amount to a violation of *ordre public* under Art. V(2)(b) of the New York Convention, because such a violation would have had to be taken up *ex officio* by the court.¹³ Moreover, the better view is that Austrian arbitration law allows dissenting opinions and that they should not hinder the enforcement of an award as long as the dissenting opinion does not reveal the content of the deliberations

of the individual members of the arbitral panel beyond the mere fact that one arbitrator dissents on certain aspects.¹⁴ In other words, the objections made in the dissenting opinion of a third arbitrator (no meeting of arbitrators to deliberate and ignoring the opinion of the outvoted arbitrator in the drafting of the text of the arbitral award) do not *per se* amount to a violation of the secrecy of deliberations.

However, the content of a dissenting opinion could also disclose flaws in the arbitral process that could amount to an *ordre public* violation or fulfill another ground for refusal of enforcement. A dissenting opinion may, therefore, lead in certain instances to a refusal of enforcement. The duty to pursue *ordre public* violations *ex officio* and the lack of a duty to submit a dissenting opinion together with the arbitral award in the enforcement application do not contradict each other. However, as soon as a party submits a dissenting opinion a court has the duty to review the dissenting opinion with regard to *ordre public* violations and in case of sufficient indications has to pursue these issues *ex officio*.¹⁵ The Supreme Court also confirmed this duty in its decision by dealing in detail with the objections made in the dissenting opinion without the Defendant having submitted any arguments in this regard.

In the context of the objections of the third arbitrator the Supreme Court emphasized that limited deliberations of the arbitrators only amount to an *ordre public* violation if these limitations actually lead to the exclusion of an arbitrator from the deliberations. In the present case, however, the outvoted co-arbitrator was able to submit its opinion on the draft award to the other arbitrators and had, thereby, the possibility to influence the decision making process of his colleagues. Furthermore, the outvoted co-arbitrator was in contact with the other arbitrators via telephone and written correspondence. The majority principle was, therefore, correctly applied and the Supreme Court was correct in rejecting any grounds for refusing enforcement.¹⁶

Overview

Enforcement Of Foreign Awards • Form Requirements Under New York Convention • Certification Of Copy Of Award By Arbitral Institution Sufficient

In its decision docket No. 3 Ob 65/11 x¹⁷ the Supreme Court dealt with the application of a Nigerian party to

declare enforceable and to enforce a foreign ICC arbitration award in Austria. The application was based on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention"). The court of first instance declared the award enforceable. The Court of Appeal reversed this decision and held that the submitted copy of the award did not fulfill the certification and authentication requirements of Art. IV (1) (a) of the New York Convention.

Art. IV (1) (a) of the New York Convention mentions two distinct forms of certification, originals of arbitral awards need to be "duly authenticated" and copies thereof "duly certified." A duly authenticated original is an original that contains a certification of the authenticity of the signatures of the arbitrators. Such an authentication has to be provided – according to the Supreme Court – at least indirectly also with regard to certified copies. In Austria it is meanwhile well established case law that the possibility to submit a certified copy does not mean that one can fully forego to authenticate the signatures of arbitrators; certified copies of awards must at least indirectly authenticate the signatures on the original award.¹⁸ The Austrian Supreme Court had ruled in its decision (docket No 3 Ob 35/08 f)¹⁹ that a certified copy of an arbitral award issued by an arbitral institution does not indirectly authenticate the signatures of the arbitrators and, therefore, does not fulfill the form requirements of Art. IV (1) (a) of the New York Convention.

In the case at hand, the Supreme Court had to revisit this issue. The Supreme Court, taking into consideration criticism in academic literature,²⁰ changed its position and held that certified copies issued by an arbitral institution also at least indirectly authenticate the signature on an original award in the following two instances: (i) if the applicable arbitration rules expressly provide for such indirect authentication;²¹ or (ii) if the applicable arbitration rules provide that the arbitral institution is responsible for notifying to the parties the award signed by the arbitral tribunal and at least one original of such an award remains deposited with the arbitral institution and the certified copy is made from such a deposited original.²²

The Supreme Court reasoned that arbitral institutions, whose arbitration rules make the institution responsible for notifying to the parties the award signed by the arbitral tribunal (*e.g.*, Art. 31 (1) of the ICC Rule

2012), are under an obligation to check the authenticity of the arbitrators' signatures on the award; otherwise the institution could not ensure that the parties will receive an enforceable decision, which is the main aim of arbitral proceedings. As the arbitral institution is regularly in contact with the arbitrators, the institution can easily check, whether the received award was issued by the appointed persons. If at least one original award remains with the arbitral institution, the certification of a copy of such an original contains also an indirect authentication of the award.

This reasoning further indicates that the Supreme Court will also be less strict with regard to the authentication of original awards. As the arbitral institution, whose arbitration rules make the institution responsible for notifying to the parties the award signed by the arbitral tribunal, are held to be under an obligation to check the authenticity of the arbitrators' signatures on the award, an original award issued by such arbitral institution should qualify as duly authenticated in the meaning of Art. IV (1) (a) of the New York Convention.

As to the form requirements of an indirect authentication, the Supreme Court stated that a certified copy of the award needs to bear a stamp of the arbitral institution and a signature of an authorized official of the institution including his or her function. Furthermore, the present decision clarifies that the certification of the arbitral institution does not require super legalization.²³

Preparations for an enforcement application can be sometimes quite burdensome. It goes without saying that having to arrange for an authentication of the signatures on an award after termination of the arbitral proceedings by, for example, a notary can be a time- and cost-consuming exercise. The above change in case law makes the enforcement of arbitral awards issued by arbitral institutions easier and is to be welcomed.

Agreement To Arbitrate Or To Mediate **• Consequences Of Obligation To Appoint** **A Mediator**

An employment contract between Claimant (employee) and Respondent (employer) contained the following clause (translation into English):

In the event the parties happen to have a difference of opinion about their contractual relationship, then the

parties will first and foremost refer the matter to arbitration. Both contractual partners will name an arbitrator within 14 calendar days and the two appointed arbitrators will agree on a chairman within 14 days. After the issuance of the arbitral award the jurisdiction of the courts may be invoked if necessary.

The courts of the first and of the second instance interpreted the wording as a mediation clause, which stipulated that the parties had an obligation to nominate a mediator in the event of a dispute arising and await a finding by the mediator before proceeding with a court action. The lower courts had directed the Respondent to mediate and to appoint a mediator as per its contractual obligations.

In its decision docket No 9 ObA 88/11 y²⁴ the Austrian Supreme Court upheld the decisions of the lower courts. The Supreme Court held that, before a court could be seized of an action falling within the scope of a mediation agreement, a party must first seek to institute mediation proceedings and to attempt to reach settlement. Moreover, before proceeding with a court action, it is necessary that all procedural steps and measures stipulated in the mediation agreement are complied with and parties must wait (a reasonable amount of time) for the mediator to reach some kind of decision before turning to the courts.

The Supreme Court stated that regardless if mediation may appear to be a fruitless endeavor, because one party has indicated it will not reach a negotiated solution and the mediation process cannot force the parties to reach a conclusion, the parties must nonetheless let the process run its course when they have agreed to do so. This is because the parties agreed on a quick, cost-efficient and informal method and success in mediation will turn on the “negotiating skill of the mediator and on the quality of the mediator’s suggested solution”, which will only come into play once mediation is commenced.

What is interesting is that the courts found the clause in the employment contract to call for mediation, although the parties had explicitly referred to an arbitral tribunal (*Schiedsgericht*), to the nomination of arbitrators (*Schiedsrichter*) and to an arbitral award (*Schiedsspruch*). The argument apparently was that the subsequent wording the parties might “invoke the jurisdiction of the courts only after the arbitral award was issued” would run counter to the principle that

arbitration excludes the jurisdiction of (state) courts and thus could only have the meaning of a mediation clause. In the view of the commentator, however, the reference to invoking the courts could also have been interpreted as relating to possible set-aside proceedings (which are also administered by state courts) so that the interpretation could have led to a proper arbitration clause.²⁵

Otherwise, this case did not break new legal ground because it is the only logical conclusion that could be reached if the law truly wanted to give mediation potency and valued the sanctity of freely negotiated contracts. What is interesting from a factual perspective is that the Claimant persisted through three instances of court proceedings on insisting on its right to mediation (i.e., could have waived right at any time and proceeded to the substance of dispute in court proceedings). In light of Respondent’s obstinate refusal to engage in the mediation process, it is not clear what Claimant hoped to gain in mediation that would outweigh the costs in time, with the general rule of thumb being that Claimants wish to speed up proceedings while Respondents often wish to slow down proceedings.

Unfeasibility Of Arbitration Clause

• Arbitral Institution Ceased To Exist

Claimant (appellee and dominant property owner) and Respondent (appellant and servient property owner) owned abutting pieces of property and had entered into an easement agreement, which contained an arbitration agreement. The easement agreement incorporated a contract dating back to 1885. Under the terms of the arbitration agreement, the parties were to refer disputes to the Austrian Engineers and Architects Association (“ÖIAV”), which would serve as the arbitral institution. The owner of the servient property began a building project against the wishes of the dominant property owner, who desired to obtain an injunction, but the ÖIAV no longer offered arbitral services when the dispute arose.

In its decision docket No 3 Ob 191/11 a²⁶ the Austrian Supreme Court dealt with the issue of unfeasibility (*Undurchführbarkeit*) of an arbitration clause and upheld the lower court of appeal’s conclusion that Sec. 584 (1) of the Code of Civil Procedure had to be applied to questions of unfeasibility of arbitration clauses according to Austrian Arbitration Act of 2006. Pursuant to Sec. 584 (1), a court must dismiss an action

when it is asserted that the matter in dispute is subject to an arbitration agreement and the other party fails to challenge this assertion by making a submission or objecting orally at a hearing. This, Sec. 584 (1) continues, does not apply when the court determines that an arbitration agreement does not exist or is unfeasible.

Whether an arbitration agreement is unfeasible can only be determined by looking at the terms of the arbitration agreement because it is not a question of formal validity of the arbitration agreement. This turns on the parties' intent, which, in addition to the text of the arbitration agreement, can be derived from the hypothetical will of the parties, trades usages, and principles of good faith and fair dealing. In short, the court should look to any consideration that could help it close a "hole" in the arbitration agreement but which would still confirm to the parties' intent. When there are two equally plausible interpretations of an arbitration agreement pointing in opposite directions, a court should choose the interpretation that promotes arbitration.²⁷

In assessing whether the arbitration agreement in question was unfeasible, because the named arbitral institution no longer offered arbitration services, the Supreme Court concluded that the parties could not have had the hypothetical will and, thus, would not have agreed to some form of ad hoc-arbitration created under the provisions of the Austrian Arbitration Act. Key considerations included the fact that the arbitration agreement mentioned the exclusive jurisdiction of the ÖIAV, the procedural rules were unclear, and no agreed upon appointing authority existed. Quite simply, the court could not find an intent by the parties to agree to arbitration in the abstract (general intent to arbitrate) from the fact that the parties specifically agreed to ÖIAV arbitration. Therefore, the court could not go behind the terms of the arbitration agreement and try to conform it to the factual reality that the named arbitral institution was not an option.

Although the details of the case turn on distinctly Austrian issues, the underlying issue is one of universal interest. How far should a court go to rescue a flawed arbitration agreement? The Austrian Supreme Court clearly indicated that the text of an arbitration agreement provides the boundary (*Grenze*) of how far a court could go to save an arbitration agreement. When an arbitration agreement names a specific arbitral

institution, the parties must choose wisely in naming an enduring institution because if it no longer exists or offers arbitral services, the parties will simply be out of luck as an Austrian court cannot remedy this defect (barring some odd factual circumstances showing a general intent to arbitrate).

Agreement To Arbitrate Or On Expert Determination • Binding Character Of Expert Determination • Scope Of Powers Of Expert

The parties entered into a consulting contract concerning the restructuring of a business group. The contract contained a fee agreement, which provided, in addition to a fixed sum, a variable amount based on the group's revenue. The parties had agreed that an expert would render a determination in the event the parties could not agree on the amount of the fee. When a subsidiary was sold a dispute arose over the fee because it was not clear whether the selling price of the subsidiary should be taken into consideration in calculating the fee. The parties could not resolve this issue and referred it to an expert for determination. The expert ultimately determined that the fee should not take into account the selling of the subsidiary.

The Austrian Supreme Court in its decision docket No 9 Ob 42/10 g²⁸ reversed the decision of the lower court and did not grant the expert opinion a binding effect. However, the court took great pains to emphasize that an expert determination remains binding in principle.²⁹ The Supreme Court enumerated criteria for determining whether an expert determination should be granted binding effect. A court will take into consideration whether: (a) the expert determination violates sec 879 of the Austrian Civil Code (which is the general provision on a conduct against *bonos mores*); (b) the expert determination is evidently unfair (*offenbar unbillig*); or (c), if the expert exceeds his or her authority. When analyzing whether an expert determination is evidently unfair, a court will consider whether the determination greatly goes against principles of good faith or when the determination is it immediately recognizable to the naked eye as wrong by someone who is knowledgeable of such matters.

In the case at hand, the Supreme Court found that the expert had exceeded his authority because he took it upon himself to (supplementary) interpret the contract rather than focus on the narrow issue of calculating the

fee, which was his task. As the expert exceeded his authority, the Supreme Court did not grant the expert determination a binding effect and ultimately interpreted the contract in a way that led to the conclusion that the fee should take the selling of the subsidiary into consideration.

The Supreme Court walked a fine line between emphasizing the fact that an expert determination is generally binding but circumstances may exist that will lead a court to conclude that it should disregard an expert determination. The three part test for determining whether a court should recognize an expert determination as binding will ultimately be a fact intensive analysis. The clear message from this decision is that an expert should strictly adhere to the scope of the task entrusted to him or her and avoid straying into any issue of contractual interpretation.

Endnotes

1. For last year's commentary *see* Christian Dorda & Veit Öhlberger, Vienna Perspective – 2011, 26/4 Mealey's International Arbitration Report 21 (2011).
2. Oberster Gerichtshof [OGH] [Supreme Court] April 13, 2011, docket No 3 Ob 154/10 h in 2011 JBl 603; *see also* Veit Öhlberger, *Vollstreckung ausländischen Schiedsspruchs trotz eingeschränkter Beratung der Schiedsrichter, fehlender Unterschrift und Nichtvorlage von Sondervotum*, 2011 ecolex 1016.
3. Art. 39(3) provides: "Where an arbitrator is unable to sign the award, the ICAC President shall certify this circumstance with a statement of the reason for the absence of the signature of the arbitrator. In this event, the date of the award shall be the date of certification of the circumstance."
4. Oberster Gerichtshof [OGH] [Supreme Court] April 26, 2006, docket No 3 Ob 211/05 h.
5. *See* Christoph Stippel & Veit Öhlberger, *Rendering of the Award by Arbitral Tribunals*, in AUSTRIAN ARBITRATION YEARBOOK 2008, 371.
6. Veit Öhlberger, *Vollstreckung ausländischen Schiedsspruchs trotz eingeschränkter Beratung der Schiedsrichter, fehlender Unterschrift und Nichtvorlage von Sondervotum*, 2011 ecolex 1016, 1018.
7. Fabian von Schlabrendorff & Anke Sessler, in ARBITRATION IN GERMANY, 394 (Karl-Heinz Böckstiegel, Stefan Michael Kröll & Patrizia Naciniento eds., 2007).
8. Veit Öhlberger, *Vollstreckung ausländischen Schiedsspruchs trotz eingeschränkter Beratung der Schiedsrichter, fehlender Unterschrift und Nichtvorlage von Sondervotum*, 2011 ecolex 1016, 1018.
9. Veit Öhlberger, *Vollstreckung ausländischen Schiedsspruchs trotz eingeschränkter Beratung der Schiedsrichter, fehlender Unterschrift und Nichtvorlage von Sondervotum*, 2011 ecolex 1016, 1018; this should be seen differently in the case of a dissenting opinion (for details on this *see infra* in the above comments).
10. *Cf., e.g.*, Ulrich Haas, in PRACTITIONER'S HANDBOOK ON INTERNATIONAL ARBITRATION, 479 (Frank B. Weigand, 2002).
11. Oberster Gerichtshof [OGH] [Supreme Court] April 26, 2006, docket No 3 Ob 211/05 h.
12. *Cf., e.g.*, Rolf A. Schütze, *Dissenting Opinions im Schiedsverfahren*, in FESTSCHRIFT NAKAMURA, 525, 535 et seq. (Andreas Heldrich & Takeyoshi Uchida eds., 1996).
13. Veit Öhlberger, *Vollstreckung ausländischen Schiedsspruchs trotz eingeschränkter Beratung der Schiedsrichter, fehlender Unterschrift und Nichtvorlage von Sondervotum*, 2011 ecolex 1016, 1019.
14. This is due to the difference between the secrecy of the deliberations (*Beratungsgeheimnis*) and the secrecy on the voting (*Abstimmungsgeheimnis*); for a detailed analysis *see* Christoph Stippel & Veit Öhlberger, *Rendering of the Award by Arbitral Tribunals*, in AUSTRIAN ARBITRATION YEARBOOK 2008, 371, 384 – 399.
15. Veit Öhlberger, *Vollstreckung ausländischen Schiedsspruchs trotz eingeschränkter Beratung der Schiedsrichter, fehlender Unterschrift und Nichtvorlage von Sondervotum*, 2011 ecolex 1016, 1019.

16. Veit Öhlberger, *Vollstreckung ausländischen Schiedspruchs trotz eingeschränkter Beratung der Schiedsrichter, fehlender Unterschrift und Nichtvorlage von Sondervotum*, 2011 *ecolex* 1016, 1019.
17. Oberster Gerichtshof [OGH] [Supreme Court] Aug. 24, 2011, docket No. 3 Ob 65/11 x in *Jus-Extra* OGH-Z 5053; *see also* Veit Öhlberger, Case Comment, *Durch Schiedsinstitution beglaubigte Kopie des Schiedspruchs genügt*, 2012 *ÖJZ* 69.
18. *See, e.g.*, Oberster Gerichtshof [OGH] [Supreme Court] Sep. 3, 2008, docket No. 3 Ob 35/08 f; Oberster Gerichtshof [OGH] [Supreme Court] Aug. 24, 2011, docket No. 3 Ob 65/11 x.
19. For a detailed discussion and a full text translation of this previous decision *see* Christian Dorda & Veit Öhlberger, *Vienna Perspective – 2010*, 25/3 *Mealey's International Arbitration Report* 43 (2010).
20. *See* Dirk Otto, Case Comment, *Formalien bei der Vollstreckung ausländischer Schiedsgerichtsentscheidungen nach dem New Yorker Schiedsgerichtsabkommen*, 2009 *IPRax* 362; Veit Öhlberger, Case Comment, *Zu den Formvoraussetzungen der Vollstreckung ausländischer Schiedsprüche nach dem New Yorker Übereinkommen*, 132 *JBl* 62, 66-67 (2010) (a summary of the critique contained in the latter case comment can be found at Christian Dorda & Veit Öhlberger, *Vienna Perspective – 2010*, 25/3 *Mealey's International Arbitration Report* 43, 45-46 (2010)).
21. The Austrian Supreme Court mentions as an example Art. 27 (4) of the Vienna Rules, which provides: "Awards are confirmed on all copies as awards of the Centre by the signature of the Secretary General and the stamp of the Centre. By this it is confirmed that the award is an award of the International Arbitral Centre of the Austrian Federal Economic Chamber and that it was made and signed by (an) arbitrator(s) chosen or appointed in accordance with these Rules of Arbitration."
22. *See, e.g.*, Art. 28 (1) in connection with Art. 28 (4) and Art. 28 (2) of the ICC Rules 1998, as applicable in the case at hand. The ICC Rules 2012 provide in Art. 34 (1), (2) and (4) for the same.
23. In previous decisions the Supreme Court had held that the signature of an official of an arbitral institution would have to be legalized in order to qualify as certification in the meaning of article IV (1) (a) of the New York Convention (*see* Oberster Gerichtshof [OGH] [Supreme Court] November 26, 1997, docket No. 3 Ob 320/97 y and Oberster Gerichtshof [OGH] [Supreme Court] November 28, 2002, docket No. 3 Ob 196/02 y).
24. Oberster Gerichtshof [OGH] [Supreme Court] Nov. 25, 2011, docket No. 9 ObA 88/11 y.
25. In this context it is worth mentioning that Austrian law contains in Sec. 618 of the ZPO and Sec. 9(2) of the Act for Courts for Labor and Social Matters [*Arbeits- und Sozialgerichtsgesetz – ASGG*] several restrictions for arbitration agreements between employers and employees.
26. Oberster Gerichtshof [OGH] [Supreme Court] 8 Nov 2011, docket No. 3 Ob 191/11 a *in* 2011 *Zak* 439.
27. Generally on the issue of defective arbitration clauses under Austrian law *see* Dorda, *"Pathologische Schiedsklauseln": Die IBA Guidelines for Drafting International Arbitration Clauses*, 2011 *ecolex* 908.
28. Oberster Gerichtshof [OGH] [Supreme Court] April 27, 2011, docket No. 9 Ob 42/10 g *in* 2011 *ecolex* 820; *see also* Reich-Rohrwig, Case Comment, *Befugnisse eines Schiedsgutachters iZm einer gesellschaftsrechtlichen Umstrukturierung; Bindung des Gutachtens*, 2011 *GesRZ* 372.
29. For detailed information on an arbitrator expert's role and his legal classification *see, e.g.*, Dorda, *M&A und alternative Streiterledigung*, 2012 *GesRZ* 5, 8; Christian Hausmaninger in *KOMMENTAR ZU DEN ZIVILPROZESSGESETZEN* § 581 ¶¶ 136 and 142 (Hans W. Fasching und Andreas Konecny eds., 2nd ed. 2007).

[docket No.:¹] **3 Ob 154/10h****Republic of Austria
Supreme Court**

[decision of 13 April 2011]

The Supreme Court – by the president of this Chamber of the Supreme Court Dr. Prückner as presiding judge as well as by the judge of the Supreme Court Hon.-Prof. Dr. Neumayer, the judge of the Supreme Court Dr. Lovrek and the judges of the Supreme Court Dr. Jensik and Mag. Wurzer as further judges in the enforcement matter between the Plaintiff D**** OAO, ****, represented by Specht Rechtsanwalt GmbH from Vienna, against the Respondent F****, represented by Scheucher Rechtsanwalt GmbH in Vienna, regarding 1,392,369.80 EUR and interest, following the appeal for review on legal grounds by Defendant against the decision (Beschluss) of the Regional Court for Civil law matters of Vienna as the lower court of appeal, dated 19 April 2010, GZ 47 R 589/09d-18, whereby due to the appeal of Defendant the decision of the District Court Inner City Vienna from 23 September 2009, GZ 64 E 3772/09z-4, was confirmed – came to the

Decision**Holding**

The appeal for review on legal grounds is dismissed.

Defendant must reimburse Plaintiff EUR 4,233.78 (including EUR 705.63 for the value added tax) for the costs of the appeal within 14 days.

Appellant's submission from 14 September 2010 is rejected.

Facts and Procedural History:

The court of first instance declared the arbitral award of the International Court of Commercial Arbitration at the Chamber of Commerce and Trade of the Russian Federation dated 14 May 2009 enforceable in Austria. The award granted damages in the amount USD 2,000,000.00, plus USD 439,613.94 in interest and USD 27,719.86 for the costs for the arbitration (Point I). The court granted the Plaintiff the right to enforce the award against receivables and moveable property (Point II).

The lower court of appeal did not grant Defendant, and debtor in the pending execution proceeding, appeal on legal grounds. It found that the grounds for refusing enforcement under Art. V of the New Yorker Convention on the Recognition and Enforcement of Foreign Arbitral Awards, BGBl 1961/200 (henceforth "NYC") were not met. A party that alleges that a procedural violation took place in the arbitration, falling under Art. V(1)(d) NYC, must demonstrate with prima facie evidence that those violations influenced the substance of the arbitral award. The Appellant does indeed list miscellaneous defects in the proceeding but does not state their possible relevance to the arbitral award. Pursuant to Art. 38(2) first sentence of the Rules of Arbitration of the International Court of Commercial Arbitration at the Chamber of Commerce and Trade of the Russian Federation ("Applicable Arbitral Rules") the arbitral award has to be rendered by a majority vote. Under Art. 39(3) of the Applicable Arbitral Rules, the Chairman [of the tribunal] must state the reason why one arbitrator did not sign an arbitral award.

An arbitrator, who does not agree with the arbitral award, can issue a dissenting opinion, which – pursuant to Art. 38(2) second sentence of the Applicable Arbitral Rules – can be attached to the arbitral award. There is no obligation to do so though. The dissenting vote could never be a title, on which execution could be granted. Art. V(2)(b) of the

NYC, as a basis to refuse recognition and enforcement of an award, should only sparingly be invoked. It can only come into play, where the execution of the foreign title is not at all consistent with the domestic legal order. The procedural breaches that Defendant claims took place would not even collectively constitute a violation of public policy. The ordinary appeal on legal ground is admissible, because the Highest Court lacks case law on whether a dissenting vote must mandatorily be submitted together with the arbitral award and whether a proceeding has to be conducted to determine why an arbitrator did not sign an arbitral award.

Legal Reasoning

Appellant's appeal on legal grounds is admissible, due to the reasons mentioned by the Court of Appeal, but it is not justified.

1. Art. V of the NYC is decisive for determining whether recognition and enforcement should be denied because, under the subsidiary clause of Sec. 86 of the Austrian Enforcement Act [*Exekutionsordnung – EO*], treaties have priority over national provisions regarding the recognition of foreign established acts and documents (3 Ob 211/05 h; 3 Ob 122/10 b; RIS-Justiz RS0121017). Only the reasons of denial pursuant to subpara. 2 of this provision have to be taken up *ex officio*. With regard to the grounds for refusal under Art. V(1) of the NYC, the Defendant bears the burden of allegation and proof (Peter Schlosser, in KOMMENTAR ZUR ZIVILPROZESSORDNUNG, Appendix to Sec. 1061 German ZPO ¶ 74 (Friedrich Stein & Martin Jonas eds., 22nd ed. 2002).

2. The issues raised by Defendant, which are admissible *nova* (Sec. 84(2)(2) first sentence of the EO), – as far as they are still the subject of the legal procedure on legal grounds – are that the missing signature of an arbitrator on the arbitral award required a(n) (*ex officio*) *prima facie* review procedure [*Bescheinigungsverfahren*] on the reasons for this omission, which would have led to the enforcement being refused. Also, the lack of confirmation by the chairman of the international commercial arbitral tribunal as to why the third arbitrator's signature was missing could not be subsumed within Art. 39(3) of the Applicable Arbitral Rules. The award submitted for declaring it enforceable did not fulfill Art. IV(1) of the NYC, as the Claimant did not enclose to the award the dissenting opinion of 18 May 2009.

3. Under Art. IV(1) of the NYC it is necessary for recognition and enforcement that the applying party submits at the time of the application a duly authenticated original of the arbitral award (subpara. a) and an original of the arbitral agreement (subpara. b). Recognition and enforcement can be refused if it is determined that the recognition or the enforcement of the arbitral award is against the public policy of the country in which recognition is sought (Art. V(2)(b) of the NYC). This can only happen when a violation of fundamental values of the Austrian legal system will occur (RIS-Justiz RS0058323 [T2]; RS0002402; RS0002409). An *ex officio* review of an award by the court called upon to recognize and enforce the award, which is what the Defendant seems to have in mind, should only take place to the extent necessary to achieve the purpose of the public policy exemption (Schlosser, op. cit. [¶ 74]).

4. Under Austrian Law, Sec. 606(1) of the ZPO regulates the signing of the arbitral award.

From this provision it follows that, in an arbitration with more than one arbitrator, the majority can sign the award as long as the chairman or a co-arbitrator notes in the award why the one arbitrator did not sign the award. Most arbitration rules contain similar provisions (*see* Klaus Lionnet & Annette Lionnet, HANDBUCH DER INTERNATIONALEN UND NATIONALEN SCHIEDGERICHTSBARKEIT, 391 n. 57 (3rd ed., 2005)) and comply with the basic principle of Sec. 31(1) second sentence of the UNCITRAL Model Law. Sec. 1054 (1) second sentence of the German ZPO (“dZPO”) also contains a similar provision. These principles share in common the fact that, in addition to applying to cases of physical obstacles to an arbitral award, they seek to protect against an obstructive arbitrator (Lionnet & Lionnet op. cit., 391; Christian Hausmaninger, in KOMMENTAR ZU DEN ZIVILPROZESSGESETZEN, § 606 ZPO ¶ 30 (Hans W. Fasching & Andreas Konecny eds., 2nd ed. 2007)). Included within this is the situation where an arbitrator simply refuses to sign an award (*cf.*, Joachim Münch, in MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG, § 1054 ¶ 16 (3rd ed., 2008)). A review by the court, of

whether the explanation given for the missing signature is justified, is not possible and for reasons of legal certainty not necessary (Schlosser, *op. cit.*, Sec. 1054 ¶ 7). The lack of one arbitrator's signature when there was a tribunal does not violate public policy, to the extent that the reason for the missing signature is noted in the arbitral award. The arbitral award presented by the Plaintiff, therefore, did not give rise to an *ex officio* review of the award.

5. The grounds for refusing the recognition and enforcement of an arbitral award under Art. V(1)(d) of the NYC are fulfilled, if a party against whom recognition and enforcement is sought, provides evidence that the constitution of the tribunal or the arbitral procedure was against the agreement of the parties or, if such is missing, is against the law of that country in which the arbitration took place. The party that bears the burden of allegation must at least provide *prima facie* evidence that the procedural violation could have influenced the arbitral award (Schlosser, *op. cit.*, Annex § 1061 ¶ 122; Dietmar Czernich, *NEW YORKER SCHIEDSÜBEREINKOMMEN*, [Art V] ¶ 45 (2008); *cf.*, Jens Adolphsen, in *MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG*, Annex § 1061 ¶ 52 (3rd ed., 2008)).

6. Under Art. 39(1) of the Applicable Arbitral Rules, the arbitral award has to be, generally, signed by all arbitrators. In light of the "majority" principle (Art. 38(2) of the Applicable Arbitral Rules), the signature of two arbitrators suffices. When only two arbitrators sign the award, the chairman of the tribunal must state the reason for the third arbitrator not signing the award (Art. 39(3) of the Applicable Arbitral Rules). The purpose of this regulation cannot be limited to the situation where the arbitrator is not physically or mentally in the situation to sign the arbitral award, as it obviously also has the purpose to counteract a delay of the procedure by an obstructive arbitrator. The conclusion of the lower court of appeal that Art. 39(3) of the Applicable Arbitral Rules applies to the situation where the acknowledgement of the chairman in the arbitral award that the third arbitrator did not sign the award because the arbitrator did not agree with the content of the decision is covered by Art. 39(3) of the Applicable Arbitral Rules is therefore upheld.

7. The objections made in the dissenting opinion of the third arbitrator, insofar as the Defendant has already made this part of the appeal and still upholds it in the appeal for review on legal grounds, can be summarized as that a meeting of the arbitrators to deliberate has not taken place and that in the drafting of the text of the arbitral award the opinion of the outvoted arbitrator was ignored.

8. The arbitral tribunal (Art. 2(5) of the Applicable Arbitral Rules) has the exclusive competence to decide the facts of the case. The Applicable Arbitral Rules do not address how and in which manner the, without a doubt necessary, consultation has to take place or whether if all three arbitrators have to be present at the same time. Generally, a consultation can be conducted orally, by telephone with the help of a video-conference or in written form (Hausmaninger, *op. cit.*, Sec. 604 ZPO ¶ 36 mwN). In addition, a bilateral pre-understanding of two arbitrators is in principle not forbidden, if this does not lead to a factual exclusion of the third arbitrator (Schlosser, *op. cit.*, Sec. 1052 ¶ 2). The Supreme Court has already ruled in the context of the ICC Arbitration Rules of 1998 that the chairman of the tribunal consulting the co-arbitrators separately via telephone, is not sufficient grounds to refuse recognition and enforcement pursuant to Art. V(1)(d) of the NYC (3 Ob 211/05h). Like in state court proceedings, it suffices for the decision making process that a matter was considered and voted upon in principle. There does not have to be a written draft (*cf.*, Schlosser, *op. cit.*, Sec. 1054 ¶ 7). Neither from the Defendant's submission, nor from the dissenting opinion, as far as it was made part of the appeal for legal reasoning procedure, can it be inferred, that the dissenting arbitrator was factually prevented from explaining his thoughts on the draft decision and prevented from contacting his co-arbitrator or the chairman in order to influence the decision making process. Nothing can be drawn from Defendant's letter from 6 May 2009 (Exhibit ./4), which is the latest date by which the third arbitrator provided the draft of his legal opinion and after the dated he was requested by the chairman over the phone to sign the arbitral award by a certain date. The lower court of appeal's view that the dissenting vote did not lead to grounds for refusing recognition and enforcement is therefore upheld.

9. It follows from the forgoing considerations that the failure to hold a meeting that all three arbitrators personally attended before issuing an arbitral award does not amount to a violation of procedural public policy. Art. V(2)(b) of

the NYC, as basis to refuse the recognition and enforcement of an award, should only sparingly be invoked (3 Ob 211/05h). The Appellant could not prove that violations of procedure took place that, according to their gravity, would constitute a violation of the main principles of the Austrian legal system (RIS-Justiz RS0002402; RS0002409).

10. The assertion that the Plaintiff would have had to submit the dissenting opinion together with its application for recognition and enforcement lacks merit. The Supreme Court has already approved with regard to the arbitration rules of the International Chamber of Commerce located in Paris that there is no obligation to submit a written dissenting opinion that was issued in a separate document, because such a document is not “approved” in the sense of the ICC Rules of Arbitration of 1998 and not a part of the arbitral award (3 Ob 211/05h).

11. Art. 38 (2) of the Applicable Arbitral Rules regulates the issuance of the arbitral award and allows for the dissenting arbitrator to write a dissenting opinion. The wording “can submit a dissenting opinion that will be enclosed to the arbitral award” allows for the disclosure of the dissenting opinion to the parties of the arbitral proceedings, but clarifies through the use of the word “enclose” that a dissenting opinion is not an essential element of the arbitral award. This is in line with the prevailing view (see also the recommendations of the working group of the ICC Commission on Arbitration, quoted in Lionnet & Lionnet, *op. cit.*, 399). Dissenting votes in general are viewed as separate from the arbitral award (Hausmaninger, *op. cit.*, ¶ 30). Therefore, it is also held that under the Arbitration Rules of the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation that the dissenting vote is not a part of the arbitral award under Art. IV(1)(a) of the NYC in connection with the application for recognition and enforcement.

The appeal for review on legal grounds was, therefore, not approved.

The decision on costs is based on Sec. 78 of the EO in connection with Sec. 41(1), 50(1) of the ZPO.

The reason why an action to set aside an award in its country of origin was rejected are irrelevant in an action to recognize and enforce the award in another country because the matter in dispute is different in the two proceedings (Schlosser, *op. cit.*, Sec. 1061 ¶ 75). The documents from the set aside proceedings submitted by Plaintiff are, therefore, not relevant to the current decision. That is why the request for the translation costs of these documents is not granted.

Every party is only entitled to one exclusive writ of appeal or response. Further amendments are not admissible (RIS-Justiz RS0041666). Defendant’s submission from 14 September 2010, therefore, was rejected.

TRANSLATORS’ NOTE

- i. Unless otherwise indicated, the translators have added bracketed text for ease of understanding. ■

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