Commentary

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By
Christian Dorda
and
Veit Öhlberger

[Editor's Note: Dr. Christian Dorda is Senior Partner at DORDA BRUGGER JORDIS, Attorneys at law, Vienna, Austria. He is a member of the Vienna Bar and also a member emeritus of the ICC International Court of Arbitration (christian.dorda@dbj.at). Dr. Veit Öhlberger, M.Jur. (Oxon) is a Senior Associate at DORDA BRUGGER JORDIS, Attorneys at law, and a member of the Vienna Bar. *Replies to this commentary are welcome.]*

Introduction

Vienna is not only the seat of UNCITRAL but also a prime European location for arbitration. With the International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC), Vienna is also home to a major arbitral institution of Europe.

Austrian law has continuously provided an elaborate statutory framework for arbitration since 1895. The Austrian Arbitration Law Reform Act 2006 (*Schiedsrechtsänderungsgesetz 2006 — SchiedsRÄG 2006*) further improved Austria's traditional position as an arbitration-friendly jurisdiction and made Austria a "UNCITRAL Model Law country."

The following article presents a commentary on recent arbitration-related decisions by the Austrian Supreme Court and will be the first of an annual contribution that will provide readers with a "Vienna perspective" on issues relevant for international arbitration.

In the style of "A View from Paris,"[1] this commentary will present one Austrian Supreme Court decision in greater detail and will also provide an overview on other interesting Austrian case law in short case summaries.

This year we focus on a contentious Supreme Court decision on Article IV of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention"). Other topics in the overview section below address questions such as, under what conditions arbitration agreements can be extended to third parties, whether certain standard arbitration clauses would cover extra-contractual claims, whether an unsuccessful challenge of an arbitrator may form a ground for setting aside an award and whether Austrian arbitration-related statutory consumer protection provisions apply also to arbitrations conducted abroad.

Focus: Enforcement Of Foreign Awards • Form Requirements Under New York Convention

In its decision docket No. 3 Ob 35/08f[2] the Supreme Court had to deal with an enforcement application of two claimants located in Cyprus and the United States, respectively, against a company located in Jersey. The Claimants sought to enforce a partial award and a final award both issued in 2003 by an arbitral tribunal of the London Court of International Arbitration (LCIA). The Court of First Instance declared both awards enforceable in Austria and granted enforcement. The Court of Appeal affirmed the enforcement decision and rejected the arguments of the defendant that an award issued in the United Kingdom needs to be confirmed by a court in its

"home country" in order to be declared enforceable in Austria.[3] Furthermore, the Court of Appeal rejected the argument of the defendant that the documents enclosed to the enforcement application would not fulfil the requirements of Art. IV of the New York Convention.

In its appeal for review to the Supreme Court, the defendant mainly argued that the certifications of the copies of the arbitral awards and the arbitration agreement were made by a registrar of the LCIA only, a person not authorized to certify copies of such documents. Moreover, the defendant argued that the copies of the awards were made from non-authenticated originals of the awards. Due to these reasons, the submitted documents did not fulfil the requirements of Art. IV of the New York Convention and, therefore, the Court of First Instance and the Court of Appeal were wrong in declaring the awards enforceable in Austria. However, the defendant did not argue that the arbitral awards or the arbitration agreement were forged or that the submitted copies did not correspond with the original documents.

The Supreme Court first held that, as the New York Convention does not clarify whether only the certification requirements of the state of origin of the award apply or whether also the requirements for the certification of foreign documents in the recognizing state must be complied with, Austrian certification requirements do not apply exclusively. Certifications may even be issued by a secretary of the arbitral institution, if the secretary is explicitly authorized to do so under the applicable arbitration rules. However, with regard to the case at hand the Supreme Court concluded that the applicable LCIA Arbitration Rules do not authorize the registrar to issue certifications and, therefore, his certifications did not fulfil the requirements of Art. IV (1) of the New York Convention.

Concerning the Arbitration Agreement the Supreme Court referred to sec. 614 (2) of the Austrian Code of Civil Procedure, introduced by the Austrian Arbitration Reform Act 2006, which provides that for the recognition and enforcement of a foreign arbitral award the submission of the original arbitration agreement or a certified copy thereof (Art. IV (1) (b) of the New York Convention) shall only be required if ordered by the court. In this context the Austrian Supreme Court confirmed the view advocated in Austrian learned literature that the submission of the original arbitration agreement or a certified copy thereof need not be ordered even when the defendant explicitly requests so; rather, the enforcement court has broad discretion in ordering such submissions.

Concerning the temporal scope of sec. 614 (2) of the Code of Civil Procedure, the Supreme Court clarified that this provision does not fall under the exception of Art. VII (2) of the Arbitration Reform Act 2006, according to which pending arbitrations and related court proceedings commenced before the entry into force of the new arbitration law shall continue to be governed by the old law; enforcement proceedings are not considered to be arbitration related proceedings in the proper sense. The Supreme Court, therefore, concluded that sec. 614 (2) of the Code of Civil Procedure applied to the enforcement proceedings at hand and that it was therefore unnecessary to examine whether the submitted arbitration agreement was duly certified.

Lastly, the Supreme Court emphasized that, when certified copies are submitted, the authenticity of the signatures on the original award must also be — at least indirectly — certified. The original English text mentions two clearly distinct forms of certification in Art IV (1) (a) of the New York Convention, originals "duly authenticated" and copies "duly certified." The possibility to submit copies does not mean that one can fully forgo to authenticate the signatures of the arbitrators. The Supreme Court held that in the present case, the submitted copies of the awards only showed the confirmation that they are true copies of the original awards. This, however, does not even amount to an indirect authentication of the signatures of the arbitrators.

Therefore, the Supreme Court concluded that the submitted copies, besides not being duly certified, did not comply with the authenticity requirements under Art IV (1) (a) of the New York Convention. Due to these reasons, the Supreme Court repealed the declaration of enforceability granted by the lower courts.

* * *

In the present decision, the Austrian Supreme Court deals for the first time since the Arbitration Reform

Act 2006 came into force with the form requirements for enforcing foreign arbitral awards on the basis of the New York Convention.

In line with its previous arbitration friendly case law, the Supreme Court confirms that Austrian certification requirements do not apply exclusively and that also the certification requirements of the state of origin of the award shall suffice (the latter despite strong criticism in the German literature) as well as other forms of certification. The decision confirms the respect of Austrian courts for the intention of the parties by acknowledging the possibilities of certifications issued by officers of arbitral institutions on the basis of the agreed arbitration rules. However, as emphasized by the Supreme Court, the applicable LCIA Rules do not contain such an authorisation of the LCIA registrar.

Beyond doubt, it will be in most cases the easiest and most cost and time efficient way to obtain copies of awards directly from the administrating institution. However, as this decision shows, for an enforcement application to an Austrian court it is important to check whether the applicable arbitration rules provide for such certification powers and that the certifications are made by the very official authorised by the rules. According to the reasoning in the present decision, within the LCIA only a certification by the President or a Vice President or a Committee of the LCIA would have sufficed (*see* Article 26.5 in conjunction with Article 3.1 of the LCIA Rules).

Whereas the above findings coherently fine-tune principles already more or less established by previous case law, the Supreme Court, on the issue of authenticity of awards, unfortunately deviates from earlier more liberal decisions: That certified copies must at least indirectly authenticate the signatures on the original award needs to be understood in such way that a duly certified copy of an award issued by an arbitral institution does not fulfil this requirement.[4] This shift in case law, in our view, is not justified: Almost all major international arbitration rules provide that the arbitral institution shall forward to the parties the award issued by the arbitrators. Therefore, one could argue that already in the mere forwarding of an award, the arbitral institution confirms that the award was indeed issued by the arbitrators appointed in the respective proceedings (and thereby providing an indirect authentication in the meaning of Art. IV (1) (a) of the New York Convention). The arbitral institution is regularly in contact with the arbitrators and can easily check, whether the received award was issued by the appointed persons. Although one could argue that regarding an award merely printed on the paper of an arbitral institution and not carrying any stamp or signature of an official of the institution (as it is, for example, the case with original awards issued by the ICC) it could be unclear for the parties whether the award they receive from the competent arbitral institution is indeed an award issued by the appointed arbitrators. However, there should be no further doubt in case of a copy duly certified by the arbitral institution: Such certified copies always bear a stamp and/or a signature of an official of the institution. Therefore, a certified copy of an arbitral award should always — at least indirectly — confirm also the authenticity of the signatures of the arbitrators.[5] Unfortunately, the Austrian Supreme Court does not (continue to) follow this view. Thus, only in the rare cases where the arbitration rules explicitly provide that a certification of an official of the arbitral institution also certifies the signatures of the arbitrators (as, for example, the Vienna Rules 2006 in Art. 27 (4))[6] one can abstain from requesting separate legalisations of the signatures of the arbitrators (which can be a rather time consuming exercise).

Regarding the documents to be submitted together with an enforcement application, the Austrian legislation made use of the possibility granted in Art. VII (1) of the New York Convention and lessened the requirements of Art. IV (1) of the New York Convention by providing in sec. 614 (2) of the Code of Civil Procedure that the submission of the original arbitration agreement or certified copy thereof shall only be required if ordered by the court. The Supreme Court confirmed that this new provision should be interpreted broadly and, therefore, restricts the cases where the court should order a submission of the arbitration agreement to cases of justified doubts as to the existence of the arbitration agreement and applies this provision also to awards issued in proceedings that were concluded before the new law was introduced.

However, as regards arbitral awards, the Supreme Court remains strict and requires a submission in full compliance with Art. IV (1) (a) of the New York Convention — even in cases where the defendant

does not argue that the arbitral awards are forged or that the copies do not correspond with the originals. Here, the Austrian Supreme Court seems to be stricter than the courts in several other jurisdictions,[7] and this has been criticized by commentators.[8] Although the Austrian Supreme Court, with regard to other questions as to the form, has been a leading authority in facilitating the enforcement of arbitral awards on the basis of the New York Convention,[9] a change in the Supreme Court's formalistic view as described, seems rather unlikely in the near future: The Supreme Court explicitly emphasized that, to assess whether the — admittedly strict — form requirements of the New York Convention are appropriate in each specific case, is a matter for State parties to the Convention or for the Austrian legislator. However, as the legislative efforts to ease the burden for parties wishing to enforce a foreign arbitral award in Austria did relate only to the arbitration agreement, the preparation of the enclosures to an enforcement application in Austria continues to require specific attention in order to avoid time and cost intensive appellate proceedings.

Overview

Law Governing Arbitration Agreement • Extension Of Arbitration Agreement To Third Parties

The Respondent had acquired 97% of the shares in V-AG, whereby the merger was subject to the Competition Authority's condition that the defendant would sell V-AG's Power Generation Business. The Claimant had been established specifically for the purpose of participating in the tender for V-AG's power generation business and was as a wholly owned subsidiary of C-AG.

In the course of the tender process, C-AG — through its managing directors, who were also the managing directors of the Claimant — entered into a confidentiality agreement with V-AG. The confidentiality agreement provided for ICC-arbitration in Munich, Germany, and clarified that German procedural law would apply to issues not determined by the applicable arbitration rules.

Eventually, V-AG's power generation business was sold to a third party and the Claimant filed a claim for damages for frustrated costs incurred by taking part in the bidding process with an Austrian state court. Respondent objected to the jurisdiction of the state court on the basis of the arbitration clause contained in the confidentiality agreement.

In its decision, docket No. 7 Ob 266/08f,[10] the Austrian Supreme Court first dealt with the issue of the law governing the arbitration agreement and held that the parties agreed to what would apply also without party agreement: Except questions relating to subjective arbitrability, the validity of an arbitration clause is governed by the law of the seat of the arbitration.

On the question, whether the arbitration agreement contained in the confidentiality agreement signed only by C-AG and V-AG would also apply to the Claimant and the Respondent, the Supreme Court held that pursuant to Austrian and German Law an arbitration clause in case of an assignment also applies to the assignee and in case of a contract for the benefit of a third party (*Vertrag mit Schutzwirkung zugunsten Dritter*) also to the third party beneficiary. With regard to the case at hand, the Austrian Supreme Court concluded that the Respondent was to be considered a third party beneficiary, because the confidentiality agreement, *inter alia*, excluded any liability of the defendant concerning the correctness and completeness of the confidential information submitted. Therefore, the dispute at hand was to be referred to arbitration.

Third Party Notice (Streitverkündigung) In Arbitration • No Binding Effect If Notified Party Did Not Join

The Claimant had commissioned a steam turbo generator which, after delivery, turned out to be defective. The Claimant first initiated arbitral proceedings against M-AG, its assumed contractual partner. M-AG notified V-GmbH, which had actually produced and delivered the defective works, of the dispute but V-GmbH did not join the arbitral proceedings.

After the tribunal had dismissed the claim, the Claimant sued V-GmbH before the Austrian state court. However, the Claimant, again, was unsuccessful because, as the Austrian Supreme Court found in docket No. 6 Ob 170/08f,[11] V-GmbH had to be qualified as the performing agent and subcontractor (*Erfüllungsgehilfe*) of M-AG and thus would not be directly liable towards Claimant.

Before the state courts the Claimant had tried to invoke the fact that M-AG had sent in the arbitral proceedings a third party notification to V-GmbH. Here one must add that under Austrian civil law (sec. 931 of the Austrian Civil Code; *Allgemeines Bürgerliches Gesetzbuch — ABGB*) such a notification can have the effect that the notified party is prevented in a later dispute from raising arguments it could have made had it joined the dispute it was notified of.

What is interesting here is that the Supreme Court denied such a binding effect with the argument that a third party, albeit notified, shall not be forced into joining arbitral proceedings in order to avoid such a binding effect. Arbitration, according to the ruling, should be seen as an exception which consists in the opting-out from the system of ordinary courts. Moreover, the third party would be deprived from the fundamental right of arbitrating parties to participate in the nomination of the arbitrators.

An arbitral dispute therefore does not have a binding effect on a third party which was notified and invited to join the arbitral proceedings, unless the third party actually joins them. The Supreme Court concluded that Claimant's constitutional right to a fair trial (Art. 6 of the European Convention on Human Rights) was not violated.

Arbitration Clause Covering 'All Disputes Arising Out Of A Contract' • Interpretation And Scope Of Arbitration Clause • Extra-Contractual Obligations

The Claimant (R-GmbH) brought a claim before the Austrian state court against, *inter alios*, the Dutch company O-BV (first Respondent). The Claimant sought damages under a contract with O-BV to market digital blood pressure measuring devices in Austria. An arbitration clause provided for ICC Arbitration of "*all disputes arising out of the contract.*"

The Claimant asserted that O-BV had sold the devices at a lower price to a competitor which was mainly active on the German but also on the Austrian market. It based the request for damages on its contract with O-BV but also on an extra-contractual liability of O-BV for abuse of a dominant market position and unequal treatment.

In docket No. 4 Ob 80/08f[12] the Supreme Court held that it had jurisdiction only over the claims for extra-contractual liability and not in respect of contractual claims raised against O-BV. In its reasoning the Supreme Court started by saying that an arbitration agreement, since it is a procedural contract, shall be interpreted in accordance with the principles of procedural law. Yet if they do not lead to an appropriate result, the provisions of the Austrian Civil Code (in particular sect. 914) shall apply by analogy. Accordingly, if no deviating common intention of the parties can be established, the objective purpose of the contract shall be relevant. When, as arbitration clauses are quite often phrased, "*all disputes arising out of a contract shall be submitted to arbitration,*" also claims for damages resulting from a breach of contract or tort claims or claims for unjust enrichment can fall under the clause but only when they are based on the same event and, thus, have a "close functional connection" with the purely contractual claims. This, in the view of the Supreme Court, was not the case in relation to the dominant market position held by the group of companies to which the first Respondent belonged. The arbitration clause did, therefore, not cover extra-contractual claims arising exclusively under competition law because they, although being broadly connected to the contractual claims, did not have such a necessary close functional connection with these.

Setting Aside Of An Award • Ordre Public • Challenge Of Arbitrators

Austria's relatively new arbitration law, which came into force on 1 July 2006, is modelled after the UNCITRAL Model Law. The content of an award of a tribunal seated in Austria may therefore be reviewed by the State Court only under the auspices of public policies. This was the reason why the Austrian Supreme Court in its decision, docket No. 9 Ob 53/08x,[13] rejected *a limine* the Claimant's final appeal, after the setting-aside matter had gone through the state courts of the first and the second instance. (Distinct from other jurisdictions the three-tier system for ordinary court matters equally applies to setting-aside proceedings.)

The arbitration had been conducted under the "Vienna Rules" of the Vienna International Arbitral Centre (VIAC). The award had dealt with mutual claims concerning the mining and the purchase of marble. The Claimant based its request to set aside the award

on alleged violations of *ordre public* and due process. Moreover, the Claimant argued that the challenge of one of the arbitrators should not have been dismissed by the Board of the VIAC.

The Supreme Court reiterated and affirmed previous decisions, which stated that the concept of *ordre public* shall apply with "utmost sparseness" and that, in particular, not every violation of mandatory Austrian law would amount to the violation of *ordre public*. Austrian law, it was made clear, does not at all allow a *revision au fond* so that the state courts cannot examine whether the arbitral tribunal correctly resolved the factual and legal questions of the case. As regards the argument of due process, the state courts are not authorized to examine whether the relevant facts of the case were sufficiently inquired and discussed, unless such procedural errors would amount to the right of a party to be heard being totally denied.

Finally, in the context with proceedings aimed at setting aside an award, the challenge of an arbitrator brought before the board of the arbitral institution could never be re-examined, the Supreme Court found.

Enforcement Of Foreign Awards • Consumers • Ordre Public

The Claimant, a Danish company, concluded with an Austrian company a franchise agreement which provided for arbitration in Denmark. The managing director of the Austrian company as well as another individual acceded to the franchise agreement as guarantors. In the course of the proceedings, the two individuals raised objections as to the competence of the arbitral tribunal. The objections, however, were rejected as belated and an award was rendered in favour of the Claimant.

In the enforcement proceedings the two individuals argued that there was no valid arbitration agreement (invoking, thereby, Art. V (1) (a) of the New York Convention) and that non-compliance with Austrian consumer protection provisions caused a violation of public policy in the meaning of Art V (2) (b) of the New York Convention.

In its decision, docket No. 3 Ob 144/09m,[14] the Austrian Supreme Court rejected the arguments of the Respondents. It held that any alleged invalidity of the arbitration clause had healed as the Respondents have raised respective objections only at a later stage of the arbitral proceedings.

With regard to the alleged violation of Austrian consumer protection provisions, the Austrian Supreme Court confirmed that the newly introduced sec. 617 of the Austrian Code of Civil Procedure[15] does not apply to arbitration proceedings with their seat outside of Austria. It furthermore clarified that an arbitration agreement with a consumer as such does not violate Austrian *ordre public* and, therefore, rejected the Respondents' appeal.

Remarkable with regard to this decision is that the Supreme Court has not at all addressed sec. 617 (1) of the Code of Civil Procedure. This provision contains the strongest restriction of the new arbitration-related consumer protection provisions introduced by the Austrian Arbitration Reform Act 2006 and permits arbitration agreements only for disputes which have already arisen — a restriction that can be found in several other arbitration laws as well.[16] Several commentators argue that this amounts to a restriction of objective arbitrability of consumer-related disputes. However, if a dispute would be not arbitrable under Austrian law, Austrian courts would have to refuse enforcement *ex officio* on the basis of Art. V (2) (a) of the New York Convention. Thus, it seems quite likely that the Austrian Supreme Court does not consider sec. 617 (1) of the Code of Civil Procedure an objective arbitrability restriction.

Endnotes

1. *E.g.*, Jennifer Kirby & Denis Bensaude, *A View From Paris — December 2009*, 24(12) MEALEY'S International Arbitration Report 34 (2009).

2. Oberster Gerichtshof [OGH] [Supreme Court] Sep. 3, 2008, docket No. 3 Ob 35/08f *in* 132 JBl 62 (2010); an English translation of the decision is annexed. *See also* Dirk Otto, Case Comment, *Formalien bei der Vollstreckung ausländischer Schiedgerichtsentscheidungen nach dem New Yorker Schiedsgerichtsabkommen*, 2009 IPRax 362; Veit Öhlberger, Case Comment, *Zu den Formvoraussetzungen der*

Vollstreckung ausländischer Schiedssprüche nach dem New Yorker Übereinkommen, 132 JBl 62, 65-67 (2010).

3. This is in line with former Austrian case law and the predominant view in learned literature (*see*, *e.g.*, Veit Öhlberger, *Vollstreckung ausländischer Schiedssprüche in Österreich und deren Formvorraussetzungen nach dem New Yorker Übereinkommen*, 5 German Arb. J. 77, 81 (2007)).

4. In its previous decisions 3 Ob 2097/96w and 3 Ob 2098/96t the Austrian Supreme Court held that among others also the ICC Rules would contain a sufficiently clear authorisation that would cover certification and — apparently also — authentication of an award. The respective provision of the ICC Rules — then Article 23 (2) of the ICC Rules 1988, which is identical with Article 28 (2) of the rules currently in force — reads as follows: "Additional copies certified true by the Secretary General shall be made available on request and at any time to the parties, but to no one else."

5. *See* more detailed Veit Öhlberger, Case Comment, *Zu den Formvoraussetzungen der Vollstreckung ausländischer Schiedssprüche nach dem New Yorker Übereinkommen*, 132 JBl 62, 66 (2010).

6. Art. 27 (4) of the Vienna Rules reads: "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."

7. *See*, *e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 17, 2000, docket No. III ZB 43/99, *in* XXVI YB Comm. Arb. 771-773 (2001) (Germany); Cour de Justice de Genève [Court of Appeal] Apr. 15, 1999, XXVI YB Comm. Arb. 863 (2001).

8. *See* Dirk Otto, Case Comment, *Formalien bei der Vollstreckung ausländischer Schiedgerichtsentscheidungen nach dem New Yorker Schiedsgerichtsabkommen*, 2009 IPRax 362; Veit Öhlberger, Case Comment, *Zu den Formvoraussetzungen der Vollstreckung ausländischer Schiedssprüche nach dem New Yorker Übereinkommen*, 132 JBl 62, 66-67 (2010).

9. The Austrian Supreme Court was one of the first courts confirming that Art. II (2) of the New York Convention prevails over any provision of domestic law regarding the form of the arbitration agreement where the convention is applicable (*see*, Oberster Gerichtshof [OGH] [Supreme Court] Nov. 17, 1971, docket No. 8 Ob 233/71, *in* I YB Comm. Arb. 182 (1976) (Austria), *c.f.*, Albert J. Van den Berg, THE NEW YORK CONVENTION OF 1958, 174 (1981)).

10. Oberster Gerichtshof [OGH] [Supreme Court] Mar. 30, 2009, docket No. 7 Ob 266/08f, *in* 50 ZfRV-LS No. 38 (2009) (Austria); *see also* Christian Koller, Case Comment, 12 Int. A.L.R. 2009, N51; Markus Schifferl, *Decisions of the Austrian Supreme Court on Arbitration in 2008 and 2009*, in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2010, 219, 230 (Klausegger, Klein, Kremslehner et al. eds., 2010).

11. Oberster Gerichtshof [OGH] [Supreme Court] Oct. 1, 2008, docket No. 6 Ob 170/08f, *in* 20 ecolex 133 (2009) (Austria); *see also* Markus Schifferl, *Decisions of the Austrian Supreme Court on Arbitration in 2008 and 2009*, in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2010, 219, 228 (Klausegger, Klein, Kremslehner et al. eds., 2010).

12. Oberster Gerichtshof [OGH] [Supreme Court] Aug. 26, 2008, docket No. 4 Ob 80/08f, *in* XXXIV YB Comm. Arb. 404 (2009) (Austria); *see also* Christian Koller, Case Comment, 12 Int. A.L.R. 2009, 40; Markus Schifferl, *Decisions of the Austrian Supreme Court on Arbitration in 2008 and 2009*, in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2010, 219, 223 (Klausegger, Klein, Kremslehner et al. eds., 2010).

13. Oberster Gerichtshof [OGH] [Supreme Court] Aug. 20, 2008, docket No. 9 Ob 53/08x, *in* 27 RdW 86 (2009) (Austria); *see also* Markus Schifferl, *Decisions of the Austrian Supreme Court on Arbitration in 2008 and 2009*, in AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2010, 219, 219 (Klausegger, Klein, Kremslehner et al. eds., 2010).

14. Oberster Gerichtshof [OGH] [Supreme Court] Jul. 22, 2009, docket No. 3 Ob 144/09m, *in* 28 RdW 20 (2010) (Austria); *see also* Veit Öhlberger, Case Comment, *Zur (Nicht-)Anwendung schiedsrechtlicher Verbraucherschutznormen in ausländischen Schiedsverfahren*, 65 ÖJZ 188 (2010).

15. Sec. 617 provides for several restrictions with regard to consumer-related arbitration, such as special form requirements, limitations as to the seat of arbitration, additional grounds for setting aside of an award and that arbitration agreements may be concluded only for disputes that have already arisen.

16. *E.g.* sec. 6 of the Swedish Arbitration Act, sec. 7 of the Danish Arbitration Act, sec. 31 of the Irish Arbitration Act and sec. 11 of the New Zealand Arbitration Act. ■

[docket No.:[i]] **3 Ob 35/08f**

Republic of Austria
Supreme Court

[decision of 3 September 2008]

The Supreme Court has, by the president of this chamber of the Supreme Court Dr. Schiemer as presiding judge and by the judges of the Supreme Court Dr. Prückner, Hon.-Prof. Dr. Sailer, Dr. Jensik and Dr. Fichtenau as further judges in the enforcement matter between the claimants (1) O***** Limited, *****, Cyprus and (2) M***** Corp. (formerly A*****, Inc.), *****, U.S., both represented by Fiebinger, Polak, Leon & Partner, Rechtsanwälte GmbH from Vienna, against the defendant C***** Limited, *****, Jersey, represented by Dr. Wolfgang Kropf, attorney at law from Vienna, regarding USD 4,404,601.89 and interest, following the extraordinary appeal for review on legal grounds of the defendant against the decision of the Regional Court for Civil Law Matters Vienna as court of appeal, dating 17 December 2007, GZ 46 R 783/07y-43, which affirmed the decision of the District Court Inner City of Vienna, dating 13 November 2006, GZ 63 E 5260/06m-2,

decided:

Holding

The appeal for review on legal grounds concerning Point II of the decision of the court of first instance is rejected.

As for the rest, the appeal for review on legal grounds is sustained so that the decisions of the lower courts are concerning point I – including the decision on costs of the court of second instance – repealed. The court of first instance is hereby ordered to redecide after having conducted supplementary procedural steps.

The costs of these appellate proceedings are further procedural costs of the first instance proceedings on the declaration of enforceability.

Facts & Procedural History

At the request of two out of four claimants the court of first instance issued declarations of enforceability for two arbitral awards of the London Court of International Arbitration (henceforth: "LCIA"), dated 28 April 2003 (Partial Award) and 3 July 2003, document number UNO242 (Final Award), against one of then two defendants, domiciled in Jersey, for the territory of Austria (Point I) and granted (by Point II of its decision) to these claiming parties execution according to sec. 294 of the Enforcement Act [*Exekutionsordnung – EO*] against the defendant in order to collect their claim of 4,404,601.89 USD including interest. The claimants had produced the documents which are required under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Federal Gazette 1961/200 (henceforth: "New York Convention") and had proven the binding force and enforceability of the awards.

By its contested decision the court of second instance rejected the appeal of two garnishees against the declaration of enforceability and, as for the rest, dismissed the full appeal of the defendant as well as the appeal of the garnishees, lodged against the enforcement approval [*Exekutionsbewilligung*]. In each case it declared that the ordinary appeal for review on legal grounds was not permitted.

According to the opinion of the Court of Appeal, garnishees of a later executive enforcement of claims [*Forderungsexekution*] are not respondents in the proceedings on the declaration of enforceability of a foreign arbitral award. They are lacking the standing to appeal against the declaration of enforceability.

[According to the opinion of the Court of Appeal] [C]ontrary to the opinion of the defendant, an arbitral award originating from Great Britain, does not have to be declared enforceable in its "home country" Great Britain by a British state court in order to be recognized in Austria. The New York Convention requires for recognition and enforcement [of a foreign arbitral award] only complying with the provisions of Art. III to V, but does not require enforceability or confirmation [of the foreign arbitral award] in the state of origin. Also a confirmation of enforceability was not necessary. The documents submitted by the claimants comply with the requirements of Art. IV of the New York Convention, the written arbitration agreement was stated at pages 6 and 7 of the Partial Award and was concluded by the defendants' counsels letter of 11 June 2001 and the claimants' counsels' letter in reply of 19 June 2001. The claimants have submitted these letters in certified translations. For certification, the confirmation of a neutral official, associated with both parties, as in this case the secretary of the arbitral institution, was sufficient. His authority had been certified by a notary public and super-legalized pursuant to the The Hague Convention. These documents were submitted together with a translation too. Finally, the submission of a notification of a change in the company's name confirmed by the Secretary of State of Delaware and [legalized by] an Apostille were sufficient proof of the change in the company's name.

Legal Reasoning

The extraordinary appeal for review on legal grounds [filed] by the defendant with regard to the enforcement approval is in any case inadmissible, the rest, however, is admissible and, relating to the alternative request for repeal, justified.

To start with, also in the third instance – as correctly pointed out by the claimants in their reply to this revision – the defendant does not claim that the arbitral awards are forged, that the copies do not correspond to the originals or that the arbitration agreement was not concluded or concluded on different terms or that in this respect too, the copy does not correspond to the original. Rather, it is merely submitted that the certifications do not comply with the requirements of Art. IV (1) (a) and (b) of the New York Convention.

The defendant rightly raises the significant legal question that there exists no case law of the Supreme Court on the question whether pursuant to the Convention the arbitration agreement may be certified by the secretary or a similar officer of the arbitral tribunal or institution and whether the certification of both, the arbitration agreement and the arbitral award, may be made by such person in all cases or only when the applicable arbitration rules so provide.

In this context the defendant argues that the claimants do not deny that the certification of the arbitration agreement was made only by a subordinate officer of the arbitral tribunal [better: arbitral institution]. The question whether the applicable arbitration rules in fact provide or allow for such certification was not assessed by the Court of Appeal. Indeed, the arbitration rules of the LCIA do not contain a provision to such effect. Although these arbitration rules provide in their Art. 26.5 that the LCIA shall transmit certified copies of the arbitral award to the parties, this does not say anything about the form the certification is to be made. A secretary of the arbitral tribunal [better: arbitral institution] is not mentioned by the rules. The arbitration rules do not say that the 'registrar' is in any way competent or authorized to certify arbitral awards or even arbitration agreements. Thus, the registrar's certifications cannot be deemed sufficient in the meaning of the case law of the Supreme Court. Therefore, it was wrong to issue a declaration of enforceability. The claimants supplied neither the original arbitration agreement (i.e., the original document) nor a certified copy issued by a person authorized to do so. Furthermore, a certified copy of a non-authenticated original document does not fulfil Art. IV of the New York Convention. The original document must be authenticated by way of legalization pursuant to sec. 79 of the Notary Public Act [*Notariatsordnung*] [this provision covers the notarisation of signatures], whilst a certification pursuant to sec. 77 of the Notary Public Act [this provision covers the notarisation of copies as true copies of an original] is sufficient only for a copy of an authenticated original.

The deciding chamber has considered the following:

I. Re Declaration of Enforceability
1. Re Certification Requirements

Pursuant to sec. 86 (1) of the Enforcement Act [*Exekutionsordnung*], rules of international law prevail over the provisions on the declaration of enforceability pursuant to sec. 79 et seq. of the Enforcement Act. This is also true with regard to the New York Convention, which came into force in Austria on 31 July 1961. Pursuant to Art. IV (1) of the New York Convention, recognition and enforcement require that the applicant supply, at the time of the application: (a) the duly authenticated (legalized) original award or a duly certified copy thereof and (b) the original agreement referred to in Art. II or a duly certified copy thereof.

Schlosser ([Peter Schlosser,] in KOMMENTAR ZUR ZIVILPROZESSORDNUNG, annex to sec. 1061 German ZPO ¶ 65 (Friedrich Stein & Martin Jonas eds., 22nd ed. 2002)) calls these form requirements an intricate exaggeration that serves no meaningful function as long as the defendant does not claim any lack of authenticity. In this context, [Schlosser] is of the opinion that the certification requirements of the recognizing state shall apply. [He argues that] it cannot be derived from the New York Convention that as an alternative the certification requirements of the state in which the arbitral award was rendered would suffice, or that this state [the state of origin] only shall be decisive. If this were the case, it would be very difficult for the domestic court to verify whether the certifying person was authorized to do so. Schlosser concedes, however, that it would be more reasonable to accept the forms [of certification] in which generally in court proceedings documents are submitted (op. cit., ¶ 66). Based on the consideration that the New York Convention does not clearly state whether only the certification requirements of the state of origin of the award apply to the arbitral award and the arbitration agreement or to their copies, or whether also the requirements for the certification of foreign documents in the recognizing state must be complied with, the Supreme Court consistently held the view that the Austrian certification requirements do not apply exclusively (3 Ob 62/69 = SZ 42/87 = EvBl 1969/432 and others; RIS-Justiz RS0075355). This [view] is to

be adhered to, particularly because it does not at all result in the opinion so strongly opposed by Schlosser that exclusively the certification requirements of the state of origin of the award shall apply. On the basis of this case law, the Supreme Court regarded also certifications pursuant to the laws of the state in which the arbitral award was rendered as sufficient, in particular also [when issued] by a secretary of the arbitral institution, if this is in accordance with the arbitration rules applied to the arbitration (3 Ob 320/97y = SZ 70/249 = RdW 1998, 340 = ZfRV 1998/23; 3 Ob 196/02y = RdW 2003, 385). In the latter decision it was also clarified that claiming non-compliance with the form requirements of Art. IV (1) of the New York Convention is no violation of the prohibition of raising new arguments in appellate proceedings [*Neuerungsverbot*]; it is, thus, irrelevant that in the case at hand the defendant did not raise this [issue] in the appeal against the declaration of enforceability. Also courts of other states let a confirmation by an arbitrator or by the secretary of the arbitral institution suffice (examples in Schlosser, op. cit., ¶ 67 n.312).

Although this is not so clearly expressed in all the decisions rendered on this issue, a duly legalized or certified document in the meaning of Art. IV (1) of the New York Convention requires in any case that the person closely associated with the arbitral tribunal [better: institution] issuing the certification is also authorized to do so under the applicable arbitration rules. After all, the parties have submitted themselves to these arbitration rules, so that it is in the context of the requirements for recognition and enforcement also justified to accept such certifications as are provided for by these rules. Already the decisions 3 Ob 2097/96w and 3 Ob 2098/96t = ZfRV 1996, 199 assume that according to the then applicable arbitration rules the signatures of the arbitrators were certified by the signatures of the president and the secretary of the arbitral tribunal. Conversely, it clearly follows from the reasoning of decision 3 Ob 320/97y that the mere certification by a secretary of an arbitral institution does not suffice, if the applicable arbitration rules do not provide for such certification.

The defendant rightly argues that the Arbitration Rules of the LCIA (several times also reprinted in Austrian literature, so for example also in Hans Walter Fasching & Andreas Konecny, KOMMENTAR ZU DEN ZIVILPROZESSGESETZEN, volume IV/2, annex XIV, 971 (2nd ed. 2007)) do not authorize the so-called "registrar" to issue certifications. Pursuant to Art. 3, he [the registrar] is one of the officials of the LCIA to whom the communications of the parties or arbitrators are addressed to (Art. 3.3); however, he is not granted authorization to issue certifications. In particular it does also not follow from Art. 26.5 who is to certify the copies of the arbitral award to be sent to the parties. At best, the general provision of Art. 3.1 could serve for this purpose, according to which the functions of the arbitral institution under these Arbitration Rules shall be performed by the President or a Vice President or by a committee, as determined by the President. The "registrar" is not mentioned in this general provision. It, therefore, cannot be assumed that the LCIA Arbitration Rules provide for certifications issued by a secretary or the "registrar" acting in the very case. Thus, the certifications by the registrar do not comply with the, although strict, requirements of the New York Convention. To assess whether they are appropriate in [each] specific case is a matter for the Convention States or for the Austrian legislator, who pursuant to Art. VII (1) of the New York Convention can also lessen the form requirements applicable to the documents to be submitted (*c.f.*, sec. 1064 (1) and (3) of the German Act on Civil Procedure [deutsche Zivilprozessordnung]; Schlosser, op. cit., ¶ 65).

2. Re Submission of Arbitration Agreement

Following the last remarks, it must be stated that also the Austrian legislator made use of this possibility by way of sec. 614 (2) of the Code of Civil Procedure [*Zivilprozessordnung – ZPO*], introduced by the Arbitration Reform Act 2006 [*Schiedsrechtsänderungsgesetz* 2006 – *SchiedsRÄG 2006*] Federal Gazette I 2006/7. This provision applies to the present proceedings due to the following considerations. According to its Art. VII (1) of the Arbitration Reform Act 2006, this act entered into force on 1 July 2006 and, hence, before (the request [for enforcement] and, therefore, also before) the first instance decision on the declaration of enforceability. However, para. 2 of this provision provides that the provisions so far in force shall apply to arbitration proceedings commenced prior to 1 July 2006. According to the Explanatory Notes to the Draft Bill [*Erläuterungen zur Regierungsvorlage – ErläutRV*] (1158 BlgNR 22. GP, 31), pending arbitration proceedings and, hence, also related court proceedings shall be conducted until their conclusion in accordance with the provisions so far in force, so that there will be in pending arbitration proceedings no change of applicable law, which concerns not only purely procedural aspects but also closely connected issues of substantive law. Also arbitration agreements concluded before the entry into force of the Act shall not be subject to a modified and, thus, unforeseeable regime. Court proceedings related to the arbitration could surely only be understood to be the ones mentioned in sec. 615 (1) of the Code of Civil Procedure; it would make not much sense to consider proceedings for the recognition and enforcement of foreign arbitral awards, which are related to the execution of such titles in Austria, as properly related to the arbitration. Also the purpose stated in the Explanatory Notes to the Draft Bill does not require the application of the less strict form requirements of sec. 614 (2) of the Code of Civil Procedure only to proceedings for the enforcement of arbitral awards rendered in arbitrations commenced after 30 June 2006. There are neither issues of substantive law connected to it, nor does the immediate application of sec. 614 (2) of the Code of Civil Procedure affect the conclusion of the actual arbitral proceedings in accordance with the provisions so far in force. Therefore, the present proceeding for the declaration of enforceability of the LCIA arbitral award against the defendant cannot be counted to those arbitral proceedings that are exempted from the immediate application of the new provisions pursuant to Art. VII (2) of the Arbitration Reform Act. Therefore, regarding the entry into force para. 1 of the Act applies (*accord* Andreas Reiner, DAS NEUE ÖSTERREICHISCHE SCHIEDSRECHT, 60 et seq. n.244 (2006) (who refers to proceedings for the declaration of enforceability commenced after 1 July 2006, which is true also in the case at hand); Veit Öhlberger, *Vollstreckung ausländischer Schiedssprüche in Österreich und deren Formvoraussetzungen nach dem New Yorker Übereinkommen*, 5 German Arb. J. 77, 80 et seq. (2007)).

Pursuant to sec. 614 (2) of the Code of Civil Procedure, the submission of the original arbitration agreement or a certified copy thereof according to Art. IV (1) (b) of the New York Convention shall only be required if ordered by the court. According to the Explanatory Notes to the Draft Bill (p. 29), such submission shall be ordered only when the existence of the arbitration agreement is in doubt. On this, it is correctly held the view that the submission does not even need to be ordered if the defendant explicitly requests so; rather, the enforcement court has the discretion (in accordance with its duties) to order such a submission (Walter H. Rechberger & Werner Melis in KOMMENTAR ZUR ZPO, sec. 614 ZPO ¶ 5 (Walter H. Re chberger ed., 3rd ed. 2006); Christian Hausmaninger in KOMMENTAR ZU DEN ZIVILPROZESSGESETZEN, sec. 614 ZPO ¶ 79 (Hans Walter Fasching & Andreas Konecny eds., 2nd ed. 2007); similarly, Öhlberger, op. cit., 80). As mentioned above, the defendant does not argue in a substantiated way that the arbitration agreement, taken as existing by the arbitral tribunal, does in fact not exist; rather, the defendant merely contests the existence of the necessary certifications. Under these circumstances no justified doubts can be assumed as to the

existence of an arbitration agreement between the parties, and, thus, the court did not need to request submission thereof. Therefore, it is irrelevant whether the arbitration agreement is duly certified.

3. Re Certification of Award

As already mentioned, Art. IV (1) (a) of the New York Convention requires the submission of a duly certified (legalized) original arbitral award or a copy that is duly certified to correspond to such original.

The Supreme Court has quoted in identically phrased passages of the decisions 3 Ob 2097/96w, 3 Ob2098/96t, 3 Ob 320/97y and 3 Ob 196/02y further doctrines of Schlosser ([Peter Schlosser,] DAS RECHT DER INTERNATIONALEN PRIVATEN SCHIEDSGERICHTSBARKEIT ¶ 928 (2nd ed. 1989)), according to which the English expression "certified" allows to consider as sufficient a confirmation by an official, who is as a neutral person closely associated with the parties to the arbitration … . A comparison with [Schlosser's] work shows that the words "for the copy of the original arbitral award" are missing in the [above mentioned] quotations. Schlosser's statement relates – on this there can be also no doubt when looking to the English text of the Convention – to the copy of the original arbitral award only, in particular because he subsequently emphasizes that the certified copy must be of an original with certified signatures. It would not make any sense to not require any formal proof of the authenticity of the [original's] signature, not even through indirect certification, when a certified copy is submitted. Indeed, the original English text mentions (more clearly than the German [text]) two clearly distinct forms of certification in Art. IV (1) (a) of the New York Convention, which are denominated as "duly authenticated" (regarding the original) and "duly certified" (regarding the copy). Thus, for the original a legalization of the signatures of the arbitrators is required (*accord*, rightly, Schlosser, op. cit.). Only for a copy the less strict form of certification is allowed, for which also Schlosser does not require the strict certification of authenticity of a handwritten signature, as provided for in Austria by sec. 79 of the Notary Public Act. Schlosser must also be followed in that the possibility to submit copies does not mean that one can fully forgo the formal confirmation of authenticity of the signatures of the arbitrators on the original for the purposes of recognition and enforcement. In this sense, the Supreme Court already required in its decisions 3 Ob 320/97y and 3 Ob 196/02y that in the case of certified copies the authenticity of the signatures on the original document must also be, at least indirectly, certified. In the case at hand, the submitted copy of the arbitral award bears only the confirmation that it corresponds to the original arbitral award. Hence, in the view of the deciding Chamber, this does not even amount to an indirect certification of the authenticity of the signatures of the arbitrators on the arbitral award in the meaning of Art. IV (1) (a) of the New York Convention.

It follows from this that, on the basis of the documents supplied, the declaration of enforceability should not have been granted.

The Court of First Instance will, therefore, have to initiate corresponding remedial proceedings (Hausmaninger, op. cit. sec. 614 ¶ 48 with further references).

II. Re Enforcement Approval

Since sec. 84 (4) of the Enforcement Act, according to which another appeal is not inadmissible because the court of second instance had fully affirmed the contested decision of first instance, is only to be applied to decisions on enforcement applications, which were filed together with requests for declaration of enforceability of foreign arbitral awards, in case of conform dismissing decisions, but not – like here – in case of conform approving decisions, the appeal for review on legal grounds against an affirming enforcement approval is, according to sec. 78 of the Enforcement Act in connection with sec. 528 (2) (2) of the Code of Civil Procedure, in any case inadmissible.

According to sec. 528 (2) (3) of the Code of Civil Procedure, the same applies to the explicitly lodged appeal on costs.

However, as a consequence of repealing the decision on the declaration of enforceability, the decision on costs of the court of second instance on the reply to the appeal of the Claimants is to be repealed. Regarding the ex parte character of enforcement proceedings, the decision on reimbursement of costs of the court of second instance has to be deemed affecting only the proceedings on the issue of granting the declaration of enforceability, which is, according to sec. 84 (1) of the Enforcement Act, bilateral in the second instance.

The reservation on costs is founded on sec. 78 of the Enforcement Act in connection with sec. 50 of the Code of Civil Procedure.

TRANSLATORS' NOTE

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