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Arbitration - Austria

Supreme Court takes restrictive view on state immunity

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In a July 11 2012 decision (3 Ob18/12m) the Supreme Court clarified the relationship between state immunity and enforcement of an arbitral award.

Facts

On May 2 2011 a Liechtenstein company had filed a request with the Vienna District Court to enforce a 2008 arbitral award obtained in *ad hoc* proceedings in Prague against the Czech Republic. The Liechtenstein company thereby requested the attachment of three pieces of art loaned by the Czech Republic to the Belvedere Museum in Vienna for the exhibition "DYNAMIK! Kubismus/Futurismus/KINETISMUS".

On May 16 2011 the Vienna District Court, as court of first instance, declared the award enforceable and approved the attachment. However, the court stopped enforcement proceedings after receipt of a notice from the Ministry of Foreign Affairs stating that the pictures were *extra commercium* assets of the Czech Republic (ie, not subject to commerce) and could therefore fall under state immunity. In the continued proceedings, the Czech Republic further argued that works of art must be considered as cultural objects serving the country's sovereign aims, and thus exempt from enforcement proceedings.

The court of second instance followed these arguments. On October 25 2011 it entirely dismissed the enforcement request, since the only objects of enforcement named were the three art pieces (and works of art must be considered as cultural objects falling under the state immunity of the Czech Republic).

Decision

In a July 11 2012 decision the Supreme Court quashed the decision of the court of second instance. The Supreme Court agreed with the logic of the court of second instance that the Czech Republic had not waived its right to recourse to state immunity in the enforcement proceedings by participating in the arbitration proceedings. It further clarified that the Austrian concept of examining the enforceability of a foreign enforcement is a specific proceeding (modelled on the New York Convention).

In dealing with the immunity defence, the Supreme Court held that only state property serving sovereign purposes is exempt from enforcement under public international law; thus, not all property of the Czech Republic is exempt as a general rule. It also noted that the Czech Republic had not obtained specific immunity status under the Austrian Act on the Temporary Immunity of Art Loans.

The Supreme Court then held that it was not for the party seeking enforcement to demonstrate that the objects were not immune; rather, this was the responsibility of the foreign state objecting to such enforcement. This principle of *in dubio pro jurisdictione* (ie, uncertainty of jurisdiction) was well established, and since the Supreme Court saw no indication that the art works served sovereign purposes, it also saw no reason to question it. However, the Supreme Court left open

the question of whether it would follow the opinion (as expressed by the German Federal Constitutional Court) to lower the burden to a *prima facie* evidence in cases involving sovereigns.

The Supreme Court further held that a general decision on the enforceability of the award should have been made, which should have taken into consideration possible arguments under the New York Convention. The fact that the Liechtenstein company had sought attachment of only three distinct objects of art did not entitle the court to dismiss entirely the enforcement request, since there may well be other objects that could have been attached.

Comment

Seeking enforcement of an arbitral award against a foreign state can be an extremely cumbersome process. In the case at hand the successful claimant apparently had no success in the respondent's home country (Czech Republic) and thus sought enforcement abroad. Relying on the New York Convention, which permits enforcement virtually everywhere in the world, the claimant subsequently sought attachment of three pictures loaned to an Austrian museum.

Although the Czech Republic's defence convinced two instances of Austrian courts - and was supported by the Austrian Ministry of Foreign Affairs - the Austrian Supreme Court fortunately clarified matters and even proclaimed the principle of *in dubio pro jurisdictione* as a general guideline for future cases.

Finally, as can be seen by the timeline, the matter shows the speed of the Austrian legal system - it took just two weeks for the initial court order to be issued by the Vienna District Court and a little over a year for the Supreme Court to issue a final decision.

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