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## Arbitration & ADR - Austria

### Supreme Court instructs lower court to apply New York Convention

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#### Facts

#### Decision

#### Comment

In a February 18 2015 decision<sup>(1)</sup> the Supreme Court issued clear instructions that when it comes to the recognition and enforcement of foreign arbitral awards, Austrian law must not be applied where it is superseded by international treaties, such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The issue at hand related to the rules applicable to the service of documents.

#### Facts

A Chinese company initiated arbitration against the Austrian respondents before the China International Economic and Trade Arbitration Commission (CIETAC). CIETAC served a request for arbitration on the Austrian respondents in accordance with its arbitration rules. The respondents rejected the delivery, at which point the delivered documents were returned to CIETAC marked "Delivery rejected". The arbitration was subsequently conducted without the respondents' participation and an award was issued in favour of the claimant.

The claimant subsequently applied for recognition and enforcement of the Chinese arbitration award in Austria. The court of first instance recognised the award and permitted its enforcement.

The respondents appealed, arguing that they had not been not duly informed of the request for arbitration; hence, their right to be heard during the arbitral proceedings had been violated. The appellate court held that under Section 80(2) of the Enforcement Act, the recognition and enforcement of a foreign arbitral award requires that a request for arbitration be served on the respondent in accordance with the legal provisions for the service of documents. These provisions (Sections 17 and 20 of the Service of Documents Act) state that if the recipient rejects a document, it must be deposited with the delivering agency for two weeks. The appellate court interrogated an employee of the delivery agency effecting the service (ie, the Austrian postal service) to determine the duration of the deposit and found that the rejected delivery had been returned to CIETAC within two days. The court thus held that the requirements for the recognition and enforcement of a foreign arbitral award had not been met and the award could not be recognised and enforced in Austria.

The claimant subsequently appealed before the Supreme Court, arguing that the service rules under the Enforcement Act could not be applied; rather, the rules under the New York Convention were applicable. The claimant also argued that in the course of the recognition and enforcement proceedings, its procedural due process rights had been violated, as the appellate court had failed to invite the claimant to participate in the evidentiary proceedings determining the facts surrounding the delivery and deposit.

#### Decision

The Supreme Court overturned the appellate court's decision, finding that the claimant's procedural due process rights had been violated. The case was returned to the appellate court.

Alongside its decision to return the case, the Supreme Court noted that the provisions of the Enforcement Act which apply to the recognition and enforcement of a foreign judgment will not apply where they are superseded by international treaties or EU law. It further noted that when determining the recognition and enforcement of a Chinese arbitral award, the grounds for rejection under Article V of the New York Convention will prevail. In this context, the Supreme Court referred to the subsidiarity principle contained in Section 86 of the Enforcement Act.

## Comment

The Supreme Court's appreciation of the New York Convention is no surprise, given the court's settled case law regarding the precedence of the New York Convention over national enforcement law.<sup>(2)</sup>

That said, this case is of particular interest, as the New York Convention contains no specific rules regarding the service of documents. Therefore, the decisive issue is whether Austrian national rules may nevertheless be applied in such a situation.

However, to give the New York Convention full effect, the requirement of 'proper notice' set out in Article V (1)(b) of the New York Convention must be construed in an autonomous way, not by reference to national laws (possibly not even known to the parties). In particular, the parties must be given the opportunity to agree on service rules, as these are typically incorporated in institutional arbitration rules.

Courts outside Austria have repeatedly held that national service laws cannot be applied in the context of international arbitrations, as parties waive their right to the formal requirements of court proceedings – including service rules – when they enter into arbitration agreements.<sup>(3)</sup> Further, courts outside Austria have held that a party that rejects the delivery of a document cannot claim that its right to be heard has been violated.<sup>(4)</sup> Thus far, the Supreme Court has not explicitly ruled on this issue. However, the directions given to the lower court demonstrate that the Supreme Court intends to follow international precedent.

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## Endnotes

<sup>(1)</sup> Docket 3 Ob 191/14f.

<sup>(2)</sup> For example, see the Supreme Court's September 1 2010 decision, Docket 3 Ob 122/10 b.

<sup>(3)</sup> Scherer, Art V mn 159 in: Wolff, New York Convention (2012) with reference to Corte Suprema (Chile), RdJ, Vol XCVI (1999), No 2, p 82, Tribunal Superior de Justicia (Mexico), IV YB Com Arb 302, 303 (1979), Tribunal Superior de Justicia (Mexico), IV YB Com Arb 301, 301-302 (1979); Born, International Commercial Arbitration, p 2217 *et seq* (2nd ed, 2014) with reference to February 14 2003 judgment, XXIX YB Comm Arb 819, 827 (Zurich Bezirksgericht) (2004), *Skorimpex Foreign Trade Co v Lelovic*, [1991] OJ No 641 (Ontario Super Court), *Vanol Far E Mktg Pte Ltd v Hin Leong Trading Pte Ltd*, [1997] 3 SLR 484 (Singapore High Court).

<sup>(4)</sup> Gaillard/Di Pietro, Enforcement of Arbitration Agreements and International Arbitral Awards, p 703 (2008); Jana/Armer/Kraneberg in: Kronke, Recognition and Enforcement of Foreign Arbitral Awards, p 243 (2010) with reference to OLG Hamm, unpublished June 26 1997 decision, 1 U 01/96 (Hamm Court of Appeal, Germany).

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