

Recognition and Enforcement of International Arbitral Awards in Austria: Sound Pragmatism 2.0

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The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“NYC”) was drafted in the spirit and with the purpose of encouraging arbitration as a dispute resolution mechanism, by providing for the simple and swift international enforcement of arbitral awards. Today, the NYC’s reach is – with the exception of a few remaining white spots – truly global.

From a practitioner’s point of view, the key to successful enforcement lies in knowing what to expect in national enforcement proceedings, in terms of the documents to be submitted along with the application for enforcement. Pursuant to Article IV NYC, the party applying for the recognition and enforcement of an international arbitral award shall supply (i) an authenticated original award or a duly certified copy thereof (Art IV(1)(a) NYC); (ii) the original agreement or a duly certified copy thereof (Art IV(1)(b) NYC); and (iii) a translation of these documents certified by an official or sworn translator or by a diplomatic or consular agent if the said award or agreement is not made in an official language of the country in which the award is relied upon (Art IV(2) NYC).

The NYC does not specify the requirements for valid authentication and certification, nor does it set forth the law governing authentication and certification. From the *travaux préparatoires*, it transpires that the Committee on Enforcement of International Awards considered that it was “*preferable to allow greater latitude with regard to this question to the tribunal of the country in which the recognition or enforcement was being requested.*” As a result, decisions of national courts tasked with the recognition and enforcement of international arbitral awards show significant divergence when it comes to interpreting the formal requirements set out in Article IV NYC.

The most recent judgment on the subject matter issued by the Austrian Supreme Court stems from February 2016. Confirming well-established jurisprudence, the court reconfirmed its previous finding that the formal requirements of Article IV(1)(a) NYC (*authenticated original award or a duly certified copy thereof*) are met, *inter alia*, if the party applying for recognition and enforcement provides the enforcement court with a copy of the original award duly certified by an authorized representative of the arbitral institution under the auspices of which the respective arbitral proceedings had been administered.

The Austrian Supreme Court thus takes a quite pragmatic approach towards interpreting the terms of Article IV(1)(a) NYC. The requirements it defines in this respect are twofold: the certified copy of the

original award submitted to the enforcement court must bear (i) the official stamp of the arbitral institution; and (ii) the signature of the duly authorized representative of the arbitral institution including an express statement as to his or her position within the arbitral institution.

In its February 2016 judgment the Austrian Supreme Court also recalled its interpretation of the requirements under Art IV(2) NYC (*translation of the arbitration agreement and of the arbitral award*). According to the court, translations of the arbitration agreement and of the arbitral award will be accepted if they were prepared by an official or sworn translator (accredited either with a court in the country where the arbitral award had been rendered or with a court in the country where the enforcement of the arbitral award is sought) or by a diplomatic or consular agent. The Austrian Supreme Court also considers translations prepared by translators accredited with a court in a third country as being acceptable. In such cases, however, the Austrian Supreme Court requires the notarization of the act by which the translator was accredited by such court.

Enforcement courts in other countries have embraced even more flexible approaches to the requirements set out in Article IV(1)(a) NYC. In Germany, for example, enforcement courts consider that Article IV(1)(a) NYC shall only apply if the party opposing recognition and enforcement denies the authenticity of the arbitral award to be enforced (German Federal Supreme Court 2000, *Claimant Investor v. Republic of Poland*). In the United States, enforcement courts consider the requirement to submit either a duly authenticated original or a duly certified copy as “*unnecessarily restrictive and at odds with a common sense reading of the provision*” (Court of Appeals 1983, *Sigval Bergesen, as Owners of the M/T Sydfonn and others v. Joseph Müller A.G.*). Swiss courts allow a party applying for recognition and enforcement to cure defects and to submit missing but necessary documents even at the appellate stage (Swiss Federal Supreme Court 2003, *A SA v. B Co Ltd and C SA*). The submission of translations, in particular of the arbitral award, is not required if the Swiss judge seized with recognition and enforcement is sufficiently capable of understanding the contents of the document submitted in the original language (Swiss Federal Supreme Court 2012, *X SA v. Z LLC*).

Clearly, less formalism and more pragmatism – much in the sense of the approach taken by the Austrian Supreme Court – is welcome when it comes to the international enforcement of arbitral awards. Still, one has to recognize that enforcement courts must not disregard entirely the formal requirements expressly stipulated in Article IV NYC. Thus, enforcement courts must not entirely cast aside the authentication requirement and content themselves with the mere physical existence of the arbitral award to be enforced. Equally, they must not ignore the translation requirements set out in Article IV NYC even if they master the relevant foreign language sufficiently.

With the most recent confirmation by the Austrian Supreme Court of its interpretation of the requirements under Art IV NYC, the enforcement of arbitral awards in Austria has become more practicable for users of arbitration and arbitration lawyers alike. Enforcement courts in other countries will hopefully follow the Austrian approach by giving preference to reasonable doses of pragmatism instead of stifling formalism. Such development would surely be welcomed by lawyers worldwide, especially when the enforcement of a long fought for arbitral award leads to proceedings not only in one but in numerous jurisdictions.