

Kluwer Arbitration Blog

Enforceability of ICSID Additional Facility Awards in Austria

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In a recent decision, the Austrian Supreme Court ruled on the enforceability of an investor-state award rendered under the ICSID Additional Facility Rules. While the [Supreme Court](#) found that the award was — in principle — enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards from 1958 (“**NYC**”), it upheld the appeal of the party resisting enforcement and referred the matter back to the court of first instance. The Supreme Court’s reasoning was in part surprising and should be considered by any parties seeking to enforce arbitral awards in Austria.

After addressing the factual background of the Supreme Court’s decision, we will lay out the Supreme Court’s reasoning and its potential implications for future enforcement cases in Austria.

Background

In the mid- to late 2000s, Strabag SE (“**Strabag**”), a large international construction company based in Austria, was awarded several large construction projects in Libya. The outbreak of the revolution in 2011 resulted in breaches of Strabag’s construction contracts and damage to Strabag’s property in Libya.

Strabag launched arbitration proceedings under the auspices of the International Centre for Settlement of Investment Disputes (“**ICSID**”) based on the bilateral investment treaty between Austria and Libya (“**BIT**”), requesting compensation for the loss incurred (*Strabag SE v. Libya*, [ICSID Case No. ARB\(AF\)/15/1](#)). Since Libya is not party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“**ICSID Convention**”), the proceedings were conducted under the ICSID Additional Facility Rules, which provide a framework for ICSID-administered proceedings where at least one party (or a party’s home State) is not party to the ICSID Convention.

With its [final award dated 29 June 2020](#) (“**Award**”), the arbitral tribunal consisting of Prof. John R. Crook (President), Prof. Antonio Crivellaro and Prof. Nassib G. Ziadé (“**Tribunal**”) confirmed its jurisdiction and ordered Libya to compensate Strabag in the amount of approximately EUR 75 million plus costs and interest.

Strabag proceeded to apply for (partial) enforcement of the Award in Austria. The competent court of first instance declared the Award enforceable. Upon appeal, the court of second instance

confirmed this decision, while finding that Libya could not rely on the grounds for refusal of enforcement under the NYC as it has not ratified the NYC. Libya again filed an appeal, this time to the Austrian Supreme Court, arguing that the Supreme Court should refuse enforcement under the NYC on various grounds, among others, due to the Tribunal exceeding its jurisdiction (Art V(1)(c) NYC).

The Supreme Court's Decision

The Supreme Court handed down its decision in September 2022. It held that Libya's appeal was justified, most notably because the lower courts failed to make material findings regarding whether or not a separate arbitration agreement existed. It annulled the judgments of the previous courts and referred the matter back to the court of first instance.

Two aspects of the decision, in which the Supreme Court had dealt with the enforceability of an ICSID Additional Facility award for the first time, are particularly remarkable: firstly, the Supreme Court's reasoning on the NYC's applicability and, secondly, the necessity for the courts to make findings on the (non-)existence of any separate arbitration agreement.

1. The Applicability of the NYC

According to the Supreme Court, Libya was entitled to rely on the grounds for refusal of enforcement stipulated in the NYC, despite not having ratified it. While the result is correct, the Supreme Court's reasoning is rather surprising and may potentially create a problematic precedent for future cases.

Essentially, the Supreme Court recognized that the ICSID Additional Facility Rules do not provide for an autonomous enforcement mechanism. Therefore, the law of the place of arbitration (in this case Washington) including all applicable international treaties would determine the applicable rules for recognition and enforcement. The Supreme Court further stated that awards rendered under the applicable 2006 ICSID Additional Facility Arbitration Rules are always subject to the NYC's recognition and enforcement regime given that the place of arbitration under these rules (Art 19) can only be in a State that is party to the NYC. The Supreme Court concluded that — for this reason — the Award is subject to the NYC.

The Supreme Court's reasoning on the applicability of the NYC is surprising and clearly contradicts the NYC's wording. Under Article I(1) the NYC applies to

“awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.”

In other words, the NYC only looks at whether an award is “foreign” or not, irrespective of the place where the award was rendered. While Austria had initially declared it would only apply the NYC to awards that were rendered in the territory of other States that are party to the NYC (“Reservation of Reciprocity” under Art I(3) NYC), it revoked this reservation in 1988. Since then,

Austria has been obliged to recognize and enforce foreign arbitral awards, regardless of whether the State they were rendered in is party to the NYC.

While in the case at hand the Supreme Court's reasoning led to the correct result, i.e. the application of the NYC to a "foreign" award, this may not always be the case. If the Supreme Court's logic would be consistently applied in future cases, recognition or enforcement of an award rendered in a country that is not party to the NYC (e.g., an award rendered in Libya under the UNCITRAL Rules) may not necessarily fall under the NYC. This would be against the NYC's clear wording, according to which Austria is obliged to recognize and enforce **any** foreign award, irrespective of where it was rendered.

2. Findings on the (Non-)existence of a Separate Arbitration Agreement

In disputing the enforceability of the Award, Libya *inter alia* relied on Art V(1)(c) NYC, arguing that the Tribunal had exceeded its jurisdiction.

In this regard, the Supreme Court stated that the Tribunal's jurisdiction in the present case was based on Articles 11 and 12 of the BIT and that pursuant to Article 11(2)(c)(ii) BIT, disputes may be administered by ICSID under the Additional Facility Rules. The Supreme Court further (correctly) stated that the ICSID Secretary General must approve any agreement to arbitrate before proceedings under the Additional Facility Rules may commence.

Surprisingly, the Supreme Court then found that this raised the question of whether Strabag and Libya had based their dispute solely on the BIT or whether they had concluded a separate arbitration agreement. Since the previous courts had made no findings on whether such separate arbitration agreement existed, the Supreme Court argued that it could not ultimately determine whether the Tribunal had exceeded its jurisdiction. It concluded that for that reason alone, the lower courts' decisions must be annulled and the matter must be referred back to the court of first instance to make specific findings on the (non-)existence of a separate arbitration agreement.

It is not quite clear why the Supreme Court would require such findings. It did not cite or refer to any evidence that would point to the existence of such distinct arbitration agreement between Strabag and Libya. In fact, from the (publicly available) Award it seemed clear that the Tribunal's jurisdiction solely rested on Article 10 of the BIT, according to which

“disputes between a Contracting Party and an investor of the other Contracting Party [...]” shall be resolved under the dispute settlement rules of the BIT.

Strabag did not rely on a separate arbitration agreement, nor did Libya assert that such an agreement exists. The Tribunal itself based its jurisdiction exclusively on the BIT and the ICSID Additional Facility Arbitration Rules.

Finally, it remains unclear whether the Supreme Court requires these additional findings only because of the specific features of proceedings carried out under the ICSID Additional Facility Arbitration Rules or whether its considerations generally apply to the enforcement of all arbitral awards that are based on international investment treaties.

Conclusion

In summary, there are at least two main takeaways from the decision that should be considered by parties seeking to enforce an arbitral award (that is not subject to ICSID's enforcement regime) in Austria:

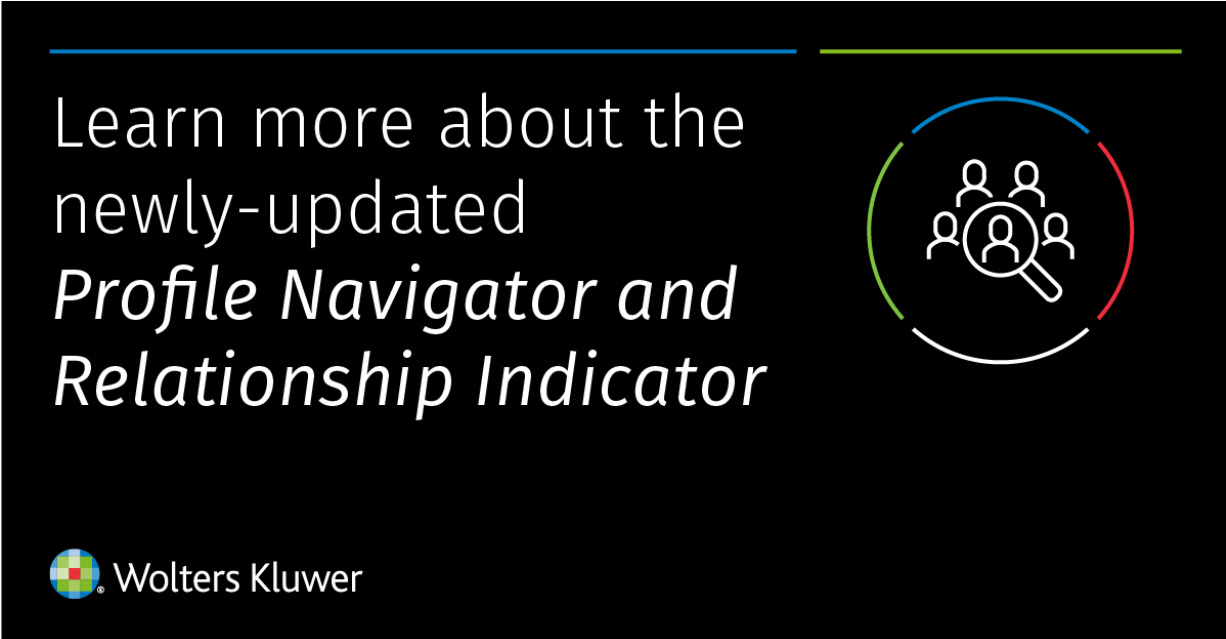
1. Awards rendered in territories that are not party to the NYC may be difficult to enforce in Austria. That is, if the Austrian court ruling on the recognition and enforcement of an award in a future case follows the Supreme Court's approach, which is contrary to the wording of the NYC.
2. Parties seeking enforcement of an investor-state award where the Tribunal's jurisdiction is based on an international treaty are well advised to make sure that the court ruling on recognition or enforcement determines the (non-)existence of separate arbitration agreements in addition to dispute resolution provisions contained in the relevant treaty.

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This entry was posted on Monday, February 20th, 2023 at 8:43 am and is filed under [Additional Facility Rules](#), [Arbitration Agreements](#), [Awards](#), [Enforceability](#), [Enforcement](#), [New York Convention](#), [Reciprocity](#), [Recognition and enforcement of arbitral award](#)

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