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RECOGNITION AND ENFORCEMENT OF THE AWARDS OF THE INTERNATIONAL ARBITRAL TRIBUNAL AT THE BELARUSIAN CHAMBER OF COMMERCE AND INDUSTRY PURSUANT TO THE NEW YORK CONVENTION OF 1958: THE CASE OF AUSTRIA

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The standards of enforcement of arbitral awards arising from the New York convention of 1958 are examined, drawing on the example of Austria. Specifically, we review the process of enforcing awards of the International Arbitral Tribunal under the Belarusian Chamber of Commerce and Industry by an Austrian court of first instance. The aim was to develop a protocol of action for Belarusian lawyers to secure recognition and enforcement in Austria of awards of the International Arbitral Tribunal under the Belarusian Chamber of Commerce and Industry. We provide recommendations grounded in the results of our study.

Keywords: international arbitration; New York convention of 1958; the Hague convention of 1961; recognition of foreign arbitral awards in Austria; arbitration practice in Austria; procedures of the International Court of Arbitration; collection of interest for late enforcement of an arbitral award.

ПРИЗНАНИЕ И ИСПОЛНЕНИЕ РЕШЕНИЙ МЕЖДУНАРОДНОГО АРБИТРАЖНОГО СУДА ПРИ БЕЛОРУССКОЙ ТОРГОВО-ПРОМЫШЛЕННОЙ ПАЛАТЕ В СООТВЕТСТВИИ С НЬЮ-ЙОРКСКОЙ КОНВЕНЦИЕЙ 1958 г.: ПРИМЕР ИЗ АВСТРИЙСКОЙ ПРАКТИКИ

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Рассматриваются требования, предъявляемые в соответствии с Нью-Йоркской конвенцией 1958 г., на примере австрийской практики. В основу была положена процедура признания конкретного решения Международного арбитражного суда при Белорусской торгово-промышленной палате в австрийском суде первой инстанции. Целью статьи является разработка конкретного алгоритма действий белорусского юриста в процессе признания и исполнения ре-

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Ключевые слова: международный арбитражный процесс; Нью-Йоркская конвенция 1958 г., Гаагская конвенция 1961 г.; признание иностранного арбитражного решения в Австрии; австрийская арбитражная практика; правила Международного арбитражного суда; взыскание процентов за задержку исполнения арбитражного решения.

Introduction

In Belarus, there are 92 registered companies with Austrian capital and 20 representative offices of Austrian companies. Likewise, three trading arms of Belarusian companies are active in Austria ("BELMET Handelsgesellschaft", "BMZ Vertriebsgesellschaft" and "SolTrade", the latter a joint venture with JSC "BelarusKaliy"), along with a representative office of Belavia, the national air carrier. Several institutional mechanisms are in place to facilitate the economic relationship between Belarus and Austria, of which the Belarusian Austrian Intergovernmental Commission for Trade and Economic Cooperation and the Belarusian Austrian Business Council is the most prominent.

The Republic of Austria is a country that is guided by the principles of neutrality in its foreign policy. Its capital Vienna is a traditional meeting point for parties interested in negotiating compromise solutions on matters of international politics and economy. Austria is also a recognized global leader in international arbitration, and has generated extensive case law on enforcement of foreign arbitral awards.

The legal framework for the recognition and enforcement of arbitral awards is provided by the Austrian arbitration act, which is a part of the Austrian Code of Civil Procedure (Zivilprozessordnung (ZPO), para 577–618). Pursuant to para 614 of ZPO, recognition and enforcement of foreign arbitral awards is performed in a manner prescribed by the Austrian enforcement act (Exekutionsordnung (EO)), unless international or EU law provides otherwise. Belarus and Austria are parties to two conventions governing mutual recognition and enforcement of arbitral awards – the European convention on international commercial arbitration and the New York convention on the recognition and enforcement of foreign arbitral awards of 1958 (New York convention). In a vast majority of cases, the New York convention is applied. In general, the order of enforcement proceedings in Austria conforms to the provisions of the New York convention, which are applied in all cases except when domestic law provides for a more simplified order of proceedings for recognition and enforcement of decisions of foreign courts [1, para 79 EO Rz. 563]. The statute of limitations provides a period of 30 years for recognition and enforcement of arbitral awards.

Recently, the International Arbitral Tribunal (Tribunal) under the Belarusian Chamber of Commerce and Industry made several arbitral awards against Austrian debtors. This has made it relevant to develop a protocol of legal action to secure recognition and enforcement in Austria of the awards of the Tribunal, given the absence of relevant case law and the fact that such recognition is being sought for the first time.

Application of the 1958 New York convention

The main benefit of the 1958 New York convention is that it is applicable to relations between parties even when the jurisdictions of the parties to the arbitration process have no arrangements for mutual recognition of the decisions of the national courts. For Austria, the New York convention entered into force on 31 July 1961, without reservations or exceptions. At present, 156 states are party to the said convention[1]. In addition, the Republic of Belarus (a party to the New York convention since 13 February 1961), similar to several other countries of the former Eastern Bloc (Bulgaria, Lithuania, Romania, Czech Republic, Slovakia, Russia, Ukraine and Vietnam) applies the provisions of this convention in respect of the arbitral awards made in the jurisdictions of non-contracting states to the extent to which they grant reciprocal treatment. This broadens the applicability of the New York convention, making it a truly universal instrument.

Another significant benefit of the New York convention is that it provides for a significantly faster process of enforcement of arbitral awards, as compared to a much more complex enforcement procedure for court decisions under the provisions of mutual legal assistance treaties. The New York convention is applied extensively to relationships among legal persons in the European Union, *despite a high degree of harmonisation of commercial law, the existence of a single judicial registry (based at Eurojust), and automatic recognition of decisions of all courts across the EU as valid and directly enforceable throughout the EU.*

[1] Convention on the recognition and enforcement of foreign arbitral awards (New York 1958) [Electronic resource]. URL: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards (date of access: 28.05.2020).

Filing a motion for recognition and enforcement of a foreign arbitral award

In Austria, the proceedings in respect of a foreign arbitral award, including of the International Arbitral Tribunal under the Belarusian Chamber of Commerce and Industry, begin with the submission of a motion for recognition (*Antrag auf Vollstreckbarerklärung*) and a motion for enforcement (*Exekutionsantrag*). Austrian procedural law does not treat submission of these two motions as separate actions, and permits both to be submitted simultaneously. To simplify and speed up the proceedings, a court will make a single determination in regard to both motions. Austrian courts also accept motions for enforcement of foreign arbitral awards in respect of interim measures.

If deficiencies are found in one or both motions the court will, as a general rule, suspend examination of the motion and set a time limit for such deficiencies to be remedied. In real estate disputes, which are subject to more stringent formal requirements, deficiencies of form may be irremediable, resulting in the motion being rejected by the court. The motion may be resubmitted subject to payment of a new judicial stamp duty. Because of the high value of real estate properties, lawyers should pay careful attention to detail in the preparation of the motions to avoid unnecessary and significant legal costs.

For real estate cases, the jurisdictional court is the cadastral court (*Grundbuchsgericht*) at the location of the real estate object, and for all other cases the district court (*Bezirksgericht*) at the location of the debtor is the competent authority. In the latter case, the value of the claim is not of essence, and may amount to millions euros.

Multiple claims in respect of one debtor are satisfied, ceteris paribus, in the order of submission. Where recovery proceedings are instituted against an object of real estate, a number of details should be born in mind. Specifically, when filing for enforcement against a debtor who possesses movable and immovable property, the relevant motion may be submitted to a district court (*Bezirksgericht*) at the location of the debtor and or to the cadastral court (*Grundbuchsgericht*) at the location of the immovable property. However, because the jurisdiction of the cadastral court is governed by a special law, and courts will abide by the principle *lex specialis derogat lex generalis* (special law repeals general law), district courts will forward the motion for recovery against real estate to a cadastral court. In this event, the date of submission of the motion will be date of its transmission to the cadastral court, not the date of its original submission to the district court. The time between the two dates may be quite significant, which may affect the order of the satisfaction of the plaintiff's claim.

Formal criteria applicable to an award for which enforcement is sought

The 1958 New York convention puts forth a set of formal requirements for an award to be enforced. Despite the existence of over 50 years of practice in the application of the New York convention, it has thus far not been possible to agree on a uniform approach to the definition of a duly executed arbitral award. Specific approaches and interpretations vary depending on the established case law, and will be examined here in greater detail.

Authenticated arbitral award. Pursuant to subpara a of Art. 4 of the New York convention, the party applying for recognition and enforcement shall, at the time of the application supply a "duly authenticated arbitral award or a duly certified copy thereof". In accordance with part 2 of para 614 of the ZPO, the arbitral award and the arbitrage agreement are supplied only at the request of the court, which in practice is made in almost every case. In an overwhelming majority of proceedings, the signatures of arbitrators are authenticated by the arbitration court itself [2, p. 78]. All the other options referred to in subparagraph *a* of Art. 4 of the New York convention involve significant costs, and are rarely used in practice.

As a general principle, the signatures of the arbitrators are authenticated by the chairman of the court of arbitration, but his authority to do so should be clearly stated in the constituent documents of the arbitral tribunal, i. e. the statute or the rules of procedure. Provisions empowering the chairman to perform such authentication are contained in Art. 39 part I of the Regulations of the Tribunal. A decision of the Tribunal is authenticated by affixing a stamp thereto the official stamp of the court, which is equivalent to the authentication procedure and conforms to the criteria applied in practice in Austrian case law [3, p. 364].

Requirements in respect of authentication of the text of the arbitral award are not established exclusively by Austrian law; the law of the jurisdiction in which the original award was made is also taken into account. In practice, this requirement can be satisfied simply by following the domestic process of apostillation consistent with the Hague convention of 1961[2]; at the same time there is no specific requirement in Austrian law for notarization/apostillation of the signature of the officer who authenticated the signatures of the arbitrators [1, para 79 EO Rz. 574].

[2]Convention of 5 October 1961 abolishing the requirement of legalisation for foreign public documents [Electronic resource]. URL: https://www.hcch.net/en/instruments/conventions/full-text/?cid=41 (date of access: 28.05.2020).

Translation into German of the award or a certified copy thereof must be made by a sworn translator assigned to a specific court. A current roster of translators from Russian into German can be consulted at the website of the Austrian Union of Sworn and Certified Translators[3]. However, there is no requirement to use a sworn translator to translate a large body of other relevant documents, and have the translation notarized, enabling the claimant to avoid substantial judicial costs. The court may, at its discretion, permit the use of other providers of translation services with sufficient fluency in the German language and knowledge of legal terminology.

Grounds for refusal of recognition and enforcement (Art. V of New York convention)

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that (Art. V part I New York convention):

(a) the parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the term of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement are sought finds that (Art. V Part II New York convention):

(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) the recognition or enforcement of the award would be contrary to the public policy (*ordre public*) of that country).

In summary, Art. V of New York convention provides for two types of reviews to which foreign arbitral awards are subject: post-hoc review within the jurisdiction where the award was made, and ex-ante review in the state of its enforcement. Because the court of the first instance uses a written procedure (that does not involve questioning the claimant or the defendant) and makes its decisions based on the case documents available to it, the presence of the grounds for refusal referred to in Art. V part I of New York Convention cannot be verified at this stage; therefore, this provision of the convention is not applied. Such verification can only be possible at later stages in the presence of both parties and depends on the circumstances of the specific case.

Cases, where the subject matter of the difference is not capable of settlement by arbitration under the laws of the country where recognition and enforcement are being sought (referred to Art. V part II lit. a of New York Convention) are very rare. Indeed, it would be hard to conceive of any situation in the relationship between parties from Austria, Belarus, or any other jurisdictions belonging to the European legal tradition. In its first decision to grant recognition and enforcement in the case of the Belarusian claimant, Private Unitary Enterprise "A" against the company "B AG", the Austrian court of appeal did not refer to the grounds for refusal listed in of Art. V part II lit. a) of New York convention, and consequently did not verify the presence of these grounds.

Verification for consistency with public policy (ordre public), Art. V part II lit. b of New York convention

The court of the jurisdiction on which enforcement of an arbitral award is being sought shall verify its consistency with domestic policy (*ordre public*) independently, i. e. irrespectively of the existence of grounds for the overruling of the award on appeal in the jurisdiction where it was made. Any such grounds may be declared by the party against whom the award is involved at any stage in the hearing by the arbitral tribunal before or after submission of such award to a foreign court.

[3]Die Liste der Gerichtsdolmetscher Österreichischer Verband der allgemein beeideten und gerichtlich zertifizierten Dolmetscher [Electronic resource]. URL: http://www.gerichtsdolmetscher.at/index.php/de/com-ponent/content/article?id=55&country=912. http://www.gerichtsdolmetscher.at/index.php/de/component/content/article?id=55&country=912(date of access: 28.05.2020).

Consistent with the established practice, an Austrian court is precluded from questioning, under the pretext of verifying consistency with public policy, the factual basis of the award or compliance with the due process or material provisions of the law of the jurisdiction where the arbitral award was made. Austrian courts are precluded from reviewing the substance of an award rendered by a foreign arbitral tribunal (prohibition of revision au fond)[4]. The findings of a foreign arbitral tribunal may only be reviewed to establish whether they are in direct contradiction to the Austrian *ordre public*.

One aspect of such autonomous review for consistency with public policy is conformity of the arbitral award with the fundamental principles of Austrian law. Where an award of a foreign arbitral tribunal is grounded in a legal doctrine that is fully contradictory to the Austrian *ordre public*, an Austrian court may refuse recognition of the foreign arbitral award. Such decisions may be made only in the most extreme cases, so the international *ordre public* may not be put in jeopardy. Moreover, contradiction of a foreign legal provision or a legal relationship with a foreign party to contradict to the Austrian legal order does not constitute sufficient basis for such decision per se; the court will also needs implementation of such provision or relationship in domestic law be fundamentally unacceptable[5].

The fundamental principles and provisions of Austrian law that constitute the Austrian *ordre public* refer mostly to the principles and provisions of the Federal Constitution and also to the fundamental principles of criminal, private and procedural law. Conformity with public policy, in this case, does not refer to the process or reasoning behind a foreign arbitral award, but rather the legal implications of such award[6].

Violation of due process as inconsistency with public policy

The final and subsidiary grounds for refusing recognition of an award is its inconsistency with European (supranational) public policy established by the procedural safeguards contained in Art. 6 part I of the European convention on human rights and fundamental freedoms of 1951 (right to fair trial). The said article has had a profound effect on the development of the procedural standards in all European *ordres publics*. The Republic of Belarus has not ratified this convention to date, although this should not be construed as to its non-compliance with the principles of due process. Similarly, being a party to the European convention of human rights and fundamental freedoms is not a guarantee of an arbitral award's conformity with the European standards of due process. The primary consideration in this regad should not be the procedural arrangements, but rather the circumstances in which specific award was made. Of greatest relevance are guarantees of independence and impartiality of a court, respect for the procedural equality of the parties and for the right of each party to present their case to the court. Moreover, not every violation of the procedural order in the jurisdiction where the award was made, or inconsistency with the procedural order of the state where recognition is sought will constitute a violation of the *ordre public*.

Under Austrian law, violation of the procedural *ordre public* occurs when the fundamental principles of due process have been violated, of which the most important are the right of each party to make clarifications on the case and present their position to the court[7]. In these examples, the procedural rights of the parties will have been grievously violated (*in unerträglicher Weise*), constituting grounds for invoking of Art. V part II lit. b of New York convention to refuse recognition of an arbitral award.

Conclusions and recommendations

Based on the results of this review, the following conclusions and recommendations may be proposed:

• one advantage of Austrian procedural law is that it enables a party seeking enforcement of a foreign arbitral award to file two motions at the same time – the motion for recognition and the motion for enforcement a foreign arbitral award;

• in real estate cases, which typically have high claim value, special attention should be paid to the rules of judicial and administrative jurisdiction over cases in order to avoid unnecessary legal costs and avoid being downgraded the order of the satisfaction of the claim where multiple claims have been made against a single debtor;

[4]3 Ob 221/04b [Electronic resource] // Das Rechtsinformationssystem des Bundes. URL: https://www.ris.bka.gv.at/Ergebnis.wxe?Suchw-orte=3+Ob+221%2F04b&x=0&y=0&Abfrage=Gesamtabfrage (date of access: 28.05.2020).

[5]RS0110743 [Electronic resource] // Das Rechtsinformationssystem des Bundes. URL: https://www.ris.bka.gv.at/Ergebnis.wxe?-Suchworte=RS-0110743&x=14&y=11&Abfrage=Gesamtabfrage (date of access: 28.05.2020).

[6]3 Ob 221/04b [Electronic resource] // Das Rechtsinformationssystem des Bundes. URL: https://www.ris.bka.gv.at/Ergebnis.wxe?Suchworte=3-+Ob+221%2F04b&x=0&y=0&Abfrage=Gesamtabfrage (date of access: 28.05.2020).

[7]3 Ob 161/09m/91 [Electronic resource] // Das Rechtsinformationssystem des Bundes. URL: https://www.ris.bka.gv.at/Ergebnis.wxe?Suchworte-=3+Ob+161%2F09m&x=9&y=13&Abfrage=Gesamtabfrage (date of access: 28.05.2020).

• authentication of the signatures of the arbitrators, performed by the chairman of the International Court of Arbitration at the Belarusian Chamber of Commerce and Industry, should be supported by translation and apostille of the relevant legal provision, notably, Art. 39 part I of the Regulations of the Tribunal which vests the chairman of the Tribunal with the authority to do so;

• where an Austrian court refuses recognition and enforcement of a foreign arbitral award on the grounds that the award would contradict public policy, it will not just establish a formal discrepancy of the arbitral award to the Austrian *ordre public*, but will also need to find that implementation such decision would be *fundamentally unacceptable* in domestic law.

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