

## Requirements concerning the form of arbitration agreements

In a recent judgement of 23. November 2009 the Munich Higher Regional Court (OLG) stated some interesting principals upon the requirements concerning the form of arbitration agreements. The court had to decide upon the following facts:

The respondent ordered from applicant the delivery of apricots. The applicant sent a confirmation of sale, which contained an arbitration clause, and delivered the goods. After the delivery the respondent sent a notification of defects of the goods and paid only a partial amount of applicant's invoice. The applicant initiated an arbitration proceeding claiming the outstanding amount. The respondent objected to the jurisdiction of the arbitral tribunal. The tribunal affirmed its jurisdiction and rendered an arbitration award ordering the respondent to pay the outstanding amount of the invoice.

The applicant filed an application before the Munich Higher Regional Court to declare the award enforceable.

The respondent objected to the declaration of enforceability arguing that the parties had not concluded an arbitration agreement. The Munich Higher Regional Court refused to declare the award enforceable and ruled that the award was not to be recognised in Germany. It held that a written arbitration agreement for the purpose of Art. II sub. 2 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) of 1958 did not exist.

The court argued that the unilateral confirmation of sale did not comply with the formal requirements of Article II sub. 2 NYC as it requires that an arbitration agreement is contained in documents that have been changed by the parties. A unilateral transmission of a document does not fulfil these requirements. The fact that the respondent notified the applicant of the defects of the goods on the confirmation of sale containing the arbitration clause was irrelevant. Article II sub. 2 NYC requires at least a formal congruence of the parties' will. This requires that - at least by means of interpretation - one must be able to deduce from the party's conduct that it actually intended to conclude an arbitration agreement.

However, in the present case such intend could not be established as respondent's correspondence after the conclusion of the contract was intended to notify the respondent on the defects of the goods. That respondent - for reasons of convenience - used the confirmation of sale containing the arbitration agreement was not sufficient to assume that respondent actually intended to conclude an arbitration agreement. Therefore the request of the applicant to have a French arbitral award declared enforceable was rejected by the Munich court.

For further information please contact:



**Michael Veltins**  
LSV Rechtsanwalts GmbH, Frankfurt  
info@LSV-Legal.com



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