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Beglaubigte Übersetzung aus der deutschen in die englische Sprache



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**Republic of Austria
District Court Floridsdorf**

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Please quote the file number
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in all filings.

In the case of plaintiff International Taekwon-Do Federation, Draugasse 3, 1210 Vienna, represented (according to the contents of the claim) by Mr. Paul Weiler, Malvenweg 27, D-51061 Cologne, represented by Mag. Werner Suppan, Huttengasse 71 – 75, 1160 Vienna, attorney at law, versus the defendants 1. Son U Chol, Draugasse 3, 1210 Vienna, and 2. Ri Yong Son, Draugasse 3. 1210 Vienna, both represented by Doralt Seist Csoklich, attorneys at law, Währinger Straße 2 – 4, 1090 Vienna, the District Court Floridsdorf issues, through judge Mag. Alexander Vragovic, the

O r d e r

for eviction

1.) The claim, defendants were guilty to hand over to plaintiff within 14 days the premises Draugasse 3, 1210 Vienna, free of chattel of their own property, failing which execution would take place, is dismissed.

2.) Plaintiff is guilty to reimburse within 14 days to defendants, jointly and severally, care of defendants' counsel, the cost of the proceeding ascertained at EUR 2,811.96 (including EUR 336.44 sales tax and EUR 792.80 cash expenses).

R e a s o n s :

Undisputed remains the fact that plaintiff is an association domiciled in Vienna with 121 Taekwon Do associations located in various countries worldwide as its members. It further remains undisputed that defendants in fact use premises in a building at 1210 Vienna, Draugasse 3 which is owned by plaintiff.

Plaintiff filed a motion to adjudicate defendant for eviction and alleged that defendant was using the abovementioned premises without authorization because there was no employment relationship existing between the parties. President of plaintiff was, following a directors' election held on 13.6.2003 in Warsaw (Poland) Mr. Tran Trieu Quan, vice president Mr. Paul Weiler and plaintiff's counsel had been granted power of attorney as such by the mentioned gentlemen.

Defendants denied this and alleged that plaintiff was not duly represented because neither Tran Trieu Quan was president nor Paul Wailer vice president of the association. In fact, following the election held on occasion of the extraordinary congress in Pyongyang (Korea) on 22nd September 2002, president of plaintiff was Mr. Chang Ung, the gentlemen Rhee Ki Hi, Pak Si Ung, Jurij Kalashnikov and Hwang Kwang Sung were vice presidents of ITF and thus authorized to represent the association. This election of the directors of ITF had been held on occasion of the obsequies for the late founder of ITF, general Hong Hi Choi. General Hong Hi Choi is said to have stated on occasion of a visit of top officers of ITF during the second week of June 2002, with more than half of the executive committee said to have been present, that Mr. Chang Ung was a worthy successor of his ITF presidency. The officers present had assured to respect and implement this wish of their teacher and master. When this had been read before the 75 members of the association present during a meeting held on occasion of the obsequies, these persons had adopted a resolution by standing acclamation, electing Chang Ung as president. The validity and the result of the extraordinary congress had also been reconfirmed on occasion of the meeting of the ITF Board of Directors held in Vienna on 16th November 2002. In case of a resignation of an elected member of the Board of Directors, it could co-opt a substitute member. This co-opted member was the to be confirmed in office by the next general meeting in accordance with the by-laws of the ITF. On occasion of this convention, the former interim president Russel McLellan had stated to Mr. Chang Ung that he would resign from his office in order to offer Mr. Chang Ung a better position vis a vis the Board of Directors as president. Following this, this Board of Directors had co-opted Mr. Chang Ung as president of ITF. The resolution to co-opt Mr. Chang Ung as president of ITF had been confirmed by the members of the general meeting held in

Thessalonica (Greece) on 12th June 2003. 88 members had participated in this general meeting so that there was a quorum of this general meeting. The directors' election alleged by the persons appearing here for plaintiff to have been held in Warsaw (Poland) on 13.06.2003, however, had not been valid because there was no quorum of a general meeting. The number of one third of the members authorized to vote, necessary for a quorum in accordance with the by-laws of the association, had not been present, as only 34 of the 121 members were present. Also, on basis of § 10 para 4 of the by-laws of the association, only the Board of Directors of the association was authorised to call for a general meeting. This had not been the case, because at that time Mr. Chang Ung had already been president of the ITF and therefore he was the only person who could call for a general meeting with legal effect, because in accordance with § 10 para 2 the president was to decide on place and time of such a meeting. Also, invitations to this congress had not been duly sent out because the invitations had been sent out on a selective basis and not to all members authorized to vote.

Plaintiff denied this and contended on his part that precisely on occasion of the memorial service for General Choi no general meeting of the ITF had been called for. In fact Mr. Tran Trieu Quan was the president of the ITF, Mr. Paul Weiler was vice president and Mr. Thomas McCallum was secretary general, as elected by the members present during the ordinary general meeting held in Warsaw on 13.06.2003. A confirmation of Mr. Chang Ung as president of ITF on the Thessalonica congress following the Pyongyang election had not been possible at all because this congress had not been a duly held general meeting of ITF, for which invitations had been sent out in due time and process. The invitations sent out on that occasion had no legal effect, having been signed by Mr. Chang Ung who at that point in time had not been president of the ITF.

Evidence was taken by examination of both defendants and of witness Thomas McCallum as well as by inspection of the documents submitted: extract of the associations' register dd. 24.06.2003 (./A), power of attorney for plaintiff's counsel by Tran Trieu Quan, (./B), power of attorney for plaintiff's counsel by Paul Weiler (./C), certificate of existence and by-laws of plaintiff dd. 23.6.1986 (./D), land register extract (./E), Sworn Statement Norman Bernard (./F), letter Norman Bernard dd. 16.01.2003 (./G), letter Master Leong Wai Meng dd. 10.10.2002 (./H), letter from Russell Maclellan dd. 31.10.2002 (./J), letter from Clint Norman dd. 26.11.2002 (./K), declaration of Polish Taekwon-Do Association dd. 22.01.2003 (./L), letter from ITF German dd. 06.03.2004 (./M), letter of ITF Austria dd. 01.03.2004 (./N), excerpt from e-mail by Tadeusz Loboda (./O), registration of the Australian delegates dd. 11.02.2003 (./P), invitation dd. 16.03. 2003 (./Q), repeated invitation dd. 17.03.2003 (./R), registration of Yugoslavian delegates (./S), registration of delegates from

Germany (/T), agenda of the congress (/U), printouts of forwarded e-mails with invitations to world congress (/V), omnibus volume invitation of Polish Taekwon-Do Association including exhibits (/W), dispatch receipt and postage invoices in Polish language (/X), one omnibus volume containing copies of translations from the English language (/Y), copies of certified translations from the English language (/Z), list of delegates to the 14th congress (.AA), one list of persons present (.AB), minutes (.AC), English translation of an Austrian lawyer's power of attorney for plaintiff's counsel (/AD), the action for arbitration filed by the Korean Taekwon-Do committee dd. 12.01.2004 (/AE), printout of a fax dd. 18.11.2002, signed by witness McCallum, addressed to the first defendant Son U Choi (/AF), two letters from Russell MacLellan on stationary of lawyer's office Merrick & Holm dd. 25.03.2004 including certified translation into the German language (/AG), certified translation of a letter dd. 26.11.2002 from Sri Ung Pak on behalf of plaintiff addressed to the Police for Associations (/AH), a letter from Tran Trieu Quan and Pablo Trajtenberg dd. 18.11.2002 to Thomas MacCallum (/AI), letter from Thomas MacCallum to G. Stylianides (/AJ), letter from Pablo Trajtenberg dd. 08.11.2002 (/AK), printout of an e-mail dd. 07.11.2002 to Thomas MacCallum (/AL), omnibus volume containing registration forms for the general meeting of plaintiff in Warsaw originating from various countries (/AM), plaintiff's by-laws dd. 7.4.1988 (/1), extract from register of associations dd. 2.10.2002 (/2), note for Ung Chang dd. 9.5.2002 (/3), invitation for memorial service for general Choi Hong Hi dd. 12.7.2002 (/4), list of members of plaintiff dd. 20.9.2002 (/5), minutes of special congress of plaintiff dd. 22.9.2002 held in Pyongyang (/6), resolution of Board of Directors of plaintiff dd. 16.11.2002 (/7), invitation for Board of Directors meeting dd. 29th October 2002 including personal invitations and dispatch confirmations (/8), extract from register of associations dd. 24.1.2003 (/9), summary employment contract of defendant Son U Chol (/10), payroll slip for Son U Chol (/11), confirmation on use of apartment for Son U Chol (.12), summary employment contract of defendant Ri Yong Son (/13), confirmation on use of apartment for Ri Yong Son (.14), payroll slip for Ri Yong Son (/15), letter from Leo Wai Meng dd. 20.11.2002 in certified translation (/16), list of participants in congress held in Thessalonica including certified translation (.17), list of members and addresses of plaintiff including certified translation into the German language (/18), letter from Phap Lu to Chang Ung dd. 13.03.2004 including translation into the German language (/19), letter from All Europe Taekwon-Do Federation dd. 14.03.2004 including certified translation (/20), letter from Leong Wai Meng to the president of the IoC dd. 05.11.2003 (/21), affidavit of Leong Wai Meng dd. 14.03.2004 including translation into the German language (/23), resolution of the

congress held in Thessalonica dd. 12.06.2003 (/24) and by inspection of file 8 C 530/03b of the District Court Floridsdorf.

The following facts are established accordingly::

Plaintiff is an association under Austrian law (extract from the associations register ./12, ./14). On 22.9.2002 obsequies were held in Pyongyang for General Choi founder and – up-to his passing away – president of plaintiff. Immediately following the burial a meeting was held in which the representatives of altogether 43 member associations were present. A letter of general Choi was read in which the latter one called Chang Ung his worthy successor, following which Chang Ung was presented to those present. Everybody present then rose and applauded, what in any case was interpreted by the members of the various member associations present as a declaration of intention that in fact Chang Ung was to become the new president of the ITF (letter from great master Wai meng to Jacques Rogge ./21). Subsequently this meeting was also called “special congress” of plaintiff (invitation for the memorial service for general Choi; minutes of the special congress of Pyongyang dd. 22.09-2002 ./6). On 16.11.2002 plaintiff held a Board of Directors’ Meeting in Vienna. On that occasion a resolution was adopted to co-opt Chang Ung as member of the Board of Directors of plaintiff, specifically as president (./7).

Subsequently two meetings were held in June 2003, each one of which having been considered and called by the parties to be a general meeting and congress respectively of defendant. On 12.6.2003 a congress was held in Thessalonica (minutes of the Thessalonica congress dd. 12.06.2003 ./24). During this congress the representatives of 88 country associations (members) authorized to vote were present (list of participants of the Thessalonica congress held on 12.06.2003 ./17). It was on that occasion that the appointment of Chang Ung as president of defendant was confirmed on basis of a majority resolution, appointment which consequently is said to have taken place already during the Pyongyang meeting held on 22.9.2002 (/24).

Another meeting took place in Warsaw on 13.6.2004, called by those present there world championship and general meeting of defendant. A total of 50 organizations was represented there, of which however only 34 were representatives of members, meaning country organisations of plaintiff (comparison list of members of plaintiff ./18 and list of participants in the Warsaw congress held on 13th June 2003 ./AB). Invitations for this congress had been sent out during November 2002 by e-mail to about half of the country organisations. These e-mails were sent out by Thomas McCallum, who up-to his removal from office adopted in a resolution of the Board of Directors meeting held on 16.11.2002 (./7) had been managing secretary general of plaintiff.

In accordance with the by-laws submitted (. /1), in accordance with § 10 para 2 of the by-laws an “ordinary board of directors meeting shall be called for every three years. The president shall decide on time and place of the ordinary meeting.” § 10 para 3 of the by-laws says: “The extraordinary Board of Directors Meeting shall take place upon written request of at least one third of all members authorized to vote in ordinary Directors Meetings. The president shall decide on the place where to hold the meeting, and he shall endeavour to meet the needs of the members to the maximum extent possible.”

In accordance with § 10 para 2 “a written invitation shall be served to members of the Board of Directors four weeks in advance for each ordinary as well as ordinary assembly. The postmark shall be sufficient proof for the date. The notification of the Board of Directors meeting shall be accompanied by the agenda to be dealt with on that occasion, and in case of an item of the agenda not mentioned there, the respective actions taken shall in any case be valid if the chairman of the assembly agrees with such request not previously notified.”

In accordance with § 10 para 6 of the by-laws “the congress meeting has a quorum if at least the majority of all delegates and not less than 1/3 of the associated organisations (except in case of exceptional circumstances) are present.

In accordance with § 12 para 3 “the Board of Directors may co-opt one of its members simultaneously also for another office which is free, however a person thus co-opted may exercise the respective office only as long until the congress appoints a new member of the Board of Directors. The ordinary meeting shall be called once each year by the president. Extraordinary meetings may be called for at any time upon request of at least one third of all members (or whenever the president considers it to be urgently required)”.

Defendants were in any case employees of ITF (summary employment contract of defendant Ri Yong Son . /10; payroll slip for defendant Son U Chol . /11; payroll slip for defendant Ri Yong Son . /13). There is an agreement between plaintiff and defendants to the effect that they are allowed to use parts of the premises in dispute for residential purposes for the duration of the employment (confirmation for the use of living space for Ri Yong Son . / 12). There is no evidence of any notice of termination of the employment contracts by a person authorised to represent plaintiff.

These facts established are based on the following evaluation of evidence:

The circumstances established are essentially based on the documents mentioned in parentheses. From these follows on the one hand the course of events in the meeting held in Pyongyang on 22.9.2002, on the other hand the further procedure on the part of the two factions formed thereafter within the ITF. It can be followed without any doubt that the procedure of those people predominantly of Asian and developing country origin who took

part in the Pyongyang meeting, was neither approved of nor considered legally binding by representatives of other, in particular West European, member countries. Further findings on the confirmation of the procedure chosen there by bodies incorporating without doubt also persons who had already been officers of plaintiff at an earlier point in time (Board of Directors) result from the respective documents quoted. The failure of the attempt of those country organisations of ITF who disagreed with this procedure, to adopt different resolutions by holding a general meeting in Warsaw, because the number of participants was not sufficient for a quorum, becomes obvious especially when comparing documents .AB and .18. It is obvious that the necessary presence and quorum was intended to be achieved by new country organizations, not known before, appearing at this congress, as well as completely different persons from those who so far had represented the country organizations. The statement of the witness McCallum was certainly characterized by the effort to evidence a continuity of plaintiff in his person, which in this form was inexistent. This became obvious especially by the fact that upon precise questioning on who were the persons present in Warsaw he had to admit that there was no check as to who represented which country organization on basis of which authorization. He then reduced the status of what he had earlier called a list of members of plaintiff, to be “private notes”, when his attention was drawn to the fact that it resulted in quite a number of inconsistencies with the persons participating in Warsaw.

Under the law, the facts established are to be evaluated as follows:

The capacity of a party to sue and be sued is a prerequisite for commencement of proceedings which in each phase of the proceeding is to be verified also ex officio. Basically, legal persons have no capacity to be a party in a proceeding, they can act only by their officers (Fasching, Textbook² margin note 351). The representation by properly elected and appointed officers of a legal person is therefore the prerequisite for commencement of a legal proceeding which must be verified if, as in this case, defendants plead for insufficient proper representation of plaintiff. In case of reasonable doubts such verification shall not be restricted to the mere score of the register (Stohanzl, Civil Procedure Code¹⁵ [2002] § 6 E 58).

The International Taekwon-Do Federation is a non profit association established on basis of the Austrian legislation governing associations. As such it is a legal person and in accordance with § 1 para 2 Associations Act has legal personality. Being a legal person, it is represented by its officers. They are, in conformity with § 3 para 2 subpara 7 Associations Act, in accordance with § 9 of the ITF association’s by-laws the Board of Directors meeting, the Board of Directors, the auditor, the executive committee and the arbitration tribunal. In accordance with § 14 para 1 of the association’s by-laws, the president, and in accordance

with § 14 para 2 in his absence the managing vice president, shall exclusively be authorized to represent the association.

It therefore had to be verified which of the presidential elections of the ITF that took place is legally valid. At first the meeting held in Pyongyang on 22nd September 2002 had to be examined if it was in a position to represent an election of the president. The by-laws are ambiguous with regard to § 10. It does not state any clear separation between the term of “Board of Directors meeting” and the term of “congressional meeting”. In accordance with § 10 para 6 of the ITF by-laws a congressional meeting has a quorum if not less than a third of the members authorised to vote are present. The ITF has 121 members. 43 members authorised to vote were present during this extraordinary meeting, so that it had a quorum for a congressional meeting. This stipulation of the by-laws has been construed to the effect that this congressional meeting then could be called for also by one third of the members. The defective formalia, that the members were not invited, explains itself initially by the Korean tradition to respect the wishes of the founder and grandmaster general Choi and to implement them at the earliest possible opportunity. These defective formalia however were repaired with the confirmation by the Board of Directors in Vienna on 16.11.2002 and by the resolutions adopted in the ordinary congressional meeting held in Thessalonica, as all 88 members authorised to vote opted for confirmation of the resolutions adopted in Pyongyang. The assumption to follow therefore was that in combination of these three proceedings Chang Ung is to be considered president of plaintiff and as such is, besides its vice president in accordance with §14 paras 1 and 2 authorised to represent the ITF. Plaintiff was therefore not represented by officers elected and appointed in conformity with the by-laws, therefore had no capacity to sue, so that the complaint was to be dismissed.

As furthermore no termination of the employment relationships with defendants – which undoubtedly existed at an earlier date – could be found, the complaint also would have had to be dismissed from the substantial point of view, because it is obviously a case of employee apartments not being used without legal title.

The decision on the cost is based on § 41 para 1 Civil Procedures Code. In accordance with § 41 para 1 Civil Procedures Code, the party losing the legal action shall reimburse to the opponent all costs of the proceeding necessary for suitable bringing of the action or defence.

District Court of Floridsdorf
1210 Vienna, Gerichtsgasse 6
Court department 12, dated 30.11.2004

Mag. Alexander Vragovic
For the correctness of the copy:
The head of the office department:
initials illegible m.p.

*I certify the exact conformity of the above
translation with the attached original
with reference to my oath.*

Vienna, 17th December 2004

*Die genaue Übereinstimmung der
vorstehenden Übersetzung mit dem angehefteten
Original bestätige ich unter Berufung auf meinen Eid.*

*Wien, am 17. Dezember 2004
eg*

