

Recognition and Enforcement of Annulled Foreign Arbitral Awards

An Analysis of the Legal Framework and its Interpretation in Case Law and Literature

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A. Introduction

I. International Arbitration Today

Today's growing inter-connectedness of the global economy frequently involves business transactions with different legal cultures, which usually entail unfamiliarity and disproportions when at least one party is reliant on foreign legal and court systems. In the course of the last few decades, international arbitration has increasingly developed from a remedy for only "the happy few" to an ordinary means of adequate dispute resolution for such complex contractual relations. International arbitration provides parties with a neutral forum, a specialised and independent panel, and the opportunity to conduct proceedings in an agreed language and little court intervention. International arbitration also provides for them easy and efficient enforcement of the resulting award.

Another particularity of international arbitration is that distinct subject matters may be governed by different systems of law. However, the determination of the applicable law, as will be demonstrated, is a fairly debated issue among arbitration practitioners and scholars. Generally speaking, the term "applicable law" may refer to the following legal matters: (i) the main contract; (ii) the arbitration agreement; (iii) the parties' capacity to lawfully enter into an arbitration agreement; (iii) the arbitration proceedings, including the capacity and jurisdiction of the arbitrators, time limits, interim judicial assistance and the form, validity and finality of the award; and (v) the enforcement of the resulting award.

Achieving quick, easy and broad satisfaction of the awarded claims is actually the "overarching goal" of parties entering into international arbitration.¹ In the event the losing party fails to comply with the award, the prevailing party must be able to resort to an effective regime and support of state authorities in order to obtain satisfaction from the awarded claims. With enforcement usually being targeted at the losing party's assets, detecting such assets is essential at the outset because the parties are frequently "global players", with assets most likely spread

1 Lew, Proof of the Applicable Law in International Commercial Arbitration, in Festschrift für Otto Sandrock zum 70. Geburtstag, Berger/Ebke/Elsing/Großfeld/Kühne (eds.) (2000), 585.

over different states, and most likely states other than the forum state. Therefore, the arbitral award must be recognised and enforced abroad, particularly in the state where the assets are located.

II. Need for Free Circulation of Arbitral Awards

It is essential that the award be brought forward from the legal jurisdiction in which it was issued (“forum state”) and enforced in another legal jurisdiction where the losing party’s assets are located (“addressee state”, “enforcing state”). Such portability is deemed to be “one of the most important features”² of an award rendered in international arbitration and is, beyond the scope of national legislation, predominantly governed by bi- and multilateral treaties aiming to connect national legal orders for creation of an intertwining effective arbitration regime. In view of the variety of such treaties, and the particular impact of the 1958 *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (discussed in detail below), arbitral awards are widely enforceable.³

1. Substance of Recognition and Enforcement

In the context of free portability of awards rendered in international arbitration, it is of basic importance to differentiate between recognition and enforcement, as do the majority of international treaties and national legal systems.⁴ Even though both recognition and enforcement are involved in giving effect to the award, recognition may be carried out without enforcement, while enforcement at the same time essentially involves recognition of the award by the court rendering the leave for enforcement.⁵ Thus it seems appropriate to distinguish between “recognition” from “recognition and enforcement”.⁶

2 See Redfern/Hunter, *Law and Practice of International Commercial Arbitration* (2004), para. 10-20.

3 Schütze, *Rechtsverfolgung im Ausland* (1998), paras. 247 et seq.; Öhlberger, *Vollstreckung ausländischer Schiedssprüche in Österreich und deren Formvoraussetzungen nach dem New Yorker Übereinkommen*, *SchiedsVZ* 2007, 77.

4 Haas, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, New York, June 10 1958, in Weigand (ed.), *Practitioner’s Handbook on International Arbitration* (2002), Article III para. 2.

5 Redfern/Hunter (2004), op. cit., para. 10-09 et seq.

6 *Ibid.*, para. 10-10. In the following treatise the term “enforcement” refers to ‘recognition and enforcement’ unless otherwise verbalised.

a) *Scope of Recognition*

Recognition implies the integration of the award into the legal system of the country whose court is recognising the award, and the extension of the *res judicata* effect to the concluded dispute.⁷ *Res judicata* refers to the finality of the present decision, precluding a novel reconsideration of the very subject matter between the identical parties.⁸

Generally speaking, the mere recognition of an arbitral award is a defensive measure, which is essentially carried out when the prevailing party in arbitration proceedings intends to retain the outcome and to prevent legal remedies against the award by requesting a court to identify the award as “valid and binding” on the parties.⁹

b) *Scope of Enforcement*

Enforcement, in contrast, is a rather offensive action – also identified as “the battle to turn that award into money”¹⁰ – providing not merely for the recognition of the legal force and effect of the award, but also ensuring its performance through the available legal channels.¹¹ A court considering an award as suitable for enforcement implicitly recognises the award as valid and binding upon the parties (*res judicata*) giving rise to the approval of enforcement. In this context, the concepts of recognition and enforcement interact as mutual parts, giving ample legal effect to foreign awards.¹²

7 Haas (2002), op. cit., Article III para. 3.; Söderlund, *Lis Pendens, Res Judicata and the Issue of Parallel Judicial Proceedings*, 22 *J Int'l Arb* (2005), 303, noting that “most legislations in continental Europe explicitly provides that ‘the arbitral award is *res judicata* in relation to the dispute it resolves’” (e.g. Articles 1476 and 1500 of the French New Code of Civil Procedure, Article 1703 of the Belgian Judicial Code, Article 1059(1) of the Netherlands Code of Civil Procedure, Article 1055 of the German Code of Civil Procedure, whereas jurisdictions with common law tradition are rather “silent on the matter (as is, e.g. the case in Swedish law).”

8 For more detailed information on *res judicata* see Söderlund (2005), op. cit., 301-322.

9 See Redfern/Hunter (2004), op. cit., paras. 10-11; Haas (2002), op. cit., Article III para. 5.

10 Tannock, *Judging the Effectiveness of Arbitration through the Assessment of Compliance with Enforcement of International Arbitration Awards*, 21 *Arb Int* (2005), 83 with reference to Kaplan speech to the Franco-British Law Society in Paris in 2001, reproduced in 19 *J Int'l Arb* (2002), 170.

11 See Redfern/Hunter (2004), op. cit., paras. 10-11-10-12.

12 *Ibid.*, paras. 10-11-10-12; Fouchard/Gaillard/Goldmann *On International Commercial Arbitration*, Gaillard/Goldmann (eds.) (1999), para. 1667.

2. Relevant Legislation on Recognition and Enforcement

Recognition and enforcement of arbitral awards beyond the jurisdiction of the relevant home state is predominantly governed by regional and international bi- and multilateral treaties, which contribute to a fairly wide scope and progressive development of free circulation of international arbitral awards. Therefore the international recognition and enforcement of arbitral awards is more likely, compared to national judgements,¹³ whose international enforceability is not similarly promoted by an internationally effective regime, – with the exception of the European Council Regulation 44/2001, which provides for the enforceability of national court decisions in civil and commercial matters within Europe.¹⁴ Thus, the high likelihood of worldwide recognition and enforcement of foreign arbitral awards is in fact a major advantage of arbitration as a dispute resolution mechanism in international trade.¹⁵

Among the multitude of treaties, the June 10 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is of enormous importance.¹⁶ Another significant, though regional treaty is the European Convention on Commercial Arbitration of April 21 1961.¹⁷ In addition, several bilateral treaties have been concluded between states in order to grant mutual promotion and protection of the recognition and enforcement of their corresponding arbitral awards. The concurrence of all such treaties contributed to a remarkable standardisation of recognition and enforcement of arbitral awards by the early 1960s.¹⁸

13 Ibid., para. 10-17; Plaßmeier, Vollstreckung nicht „endgültiger“ Schiedssprüche – Zugleich eine Anmerkung zum Beschluss des BayObLG vom 22 .11. 2002 (SchiedsVZ 2003, 142), SchiedsVZ (2004), 234-237.

14 Schütze (1998) op. cit., paras. 247 et seq.; Horvath, What weight should be given to the Annulment of an Award under the Lex Arbitri? – The Austrian and German Perspectives, 26 J. Int'l Arb (2009), 251; Redfern/Hunter (2004), op. cit., para. 10-17 at fn. 30.

15 See *ibid.*, paras. 10-17.

16 The text of the New York Convention is available on http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html

17 The text of the European Convention is available on <http://www.jurisint.org/en/ins/153.html>

18 Horvath (2009), op. cit., 252.

3. Moot Case

Despite the multitude – or maybe due to the multitude – of national and international legislation on enforcement of foreign awards, curious situations may occur. For example:

An award rendered in an international arbitration proceeding in Vienna is subsequently challenged in the Austrian courts, and successfully set aside based on a violation of Austrian public policy. While such a result is as equally satisfying for the defending party, as disappointing for the initially prevailing party, the tides are turning when it comes to enforcement: While English courts may give credence to the Austrian annulment decision by deciding to reject the request for enforcement of the nullified award; German courts, in contrast, may grant enforcement to the nullified award and hence give effect to something that was once called a legal *nullum*.

But it may get even worse: A second arbitration proceeding on the same matter may be initiated in Austria, and this time the underlying party of the first arbitration may obtain an award in his favour – contradictory to the original award. Subsequently the party may try to have the second award enforced in Germany. However, German courts now would have to deny enforcement of the second, though effective award, simply because the original, though nullified award, was recognised before and hence became a *res judicata* capable of precluding any further adjudications on the very subject matter. Notwithstanding, the battle is not yet lost for the second award: the English court that previously refused to enforce the first award – and thus has no *res judicata* in the present matter – may now readily grant enforcement of the second contradictory award.

Accordingly, both parties of the arbitration were not only able to obtain an award in their favour, but were also granted enforcement of the merits. At first glance, this might appear as an exemplary win-win situation. But the opposite is true: Both parties lost in subsequent arbitration and underwent the related enforcement proceedings – their own achievements were thus swept away.

Such an outcome contravenes the common sense of justice. Parties calling for any kind of dispute resolution have a fair interest and need for a lawful and effective decision, only open for a review by a higher level of jurisdiction, but not for contradictory findings on a parallel level, that is furthermore equally enforceable. Obviously, recognition and enforcement of arbitral awards notwithstanding their previous annulment by a foreign court is a complex issue.

As for the introductory moot case it is, in fact, improbable that an award violating Austrian public policy will “pass muster” in Germany due to several similarities between the German and the Austrian legal orders. But the illustrated constellation may as well involve states whose legal systems and concepts of public policy are significantly different and therefore more difficult to reconcile.

4. Purpose of the Subsequent Examination

The demonstrated feasibility to enforce arbitral awards notwithstanding a previous annulment by competent courts in the forum state has been identified as “one of the most hotly debated subjects” in international arbitration.¹⁹

The purpose of the subsequent thesis is to trace the origins of such remarkable outcomes in enforcement decisions. The examination therefore begins with the leading international treaties affecting recognition and enforcement of foreign arbitral awards, continuing with their complex interplay on the highly controversial phenomenon of recognition and enforcement of set aside awards.

Since the USA and West-Europe rank among the major venues for international arbitration,²⁰ the examination is subsequently aimed at the distinctive case law of predominantly French, U.S. American, Austrian and German courts entailing a study of the underlying conflicting concepts of the role of the arbitral seat as to the validity of arbitral awards. At the end it is attempted to point out feasible improvements towards harmonisation of the presently inconsistent case law.

19 Gaillard, *The Representation of International Arbitration*, 238 *New York Law Journal*, 4 October 2007.

20 Webster, *Evolving Principles in Enforcing Awards Subject to Annulment Proceedings*, 23 *J Int'l Arb* (2006), 205.