Recognition and Enforcement / setting aside of arbitral awards

Prof. Dr. Ulrich Haas
(1) Recognition and Enforcement
- effects -

Effects of an award
- enforceability

Foreign Arbitral Award
- res iudicata
- altering a legal relationship
- preclusive effect

conferred upon award by foreign arbitration law

Order of enforcement
(contains implicit recognition)

recognition

effects / procedure / conditions

Nostrification theory

Extension of effect-theory

Effects of an award conferred upon award by foreign arbitration law

(1) Recognition and Enforcement

Effects of an award
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Order of enforcement
IPRG 194
NYC

Lugano Convention (Art I II Nr. 4)
Scope of application of the NYC (Art I)
Rules applicable to the procedure (Art III, IV)

recognition

effects / procedure / conditions
Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958 (NYC)

- Became effective on 7 June 1959

- 156 parties (as of April 2016) “perhaps the most effective instance of international legislation in the entire history of commercial law”

- predecessors: Geneva Convention (1927) and Geneva Protocol (1923)
  - limited field of application
  - heavy burden of proving prerequisites for the enforcement

- 1953 ICC submitted a proposal for a convention to ECOSOC of the United Nations

- 1954 an ad hoc Committee was set up

- presented its draft to ECOSOC / member states and organisations for comments

- conference was convened from 20 May – 10 June 1958 and was attended by representatives of 45 nations

(1) Recognition and Enforcement - scope of application -

Art I (1): This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

**How to determine the situs of an arbitration?**

M1: determines by adjective criteria (party autonomy / agreement of the parties) plus is not necessarily identical with venue of the arbitration. Venue may, however, have incidental value in case of no express agreement by the parties

M2: place where award is perfected (British Courts): “A document is made when and where it is perfected. An award is perfected when it is signed.”

**Foreign arbitral award**

- Alt. 1: territorial principle
- coincidental results
- mod. means of communication
- appl. law to finalize act
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Recognition and Enforcement

**Recognition and Enforcement**

- No domestic domicile
- Written agreement
- No indirect exclusions
- Manifest expression of parties’ will
- Partial waiver possible
- Art 6 ECHR

**Consequences?**
- Enforcement: procedure according to domestic law; conditions follow the NYC (restricted to Art. V – “by analogy”)
- Recognition: disputed (see language 192 (2))

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**Recognition and Enforcement**

**BGE (22.3.2007) 133 III 235**: A tennis player was a member of the Association of Tennis Professionals Tour (ATP). The latter organises and regulates the Men’s Pro Tour in the sport of tennis. The regulations contain – inter alia – provisions for the fight against doping and a CAS-arbitration clause for all disputes between ATP and its members (tennis players). In addition the rules contain a provision whereby an appeal against the award is excluded (PIL 192). The tennis player tested positive for a doping substance and was sanctioned by the ATP. The sanction was appealed to CAS which – in part – upheld the sanction. The player appealed to the Federal Tribunal which – in a first step – had to decide whether the waiver according to PIL 192 was valid or not.
(1) Recognition and Enforcement
- scope of application -

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Alt. 1

Can the Convention be applied to „a-national awards“

Def. of an a-national award (floating award)

Interpretation
- autonomous wording
- history
- systematics (Art. V(1) lit. a, V(1) lit. e)

Alt. 2

Foreign arbitral award

(1) Recognition and Enforcement
- scope of application -

Art. 1(3) When signing ... this Convention ... any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered commercial under the law of the State making such declaration.

* Rationale: the obligation to grant rights to another country that is not willing to do the same
* Point of attachment: only territoriality criteria (not Art 1 (1) 2nd alt.)
* Historical reasons
- lacunae?
* Formal or specific material examination (“on the basis of”)

Reciprocity reservation

Art 194 PIL

reservations not convincing
(1) Recognition and Enforcement - scope of application -

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Commercial reservation

reservations

rationale: differentiate between commercial / non-commercial matters

Problem: relationship between the two exceptions

(1) Recognition and Enforcement - scope of application -

Art. 1(1) This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal ...

(2) The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

awards

Note guidance on the term award
- parties to the dispute
- ad hoc tribunals / permanent tribunals

Characteristic elements of an award
- autonomous interpretation
- third party decision
- submission agreement
- extent of voluntary submission
- legal nature of dispute
- court-like proceedings / degree of authority
- content and effect of decision
Court of arbitration for Sport

- 1979: “Affaire des deux Chines”
- Federal Tribunal Matter „Gundel”
- 1994: reorganisation of the CAS

BGE 129 III 445, 454: third party

Court of Arbitration for Sport

IOC

CAS / TAS

ICAS

Panels
Divisions Art. S20
Court Office Art. S22
CAS, Art. S12
ICAS: Art. S2, S6
Example (third party decision)

- pool of arbitrators
- IOC
- ICAS
- CAS
- Court Office

BGE 129 III 445, 454:
- third party
- equal influence on constitution of panel
- structural and organisational independence
- financial independence

Example (voluntary submission)
(1) Recognition and Enforcement
- scope of application -

Art. 1(1) This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.

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Other forms of decisions? (expert determination; settlements, ADR, court decisions, court order of enforcement, interim relief by arbitration tribunal, procedural orders, partial award, award on costs, etc.)

Characteristic elements of an award
- autonomous interpretation
- third party decision
- submission agreement
- extent of voluntary submission
- legal nature of dispute
- court-like proceedings / degree of authority
- content and effect of decision

Lex fori / state of origin

(1) Recognition and Enforcement

- enforceability
- res judicata
- altering a legal relationship
- preclusive effect

conferred upon award by foreign arbitration law

IPRG 194
NYC

Order of enforcement

Effects/ procedure/ conditions

Scope of application of the NYC (Art I)

Rules applicable to the procedure (Art III, IV)
(1) Recognition and Enforcement - procedure -

Art. III: Each Contracting State shall recognize awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards than are imposed on the recognition and enforcement of domestic arbitral awards.

No special provision on procedure, but the following directives:
- no discrimination of foreign awards in favour of domestic
- rules of procedure may not derogate or undermine the conditions laid out in Art. IV-VI
- respondent must be granted right to be heard (see Art. V)

What belongs to „rules of procedure“?
- form of request, competent authority, manner in which proceedings are conducted, legal remedies, time limits, provisional enforceability, offset, counterclaim

(1) Recognition and Enforcement - procedure -

<table>
<thead>
<tr>
<th>Recognition: PIL 29 III</th>
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<tbody>
<tr>
<td>Enforcement</td>
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<tr>
<td>Money judgements: SchKG 67, 69, 74, 84 II, 81 III</td>
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Like foreign court decisions, BGE 101 p 521 ff.

No res judicata
(1) Recognition and Enforcement - procedure -

- Recognition: PIL 29 III
- Enforcement
  - Like foreign court decisions, BGE 101 Ia 521 ff
  - Money judgements: SchKG 67, 69, 74, 84 II, 81 III
  - Other judgements: ZPO 341

- Recognition: PIL 29 I
- Enforcement: PIL 28, 29 I

No res iudicata

res iudicata
(1) Recognition and Enforcement - conditions -

Art. IV (1) To obtain the recognition and enforcement ..., the party applying for recognition and enforcement shall, at the time of the application, supply:
(a) The duly authenticated original award or a duly certified copy thereof;
(b) The original agreement referred to in article II or a duly certified copy thereof
(2) If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Art. IV regulates the evidence to be provided by party availing itself of the award:
- conditions are exhaustive (see Art. III)
- dispense from requirements? rules of evidence?, relation with Art. V

Art. IV (1) lit. a: evidence that award was made
Art. IV (1) lit. b: evidence that arbitration agreement exists
- problem if arbitration agreement by exchange of letters
(1) Recognition and Enforcement - conditions (Art. V) -

Art V (1): grounds upon request

Exhaustive grounds (BGE 108 Ib 85, 87)
- problem: court discretion? "may"
- burden of presentation and burden of proof (V(1), V(2) – relationship to IV)
- waiver of grounds (beforehand/after the award)
- preclusion because no appeal was filed or appeal against award dismissed ex tempore (Art 2 ZGB)
- partial recognition / enforcement
- no révision au fond
- Art. VII NYC (more-favourable-right provision)
  * lex posterior derogat legi priori
  * application ex officio
  * cherry-picking-theory (BGE 110 Ib 191, 194)

Art V (2): grounds considered sua sponte

Art V (1): grounds upon request

(1) Recognition and Enforcement - conditions (Art. V (1) lit. a) -

Formal validity, Art. II (2)

Law applicable to conclusion and validity (lit a 2nd alt), not arbitrability?

Subjective arbitrability lit a 1st alt

Conflict of law rule lex fori (authority, extension to third parties, etc.)

minimum content, Art II (1) lit a 1st alt
(1) Recognition and Enforcement
- conditions (Art. V (1) lit. e) -

"no longer binding"
- limitation periods
- setting aside by competent authority
- standard for setting aside procedure?
- see also Art VI

Effects of an award

"Non-binding"
- Which law decides upon "binding effect"?
- when does award become binding
  (enforceable in country of origin, ordinary measures of relief)

Foreign Arbitral Award

conferred upon award by foreign arbitration law

Art. 1504 NCPC

(1) Recognition and Enforcement
- Private enforcement -

Dispute arises
Initiation of arb proceedings
award
Non-compliance with award
sanction by International Federation
Initiation of arb proceedings
award

FIBA Rules: "In the event that a party ... fails to honour a final award ... (the "first party") ...
..., the party seeking enforcement of such award (the "second party") shall have the right to request that IF sanction the first party. The following sanctions can be imposed by the IF:
a) a monetary fine of up to EUR 100.000 ...; and/or
b) withdrawal of license if the first party is a player's agent; and/or
c) a ban on international transfers if the first party is a player; and/or
d) a ban on registration of new players and/or a ban on participation in international club competitions if the first party is a club.
The above sanctions can be applied more than once."
(1) Recognition and Enforcement
- Private enforcement -

Dispute arises → Initiation of arb proceedings → arbitration → award → sanction by International Federation → Non-compliance with award → Initiation of arb proceedings → award

FT 4P.240/2006: “An appeal against an arbitral award is only successful, if the latter violates the ordre public. Whether the monopoly of a state to grant enforcement is part of the ordre public, ... can be left unanswered in the case at hand. In essence the arbitral award in dispute here is not dealing with the enforcement of a monetary claim. [The IF] ... does not assume powers ... like a state authority to enforce the monetary claim (eg attachment of debtor’s property, auction of debtor’s property / assets). The arbitral award in the case at hand does not concern measures of enforcement, but represents a disciplinary measure on the basis of association law ... to which the members submit voluntarily. The fact that within the sports environment these disciplinary measures may have enforcement-like effects ... is compatible with Swiss law.”

international club competitions if the first party is a club.
The above sanctions can be applied more than once.”

(2) Challenge and revision of the award

Grounds according to Art 190 (2) PIL (PIL 191, BGG 77)

exclusion grounds

Arbitral tribunal constituted irregularly
Arbitral tribunal wrongly accepts jurisdiction
Arbitral tribunal decides ultra / infra petita
Violation of due process
Violation of public policy

Final award, partial award, for preliminary award (as to substance/ competence BG (20.1.2010), see (para 3)

No automatic stay of enforcement (190(1)), see BGG 103 f

Main difference: no appeal for violation of the rules applicable to the arbitration procedure (NYC V(1) lit. d

NYC V(1) lit d
NYC V(1) lit a
V(2) lit a
NYC V(1) lit c
NYC V(1) lit b
NYC V(2) lit b
NYC V(1) lit b
(2) Challenge and revision of the award

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Arbitral tribunal constituted irregularly

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Arbitral tribunal decides ultra / infra petita

Violation of public policy

Violation of due process

Exception: lit. b exclusive grounds

Nature of the appeal (cassatory) Federal Tribunal accepts jurisdiction

Federal Tribunal decides on the basis of the facts established by the arbitral tribunal (see BGG 105, BG (20.1.2010): no correction or completion sua sponte by the court even if established facts are manifestly wrong; facts can be only revised in light of grounds enumerated in Art. 190 (2) – in particular (d))
(2) Challenge and revision of the award

Grounds according to Art 190 (2) PIL (PIL 191, BGG 77)

- Arbitral tribunal constituted irregularly
- Arbitral tribunal wrongly accepts jurisdiction
- Violation of lis pendens, Bgs (20.1.2010)
- No conclusion of contract
- Non-observance of form requirements

(2) Challenge and revision of the award

Grounds according to Art 190 (2) PIL (PIL 191, BGG 77)

- Arbitral tribunal constituted irregularly
- Arbitral tribunal wrongly accepts jurisdiction

problem: arbitration clause by reference
(2) Challenge and revision of the award

Grounds according to Art 190 (2) PIL (PIL 191, BGG 77)

- Arbitral tribunal constituted irregularly
- Arbitral tribunal wrongly accepts jurisdiction
- Arbitral tribunal decides ultra / infra petita
- Violation of due process
- Violation of public policy

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express referral

„general“ referral?

* BG 4P.230/2000: „178 (1) does not require that the arbitration clause be included in the documents exchanged between the parties“.

General referral is – from a formal point of view – admissible

* BGE 110 II 54: not a formal question but rather a „material“ question, whether or not arbitration agreement was concluded is to be evaluated on the basis of all circumstances of the case

* BG 4A_548/2009: „le TE examine toutefois avec „bienveillance“ le caractère consensuel du recours à l’ arbitrage en matière sportive, dans le but de favoriser la liquidation rapide des litiges par des tribunaux spécialisés.“

Stanley Roberts  Dodo  Hadary  Busch
(2) Challenge and revision of the award

Def.: violation of ordre public (international) if award is incompatible with basic principles and values which are commonly recognised and should – from a Swiss perspective – form the basis of any legal order [BGE 132 III 389]

- material ordre public: is violated if award violates the basic principles of the applicable law to a degree that is incompatible with the generally accepted values and principles, eg BG (20.3.2008)

- Arbitral tribunal wrongly accepts jurisdiction

- Arbitral tribunal constituted irregularly

- Arbitral tribunal decides ultra / infra petita

- Violation of public policy

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- Pacta sunt servanda

- Principle of bona fide

- Abuse of law

- Discriminatory measures

- Protection of juridical incapable persons

- Violation of public policy

FT 27.3.2012 4A_558/2011