



# How can awards, determinations and court judgements in contractual matters be enforced, especially internationally?

Thomas Schmitz



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# General Overview

## I. Arbitral awards

1. Introduction to arbitration
2. International recognition and enforcement of foreign arbitral awards
  - a) The New York Convention, 1958
  - b) Other relevant conventions and treaties

## II. Court decisions

1. International recognition and enforcement of foreign court decisions
  - a) In the EC
  - b) Internationally
2. Conclusion

# I. Arbitral Awards – Introduction

**Arbitration is a legal technique for the resolution of disputes outside the courts where the parties to the dispute refer to one or more persons (arbitrators) by whose decision (award) they agree to be bound.**

# I. Arbitral Awards - Introduction

## Advantages of arbitration over court proceedings

- High degree of expertise
- Faster
- Cheaper and more flexible
- Non-public, generally
- Language eligible
- Limited possibilities for appeal
- Easier to enforce internationally

# I. Arbitral Awards - Introduction

## Facts and figures to highlight relevance of arbitration internationally

- Over 800 arbitration requests filed with the Arbitration Commission of the ICC in 2009
- ICC being one of many arbitration institutions around the world (others: AAA (US), LCIA (UK), HAKIAC (Hong Kong))
- Requests concerned over 2,000 parties from 128 countries
- Place of arbitration located in over 50 countries
- Arbitrators of 73 nationalities were appointed



High interest/need to enforce award internationally!

# I. Arbitral Awards - Enforcement

## The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) **New York Convention (NYC)**

### Art. I

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

# I. Arbitral Awards - Enforcement

- NYC is by far the most important international instrument on arbitration law
- As of September 2011, 146 countries ratified Convention, every significant commercial country included
- “Reciprocity” reservation: State will apply Convention only to recognition and enforcement of awards made in territory of another contracting state (i.e. USA, France, NZ and others)
- Countries such as Chile, Italy, South Africa and Germany have no such reservation
- USA applies NYC only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under national law

# I. Arbitral Awards - Enforcement

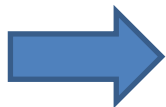
## Principle of favorability (Art. VII NYC):

Whenever bi- or multilateral treaties or national laws of the country in which enforcement is sought offer more favorable provisions in regard to enforcing a foreign award than the NYC, the applicant may rely on those provisions instead.

## Example:

Art. IV NYC: application must comprise authenticated original award, or certified copy thereof and translation if necessary

Sec. 1064 of the German Procedural Code: original or certified copy of award but no translation thereof



Thus when applying for enforcement of foreign award in Germany, Sec. 1064 is more favorable and no translation is needed



# I. Arbitral Awards - Enforcement

## How to enforce in practical terms

- Application to relevant court
  - Germany: higher regional court (OLG) within whose jurisdiction debtor is situated
- Submission of
  - Arbitral award or authenticated copy thereof
  - Arbitration agreement
  - Translations thereof if not in language of court
- Debtor is heard in regard to application

# I. Arbitral Awards - Enforcement

## Limitations to enforceability

- Party may object due to the following reasons: (Art. V para. 1 NYC)
  - Under applicable law party was under some incapacity
  - Agreement not valid under governing law
  - Party was not given proper notice and was thus unable to present case properly
  - Award does not fall under agreement
  - Tribunal not composed properly
  - Award not binding yet
  
- Court considers without party involvement: (Art. V para. 2 NYC)
  - Subject matter not capable of resolution by arbitration
  - Enforcement contrary to public policy/ordre public

# I. Arbitral Awards - Enforcement

## Public Policy/ Ordre Public

- concerns the body of principles underlying the operation of legal systems in each state
- Comprises social, moral and economic values, i.e.
  - Protection of property
  - Doctrine of evasion
  - Right to be heard
  - Alcohol consumption: arbitral awards referring to production or distribution of alcoholic beverages will not be enforceable in Iran or Saudi Arabia

# I. Arbitral Awards - Enforcement

## Other relevant conventions and treaties

- Geneva Protocol on Arbitration Clauses (1923): Albania, Bahamas, Brazil, Iraq, Burma, Pakistan
- Geneva Convention on the Execution of Foreign Arbitral Awards (1927): Anguilla, Bahamas, Burma, Pakistan
- European Convention on International Commercial Arbitration (1961): 32 member states
- Bilateral treaties normally refer to New York Convention



Due to little participation and supersession of the New York Convention, these treaties and conventions are of little use!

# I. Arbitral Awards - Enforcement

## Enforcement Problems/Risks

Difficulties arise if and when the award is revoked in the originating country but the initially winning party already applied for or even enforced the award:





- Radenska v. Kajo: Austrian High Court deemed revocation of award in Slovenia irrelevant for past enforcement
- Hilmarton v. Omnium: Dutch Court of Appeals recognized Russian award even though revoked
- Chromalloy Aeroservices v. Arab Republic of Egypt: US court recognized an Egyptian award even though revoked



Difficult to predict court reaction to revocation of award

# I. Arbitral Awards - Enforcement

## Conclusion Arbitral Awards

-  Easy to enforce thanks to New York Convention
-  Only limited defenses possible
-  Not limited to damages
-  Impact of revocation of award uncertain

# II. Court decisions - Introduction

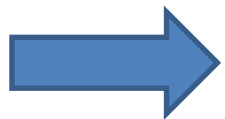
Since there is no treaty comparable to the almost globally applicable NYC the following treaties are relevant:

- Hague Convention on Foreign Judgments in Civil and Commercial Matters (1971)
- EC Council Regulation No 44/2001 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels I)
- EC Council Regulation No 805/2004 creating a European Enforcement Order for uncontested claims
- And other treaties

## II. Court decisions - Enforcement

### Hague Convention on Foreign Judgments in Civil and Commercial Matters (1971)

- Member states grant mutual recognition and enforcement of court decisions
- Only 5 member states: Albania, Cyprus, Kuwait, the Netherlands, Portugal



Of little use due to little participation



# II. Court decisions - Enforcement

## Brussels I Regulation

- Judgment given in EU is to be recognized in other EU countries without special procedure (Art. 33 I)
- Recognition granted automatically and only declined if: (Art. 34/35)
  - Contrary to public policy/ordre public
  - Defendant was served too late to prepare proper defense
  - Irreconcilable with decision of country where recognition is sought or with earlier judgment between the parties over the same matter

# II. Court decisions - Enforcement

## Brussels I Regulation (cont'd)

- Court may stay proceedings if appeal has been lodged (Art. 37)
- Enforcement:
  - Application necessary to competent authority, named in Annex III of Brussels I Regulation
  - Procedure governed by law of member state in which enforcement is sought
  - Party against whom enforcement is sought is not heard during proceeding, but may appeal enforcement decision

# II. Court decisions - Enforcement

## Regulation No 805/2004 creating a European Enforcement Order for uncontested claims

- Automatic recognition and enforcement
- No grounds for refusal
- Applicable in civil and commercial matters
- Applicable in all member states (except Denmark)
- Only if claim is uncontested, i.e.
  - court settlements, default judgments, acknowledgement of debt or
  - debtor never contested claim during proceedings

## II. Court decisions - Enforcement

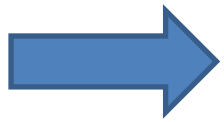
- If no treaty or convention is applicable, law of the country where enforcement is sought determines whether recognition and enforcement are granted
- Generalizations difficult to make, some common criteria might be
  - Proper jurisdiction of foreign court over defendant
  - Proper service of documents to defendant
  - Proceedings are not tainted by fraud
  - Proceedings did not offend public policy/ordre public

## II. Court decisions - Enforcement

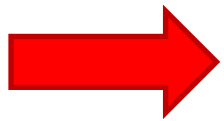
- General reluctance to enforce foreign/US judgments containing punitive or multiple damages

## II. Court decisions - Enforcement

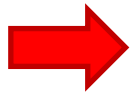
### Conclusion Court Decisions



Easy to enforce within EC thanks to Brussels I Regulation



Outside EC no worldwide Convention such as NYC



Enforceability highly dependent on treaties and national laws



Conditions for enforcement vary considerably

# Over-all Conclusion



Arbitral award generally easier to enforce, especially outside the EC



New York Convention is foundational instrument for international enforcement of awards



When entering into business relations, these facts should be considered carefully

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# Thank You!

Steinstr. 20  
40212 Düsseldorf  
Germany

Tel. +49 (0)211 550 22 0

Fax +49 (0)211 550 22 550



**Thomas.Schmitz@rokh-ip.com**

[www.rokh-ip.com](http://www.rokh-ip.com)