Recognition and Enforcement of Foreign Arbitral Awards
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A. Introduction

1. The history of awards rendered in international arbitration between States has been intimately linked with the rise of the prohibition of the use of force by States to settle international disputes (see also Drag-Porter Convention [1907], Peaceful Settlement of International Disputes; Use of Force, Prohibition). In contrast, the effectiveness of arbitral awards rendered in relation to a private party usually depends on a national legal framework which provides for legitimate coercive measures. Only in this context does the problem of the recognition and enforcement of foreign arbitral awards arise (see also Judicial and Arbitral Decisions, Validity and Nullity).

2. Arbitral awards are made by arbitrators, i.e. individuals who have not been vested with permanent jurisdictional powers deriving from a State’s monopoly of coercion and jurisdiction (‘imperium’; see also International Courts and Tribunals, Judges and Arbitrators). Parties that submit to arbitration may rely on private mechanisms for ensuring — complying with the resulting award, such as performance guarantees or black lists of trade associations. The recognition of the award’s res judicata effect and its value as a title for public enforcement, however, will depend on national procedures by which the award’s compatibility with the fundamental principles of justice of the lex fori is certified. The homologation of the award allows a public authority legitimately to recognize the award and to rely on it in later judicial proceedings between the same parties, or to order measures of enforcement such as the attachment, garnishment, execution, or seizure of assets of a recalcitrant debtor (→ Debt).

3. The logic of homologation applies to both national awards made at home and foreign awards rendered abroad, just as it does to foreign judgments (see also Recognition and Enforcement of Foreign Judgments). As opposed to foreign judgments, however, awards are not as easily characterized in terms of ‘nationality’ on the basis of the territorial limits of the exercise of sovereignty. Rather, the legal nature attributed to arbitral awards has been crucial for determining the regime for recognition and enforcement of foreign arbitral awards, as shown in the following.

B. Historical Development and Context

1. The Action on the Award: Characterizing Awards as Contractual

4. Following the late Roman tradition of the actio in factum, both the common law and the continental ius commune obliged the successful party in an arbitration to initiate fresh court proceedings after obtaining the award. This ‘action on the award’ aimed at enforcing the compromissum, i.e. the contractual submission agreement by which the parties assumed the obligation to comply with the future award (→ Compromiss). The action did not permit the parties to go back to the original cause of action, which was considered to have been merged in the award. In line with the non-territorial conception of the common law and the ius commune, this mechanism of contract enforcement was available (and still is under English common law alongside the new statutory remedies) independently of the territorial origin of the sententia arbitri ex compromissa.

2. Distinction between Awards Characterized as Contractual and Those Characterized as Jurisdictional

5. The essence of the actio ex compromiso also survived the early French codification. The Code de procédure civile reshaped it as a simplified and speedier enforcement procedure by which awards received leave for enforcement ex parte if they conformed to French public policy (Art. 6 Code civil) without distinguishing between awards made in France and awards made abroad (Arts 1020, 1021 Code de procédure civile prior to amendment; Order public [Public Policy]).

6. French scholars and courts in the early 19th century, however, started distinguishing between ‘contractual’ awards resulting from arbitral
proceedings set in motion voluntarily by the parties, as opposed to "jurisdictional-procedural" awards which owed their existence to the intervention of some public force. The latter comprised cases of mandatory arbitration imposed by statute and cases in which a court had to appoint an arbitrator or umpire because the defendant refused to participate or because the arbitrators appointed by the parties could not agree on the result. If the public force intervening in the arbitral proceedings was that of a foreign authority, the awards were no longer eligible for being enforced like national awards. Rather, this type of foreign award was submitted to the procedure for obtaining leave for enforcement for foreign judgments. This action en exequatur included an onerous review of the merits of the decision (révision au fond), which, for judgments, was finally abolished only in 1964, but which was abolished for arbitral awards in the early 20th century (see also Bernard & Lowagie v General Mercantile Co [1903]).

3. Assimilating Foreign Awards to Foreign Judgments

7 As of 1899, French courts and scholars gradually abandoned the distinction between contractual awards and procedural awards and started assimilating all foreign arbitral awards to foreign judgments with the argument that foreign arbitrators would be even less trustworthy than foreign judges (see also Marquis de Santa-Cristina v Princes Del Dragon-Cour [1902]). This harsh position was, however, somewhat tempered by bilateral treaties that provided for simplified recognition and enforcement.

8 The earliest treaty covering arbitral awards was concluded in 1867 between the Grand Duchy of Baden (where much of French law continued in force until 1871) and the Swiss Canton of Aargau, followed by the French-Swiss Treaty of 1869, and the Belgian-French Treaty of 1899 (see also → Arbitration and Conciliation Treaties). These treaties put arbitral awards on the same footing as judgments, but eliminated the révision au fond for either of them. The treaties required the requesting party to produce a certified copy of the judgment or award; proof that the other party had been summoned to the proceedings; and a certificate issued by the local authority that the decision had turned into res judicata according to the laws of the country of origin, meaning that recourse against the award was no longer possible.

4. Double Exequatur

9 However, the liberal treatment of awards initiated by these treaties suffered a serious setback. The Spanish-Swiss Treaty of 1896 also excluded any révision au fond but required a certificate issued by the authorities in the country of origin that the award was not only "final" in the sense of res judicata, but also "enforceable". This requirement was simple to meet for judgments, which automatically become enforceable as soon as any recourse against them is no longer possible, a fact that could easily be certified by the foreign court itself. Arbitral awards, in contrast, require separate judicial exequatur proceedings in the country of origin to become enforceable there—a significant practical complication of which the drafters of the treaty apparently had not thought.

10 The incidental understanding was that a successful claimant could not obtain more domestically than his title was worth in the country of origin. This understanding can also be found in the first multilateral treaty that covered the recognition and enforcement of arbitral awards, the South-American Treaty of Montevideo on Procedural Law of 1899 ("1889 Montevideo Convention"). It provided that "judgments and arbitral awards rendered ... in one of the signatory States will have in the territory of the other signatories the same force as in the country where they were pronounced" (Art. 5.1889 Montevideo Convention; translation by the editor). In consequence, the successful party first had to obtain exequatur in the country in which the award had been rendered before it could seek exequatur in the country of actual enforcement.

11 The unconsidered equation of awards and judgments and the resulting burden of double exequatur also proliferated in the Código Bustamante signed in Havana in 1928, the Treaty of Montevideo on International Procedural Law of 1940, and the Cairo Convention of the → League of Arab States (LAS) of 1952, as well as in many bilateral treaties, such as the Belgian-Dutch Treaty of 1925, the French-Italian Treaty of 1930, the treaties of friendship, commerce and navigation signed by the US with Greece (1951), Germany (1954), and the Netherlands (1956), as well as the Belgian-German Treaty of 1958.

12 The 1927 Geneva Convention on the Execution of Foreign Awards, concluded under the auspices of the → League of Nations in order to simplify the enforcement of awards, only required in Arts 1 (d) and 4 (2) proof that the award was "final" in the sense of res judicata. Nevertheless, many national courts interpreted this condition as requiring proof of exequatur or alike in the country of origin, thereby depriving the convention of most of its value.

5. Outright Obstruction to Arbitration

13 By the first half of the 20th century, the requirement of double exequatur was also well-entrenched in a number of domestic laws, such as in most US States, in Austria, Hungary, Czechoslovakia, Italy, and Paraguay. One of the last strongholds against arbitration was, until 1966, Brazil. In Brazil, only foreign decisions granting exequatur to awards could be recognized and enforced; the awards in themselves had no value. In order to be eligible for the domestic exequatur, the foreign exequatur had to be the result of contentious proceedings; this meant that the judicial summons had to be served on the recalcitrant award-debtor with formal letter rogatory via diplomatic channels, which usually took more than a year. Paired with the requirement that awards could only be validly rendered if based on arbitration agreements covering existing, but not future, disputes (submission agreements post litum natam), awards against recalcitrant Brazilian parties were almost valueless.


14 In the light of these restrictive or even protectionist attitudes, in 1953, the → International Chamber of Commerce (ICC) made a proposal to the United Nations Economic and Social Council to draft a convention on international arbitral awards that would be independent of any national laws in order to eliminate the resulting serious obstacles to the circulation of awards. Although such a fully autonomous approach was rejected, the → United Nations elaborated its own draft which was finally adopted in New York on 10 June 1958 as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), and which date has been ratified by 142 States.

15 The New York Convention, in contrast to the 1927 Geneva Convention on the Execution of Foreign Awards which it replaced, no longer requires that parties be subject to the jurisdiction of different Contracting States. Its rules thus apply to awards made in any foreign country, unless the Contracting State has made a reservation that the award must come from another Contracting State, a reservation that is still maintained by 70 Contracting States (→ treaties, Multilateral, Reservations list). By establishing uniform and autonomous rules on recognition and enforcement that supersede any contrary domestic rules (→ international Law and Domestic (Municipal) Law), the New York Convention has the great merit of successfully tackling the three main obstacles the 1927 Geneva Convention on the Execution of Foreign
C. Developments since the New York Convention and Conflicts of Treaties

16 Since 1958, a number of regional conventions have followed, yet without much or any practical relevance. Other efforts of international codification at the global level, such as by the → World Bank Group and the → United Nations Commission on International Trade Law (UNCITRAL), have been much more significant. The relation of all these instruments to the New York Convention is often complicated and sometimes outright problematic.

1. The European Context

17 The European Convention on International Commercial Arbitration of 1961 was elaborated under the auspices of the UN's Economic Commission for Europe with the aim of facilitating trade between Eastern and Western Europe (although the convention is also open to non-European countries). This convention has the merit that it limits the grounds for setting aside an award in the country of origin, which have to be recognized in the country in which enforcement is being sought. Within the Eastern Bloc, the Member States of the → Council for Mutual Economic Assistance (COMECON) concluded the Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-Technical Co-operation (Moscow Convention) of 1972, which provided uniform rules for arbitrations resulting from contracts concluded within the framework of economic and scientific-technological co-operation between the Member States (→ Regional Co-operation and Organization: European States).

2. The American Context

18 The Inter-American Convention on International Commercial Arbitration (Panama Convention) of 1975 and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 1979 (1979 Montevideo Convention) were concluded in the context of the → Organization of American States (OAS) (→ Commercial Arbitration, International). The former, adopted upon the insistence of the US, has the merit of successfully luring the reluctant Latin American States to accept the efficient rules of the New York Convention, which was copied (not without adding some ambiguities) and presented as an ‘own’ instrument adapted to the necessities of the Western Hemisphere. The acceptance of the Panama Convention thereby saved the way for the later ratification of the New York Convention. The 1979 Montevideo Convention, however, constitutes a grave fallback to the equation of foreign awards and foreign judgments along the lines of the old Montevideo Conventions of 1889 and 1940, and is largely irreconcilable with the modern acquis of the New York and Panama Conventions. The same contradiction is inherent to the 1992 Protocol on Judicial Co-operation and Assistance in Civil, Commercial, Labour and Administrative Matters (Protocol of Las Leñas) of the → Mercosur, which, in this respect, copied the 1979 Montevideo Convention. The Mercosur Agreement on International Commercial Arbitration, → International Commercial Arbitration, → International Commercial Arbitration Commission (CIAC), → Regional Co-operation and Organization: American States).

3. The Arab and African Context

19 Similarly problematic is the relationship between the New York Convention and the 1983 Riyadh Convention on Judicial co-operation between States of the Arab League, whose Art. 37 still requires the requesting party to present evidence that the award has become enforceable in the country of origin and which thereby perpetuates the double exequatur established by its predecessor, the 1952 Cairo Convention on the Enforcement of Court Decisions and Arbitral Awards.

20 The 1999 Uniform Act on Arbitration Law of the Organization for the Harmonization of Business Law in Africa ('OHADA') is directly applicable to awards made in any of the 16 Member States. The 1999 Uniform Act on Arbitration Law was modelled after the 1981 French rules on recognition and enforcement of international arbitral awards (Arts 1489–1507 Nouveau Code de Procédure Civile), which are compatible with the New York Convention (→ Regional Co-operation and Organization: African States).

4. The UNCITRAL Model Law

21 The highly successful Model Law on International Commercial Arbitration of 1985 (revised in 2006) of the UNCITRAL (UNCITRAL Model Law) has influenced national legislation on arbitration in 63 jurisdictions. It copied the provisions on recognition and enforcement of arbitral awards from the New York Convention, and—in the spirit of ICC's proposal of 1953 and under the influence of the French rules of 1981—made these rules applicable to any award ‘irrespective of the country in which it was made’ (Art. 35 UNCITRAL Model Law). It thereby promotes a single regime for the enforcement of international awards.

5. Investment Disputes

22 The special nature of → investment disputes between foreign investors and host countries led the World Bank Group to elaborate a multilateral treaty governing the arbitration of these disputes (see also → Calvo Doctrine/Calvo Clause; → Investments, International Protection). The 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which established the → International Centre for Settlement of Investment Disputes (ICSID) and which has been ratified by 143 States, provides a special regime for the enforcement of the resulting awards. These efficient rules accepted by the host countries constitute...
the quid pro quo that lead the home countries of investors to renounce the previous practice of granting → diplomatic protection to their nationals pursuant to Art. 27 ICSID Convention. Each Contracting State, without generally waiving its → State immunity from enforcement (Art. 55 ICSID Convention), is obliged to recognize the binding nature of an ICSID award and to enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State (Art. 54 (1) ICSID Convention). This unconditional obligation to give effect to the award, paired with the possibility to challenge the award pursuant to Art. 52 ICSID Convention, should—at least in theory—exclude any objections against enforcement under Art. V New York Convention or under each Contracting State’s national law. The New York Convention regime remains, however, applicable to awards made under the ICSID Additional Facility Rules, which allow investment arbitration in certain cases with non-contracting host States, as well as to awards made in ad hoc arbitration based on bilateral investment treaties (→ Investments, Bilateral Treaties).

D. The Modern Regime of Enforcement and Recognition

23 Due to the New York Convention’s great success as regards both its almost universal acceptance and the efficiency of its regime, the New York Convention is today the internationally prevailing standard of regulating enforcement and recognition of foreign awards. The following sketch of the modern regime of recognition and enforcement will therefore concentrate on the provisions of the New York Convention. However, it has to be borne in mind that some national laws, such as Belgian, Dutch, and French law, offer even more permissive and pro-enforcement-biased regimes than allowed by the most favourable rights provision in Art. VII (1) New York Convention.

1. The Presumption of Binding Force and of Validity of the Arbitral Award

24 Art. III New York Convention, read in conjunction with Arts IV and V ibid, spells out the foundations that allow for the free circulation of arbitral awards. All Contracting States recognize the presumption that, in their courts, an arbitral award is binding upon the parties as soon as the award is made. Enforcement of such binding awards follows the rules of procedure of the lex fori of the requested court, although these are modified by the New York Convention’s specific rules so as to guarantee a uniform outcome in all Contracting States. This ideal of decisional hierarchy, coupled with the ideal of non-discrimination of foreign awards, is acknowledged not to be absolute, since Contracting States can—and often do—impose different procedural conditions for awards made inland and for foreign awards. This difference is allowed as long as the procedures to which the latter are submitted are not “substantially more onerous” (Art. III New York Convention) than those to which the former are submitted.

25 Art. IV New York Convention provides for the corollary to the presumption of binding force of foreign awards: the presumption of their validity. Accordingly, the requesting party does not have to present any documentation other than the award itself and the arbitration agreement as the legitimation of arbitral jurisdiction. In consequence, only a successful rebuttal of these presumptions allows a court to refuse recognition and enforcement.

2. Grounds for Refusing Enforcement to Be Proven by the Opposing Party

26 The burden of presenting evidence that allows the presumption of the binding force of the award to be rebutted is borne by the party against whom recognition and enforcement is being sought. The grounds that may be invoked are strictly limited to the exhaustive list set forth in Art. V (1) New York Convention, which primarily relate to a party’s fundamental right to due process of law.

27 With regard to the arbitral Tribunal’s jurisdiction, the award will not be recognized or enforced if the opposing party can furnish proof that the arbitration agreement was not valid (Art. V (1) (a) New York Convention) or if its scope has not been respected (Art. V (1) (c) ibid). As regards formal procedure, the opposing party will have to show that it did not have a proper opportunity to present its case (Art. V (1) (b) ibid) or that the composition of the Tribunal or the arbitral procedure was irregular (Art. V (1) (d) ibid).

28 Furthermore, the presumption of the award’s binding force can be rebutted by proving that the award has not yet become binding (either because the arbitration agreement provides for a second arbitral instance or because the law at the place of arbitration allows for ordinary appeal against the award, or because a grace period for its implementation has been granted), or that the award has been set aside or suspended by the competent authority of the country of origin (Art. V (1) (e) New York Convention).

29 The law of the country in which the award was rendered plays a significant role under the New York Convention and its impact justifies the differentiated treatment of foreign and domestic awards. Accordingly, the choice of the place of arbitration may be crucial. Failing an agreement between the parties on the composition of the arbitral tribunal, or on the details of how to conduct the arbitral proceedings, it is the law at the place of arbitration that will govern these questions (Art. V (1) (d) ibid). This solution corresponds to the fact that all judicial assistance for the practical implementation of the arbitration agreement depends on the domestic courts at the place of arbitration (see Art. II (3) ibid). In the absence of a choice by the parties, the lex fori of the courts charged with this implementation also governs the validity of the arbitration agreement itself (Art. V (1) (e) ibid). Finally, the law at the place of arbitration will usually also govern the question on which grounds the award can be set aside (Art. V (1) (f) ibid).

3. Grounds for Refusing Enforcement Considered Ex Officio by the Requested Court

30 Beyond the grounds protecting the award debtor’s individual interests in seeing its rights of due process respected, the New York Convention also recognizes grounds protecting the public interests of the forum. These interests should be taken into consideration by the requested court ex officio so as to guarantee the constitutional legitimacy of its exercise of public power.

31 The New York Convention allows the requested court to review whether the lex fori, which may reserve certain matters to the exclusive jurisdiction of domestic courts, allowed the subject-matter(s) of the dispute to be entrusted to arbitrators (objective arbitrariness) (Art. V (2) (a) New York Convention). This ex ante filter of the legitimate subjection of the dispute to the black box of arbitral decision-making is one of the cornerstones of the New York Convention. This elimination from arbitration of most subject-matters which potentially affect public interests justifies the exclusion of most review of the merits of the award and limiting the grounds for refusal to the mere aspects of due process. Even the plainly wrong application of the applicable law is per se no ground for refusing enforcement, but it is the parties assume by entrusting their dispute to ‘private judges’ without the possibility of appeal.

32 The resulting veil that shields the award against any review of its merits can only be pierced in very exceptional cases. Courts will refuse to lend public force to the award when the recognition or enforcement of the foreign award would lead to results contrary to the public
policy of the forum (Art. V (2) (b) New York Convention). It follows that the public policy exception constitutes a very limited backdrop of last resort to safeguard public interests as long as due process has been respected. As a counterpart to the rather rigid input filter of arbitrability, the output filter of the public policy exception must be interpreted restrictively and will allow the refusal of recognition or enforcement only in cases of clear contradiction to the essential economic, political, or social values of the forum.

E. Assessment

33 The regime of recognition and enforcement established by the New York Convention has proven to be most effective and most beneficial for the development of international commercial arbitration. However, there remain two complicated topics, the enforcement of awards set aside in the country of origin and the liberalization of arbitrability. The latter still causes much controversy among scholars and some antagonism between national courts from different countries, mostly at the expense of arbitration as an efficient tool for resolving international commercial disputes.

1. Enforcement of Awards Set Aside in the Country of Origin

34 Occasionally, domestic laws in certain forums allow an award to be set aside on grounds that are purely domestic in nature. The setting aside of awards issued in an international arbitration may be contrary to the goals pursued by the creation of an international arbitration system and unsuitable for the international context. Art. IX 1961 European Convention on International Commercial Arbitration intended to limit impact of ‘exotic’ grounds which allow the setting aside of an award at the place of arbitration. According to this provision, Art. V (1) (e) New York Convention shall only lead to the refusal of recognition and enforcement of an award if it has been set aside by a foreign court on grounds that are equivalent to those found in the New York Convention for allowing the refusal of recognition and enforcement. However, Art. IX European Convention on International Commercial Arbitration has failed to have much impact in practice. Pursuing the same aim as the European Convention on International Commercial Arbitration, but much more radically, French courts systematically disregard any foreign setting aside decision and use only French law as a benchmark to determine the award’s effectiveness (see Hilmarton v OTV [1994] 327; Putrabali v Rena [2007] 267). This controversial approach, which is allowed under Art. VIII (1) New York Convention, was also practised by US courts (Chromalloy Aerosservices v Arab Republic of Egypt) until they recently abandoned it explicitly (TermoRio v Electranca [2007]). The US courts have thereby aligned themselves with German and English courts, which give strict priority to the setting-aside decision in the country of origin. The foreign decision setting aside the award is recognized according to the general rules for foreign judgments, so that a foreign setting-aside decision is only disregarded if it violates the forum’s international public policy.

35 Proposals de lége ferenda equally diverge greatly. Some scholars, in line with the French approach, insist that only ‘international standard annulments’ (in the sense of the 1961 European Convention on International Commercial Arbitration) should be recognized and thus allowed to frustrate the recognition and enforcement of a foreign award. Others argue that an award set aside abroad should be recognized and enforced only if the foreign annulment decision was taken in manifest disregard of the arbitration law at the place of arbitration, ie if the annulment court permitted its own laws. It is submitted that the most convincing approach is simply to apply the general rules of recognition, as done in Germany, England, and the US, so as to allow the enforcement of an award set aside abroad only if its setting aside amounts to a violation of fundamental norms of justice. The risk of having chosen the ‘wrong’ place of arbitration, and hence the possibly adverse consequences of exotic local laws, has to be borne by the requesting party, which had accepted arbitration under these problematic laws. Accordingly, annulled awards should only be enforced if the annulment has been obtained in the country of origin on the basis of corruption, collusion, or other manifest abuses contrary to public policy (→ Corruption, Fight against).

2. The Liberalization of Arbitrability

36 The other highly controversial issue in the recognition and enforcement of foreign—but also domestic—awards is the degree of court review of arbitral awards in reaction to the on-going liberalization of the subject-matters that are deemed to be arbitrable. The increasing use of international commercial arbitration has first led US courts to allow arbitral tribunals to decide on subject-matters which traditionally had to be held to be outside the scope of private dispute resolution because of the incidence of public interests, such as claims based on competition law (Mitsubishi Motors v Solex Chrysler-Plymouth[1983]). European courts have also accepted this significant broadening of the scope of arbitration (in Germany ÖLG Dresden [2002]; see also ECDAR 2012). The reason for this liberalization of arbitrability has been that the enforcement courts will control ex post whether the arbitrators correctly applied the internationally mandatory rules of the lex fori on that matter, even if the contract is governed by foreign law (‘second look doctrine’). French courts, however, have recently pushed their pro-arbitration policy even further by limiting their control to ‘flagrant, effective, and specific’ violations of competition law provisions only (Thaïés Air Défense v GIE et Euromississile[2005] 751). It can be doubted that such a high degree of liberality will help consolidating the trust in, and thus the role of, arbitration as the most apt mechanism for solving international commercial disputes.

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