

Challenge, recognition and enforcement of an award

International Commercial Arbitration and International Sales Law

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Schedule

International Arbitration

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29.11 Arbitration proceedings I

06.12 Arbitration proceedings II

13.12 **Challenge, recognition and enforcement of an award**

17.01 Specific types of arbitration

Interrelation of courts and ATs

ML: Art. 5 “Extent of court intervention”: In matters governed by this Law, no court shall intervene except where so provided in this Law.

1. appointment (Art. 11)
2. challenge and termination of the mandate of an arbitrator (Art. 13,14)
3. jurisdiction of the AT (Art. 16)
4. court assistance in taking evidence (Art. 27)
5. compatibility of AA with court-ordered interim measures (Art. 8, 9, 17J)
6. R&E of interim measures (Art. 17H and Art. 17I)
7. R&E of awards (Art. 35, 36)
8. setting aside of an arbitral award (Art. 34)

Interrelation of courts and ATs in the EU

NYC Art. II(3): The court of a CS, when seized of an action in a matter in respect of which the parties have made an [AA], shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the R&E of judgments in civil and commercial matters (Brussels I): Judgment of any EU court is recognized in the EU countries unless R is contested. Art. 2: persons shall be sued in the courts of the State in which they are domiciled. But: the Regulation does not apply to arbitration.

Re may argue that no AA exists and the court of his or her domicile has jurisdiction (not the courts at the seat)

Interrelation of courts and ATs in the EU: case practice

Marc Rich: English (seat) v. Italian (respondent's) court: validity of AA

ECJ: English court could intervene in support of arbitration

West Tankers

Gazprom: Lithuanian court v. SCC: anti-suit injunction issued by the AT

Lithuanian court refused R&E due to the alleged conflict with the Regulation

ECJ: proceedings for the R&E of arbitral awards are not covered by the Regulation. Advocate General Opinion

Interrelation of courts and ATs in the EU: West Tankers 2009 & Nori Holdings Ltd 2018

English (seat) v. Italian (insurers') court: anti-suit injunction restraining the insurers from pursuing the proceedings before the Italian courts

English court: the principle of mutual trust does not extend to arbitration (as it is excluded from the Regulation)

ECJ: it was for the courts first seised (Italian courts) to determine the validity of an AA. Consistent with Art. II(3) NYC

if, by means of an anti-suit injunction, the [Italian courts] were prevented from examining itself the preliminary issue of the validity or the applicability of the AA, a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed ... would therefore be deprived of a form of judicial protection to which it is entitled.

Interrelation of courts and ATs in the EU: Brussels Recast

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the R&E of judgments in civil and commercial matters (Brussels II)

Art. 73(2) & Recital 12: NYC takes precedence over this Regulation

Nothing ... should prevent the courts ... from referring the parties to arbitration, staying or dismissing the proceedings, or examining whether the AA is null and void, inoperative or incapable of being performed, ...in accordance with their national law.

This Regulation should not apply to: the establishment of an AT, the powers of arbitrators, the conduct or any other aspects of arbitration procedure, nor to any action or judgment concerning the annulment, review, appeal, R&E of an arbitral award.

Termination of the proceedings

1. With an award
2. With no award
 - CI withdraws its claims unless
 - Re objects
 - there is a legitimate interest in obtaining a settlement
 - both Parties agree
 - it is unnecessary or impossible to continue A

Awards in arbitration

A title (award or order) is not an indicator. NYC applies only to awards!

Categories of awards:

- interim award (partial, preliminary, interlocutory award)
- additional award
- final award

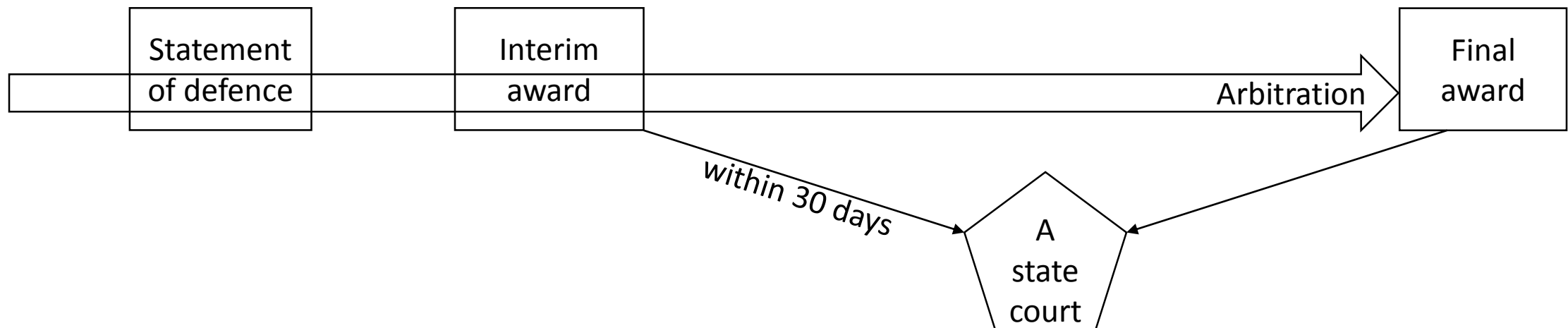
Categories of opinions (not part of the award):

- separate or concurring
- dissenting

Conduct of the proceedings

Proceedings can be bifurcated into

- jurisdiction and merits
- liability and quantum



How an AT reaches its decision

UNCITRAL AR

if not unanimous, the award shall be made by a majority of the arbitrators

Exception under Art. 31(2) for procedural ?s. The presiding arbitrator decides on his own, subject to revision by the AT

ICC, LCIA AR

the award, if not unanimous, may be made by a majority of the AT and that if there is no majority, the chairman of the AT makes the decision alone

Requirements to awards in arbitration

A valid award:

- in writing,
- reasoned, dated, with indication of place, signed
- should deal with all substantive matters, be consistent and dispositive
- an additional requirement by the ICC Rules: approved by ICC Court

Remedies that can be awarded:

- monetary compensation;
- punitive damages;
- specific performance and restitution;
- injunctions;
- declaratory relief;
- gap-filling of contracts;
- interest; and
- costs.

Legal force of an award in arbitration

Common law: res judicata and issue estoppel

Civil law: res judicata

Choice of law governing preclusive effect of arbitral awards

In Germany: the same legal force as for a court judgement but only between the parties, including

- full legal successors

- partial legal successors that have obtained the object in dispute if included into the AA or in case of assignment

Ex officio

What can the parties do with an award?

A winning party:

- confirm the award
- locate the assets of the losing party and seek R&E under NYC or under a more favourable relevant treaty or local law (forum shopping)

A losing party:

- carry out the award volutarily
- challenge the award in the courts at the seat
- resist R&E
- negotiate

correction, interpretation or supplementation

CHALLENGE (AT THE SEAT)

Presumptive validity of the awards subject to Art. 36 ML or in Germany: §1059 II ZPO. Proceedings: OLG, a possible appeal to BGH

Validity of agreements waiving right to seek annulment?

The result of a successful challenge:

- the award is annulled – set aside – vacated (in whole or in part)

the court may also:

- confirm the award;
- refer it back to the AT for reconsideration;
- vary the award.

Grounds for setting aside and non-R&E

by request of a party:

- incapacity of the parties, invalidity of the AA,
- denial of opportunity to present a party's case
- beyond the scope of the AA,
- failure to comply with procedure
- substantive review (rare, not in ML)

ex officio:

- non-arbitrability
- against public policy

by request of a party:

- incapacity of the parties, invalidity of the AA,
- denial of opportunity to present a party's case
- beyond the scope of the AA,
- failure to comply with procedure
- not yet binding award, setting aside or suspension of an award

ex officio:

- non-arbitrability
- against public policy

Substantive review:

English Arbitration Act, Section 69

Unless otherwise agreed by the parties, a party may appeal to the court on a ? of law arising out of an award ... if the court is satisfied—

- a) that the determination of the ? will substantially affect the rights of one or more of the parties,
- b) that the ? is one which the AT was asked to determine,
- c) that, on the basis of the findings of fact in the award—
 - (i) the decision of the AT on the ? is obviously wrong, or
 - (ii) the ? is one of general public importance and the decision of the AT is at least open to serious doubt, and
- d) that ... it is just and proper in all the circumstances for the court to determine the ?

RECOGNITION AND ENFORCEMENT

Recognition – respect and confirm legal force & effects of an award

Enforcement – ensure that the award is carried out

Types of enforcement:

- E at the seat
- E of a ‘foreign’ or ‘international’ award made outside

Formalities under the NYC:

- the duly authenticated original award or a duly certified copy thereof; and
- the original AA or a duly certified copy thereof
- their translation

R&E under the NYC

Reservations (Art. 1.3):

- reciprocity
- commercial

Features:

1. no review on the merits!
2. exhaustive grounds
3. enforcement 'may' be refused (not 'must' be refused)
4. all grounds shall be interpreted restrictively (pro-enforcement bias)