

International Commercial Arbitration

The Challenge of the Award

Mag. Martin Platte, LL.M.

Introduction

- Art 35 (1) ML
- *An arbitral award, irrespective of the country in which it was made, shall be recognized as binding...*
- Presumptive finality of arbitral awards

Introduction

- Motivation for challenging the award
 - genuine
 - tactical

- Likelihood of success

- Alternatives to challenge
 - (attempt to) resist enforcement
 - appeal against award (if and where possible)

Salient Considerations

Challenge of the award

- Where?
- When?
- Why?

Forum for Challenge („Where“)

- Art V (1) (e) New York Convention 1958

... has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

- Country in which award was made (usually) equals country under whose law it was made. Actions for annulment outside the seat of arbitration „once-in-a-blue-moon“ event (Karahah Bodas Co., 364 F.3d)

Forum for Challenge („Where“)

- Art 34 (2) ML

An arbitral award may be set aside by the court specified in article 6

- Art 6 ML

The functions referred to in articles 34(2) shall be performed by ... [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions]

Forum for Challenge („Where“)

Section 615 Austrian CCP

For the action for setting aside an arbitral award and for the action for declaration of existence or non-existence of an arbitral award ... the Supreme Court (*Oberster Gerichtshof*) shall have jurisdiction.

Forum for Challenge („Where“)

- US Federal Arbitration Act 9 U.S.C. § 10

... the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration ...

- Section 1062 (1) n 4 German CPC

The higher regional court (Oberlandesgericht, OLG) designated in the arbitration agreement or, if no such designation was made, the higher regional court in the district of which the venue of the arbitration proceedings is located, is competent for decisions on petitions and applications regarding the setting aside of an arbitral award

Time Limits („When“)

- Art 34 (3) ML

An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received that award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

- Section 611 (4) Austrian CCP

The action for setting aside must be made within three months. The time period shall begin with the day on which the claimant received the award or the additional award. An application made in accordance with Article 610 paragraph (1) numbers 1 or 2 of this Law shall not extend this time period.

Time Limits („When“)

- Section 70 (3) English Arbitration Act 1996

Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.

- Art 59 China Arbitration Law

A party that wishes to apply for setting aside the arbitration award shall submit such application within six months from the date of receipt of the award.

Grounds for Annulment („Why“)

Eco Swiss China Time Ltd v Benetton Int'l NV
(ECJ, 1 June 1999, Case 126/97)

„... it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognize an award should be possible only in exceptional circumstances.“

Grounds for Annulment („Why“)

John J. Kerr, (34 ICLQ 1 (1985) 15)

Possibility of challenging arbitral awards at the place where they were made is a „bulwark against corruption, arbitrariness and bias“.

Grounds for Annulment („Why“)

- Grounds which have to be raised by the challenging party

(Art 34 (2) (a) ML: „... the party making the application furnishes proof that:“)

- Grounds to be considered *ex officio* by court

(Art 34 (2) (b) ML:“... the court finds that:“)

Grounds for Annulment („Why“)

- (1) Arbitration Agreement Invalid (Art 34 (2)(a)(i) ML)
- (2) Party denied right to be heard / opportunity to present its case (Art 34 (2)(a)(ii) ML)
- (3) Award extra/ultra petita (Art 34 (2)(a)(iii) ML)
(infra petita?)

Grounds for Annulment („Why“)

- (4) Composition of AT / arbitral procedure not in accordance with parties' agreement (Art 34 (2)(a)(iv) ML)

- (5) Dispute not capable of settlement by arbitration (Art 34 (2)(b)(i) ML)

- (6) Violation of public policy (Art 34 (2)(b)(ii) ML)

Grounds for Annulment („Why“)

- (7) Award procured by fraud / violations of criminal law (FAA § 10(a)(1); Austria CCP section 611 (2) no. 6)

- (8) Arbitrator's decision seriously flawed on merits (section 69 EAA)

Grounds for Annulment („Why“)

Invalid Arbitration Agreement

- applicable law
- incapacity of party
- other grounds

Grounds for Annulment („Why“)

Invalid Arbitration Agreement – applicable Law

Art V(1)(a) New York Convention 1958:

The *parties* to the agreement referred to in article II were, *under the law applicable to them under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.*

Grounds for Annulment („Why“)

Invalid Arbitration Agreement – applicable Law

Art 34 (2) (a) (i) ML:

a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State

Grounds for Annulment („Why“)

Invalid Arbitration Agreement – applicable Law

Section 611 (2) no 1 Austrian CCP:

...a valid arbitration agreement does not exist... or if a party was under some incapacity under the law applicable to them to conclude a valid arbitration agreement.

Grounds for Annulment („Why“)

Invalid Arbitration Agreement – incapacity

- Person signing the arbitration agreement not duly authorised to do so

ICC Case no 6850, XXIII YBCA 37 (1998) – power of attorney did not cover submission to arbitration

- State Bodies

Fougerolle SA v MoD of the Syrian Arabic Republic, XV YBCA 515 (1990) – Council of State had not advised on arbitration agreement;

Societè Tunisienne d'Electriciteè v Societè Entrepouse, III YBCA 283(1978) – under local law State bodies were not allowed to submit to arbitration

Grounds for Annulment („Why“)

Invalid Arbitration Agreement – other grounds

- Written form / incorporation
- Ambiguity / pathological clauses
- Duress
- Unconscionability

Grounds for Annulment („Why“)

Right to be heard

- No proper notice of appointment of arbitrator
- No proper notice of appointment of arbitral proceedings
- Otherwise unable to present case

Grounds for Annulment („Why“)

Right to be heard - unable to present case

Generica Ltd v Pharmaceuticals Basics Inc, XXIII YBCA 1076(1998)

„that defence basically corresponds to the due process defence that a party was not given the opportunity to be heard at a meaningful time and in a meaningful manner ... it is clear that an arbitrator must provide a fundamentally fair hearing ... A fundamentally fair hearing is one that meets the minimal requirements of fairness – adequate notice, a hearing on the evidence and an impartial decision by the arbitrator.“

Grounds for Annulment („Why“)

Right to be heard - unable to present case

Parsons & Whittemore, I YBCA 205 (1976)

„Nevertheless, parties that have chosen to remedy their disputes through arbitration rather than litigation should not expect the same procedures they would find in the judicial arena.“

Grounds for Annulment („Why“)

Right to be heard - unable to present case

- Fair and equal treatment - Art 6 ECHR
- Notification of every submission / hearing
- Time Limits / Adjournment
- Comment on results of taking of evidence
- Obligation on AT to consider submissions / comments
- Oral hearing – Austrian Supreme Court, 7 Ob 111/10i
- „Surprise decision“ (?) - Austrian Supreme Court, 9 Ob 27/12d

Grounds for Annulment („Why“)

Right to be heard - unable to present case

- Not: restrictions on evidence (eg number of witnesses...)
- Not: failure to deal with each and every (evidentiary) application
- Not: incomplete investigation of the facts

Grounds for Annulment („Why“)

Award extra/ultra/infra petita

- Extra petita: issues decided not within scope of arbitration agreement
- Ultra petita: award goes beyond relief requested
(*Westland Helicopters Ltd v The Arab British Helicopter Company*, XVI YBCA 174 (1991))
- Infra petita: AT does not consider all issues submitted to it
(section 68 (2) (d) EAA; Swiss PIL Art 190 (2))

Grounds for Annulment („Why“)

Composition of AT / arbitral procedure not in accordance with parties' agreement

- Arbitrator biased – pre/post award
(Austrian Supreme Court, 2 Ob 112/12b)
- Undue influence of one party on composition of AT
- Consolidation / joinder
- Not: Arbitrator not on list

Grounds for Annulment („Why“)

Dispute (usually) not capable of settlement by arbitration

- Family law
- Criminal law
- Intellectual property rights (not: licences)
- Insolvency
- Housing / Tenancy law
- Labour law (but: after dispute has arisen; sec 618 Austrian CCP)
- Consumer law (but: after dispute has arisen; sec 617 Austrian CCP)

Grounds for Annulment („Why“)

Dispute capable of settlement by arbitration

Section 582 Austrian CCP:

“Any pecuniary claim that lies within the jurisdiction of the courts of law can be the subject of an arbitration agreement. An arbitration agreement on non-pecuniary claims shall be legally effective insofar as the parties are capable of concluding a settlement concerning the matter in dispute.”

Grounds for Annulment („Why“)

Violation of public policy („ordre public“)

- Whose public policy?
- National versus international public policy
- Substantive v procedural ordre public
- Basic notions of constitutional, criminal, procedural and public (including EU) law (RIS-Justiz RS0110125)

Grounds for Annulment („Why“)

Violation of public policy („ordre public“)

- Inconsistency of award
- No taking of evidence at all
- Arbitrary decisions
- (substantial) violations of EU law
- Interest rate of 107,35% (Austrian Supreme Court 3 Ob 221/04b)
- Decisions *ex aequo et bono* without authority (?)
- Not: „mere“ violation of mandatory provisions

Grounds for Annulment („Why“)

Award procured by violations of criminal law

- Fraud
- Corruption
- Perjury
- Fabricated evidence / forgery of (protected) documents
- Coercion / duress

Grounds for Annulment („Why“)

Arbitrator's decision seriously flawed on merits

Basic rule: no review on the merits

But: some national laws / case law permit review on the merits in severe cases

Grounds for Annulment („Why“)

Arbitrator's decision seriously flawed on merits

Section 69 EAA 1996:

(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

(3) Leave to appeal shall be given only if the court is satisfied—

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that, on the basis of the findings of fact in the award—

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

(8)... leave of the court ... shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.

Grounds for Annulment („Why“)

Arbitrator's decision seriously flawed on merits

re: Section 69 EAA 1996:

Question must be one of English law

(Reliance Industries Ltd v Enron Oil & Gas India Ltd [2002] 1 All ER (Comm) 59 (QBD)

Grounds for Annulment („Why“)

Arbitrator's decision seriously flawed on merits

US Case law: manifest disregard of the law (?)

- *Wilko v. Swan*, 74 S. Ct. 182 (1953)
- *Duferco Int'l Steel Trading v. T. Llaveness Shipping A/S*, 33 F.3d 383, 389-90 (2nd Cir. 2003)
- *Hall Street Associates v. Mattel, Inc.*, 128 S. Ct. 1396 (2008)

Other Considerations

- Additional grounds for challenge agreed by parties?
- Waiver to challenge in advance?
- Waiver to challenge during proceedings?
- Remission?
- Effects of award having been set aside?
- Arbitration agreement (still) valid after award set aside?

Other Considerations

Additional grounds for challenge agreed by parties

Hall Street Associates v. Mattel, Inc., 128 S. Ct. 1396 (2008)

„... the statutory grounds for prompt vacatur and modification may not be supplemented by contract.“

Other Considerations

Waiver to challenge in advance

Swiss PIL Art 192 (1)

“If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190(2).”

Other Considerations

Waiver to challenge in advance

French CCP Art 1522:

“By way of a specific agreement the parties may, at any time, expressly waive their right to bring an action to set aside.”

Other Considerations

Waiver to challenge during proceedings

ICC Rules 2012, Art 39

“A party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object.”

Other Considerations

Waiver to challenge during proceedings

Section 73 (1) EAA 1996:

If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—

- (a) that the tribunal lacks substantive jurisdiction,
- (b) that the proceedings have been improperly conducted,
- (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or
- (d) that there has been any other irregularity affecting the tribunal or the proceedings,

he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.

Other Considerations

Waiver to challenge during proceedings

Austrian CCP section 583 (3):

“A defect of form of the arbitration agreement shall be cured in the arbitration proceedings by entering an appearance in the case, if a notification of the defect is not made earlier or at the latest together with entering an appearance.”

Other Considerations

Remission to AT

- Common law versus civil law
- Art 34 (4) ML:

“The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.”

Other Considerations

Effects of award having been set aside

Art V(1)(e) New York Convention 1958:

“Recognition and enforcement of the award may be refused ... if ... the award has ... been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made”

Other Considerations

Effects of award having been set aside

General Rule: Award not enforceable

But (1): European Convention on International Commercial Arbitration 1961, Art IX (2) - setting aside of an award based on violation of public policy does not constitute ground for refusing enforcement of the award in another contracting state.

But (2): Artt V(1) (and VII) New York Convention 1958 - Recognition and enforcement of the award may be refused...

Other Considerations

Effects of award having been set aside

New York Convention Art VII – Art 1502 French CCP:

Chromalloy Gas Turbine Corp v Arab Republic of Egypt

Omnium de Traitement et de Valorisation v Hilmarton

See also: *COMMISA v PEMEX*

Other Considerations

Arbitration agreement (still) valid after award set aside?

General Rule: yes – section 1059(5) German CCP

“Setting aside the arbitral award shall, in the absence of any indication to the contrary, result in the arbitration agreement becoming operative again in respect of the subject-matter of the dispute.”

But: if award set aside due to arbitration agreement being invalid - no

Art 34 ML (1)

Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

Art 34 ML (2)

An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

Art 34 ML (3)

An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received that award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

Art 34 ML (3)

The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

Art 34 ML (4)

The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

Contact Details

Martin Platte

T: +43 1 532 0420

E: martin.platte@platte.legal

I: www.platte.legal