

Commentary

German Federal Court Of Justice No Longer Permits The Recognition And Enforcement Of Foreign Judgments Entered Upon Arbitral Awards

By
Markus Burianski

[Editor's Note: Markus Burianski is a local partner at White & Case LLP, Frankfurt, Germany and member of the Frankfurt bar. He practices in the field of international arbitration and litigation. Copyright 2009 by Markus Burianski. Replies to this commentary are welcome.]

On 2 July 2009,¹ the German Federal Court of Justice, the *Bundesgerichtshof*,² revisited a line of jurisprudence stretching back 25 years and held that foreign judgments that confirm arbitral awards can no longer be recognized and enforced in Germany. Instead, even if an arbitral award had been confirmed by a state court, it can only be enforced on the basis of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention") or other applicable international conventions.³

The Decision

A Superior Court of California rendered a judgment confirming an international arbitral award granting the creditor around USD 250,000.⁴ In its judgment, the Superior Court adopted explicitly or tacitly the Tribunal's factual findings and legal conclusions.

The creditor then attempted to enforce the judgment, rather than the arbitral award, against the debtor in Germany. This approach was based on a line of constant jurisprudence by the *Bundesgerichtshof* pursuant to which both foreign arbitral awards and foreign judgments confirming such awards could be recognized and enforced in Germany.⁵ In line with this jurisprudence, both the first instance and the appeal court recognized the foreign judgment.

In its 2 July 2009 decision, the *Bundesgerichtshof* expressly overturned its previous line of jurisprudence and held that the US judgment confirming the US arbitral award could not be recognized and enforced in Germany. Instead, the creditor's options are limited to enforcing the arbitral award itself, on the basis of the New York Convention.

The *Bundesgerichtshof* first noted that its previous position was internally inconsistent: Its former approach had been based upon the *doctrine of merger*,⁶ which is applied in certain common law jurisdictions and according to which a foreign judgment that confirms an arbitral award absorbs the latter and becomes a judgment separate from the award. Thus, it had permitted to enforce judgments confirming awards just as any other foreign judgment. However, despite this "absorption" or "merger," the *Bundesgerichtshof* had still permitted parties to apply for recognition and enforcement of arbitral awards that had been the subject of court confirmation.

The *Bundesgerichtshof* then noted that recognition and enforcement of foreign judgments that recognize and declare enforceable other judgments (so-called "double exequatur") was not permitted under various instruments: Neither Council Regulation (EC) No. 44/2001 ("Judgment Regulation"),⁷ the *Brussels Convention*,⁸ the *Lugano Convention*,⁹ nor the relevant provisions of the German Code of Civil Procedure¹⁰ allow the recognition of judgments regarding the enforceability of other judgments. The rationale is that the exequatur of an exequatur decision could circumvent provisions applicable to the

recognition of the first judgment (e.g., the requirement of reciprocity).

Against the background of the two preceding considerations, the *Bundesgerichtshof* held that only exceptional circumstances could permit double exequatur of arbitral awards. Such exceptional circumstances, however, would not exist:

First, the *Bundesgerichtshof* noted that the Judgment Regulation and the *Lugano Convention* exclude arbitral awards from their scope.¹¹ Thus, neither arbitral awards rendered in EU/EFTA Member States nor EU/EFTA-exequatur judgments concerning awards benefit from the simplified recognition regime. Therefore, the court's previous approach had left open the non-justified possibility that awards from third countries could be subject to a more permissive regime than awards from EU/EFTA Member States (i.e. the creditor could enforce either the award itself, or a judgment confirming it).

Second, the *Bundesgerichtshof* highlighted that the German constitution provides that debtors should be confronted with only one enforceable instrument with regard to a given debt. It would unreasonably favor creditors if they could choose the easiest way to enforce their title or even try several proceedings in order to finally succeed in recovering the amount owed.

Third, the *Bundesgerichtshof* held that its previous approach invited parties to circumvent the provisions applicable to foreign awards. If, however, the recognition of foreign exequatur judgments required courts to also consider the conditions applicable to foreign awards, double exequatur would be superfluous. In addition, it would create possibly complex follow-on questions such as whether the requirement of reciprocity would also relate to German exequatur judgments.

Fourth, the *Bundesgerichtshof* considered that "double exequatur" would lead to jurisdictional inconsistency with the provisions governing the recognition of awards: In 1998, exclusive jurisdiction over the enforcement of arbitral awards was conferred on appeal courts, which in turn have mostly assigned arbitration matters to highly specialized chambers. By contrast, the recognition of foreign judgments

incorporating arbitral awards falls within the jurisdiction of county or district courts, depending on the amount at dispute. This split jurisdiction would be illogical, particularly if the lower courts had to analyze the provisions applicable to the incorporated foreign arbitral award.

Fifth, the *Bundesgerichtshof* considered that the purpose of a foreign exequatur judgment, even if based upon the *doctrine of merger*, would be limited to permitting to enforce an award in the exequatur country's territory. While the foreign exequatur judgment was procedurally an autonomous decision, it was not a foreign judgment based upon an independent, reproducible assessment of the facts and legal conclusions.

Sixth, the *Bundesgerichtshof* concluded that double exequatur would erode the scope of the New York Convention, which sets out the conditions under which foreign arbitral awards can be enforced. A signatory state could escape the New York Convention to the extent it accepts double exequatur, unless the requirements of Article 5 of the Convention were analyzed as part of public policy (*ordre public*).

Assessment And Practical Consequences

In a discussion of double exequatur in connection with foreign arbitral awards one needs to carefully distinguish two questions:

The first question is whether the rendition of an exequatur judgment may be a reason to refuse recognition of an award abroad. Where recognition and enforcement of foreign awards is governed by the New York Convention, it clearly is not: Article 5 exhaustively enumerates the reasons to deny recognition.¹² Nevertheless, awards rendered in the USA or the United Kingdom that were confirmed by judgment¹³ surprisingly often meet the defense that they can no longer be enforced abroad because they were absorbed by the exequatur decision pursuant to the doctrine of merger.¹⁴ It would seem that most, if not all courts have come to the same conclusion as the *Bundesgerichtshof*, i.e. that the doctrine of merger does not bar the recognition of the award because the scope of the doctrine is limited to the exequatur country.¹⁵ Indeed, "to hold otherwise would deprive the beneficiary of the relatively clear and straightforward arrangements in the [New York] Convention scheme . . .".¹⁶

The second question is whether foreign exequatur judgments can be recognized and enforced, provided that the conditions for recognition of foreign judgments are met. Reasons to pursue such a strategy are manifold: Parties may consider recognition of the judgment to be quicker (e.g. pursuant to the Judgment Regulation, which provides for other, arguably lower formal requirements than the New York Convention) or to avoid certain defenses (e.g., as in the current development of the Yukos saga, that the award was set aside).¹⁷ It is further conceivable that the exequatur judgment comprises ancillary decisions that the creditor also wants to enforce¹⁸ or that national regimes for limitation periods play a role in that an award may be time-barred but the necessarily subsequent judgment confirming this award is not yet.

Since the second question was the subject of the discussed decision, it is somewhat surprising that the *Bundesgerichtshof* did not start with the analysis of whether the Superior Court's exequatur decision was a "judgment" in the sense of Sections 722 and 723 of the German Code of Civil Procedure. If it was not, the discussion could have ended there — in line with the widely recognized French principle "*L'exequatur sur l'exequatur ne vaut.*"

Surprisingly, this pivotal question, which previously had been the basis for the *Bundesgerichtshof* to allow recognition,¹⁹ was only the Court's penultimate consideration, and it only included one sentence: "*The transformation of the award is an autonomous procedural decision, but not a foreign judgment based upon an independent, reproducible assessment of the facts and legal conclusions.*" The *Bundesgerichtshof's* considerations of the Judgment Regulation would not appear to have been relevant for the case because Sections 722 and 723 of the German Code of Civil Procedure are not based upon it, but are German domestic law. The scope of the applicable enforcement treaty or domestic law provision on enforcement is to be assessed autonomously.²⁰

The *Bundesgerichtshof's* exhaustive assessment even of consideration not pertinent to the case at hand indicates that it did not want to limit its decision to US judgments, but rather wanted to make clear that it applies to all foreign exequatur judgments, including those rendered in the EU/EFTA.²¹ The result is *de lege lata* convincing, essentially because of court specialization in arbitration matters. German legisla-

tors considered arbitral matters to be an exceptional and intricate area of law, requiring expertise. This motivated them to concentrate arbitration matters in specialized appeal court chambers. The prohibition of double exequatur in connection with arbitral awards will fulfill the legislators' goal of keeping arbitration matters before this small number of specialized fora. This should significantly diminish the risk of inconsistent decisions by separate enforcement courts, particularly because lower courts, which have jurisdiction for the recognition of judgments, would only deal on rare occasions with arbitration matters. *De lege ferenda*, this line of reasoning could, however, become obsolete through the European Commission's temptation to extend the scope of the Judgment Regulation to arbitration matters.²² One of the suggested modifications is to assign exclusive competence for the recognition of arbitral awards to the court at a tribunal's seat and to permit free circulation of this court's decision within the EU.²³

Almost in passing, the *Bundesgerichtshof* solved a further open question, namely whether Article 5 of the New York Convention must be read as "*may be refused*" or "*shall be refused*," i.e. whether an enforcement court has discretion to recognize foreign awards despite the presence of a defense. Its emphasis of "*circumvention of the provisions applicable to recognition*" and "*erosion of the New York Convention*" makes sense only if the Court considers the existence of a proven defense under Article 5 to prohibit recognition. While this notion corresponds to the majority position in Germany,²⁴ it is internationally speaking unusual. Most international commentators conclude that the application of the exceptions provided by Article 5 are discretionary.²⁵

The discussed decision teaches two important lessons: It will firstly require practitioners to revisit intuitive reactions when enforcing in Germany a foreign arbitral award which was confirmed by judgment. Now, recognition of the arbitral award in accordance with the New York Convention is the only means of enforcement. In spite of their reduced options, the position of creditors has not been adulterated as German courts generally, and the *Bundesgerichtshof* in particular, are very permissive regarding the recognition of foreign arbitral awards. The decision secondly creates clarity for potential debtors as to what to expect, both regarding the future enforcement strategy

and the prospects of potential defenses provided by the New York Convention.

Endnotes

1. Bundesgerichtshof, judgment dated 2 July 2009, IX ZR 152/06, *Neue Juristische Wochenschrift* 2009, p. 2826.
2. The Bundesgerichtshof is the final instance in civil matters; questions with constitutional implications may be referred further to the Federal Constitutional Court ("Bundesverfassungsgericht").
3. E.g. the European Convention on International Commercial Arbitration of 1961.
4. The Tribunal members were not identified.
5. Bundesgerichtshof, decision dated 27 March 1984, IX ZR 24/83, *Neue Juristische Wochenschrift* 1984, 2765; decision dated 10 May 1984, III ZR 206/82, *Neue Juristische Wochenschrift* 1984, p. 2763.
6. See Mosk/Nelson, *The Effects of Confirming and Vacating an International Arbitration Award on Enforcement in Foreign Jurisdictions*, *Journal of International Arbitration*, Vol. 18 No. 4 (2001), pp. 463, 466 et seq. with further references.
7. Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgment in civil and commercial matters, O.J. (2001) No. L12, p. 1. This Regulation applies to judgments rendered in EU-Member States.
8. Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Brussels on 27 September 1968, O.J. (1972) No. L299, p. 32. The Brussels Convention was the predecessor of the Judgment Regulation.
9. Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988, O.J. (1988) No. L319, p. 9. The Lugano Convention applies to judgments rendered in EFTA-Member States with the exception of Liechtenstein.
10. Sections 722, 723, 328 of the German Code of Civil Procedure are the (general) provisions on the recognition and enforcement of third country judgments.
11. See Article 1 para. 2 (d) of the Judgment Regulation; Article 1 para. 2 no. 4 of the Lugano Convention.
12. van den Berg, *The New York Arbitration Convention of 1958* (1994), p. 265.
13. For example pursuant to Section 1287.4 California Code of Civil Procedure or Article 66 (1) and (2) of the Arbitration Act 1996.
14. See, for example, Supreme Court of New South Wales (Australia), decision of 17 October 1988, *Yearbook Commercial Arbitration* Vol. XV (1990), p. 360 (361); High Court of Delhi (India), decision of 12 July 1985, *Yearbook Commercial Arbitration* Vol. XI (1986), p. 502 (505); High Court of Bombay (India), decision of 19 November 1984, *Yearbook Commercial Arbitration* Vol. XIV (1989), p. 644 (646); Hanseatisches Oberlandesgericht Hamburg (Germany), decision of 27 July 1978, *Yearbook Commercial Arbitration* Vol. IV (1979), p. 266 (267). The Italian Corte di Cassazione permitted in 1979 also the enforcement of a UK exequatur decision concerning a UK award, decision of 27 February 1979, *Yearbook Commercial Arbitration* Vol. VII (1982), p. 333.
15. High Court of Delhi (India), decision of 12 July 1985, *Yearbook Commercial Arbitration* Vol. XI (1986), p. 502 (505/506).
16. Supreme Court of New South Wales (Australia), decision of 17 October 1988, *Yearbook Commercial Arbitration* Vol. XV (1990), p. 360 (365), citing Patchett, *Recognition of Commercial Judgments and Awards in the Commonwealth* (1984), para. 8.26.
17. Yukos currently applies for recognition and enforcement of four arbitral awards worth USD 419 million against the Russian state-owned oil company Rosneft as well as a Dutch court ruling recognizing the awards despite the fact that Russian courts

- vacated the awards (Yukos Capital S.a.r.l. vs. OAO Rosneft, Amsterdam Court of Appeal, decision of 28 April 2009, Case No. 200.005.269/01). The docket number of the USDC for the Southern District is 09 CIV 7905. Note that this constellation differs from the constellation in the discussed decision because the Dutch court did not recognize a domestic, i.e. Dutch award but a foreign award.
18. Borges, *Doppelexequatur von Schiedssprüchen in der EuGVVO*, Internationales Handelsrecht (IHR) 2006, p. 206.
 19. Bundesgerichtshof, decision of 27 March 1984 (IX ZR 24/83), Neue Juristische Wochenschrift 1984, 2765, para. 10.
 20. See Higher Regional Court of Frankfurt (Germany), decision of 13 July 2005 (20 W 239/04), Internationales Handelsrecht (IHR) 2006, p. 212 for the scope of Article 38 of the Judgment Regulation with regard to an English exequatur decision; Cour de Cassation (France), Revue de l'arbitrage 2004, p. 337, and House of Lords (UK), Arab Business Consortium v. Banque France-Tunésienne (1996). 1 Lloyd's Law Reports (L.R.), p. 485, both concerning the Brussels Convention; Corte di Cassazione (Italy), decision of 27 February 1979, Yearbook Commercial Arbitration Vol. VII (1982), p. 333 with regard to the scope of an Italian-English Treaty dated 7 February 1964 on the Recognition and Enforcement of Court Decisions in Civil and Commercial Matters.
 21. Bundesgerichtshof, decision dated 2 July 2009, IX ZR 152/06, Neue Juristische Wochenschrift 2009, p. 2826 (2827).
 22. Green Paper on the review of the Council Regulation (EC) No. 44/2001 on Jurisdiction and the recognition and enforcement of judgments in civil and commercial matter, dated 21 April 2009, COM(2009) 175 (final).
 23. The Brussels I - Regulation (EC) No 44/2001: The Heidelberg Report on the Application of Regulation Brussels I (2008), page 130.
 24. Higher Regional Court of Düsseldorf (Germany), decision of 15 July 2002, 6 Sch 05/02, available online at <www.dis-arb.de>; Higher Regional Court of Düsseldorf (Germany), decision of 21 July 2004, VI Sch (Kart) 01/02, Yearbook of Commercial Arbitration Vol. XXXII (2007), p. 315 (318); Voit in Musielak, ZPO, 6th Ed. (2008), § 1061 ZPO para 28; Haas in Weigand, *Practitioner's Handbook on International Arbitration* (2002), page 487 para. 4; Münch in *Münchener Kommentar zur Zivilprozessordnung*, 3rd Ed. (2008), § 1061 para 17; Schwab/Walter, *Schiedsgerichtsbarkeit*, 7th Ed. (2005), Chap. 56, para 3.
 25. For example Phillip Capper, *Refusing the enforcement of awards — where discretion "may" be exercised*, KluwerArbitrationBlog, 23 July 2009, <http://kluwerarbitrationblog.com> (last accessed on 8 October 2009). ■