

Is There a Double Standard for the Enforcement of Foreign Arbitral Awards in the Czech Republic?

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The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('**New York Convention**') stipulates in Article III that enforcement of foreign arbitral awards should not be subject to more onerous conditions, higher fees or charges than those that are imposed on enforcement of domestic arbitral awards.

However, the Czech Supreme Court ('CSC') repeatedly took a rather startling stance on this provision. In its case law, the CSC stated that foreign arbitral awards cannot be enforced by a private bailiff but only through court enforcement. In contrast, domestic arbitral awards continue to enjoy the benefits of enforcement by a private bailiff. This post explains the CSC's position and the practical implications of it.

Evolution and Reasoning of the CSC's Decision

The problem with enforcement by a private bailiff first arose in 2016 due to the change of the Czech Execution Code.[fn]Act No. 120/2001 Coll., on Court Bailiffs and Enforcement Activities, as amended.[/fn] In its decision,[fn]Decision from 1 July 2016, file no. 20 Cdo 1349/2016.[/fn] the CSC stated that foreign court judgements cannot be enforced by a private bailiff but only through court enforcement. The case concerned judgement rendered by the County Court of the 18th Circuit for Brevard County, Florida. There is no mutual legal assistance treaty for civil matters between the Czech Republic and the USA. Therefore, the Czech Private International Law Act ("PILA")[fn]Act No. 91/2012 Coll., Governing International Private Law.[/fn] was applicable.

The PILA states in Section 16(3) that the enforcement of a foreign decision concerning property must be ordered by a reasoned decision of the Czech court (the same applies to foreign arbitral awards). If there is enforcement through a bailiff, there is only one court decision - the one which authorizes the bailiff to proceed with enforcement. This particular court decision does not include reasoning. Due to the missing reasoning, the CSC concluded that the court's decision on bailiff's authorization does not meet the requirement specified in Section (16)3 of the PILA. As a result, it is not possible to enforce foreign court decision through bailiff without prior separate proceedings on the recognition of the foreign decision.

Several days after the aforementioned decision was rendered, the CSC issued another one.[fn]Decision from 16 August 2016, file no. 20 Cdo 5882/2016.[/fn] This time, it involved a foreign arbitral award and its enforcement in the Czech Republic under the New York Convention. The CSC, referring to the above-mentioned decision, stated that foreign arbitral awards also cannot be enforced by a bailiff if there is no separate decision on recognition of the foreign arbitral award. The CSC specifically referred to Article III of the New York Convention and noted that a possibility to use only court enforcement for arbitral awards does not present more onerous conditions for foreign arbitral awards because the same conditions apply to enforcement of both domestic and foreign awards.

The CSC confirmed its position in 2016,[fn]Decision from 3 November 2016, file no. 20 Cdo 1165/2016.[/fn] and again in 2018[fn]Decision from 12 June 2018, file no. 20 Cdo 1754/2018.[/fn] when it added to its previous reasoning that Article III of the New York Convention envisages that the enforcement procedure is to be governed by the law of the state where the award is being enforced. Thus, if the award is being enforced in the Czech Republic, the Czech law, namely the Code of Civil Procedure[fn]Act No. 99/1963 Coll., on Code of Civil Procedure, as amended.[/fn] and the Execution Code govern the procedure.

Practical Implications of the CSC's Case Law

In general, there are two possible types of enforcement of domestic arbitral awards and court decisions in the Czech Republic. The first one is the court enforcement, where the title is enforced by a court. This type of enforcement proceedings is much less used because the creditor in the motion for enforcement needs to specify the debtor's assets (e.g., real estate, bank account, etc.) Also, the court enforcement is subject to a court fee of 5% of the amount sought. Without the payment of the fee, the court will not act upon the motion.

The second type of enforcement is through a private bailiff. Bailiffs in the Czech Republic are specialized lawyers whose practice focuses on enforcement. This type of enforcement is heavily preferred because, usually, the creditor does not need to pay any fee beforehand as the costs of enforcement are paid directly by the debtor. Moreover, the bailiff actively searches for the debtor's property and has available a wide array of methods to do so. Another significant advantage of this type of enforcement is that, after the bailiff is authorized to start the proceedings, all debtor's assets are frozen. Thus, the debtor cannot dispose of them.

Either of the two possible types of enforcement is an option for Czech arbitral awards. But due to the CSC's case law, only court enforcement is possible for foreign arbitral awards. This introduces significant difficulties. With the bailiff enforcement, the creditor can – through the bailiff – gather information on debtor's assets. The debtor then cannot hide its assets which, in turn, considerably increases chances of successful enforcement.

In case of court enforcement, the court itself does not search for debtor's assets and instead totally relies on information supplied by the creditor. If the creditor cannot specify debtor's assets, the court enforcement will not be successful. As a result, court enforcement is more complicated for the creditor than private bailiff enforcement.

Critique of the CSC's Case Law

The CSC's case law thwarts enforcement of arbitral awards through a bailiff without adequate reasoning. For this, the CSC was heavily criticized.[fn]See e.g. Rathouský, Ondřej; Skorkovská,

Tamara: Exekuce na základě zahraničních rozhodčích nálezů. Bříza, Petr: Exekuce cizích rozhodčích nálezů ve světle problematického rozhodnutí Nejvyššího soudu. Epravo.cz magazine 2/2017, p. 53. Hoder, Lukáš: Judikatura Nejvyššího soudu znevýhodňuje cizí rozhodčí nálezy. Soukromé právo 7-8/2019, p. 62.[/fn]

The CSC also disregarded commentaries. There is a special provision in the Czech Execution Code which states that an “enforceable arbitral award” is also suitable for enforcement by a private bailiff. According to the commentaries,[fn]See Jirmanová, Miroslava: Section 37. In: Kasíková, Martina et al.: Exekuční řád. 4th edition. C.H.Beck 2017, p. 219.[/fn] an arbitral award whose enforcement is sought under the New York Convention falls within this category and thus is suitable for bailiff enforcement without separate decision on recognition. However, the CSC’s case law does not reflect this doctrine and provides no viable explanation.

The CSC is right that the same regime of court enforcement is applicable to both foreign and domestic arbitral awards. Still, the CSC overlooked that in the case of domestic arbitral awards, bailiff enforcement is an option while that might not be possible for foreign arbitral awards at all.

Namely, under the CSC’s case law, for an arbitral award to be enforced by a bailiff, it would have to be first recognized by a separate court decision. But the Czech PILA does not specifically provide for the possibility of separate recognition of foreign arbitral awards but only of foreign court decisions. There is no case law yet on the question whether the provisions of the Czech PILA on foreign court decisions are also applicable on foreign arbitral awards. Thus, even if the courts endorse the approach that such recognition is possible anyway, at this point, uncertainty looms in the air.

However, even if a separate decision on recognition turns out to be possible for foreign arbitral awards, this would not solve the problem because the debtor is a party to the proceedings on the recognition of the award. So, the debtor can prolong and complicate the proceedings by procedural obstructions. Even more importantly, the debtor will be informed that the creditor is trying to enforce an award against him in the Czech Republic and might start to dispose of the assets or hide them. Thus, even if the creditor is successful in getting the award recognized, there might no longer be any debtor’s assets to satisfy the creditor.

Might Injunctive Relief Help?

A possible solution might be a motion for injunctive relief filed in recognition proceedings. But it also has several flaws. First, it is unclear whether it is even possible to ask for injunctive relief in the recognition proceedings. For the injunctive relief to be granted, future enforcement of decision must be at risk. However, in recognition proceedings, even if the debtor disposes of all their assets, the enforcement of the decision, *i.e.* the decision on recognition, is not at risk because it is not a decision on the property. Therefore, the court might dismiss the motion for injunctive relief.

Secondly, there are several types of injunctive relief. In the case of debtor getting rid of their assets, only a freezing injunction would be effective. To apply for such injunction, the assets to be frozen need to be specified, which brings us again to the very beginning of this discussion: If the creditor was able to specify assets of the debtor, the creditor would not have to ask for injunctive relief in the first place because the court enforcement would be an available recourse. For these reasons, injunctive relief has little potential to solve the conundrum.

What Is Next?

None of the problems mentioned above applies to the enforcement of domestic arbitral awards because they do not need to be recognized. Bailiff enforcement is much more efficient than court enforcement. Majority of enforcement cases involves a situation where the debtor does not disclose its assets and does not pay voluntarily. In such scenario, court enforcement is practically useless. Therefore, by allowing only court enforcement for foreign arbitral awards, the CSC's case law creates more onerous conditions for the enforcement of foreign arbitral awards than those that apply to enforcement of domestic awards. As a result, the enforcement of foreign arbitral awards in the Czech Republic is paved with enormous difficulties, and it is questionable to what extent these can be overcome in practice.

The CSC's approach, as illustrated above, is contrary to the New York Convention, since it subjects foreign arbitral awards to more onerous conditions than the Czech arbitral awards. It also protects Czech debtors who do not wish to settle their debts.

There are two possible solutions to this situation. The first one involves the CSC changing its case law. The second one involves a change of Czech law which would make clear that either separate recognition proceedings are possible for foreign arbitral awards as well, or better, that bailiffs can also enforce foreign arbitral awards. Until then, the creditors who wish to enforce their foreign arbitral awards against debtors with assets in the Czech Republic need to check the statute of limitation and then hope that either of these changes occurs before their title is time-barred.