Kluwer Arbitration Blog

Enforcement in Romania of Awards Set-Aside at their Seat

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The Question

The question of enforcing arbitral awards which had been subject to set-aside proceedings at their seat is long-standing in academic debate[1)] and it continues to be of acute practical importance.

Yet, and despite the unusual uniformity of legislative drafting on this topic, which we owe to the geographical pervasiveness of the New York Convention, judicial responses in various jurisdictions have been spanning from one end to the other of the spectrum of possibilities.

Here, we briefly test-run some recent judicial practice against the particulars of the Romanian legal system, in the hope of assisting practitioners in tackling the issue in an intelligible manner if and when the matter reaches the courts.

The Romanian Civil Procedure

The New York Convention 1958 applies in Romania since 1961 (see Decree of the Council of State no 186 of 24 July 1961). However, there has not been, to our knowledge, any reported court decision directly on the issue.

The wording of the Romanian Civil Procedural Code 2010, which gives effect to the New York Convention prescription, reads (in our translation):

> Art. 1129: Grounds for refusal of recognition or enforcement
> Recognition and enforcement of the award is refused by the court, if the party against whom the award is invoked proves any of the following circumstances:
> […]
> (f) The award has not yet become binding on the parties, or 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.

The first observation to be made is that the language, in Romanian, is more restrictive than the English authentic version of the Convention, which is express to the effect of preserving the court's discretion to enforce (i.e. recognition and enforcement "may be" refused).

Arguably, it is also stricter, in its normative part, than the French authentic version of the Convention which stipulates that the recognition and enforcement "will not be refused … unless" ("ne seront refuses … que si")[2], thus under-determining what *must* happen if the condition is indeed met, and which suggests, in the French version, a *necessary* but not the *sufficient* condition for the norm. The New York Convention language can be said to be *consistent* with (i.e. not excluding) a residual discretion of the court to enforce in certain special circumstances (discussed below.)

By contrast, the syntax of the Romanian Civil Procedure Code provision is: if the condition is met, the enforcement "is refused by the court" – i.e. affirming the premise, confirms the conclusion.

Nevertheless, assuming that the language is indeed logically tighter in the Romanian formulation, it remains the case that, where the national provisions fall foul of the general purpose of the Convention to promote enforcement of arbitral awards, the language of the Convention may be held to prevail over the national provision.[3]

Before addressing this point further, we turn to the recent arguments by the Netherlands Supreme Court in the *Maximov* enforcement case.

Maximov

The facts of the dispute between Nikolay Maximov and the Novolipetsky Metallurgichesky Kombinat have been widely reported. Briefly, the dispute concerns an arbitral award obtained by Mr Maximov at the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, but which was set aside by the Moscow Commercial Court on 21 June 2011, a quashing decision which was upheld on appeal by the Federal Commercial Court of Moscow District on 10 October 2011, and permission to appeal was refused on paper by the Supreme Commercial Court of the Russian Federation on 30 January 2012. Mr Maximov has attempted enforcement of the arbitral award in France, where he was successful[4], and in the Netherlands and the UK[5]
, where, in each case he has not.

The Netherlands Supreme Court has issued a decision on enforcement proceedings on 24 Nov 2017[6] which further elaborates on the way Art. V (1) e) is approached by the court.

The decision is interesting for our purposes for at least two reasons: one, it contains an interpretative discussion of the normative language of the New York Convention based on the Vienna Convention on the Law of Treaties 1969 and the New York Convention's travaux préparatoires. Second, it reaffirms the margin of appreciation of the Dutch courts in determining whether to exercise their discretion to refuse enforcement under the New York Convention, and proposes certain landmarks for the exercise of that discretion.

On the first point, the Netherlands Supreme Court proposes that the only interpretation consistent with both authentic languages of the New York Convention art. V (1) e) given the Convention's general purpose and design, is that the courts retains a margin of appreciation in determining whether to refuse enforcement where the facts at art. V (1) e) are invoked, in special circumstances (see para 3.4.5 of the Netherlands Supreme Court Decision).

On the second point, the Netherlands Supreme Court asserts that such special circumstances where such enforcement discretion could be exercised, include situations where the foreign annulment judgment is incapable of recognition in the Netherlands on the ground that one or more of the conditions that apply under Dutch private international law are not respected for the recognition of a foreign decision (para 3.4.6 of the Netherlands Supreme Court Decision). It is notable that this is so, despite the fact that it may not be procedurally necessary for the party resisting enforcement to introduce a separate action for the recognition of the foreign annulment decision.[7)]

The approach is on its face similar to the one used in the case of *Yukos Capital*[8)] by the same Dutch courts, which, on different facts, led to the opposite conclusion, i.e. enforcement was permitted.

On the one hand, it may be argued that the strengthening of the discretion of enforcement courts in connection to Art. V (1) e) renders the application of that provision unpredictable, thereby defeating the purpose of the Convention drafters.[9)]

However, since the circumstances giving rise to the application of the art V (1) e) exception are inextricably linked to a foreign court judgment, it is difficult to see how national courts can ignore the question of whether that judgment, properly considered, would otherwise be apt to be recognised by the enforcement forum. Conversely, it could be argued that, giving uncritical credence to the annulment decision, would amount to affording the foreign court judgment a level of deference superior to the one conferred upon the foreign arbitral decision. In the context of the purpose of the New York Convention, this is difficult to defend, especially as the annulment proceedings are de plano excluded from the scope of the New York Convention.[10)]

Foreign judgments

In any event, it is not necessary to dispense with this criticism for the limited purposes of this exercise. We find value in examining what could be the result of such approach in the case of the Romanian Civil Procedure Code, as no other guidance is provided to the courts by the New York Convention itself for the application any residual discretion in the application of Art. V (1) e). In this context, the framework affirmed by the Netherlands Supreme Court would have the merit of providing clear criteria, endogenous to the Romanian law, for examining the matter, albeit without predetermining any future decision on different future facts.

The relevant rules are contained in arts. 1096-1098 of the Romanian Civil Procedure Code and provide for basic conditions to recognition as well as a list of grounds for which a court “may” refuse enforcement. For a foreign court decision to be recognised it must be:

> (a) final [definitive] under its own law;
> […]
> (c) passed in a jurisdiction in respect of which there is “reciprocity” of recognition of the effects of court judgments.

Among the express grounds for which a court “may” further refuse enforcement, we note in particular the circumstance that the judgment is “manifestly contrary” to public order as reflected in the Romanian private international law; and that this *incompatibility is weighed taking account particularly of the intensity of the connection with the Romanian legal order and the gravity of the*

effect thereby caused. There would also be ground for refusal of enforcement, inter alia, where the judgment in question is subject to challenge in the jurisdiction where it was issued.

We observe here the difference in language: while enforcement of a foreign arbitral award "will be refused … if", enforcement of a foreign court decision "may be refused." We note also that the "public order" standard is not only elevated by the requirement of "manifest" incompatibility, but weighed further against the extent of the connection to the forum. Both elements of the standard further emphasise the very limited scope for a refusal of enforcement.

On the other hand, for a recognition and enforcement procedure, the foreign court decision must be "definitive" which would not be the case after a judgment of first instance regularly subject to appeal. On the facts of *Maximov*, the annulment of the arbitral award would therefore have been apt to be given weight only upon dismissal of its final appeal.[11)]

More generally, by referring the question of the application of art. V (1) e) to the national rules on enforcement of foreign court judgments, we move beyond a scrutiny of the formal legal grounds invoked by the annulment courts in their quashing decision. Instead, the challenge becomes one of proper grounding and evidencing a refusal of enforcement of the annulment decision, in particular by reference to "manifest incompatibility" with national public order. This task imposes an appropriately "heavy burden"[12)] on the party attempting the enforce despite the prima facie application of art. V (1) e).

Conclusions

The Romanian courts are bound by legislative language which purports to limit their discretion to enforce foreign arbitral awards set aside at their seat. Nevertheless, the New York Convention language may be given precedence if more lenient to enforcement and therefore we cannot exclude a certain margin of appreciation subsisting in Romanian courts confronted with the argument.

Furthermore, taking our cue from the Netherlands Supreme Court decision in Maximov, we suggest that introducing criteria from private international law rules on recognition of foreign judgment into the exercise of art. V (1) e) assessment, would lead to a standard not unlike the one used by the Dutch, UK or US courts.[13)] In particular, the threshold for a finding that the foreign annulment decision is to be disregarded for "public order" considerations would be a very high one, and met only in exceptional circumstances.

Finally, we agree that the application of art. V (1) e) has yielded divergent results in various jurisdictions (and even within the same jurisdiction) potentially detracting from a purpose of uniformity which may be said to be implicit in the New York Convention design. However, by way of limited defence, we would argue that this may be the result not of any insurmountable defect in the wording of Art. V (1), but of the diversity of factual circumstances and evidentiary difficulties in defeating a foreign judgment on "public order" grounds. Last but not least, the uncertainty might also be a result of shifts in court attitudes and perceptions surrounding particular foreign justice systems.

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Dutch texts which would be otherwise inaccessible to the writer.

References

?1 For instance, Nadia Darwazeh, Article V (1)(e), in Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention 301, 307-09 (H. Kronke, P. Nacimiento et al. eds., 2010); Paulsson, Jan, Enforcing Arbitration Awards under the New York Convention, Experience and Prospects, Papers presented at "The New York Convention Day", 10 June 1998, United Nations Publication, 24 (1999)

?2 The Romanian translation of the Art V as provided in the Decree by which Romanian adhered to the New York Convention in 1961 appears to be a close translation of the French authentic version of the Convention and reads (in our translation of the relevant part) "The recognition and enforcement of the award will not be refused, upon request by the party against whom it is invoked, unless that party proves …".

?3 The Romanian Constitution Art 11 consecrates properly ratified international treaties as “internal law”. See also the Vienna Convention on the Law of Treaties 1969 art. 27, replicated in internal law by the Art. 31 (5) of the Law of Treaties no 590/2003, which prevents courts from invoking national law to refuse the application of international treaties, a principle confirmed also by case law, cf. e.g. Romanian Supreme Court Decision no 3283 of 17 Sep 2014.

?4 Cour de Cassation, chambre civile 1, 25 mai 2016, 14-20.532 ; Cour D’appel De Paris Pôle 1 – Chambre 1 Decision of 01 April 2014, 12/15479 ; Order of exequatur by the Tribunal de Grande Instance Paris dated 16 May 2012.

?5 Maximov v Open Joint Stock Company “Novolipetsky Metallurgichesky Kombinat” [2017] EWHC 1911 (Comm).

?6 Hoge Raad Decision of 24.11.2017, case number 16/05686. ECLI:NL:HR:2017:2992.

?7 Amsterdam Court of Appeal Decision of 18 Sep 2012, interim judgment. case number 200.100.508/01.

?8 Amsterdam Court of Appeal Decision of 28 April 2009, case number 200.005.269/01

?9 Paulsson, Marike R. P., “Enforcement of Annulled Awards: A Restatement for the New York Convention?” Kluwer Arbitration Blog, December 21, 2017

?10 Art. I of the New York Convention as universally interpreted by the courts. See also Albert Jan van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation 20 (1981), p 20 and ff.

?11 This is without prejudice to the New York Convention’s own mechanism in Art. VI permitting (but not mandating) an adjournment of enforcement proceedings pending conclusion of set-aside proceedings at the seat.

?12 We use the words of Sir Michael Burton (Sitting as a Judge of The High Court) in Maximov v Open Joint Stock Company “Novolipetsky Metallurgichesky Kombinat” [2017] EWHC 1911 (Comm), who rendered judgment refusing enforcement in the same dispute in the UK.

?13 See for instance Corporacion Mexicana de Matenimiento Integral, S De RL De CV v Pemex-Exploracion y Produccion, No 13-4022 (2d Cir Aug 2, 2016) by reference to language similar to the Art. V (1) found in the Inter-American Convention on International Commercial Arbitration, also known as the Panama Convention.

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