

Kluwer Arbitration Blog

Leave to Enforce Award by Amsterdam Court of Appeal Granted Despite Lack of Original Arbitration Agreement or Duly Certified Copy

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In [Case No. ECLI:NL:GHAMS:2024:947](#), the Appeal Court in Amsterdam granted leave to enforce an arbitral award despite the applicant being unable to produce the original arbitration agreement or a duly certified copy thereof, as prescribed by article IV(1) of the [New York Convention](#). This post assesses this decision and similar decisions against the background of the requirements of Article IV of the New York Convention.

Background

In 2015, GPGC, a Ghana-based energy company, and Ghana entered into an Emergency Purchase Agreement (“Agreement”). Pursuant to the Agreement, GPGC would relocate two power plants from Italy to Ghana. The Agreement provided that disputes were to be submitted to ad-hoc arbitration in accordance with the [UNCITRAL Rules of Arbitration](#) and be seated in London under English law.

After Ghana purported to terminate the Agreement, GPGC initiated arbitration proceedings claiming compensation. In January 2021, the tribunal awarded over USD 134 million plus interest and cost. Ghana made partial payments in satisfaction of the award, but over USD 109 million remained outstanding. GPGC submitted an application for the enforcement of the award with the Amsterdam Appeal Court. Ghana did not appear in the proceedings. The court granted the application despite the unavailability of the original arbitration agreement or a duly certified copy thereof.

Originals and Authenticated or Certified Copies

Article IV(1) of the New York Convention provides that a party applying for recognition and enforcement shall submit the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement or a duly certified copy thereof. The court observed that GPGC had submitted a copy of the award duly certified by a notary public. However, GPGC had only submitted a copy of the arbitration agreement and not the original or a duly certified copy thereof.

GPGC had explained that the original agreement was no longer available, so it was impossible to produce the original agreement or a duly certified copy thereof.

The court ruled in GPGC's favour. It emphasised that Article IV of the New York Convention does not impose sanctions on a failure to comply with the requirements laid down therein. The court took into account that it was satisfied that there was an arbitration agreement and its content. Furthermore, Ghana had not disputed the existence and content of the arbitration agreement in the arbitration. The court also relied on witness statements confirming that the copy of the award submitted by GPGC was identical to the original. Moreover, Ghana had made numerous payments in satisfaction of the award, implying that it did not dispute the validity of the award nor the arbitration agreement. The English courts had also [recognised the award and granted leave for enforcement](#).

The above outcome corresponds to the reality of concluding agreements in this day and age. Parties tend to exchange scanned and signed copies of agreements by e-mail. Neither party therefore possesses the original agreement signed with pen on behalf of the other party. Despite that fact, parties may be held to have agreed to arbitration and not to contest the validity of an arbitration agreement or award. In his [analysis of the New York Convention published in 1981](#) (pps. 246-49), Professor Van den Berg stated that true, not certified copies of the agreement and award could suffice, pointing to the purpose of Article IV, namely to ease the conditions to be fulfilled by the applicant as much as possible.

A party will also not maintain the original agreement signed on its own behalf forever. For instance, under Dutch law the board of a legal entity is only required to keep documents in its archives for a period of seven years pursuant to Article 2:10(3) of the [Dutch Civil Code](#). This seven-year period also applies to legal persons for tax purposes pursuant to Article 52(4) of the [Dutch General Tax Act](#). It is not uncommon for arbitrations or subsequent state court proceedings to be initiated after that period.

The outcome in *GPGC v. Ghana* before the Appeal Court in Amsterdam is similar to an earlier [decision of the Appeal Court in Den Bosch rendered in 2020](#). That decision concerned a request for recognition and enforcement of an award where only a scanned copy of the arbitration agreement was submitted. The court ruled that the lack of availability of the original arbitration agreement was no reason to deny the request. The court took into account that the defendant replied to an e-mail by the arbitrator, addressing the performance of the agreement that included the arbitration clause. The court held this to confirm that the defendant accepted the arbitration and had agreed to the arbitration agreement. The court also ruled that the defendant was validly notified of the proceedings to recognise and enforce the award. Furthermore, the court took into account that the defendant engaged in settlement discussions with the lawyer for the applicant after the award was rendered.

Even if Ghana were to have appeared in the enforcement proceedings to contest the requirements of Article IV of the New York Convention being met, that may not have made a difference. In some other jurisdictions, similar rulings on the requirements of authentication and certification were rendered. In 2022, the [United States District Court for the Southern District of California](#) assessed a request for recognition and enforcement of an award while the defendant pointed to the lack of availability of the original arbitration agreement. The court ruled that, although the original arbitration agreement was not submitted, the copies of the agreement that were submitted were considered satisfactory evidence. The court agreed with the applicant that no original arbitration

agreement existed, as the agreement was executed in counterparts by different parties. As another example, in 2022 the [Federal Court of Australia](#) granted leave to enforce an award despite the lack of an authenticated or certified hard copy original, as it was satisfied that the award, which was provided to the parties by e-mail only, met the requirements of authentication.

Certified Translations

The approach described above for Article IV(1) of the New York Convention also corresponds to the interpretation of Article IV(2) of the Convention. This article provides that if the award or arbitration agreement is not made in an official language of the country in which recognition or enforcement is sought, the applicant is required to produce a certified translation thereof in an official language of that country. Despite that provision, Dutch courts frequently allow recognition and enforcement of awards in absence of such a translation. In 2018, [the Appeal Court in The Hague](#) ruled that the lack of a translation was no reason to deny the request. In that case, the arbitration was conducted in the English language, which the defendant was held to understand. In August 2024, [the Appeal Court in The Hague](#) granted a request for recognition and enforcement of an award against a Dutch individual for payment under a student loan. The court ruled that it did not need to be provided with a Dutch translation of the award and arbitration agreement, as the court sufficiently understood these documents, which were in English.

Recognition or Enforcement

One other aspect of the decision in *GPGC v. Ghana* merits further consideration. Remarkably, in its application, GPGC only requested leave to enforce the award and not the recognition of the award. Only at the hearing did GPGC request recognition of the award. The court ruled that GPGC could not expand its request at the hearing, as the amendment of the request had not been served on Ghana, which had not appeared in the proceedings. In the operative part of the decision the court granted GPGC leave to enforce the award in the Netherlands. However, the court assisted GPGC by explaining that GPGC's initial request for leave to enforce the award was held to include a request for the recognition of the award.

Concluding Remarks

The outcome in *GPGC v. Ghana* before the Appeal Court in Amsterdam and the other cases described above confirm that Dutch courts take a flexible approach as regards formalities prescribed under Article IV of the New York Convention. Even if a party does not produce the original arbitration agreement or a duly certified copy thereof or does not produce a certified translation of the award and arbitration agreement, awards can be recognised and enforced in the Netherlands, as long as the court is satisfied of the existence and validity of the award and the arbitration agreement.

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