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THE RECOGNITION AND ENFORCEMENT OF UNAUTHENTICATED PARTIAL AWARD

Ivan Tilošanec

Permanent Arbitration Court
Croatian Chamber of the Economy
Rooseveltov Trg 2
HR-10000 Zagreb
Phone: + 385 1 460 6733
Fax: + 385 1 460 6752

Croatian Arbitration Association
@ University of Zagreb Faculty of Law
Trg Maršala Tita 3
HR-10000 Zagreb
Phone: + 385 1 485 1800
Fax: + 385 1 485 1801

Ivan Tilošanec

Attorney-at-Law

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Analysis of a recent case of the Bulgarian courts practice

1. Introduction

The Supreme Court of Bulgaria, ruling in the process of recognition and enforcement of an arbitral award made in Switzerland (Resolution No. 356 of February 23,1999), denied the appeal of a Croatian company and confirmed the contested decision of the Appellate Court in Sofia (Resolution No. 570 of October 9, 1998). The appellate decision struck down the 1997 decision of the City Court in Sofia (Resolution No. 1543 of November 5, 1997) granting recognition. Thereby, the request for recognition and enforcement on the territory of the Republic of Bulgaria of an arbitral award of February 4, 1995 rendered by an *ad hoc* arbitral tribunal seated in Bern was denied.

The international arbitration held in Switzerland that gave rise to this case was presented in more detail at the Sixth Croatian Arbitration Days in December 1998[1]. On that occasion we partially presented the course of the proceedings for recognition and enforcement of the cited arbitral award before the City Court in Sofia and the Appellate Court in Sofia. Since, in the meantime, the proceedings for recognition and enforcement were completed by a denying decision of the Supreme Court of Bulgaria, we now have the opportunity to present a critical overview of the whole case and the final decision[2]. The emphasis is put on the validity of the grounds given in the explanation of the decision of the Supreme Court of Bulgaria, in particular in respect of the meaning of the "duly authenticated" clause in art. IV. para. 1. of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: NYC).

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[1] ***See* I. Tilosanec, *Tracing One* Ad Hoc *Arbitration,Pravo u gospodarstvu, I/1999, pp. 160-166*157-164.**

[2] **The Resolution No. 1543 of the City Court in Sofia of November 5, 1997 translated into English was published in 5 CROAT. ARBIT. YEARB. (1998), at 248-255, and the Resolution of the Appellate Court in Sofia of October 9, 1998 and the Resolution No. 356 of the Supreme Court of Appeal of Bulgaria of February 23, 1999 were published translated to English in 6 CROAT. ARBIT. YEARB. (1999), at 204-212.**

2. Issues in this case

2.1 Due authentication of arbitral awards

The Supreme Court of Bulgaria (hereinafter referred to as the Supreme Court) affirmed the decision of the Appellate Court to deny recognition and enforcement of the First Partial Arbitral Award. The court also confirmed the explanation that "arbitral award, whose enforcement is requested, is not authenticated by the arbitral tribunal that rendered it and is not accompanied by certificate of its entering into force, by which the provisions of Article IV, paragraph 1, item 'a' of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards in connection with Article 305, paragraph 1, item 'a' of the Code of Civil Procedure".

Restating the facts of the case, the Supreme Court found that the parties concluded a contract that contained an *ad hoc* arbitration clause providing for an arbitration in Bern, Switzerland and the application of the UNCITRAL Arbitration Rules. The parties agreed upon the Swiss Law on Obligation (Bern Canton) as the substantive law applicable in the event of a dispute.

The Supreme Court held that it is not disputable that recognition and enforcement of this arbitral award should be in compliance with the requests of NYC (ratified in Bulgaria in 1961) while the arbitration agreement is subject to the Bern cantonal law pursuant to the will of the parties. This law, according to the Court's conclusion, would be *lex specialis* in relation to NYC whose application in that case is subsidiary.

Furthermore, the Supreme Court analyzed the requirements of the Swiss Federal Code on Private International Law (CPIL) and determined that under Article 193, authentication should be performed by a Swiss court at the seat of the arbitral tribunal. Pursuant to Article 194 CPIL, only recognition and enforcement of foreign arbitral awards are subject to the application of NYC; accordingly, the disputed award should not be subject to NYC, since it was, in Switzerland, issued by a local and not by a foreign tribunal. Consequently, the authentication of the award had to be made, under local Swiss law, by a local Swiss court. The Supreme Court concluded that the said partial award was not validly authenticated in this sense and that, for this reason, it cannot be recognized in Bulgaria.

The Supreme Court emphasized that, even had the applicant's argument that the case in dispute is subject exclusively to the provisions of NYC been valid, based on Article III NYC the contracting states shall allow the enforcement according to procedural rules applied on the territory on which the enforcement is sought. In this case, it relates to the

provisions of the Bulgarian Code of Civil Procedure (BCCP), chapter XXXII, Articles 303-307. According to Article 305, paragraph 1, item 'a' BCCP, the request for enforcement should be accompanied both by the award authenticated by the court on whose territory the award was rendered, and with the certificate that the award is final and binding.

To fully understand the presented standpoints of the Supreme Court, we will briefly outline the notions of domestic and foreign arbitrations and the notions of national and international arbitrations.

Determination of arbitration as domestic or foreign is made under two criteria: the criterion of the place where the award was made and the criterion of the party autonomy. It is disputable which of the two criteria is primary and which is secondary.[3] According to the criterion of the place where the award was made, the award has the nationality of the state of the seat of arbitration, while according to the criterion of the autonomy of the will of the parties, the award pertains to the state whose substantive law was selected as applicable for the arbitration agreement and conduct of the arbitration proceedings regardless of the place where it was rendered. The distinction between domestic and foreign arbitrations is essential, as in this particular case, because it determines the law applicable for the *exequatur* proceedings.[4] Domestic awards (by state of origin) are not subject to preliminary evaluation for compliance with public order and do not request recognition, while foreign decisions have to be subject to a special proceedings of recognition in order for the country in which the award is to be enforced to render them the power of a domestic tribunal award[5].

Arbitration is considered international if it deals with parties from different states, and it is national if it involves only domestic legal entities[6].

Accordingly, the First Partial Award rendered in this case had the seat of arbitration in Bern (Switzerland), and has to be considered a Swiss award according to the place where it was made. On the other hand, the parties' agreement was to apply the UNCITRAL Arbitration Rules. Therefore, the application of Swiss law was subsidiary and had to supplement provisions of the UNCITRAL Rules, with the exception of the Swiss

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3 M. Dika,* Recognition and Enforcement of Foreign Arbitral Awards According to Croatian and Slovenian Law, Proceedings, 1st Croatian Arbitration Conference *(1993), pp. 116-134.

4 A.* Goldštajn, International Commercial Arbitration, Part 2, *Zagreb, Informator (1976), p 6.

5* S. Triva, Sketch 3 on Draft Croatian Arbitration Act, Pravo u gospodarstvu *1/1999,* pp. *5-24

***6 A.* Goldštajn, *supra* note at 11.**

mandatory provisions[7]. In Bulgaria, a Swiss arbitral award is considered a foreign award. The fact that the award would be considered domestic if the enforcement had been sought in Switzerland should not have influenced the proceedings in Bulgaria. However, the Bulgarian Supreme Court used the opposite line of argument and applied rules of the Swiss national law, as they would be applied had the enforcement been sought in Switzerland.

The Swiss procedural law was therefore applicable in the arbitration proceedings. Since the parties to the arbitration had their seats abroad, the arbitration was international and the provisions of 1987 CPIL apply. Article 1, paragraph 1 of CPIL determines the scope of application in the following way:

> "This law governs, in an international context:
> a) the jurisdiction of the Swiss judicial and administrative authorities;
> b) the applicable law;
> c) the conditions for the recognition and enforcement of foreign decisions;
> d) bankruptcy and composition agreements;
> e) arbitration."

Under paragraph 2 of the same article, "international treaties take precedence" [8]. In an international arbitration, the Chapter XII 'International Arbitration', (Articles 176-194) applies. According to Article 182 CPIL the parties themselves determine the rules of procedure. The UNCITRAL Arbitration Rules chosen by the parties regulate arbitration procedure quite extensively. The award in question is rendered and communicated to the parties in accordance with those Rules. The main issue in this case is whether the parties were obliged to deposit a copy of the award with the Swiss court and obtain a certification of enforceability from this court in order to have a "duly authenticated original award" under Art. IV para. 1.(a) of the NYC. It is true that UNCITRAL Arbitration Rules provide in Article 32, para. 7, "if the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement [...]". However, the First Partial Award issued in this case was not deposited or registered at the Canton Court in Bern because this was not an obligation under applicable national law. The provision of Article 193 CPIL, to which, in our opinion, the Supreme Court of Bulgaria incorrectly referred, reads:

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[7] **K. Sajko, *Croatian Companies as Parties of International Arbitral Disputes Governed by Application of Swiss Law, Pravo u gospodarstvu, 1-2/1995, pp. 25-39*.**

[8] **Cited according to K. Sajko, Private International Law, General Part, Informator, Zagreb, 1996, p. 261.**

"(1) Each party may deposit at its own expense a copy of the award with the Swiss court at the seat of the arbitral tribunal.

(2) The Swiss court shall certify at the request of a party that the award is enforceable.

(3) At the request of a party, the arbitral tribunal shall certify that the award was rendered in conformity with the provisions of this Code; such a certificate is equivalent to a deposit with the Court." [9].

The application of NYC in Bulgaria is beyond dispute. Under Article 1 NYC, "the Convention applies to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought". [10]

The recognition and enforcement according to NYC require fulfilment of formal and substantive requirements. The formal requirements relate to documents that should be attached to the application, while the substantive requirements are listed in the negative form, as impediments to recognition and enforcement. [11] In order to achieve facilitation of execution of arbitral awards, the applicant should proven formal requirements, while substantive requirements have to be proven by the party opposing the recognition and enforcement. [12]

Disputed in this case is a formal requirement for recognition and enforcement, under Article IV paragraph 1, item 'a' NYC that requires submission of *the duly authenticated original award or a duly certified copy thereof."*

In the practice of the application of NYC this requirement has been interpreted in the sense that the party requesting recognition and enforcement, if submitting the original of the award, has to supply a proof of its authenticity. Since the arbitral award should be signed, it is essential to submit proof that the award was signed by the arbitrators and that the signatures on the award are authentic.[13] The expression *'duly authenticated original'*

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[9] Cited according to translation of Umbricht, Badertscher & Jaag in cooperation with Fulbright & Jaworski - LDIP/IPRG/LDIP/CPIL, Payot Lausanne, 1989. *See also* P. KARRER & K. ARNOLD, SWITZERLAND PRIVATE INTERNATIONAL LAW STATUTE, Deventer-Boston (1989), p. 166

[10] Cited according to A. GOLDŠTAJN, S. TRIVA, International Commercial Arbitration, *Zagreb, Informator (1987), p* 319-335.

[11] Dika, *supra* note

[12] Goldštajn & Triva, *supra* note , pp. 324-325.

[13] S. Triva, *supra* note.

therefore has to be interpreted in the same sense as the document that is indisputably original. For avoidance of doubt, it may be required that the signatures of the arbitrators be certified - which in the practice of *ad hoc* arbitration means verification of the signatures of the members of the arbitral tribunal by a notary public or a similar authority.

In the analyzed case, the party opposing recognition and enforcement did not contest either the validity of arbitrators' signatures or that the submitted award is original; it solely asserted that the award had not been *duly authenticated,* and interpreted it as the request to submit the certificate of enforceability by the Swiss court under Article 193 CPIL in connection with Article 305 BCCP.

The first instance court established that the authenticity of the arbitral award was not disputed; with respect to "authentication", it found that it is subject to Bulgarian law that refers back to NYC. Therefore, it ruled that both the requirements of NYC and the requirements of national law were met. Based on this finding, the court granted recognition and enforcement.

This opinion was reversed by the decisions of the Court of Appeal and the Supreme Court. *Inter alia* these courts connected the issue of "due authentication" with the issue of enforceability and legal force of the award, and found that the statements of the arbitrators presented in the proceedings made in writing, in Bulgarian language, the signatures on the depositions certified by a notary public in Bulgaria (stating that the first partial award of February 4, 1995 is final, in force and enforceable) are not sufficient proof of enforceability, since the statement is a private document and not a document that would have the force of an official certification in the sense of Article *IV* NYC; such certification would only be the enforceability certificate issued by the Swiss court under Article 193 CPIL. We believe that the presented standpoint is not correct, bearing in mind that the previously cited UNCITRAL Arbitration Rules and CPIL in connection with Article IV NYC do not set forth an obligation to enclose the certification of a foreign court on enforceability of the award. Moreover, the cited paragraph 1 of Article 193 clearly provides *no obligation of deposition* of arbitral awards. Obligation exists only on the side of the court that is obliged to issue the certificate of enforceability of the award at the request of a party, but that does not imply that the party is obliged to request such a certificate. If this is sufficient, Art. 193 para 3 equates the effects of the certificate issued by the arbitral tribunal and the deposition of the award at a court of law in Switzerland, which means that the Swiss legislature for the disputes with international element simplified the formal requirements for enforcement of an award rendered in Switzerland to the maximum extent.

In the proceedings before the higher courts the disputed issue was the application of domestic rules on *exequatur* in connection with the provision of Article III NYC which reads: "Each Member State shall recognize the validity of arbitral award and allow enforcement thereof according to rules of procedure in force in the territory on which the award is called upon under conditions regulated in the following Articles. For recognition and enforcement of arbitral awards to which this Convention applies no stricter conditions can be imposed (...) than the ones required for recognition or enforcement of domestic awards."

The Bulgarian Supreme Court determined that, in addition to the provisions of NYC, it should apply the provisions of BCCP, Chapter XXXII entitled *"Recognition and enforcement of decisions of foreign courts"*[14]. In our opinion, such a standpoint is odd because the cited provisions clearly relate solely to decisions of foreign courts and not to arbitral decisions. The difference is essential since the recognition and enforcement of decisions of foreign courts-of-law on the basis of bilateral agreements on legal assistance consistently requires a special certificate of legal validity and enforceability of the decision and the verification of the court that rendered the decision, whilst the requirements for foreign arbitral awards are alleviated by the application of NYC.

The same conclusion may be drawn from the provision of Article 51 of the Law on International Commercial Arbitration of Bulgaria (hereinafter referred to as LICAB). [15] The paragraph 1 of the cited Article provides the following for international arbitral awards made in Bulgaria: *"The City Court in Sofia shall render at the request of a party a writ of execution stating that the award has already entered in force. The arbitral award and the evidence that it was delivered to the counter-party in enforcement proceedings should be enclosed to the request. "* Paragraph 2 states that *"for recognition and enforcement of foreign arbitral awards the provisions of international treaties concluded by the Republic of Bulgaria shall apply ".*

Before the amendments of the LICAB in 1993, the proceedings on recognition and enforcement of domestic arbitral awards with an international element were regulated by special provisions of Articles 49 to 51 set forth in accordance with the UNCITRAL Model-Law. [16] Under the, now repealed, provision of Article 49, paragraph 1 *"the original of the*

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[14] *Grazdanski procesualen kodeks,* Novazvezda, Sofia (1995) p. 66.

[15] *Zakon za mezdunarodni trgovski arbitraz,* OFFICIAL GAZETTE OF BULGARIA, No. 60 of August 5, 1998 and No. 93 of November 2, 1993, Sofia.

[16] S. Triva, *Adoption of the UNCITRAL Model-Law into Croatian Arbitration Law, Pravo u gospodarstvu 1-2/1995, p. 21.*

award and the original of arbitration agreement or the certified copies thereof" should be enclosed with the request for recognition and enforcement of arbitral award. No further formal requirements were imposed. The amendment that repealed the cited provisions was obviously motivated by the viewpoint that domestic arbitral awards should not be subject to a special procedure for recognition and enforcement; they are enforceable documents as such.

2.2 Enforceability of a partial arbitral award

The higher Bulgarian courts found an additional ground for denial of recognition and enforcement of the First Partial Award in the very fact that the disputed award was partial. They concluded that, according to Article 32 of the UNCITRAL Arbitration Rules, recognition and enforcement of the award cannot be sought, because recognition and enforcement can only be sought on the basis of the final (and not partial) award.

The Bulgarian Supreme Court did not object to the right of the arbitral tribunal under Article 32 para 1 of the UNCITRAL Arbitration Rules to render temporary, preliminary or partial awards. However, it asserted that for the parties in the dispute the only relevant award is the final award which, in the opinion of the Supreme Court, follows logically and grammatically from the interpretation of Article 32, paragraph 2. Subsequent temporary, preliminary or partial award may, for example, grant the counter-claim or objections from the counter-claim. Allowing enforcement of a partial award would bring ambiguity and make final solution of the parties' relationship impossible.

The additional argument by which the Supreme Court supports such a conclusion is the provision of Article V, paragraph 1, item 'e' NYC by which finality of the award is provided as the obligatory requirement for enforcement. The fact that the arbitral tribunal, upon making the partial award, made a procedural order that the proceedings continue in respect of the remaining unresolved claims and counter-claims, is interpreted by the Supreme Court as obvious proof that the award was not final. The Supreme Court deems that the arbitrators' statement submitted by the applicant should be interpreted in the way that the partial arbitral award is considered final because no appeal can be filed against it. That, however, does not mean that the dispute between the parties is finally resolved by the award.

The statements cited from the explanation of the Supreme Court, in our opinion, contradict the grounds that the Supreme Court deems relevant for rendering a denying decision.

Article V, paragraph 1, item 'e' NYC provides as follows: ". Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnished to the competent authority where the recognition and enforcement is sought, proof that:

> (e) 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."

According to NYC, the burden of proving the existence of negative presumptions for deciding the application for recognition and enforcement should be on the respondent and not on the applicant.[17] In our opinion, the higher courts failed to correctly apply the rules on burden of proof deriving from Article V, paragraph 1 NYC. Apart from the objection that the award had not yet become final, binding and enforceable, the respondent failed to submit any other evidence that would correspond with the cited provision of NYC. Which evidence that should it be, depends on the grounds stated as impediment for granting recognition and enforcement. In any case, finality, binding force and enforceability are evaluated under the law of the state of origin and procedural rules applicable for the arbitration proceedings.[18]

Article 32 of the UNCITRAL Arbitration Rules provides:

> "Article 32 - Form and effect of the award
>
> 1. In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.
>
> 2. The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.
>
> 3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.
>
> 4. An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for absence of the signature.
>
> 5. The award may be made public only with the consent of both parties.

[17] **Dika, *supra* note.**
[18] **Goldštajn & Triva, *supra* note.**

6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal."

Consequently, the cited provisions of the UNCITRAL Arbitration Rules show that an arbitral award becomes final and binding after it has been communicated to the parties. That rule applies for any arbitral award that the arbitral tribunal is authorized to render, therefore, even for a partial arbitral award.

The same applies according to the provisions of the subsidiary procedural law, Articles 188-190 CPIL. Under Article 188 "Unless the parties have agreed otherwise, the arbitral tribunal may render partial awards." Article 189 provides that

"1. The arbitral award shall be rendered according to the procedure and in the form agreed upon by the parties.

2. [...] The award must be in writing setting forth the reasons on which it is based, and be dated and signed. The signature of the chairman is sufficient." Article 190 determines that "1. the award is final when communicated".[19]

Consequently, for enforceability of an arbitral award rendered in Switzerland according to UNCITRAL Arbitration Rules it is sufficient either that the parties waived their right to appeal (set aside) the award under Article 192 CPIL, or that the time limit of 30 days for filing such claim expired, or that the Federal Supreme Court rendered a decision denying the claim to set aside.

In our opinion, the Bulgarian Supreme Court misconstrued the expression *'binding'* from Article V NYC. When subjected to the provision of Article 32 of UNCITRAL Arbitration Rules and Article 189 CPIL, this expression in the present case undoubtedly means that all necessary requirements were met since no further legal remedies were possible against the award and, therefore in that sense, it was final and binding. Since the counter-party did not request the setting aside within the proscribed period, the disputed award also became enforceable.

What is the legal nature of the partial arbitral award from Article 32 of UNCITRAL Arbitration Rules and Article 189 CPIL? In support of the view that such an award is independent and has an independent legal nature we may cite provisions on the final and binding characteristics of arbitral awards, which in respect of these qualities do not distinguish a partial award from any other awards that the arbitral tribunal is authorized to

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[19] KARRER & ARNOLD, *supra* note 9.

render. The comparison of various arbitration rules shows that rendering of a partial award is a possibility commonly used in arbitration practice. Thus, Article 2, item 3 of the Arbitration Rules of the International Chamber of Commerce, setting out the definitions, regulates that the term "'Award' includes, *inter alia,* an interim, partial or final Award", and Article 25 reads: "The award shall state the reasons upon which it is based". Pursuant to Article 28 of the same rules "every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay...". The corresponding provision is contained in Article 37 of Zagreb Rules: "In addition to making a final award, the arbitral tribunal shall be entitled to make interlocutory and partial awards".

A partial award may be rendered when some of the independent claims were ripe for decision and the arbitral tribunal considers it appropriate with respect to the speed and efficiency on one hand, and legal certainty on the other. It is emphasized in theory that a partial decision has an independent legal nature with respect to legal remedies and enforcement. [20] Contrary to this opinion, the Bulgarian Supreme Court held that the term "binding" only applies to legal remedies, but not suitability for enforcement. The argument it states in favour of its view is that allowing enforcement of the partial award may be an obstacle to a subsequent award that, for example, grants relief to the respondent on the basis of its counter-claim and thus brings uncertainty regarding the final resolution of the dispute. Such an argument is purely hypothetical, and has no support either in theory or in the practice of international commercial arbitration. In addition, the whole tradition of the international arbitration in Switzerland runs against such an interpretation. In this case, the facts also speak against it: after the First Partial Award the arbitral tribunal rendered the Second Partial Award and the Final Award and each of them were independent awards that finally decided one of the claims stated in the proceedings.

3. Final remarks

The presented case from the practice of Bulgarian courts in the process of recognition and enforcement of foreign arbitral awards shows that in some instances there we may still encounter the lack of knowledge and understanding of the nature and specific needs of

[20] **S. Triva, Civil Procedural Law, Official Gazette, Zagreb, 1983.**

international commercial arbitration as a means of quick and efficient resolution of commercial disputes between subjects from various countries and different economic, social and cultural *milieus.* It may particularly be demonstrated in relation to *ad hoc* arbitrations since they, unlike permanent arbitration institutions, do not have a permanent organization dealing with technical and administrative matters necessary for successful conduct and completion of proceedings.

International treaties that are commonly accepted have little effect in practice if there is no unity in interpretation of their basic provisions. Although they are incorporated in national legislation, lack of adequate practical implementation by all the actors results in loss of legal protection and consequently advancement in international economic relations.

An important goal of the international arbitral law is to promote commercial customs and principles of fulfilling contractual obligations and voluntary recognition of arbitral awards thus avoiding enforcement. The national courts are used as a tool for dissemination of arbitral culture and raising awareness as well as ensuring ultimate legal protection. Therefore, it is of the utmost importance that the highest state courts ensure a correct application of all relevant arbitral instruments, especially in disputes with an international element. Communication between the state courts and arbitral tribunals whose awards need to be enforced is essential for better efficiency.