

The Healthy Award

**Challenge in International
Commercial Arbitration**

Dr. Christoph Liebscher

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THE HEALTHY AWARD

CHALLENGE IN INTERNATIONAL
COMMERCIAL ARBITRATION

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Preface

... no study deserves the name of a science if it limits itself to phenomena arising within its national boundaries. For a long time lawyers were content to be insular in this sense, and to some extent they are so still. But such a position is untenable, and comparative law offers the only way by which law can become international and consequently a science.'

Konrad Zweigert and Hein Kötz
An Introduction to Comparative Law 15

Scholars and practitioners in international arbitration have been accustomed to looking over the fence of their own legal garden for quite some time. Although the jurisdictions which will be the subject of this book resemble each other in many respects, it will be shown that there are a number of differences.

Arbitration exists to settle disputes. Although many disputes are settled by the parties after the filing of a request for arbitration, the certainty that an award will be rendered is a strong motivation for amicable settlement. A valid and enforceable award is the *raison d'être* of an arbitration agreement. This legal certainty may also serve to explain why voluntary compliance with an award is the rule rather than the exception.¹

The purpose of this book is, firstly, to introduce the reader to the legal situation in Austria, England, France, Germany, and Switzerland, focussing on the challenge of awards, secondly, to try to permit an in-depth comparison and, finally, to make some suggestions for further development.

One issue provides an important background to this book: the recognition and enforcement of an award set aside in the country of the seat of arbitration. As a solution for the difficulties arising in such a situation Paulsson has suggested distinguishing between a local standard annulment ('LSA') and an international standard annulment ('ISA').² Therefore, another purpose of this book is to demonstrate how easy or difficult it is to establish not general principles, but detailed rules common to several jurisdictions.

Such a book could not be written without the moral and practical assistance of a great number of people. To mention some does not at all mean that there

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1. Haas in *Weigand, Practitioner's Handbook* marg. no. 4; Schmidt-Diemitz [1999] DB 369; Raeschke-Kessler (2002) 30 IBL 158 at 158.
 2. Paulsson (1996) 7 *Am Rev Int Arb* 99.

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I welcome any indication of mistakes or inconsistencies as well as any exchange of ideas on the topics covered in this book.

Christoph Liebscher

Vienna, November 2002

Abbreviations

A	Publications of the EHR Court; Judgments and Decisions (1975–1995)
AA 1996	Arbitration Act 1996
AAA	American Arbitration Association
ABGB	Allgemeines Bürgerliches Gesetzbuch (<i>Austrian Civil Code</i>)
AC	Appeal Cases
Adm. Ct	Admiralty Court
ADR	Alternative Dispute Resolution
ADRLJ	The Arbitration and Dispute Resolution Law Journal
ADRLN	Arbitration & Dispute Resolution Law Newsletter
AG	Die Aktiengesellschaft
AGBG	Gesetz zur Regelung der Allgemeinen Geschäftsbedingungen (<i>German Law on Standard Form Contracts</i>)
AI	Arbitration International
AktG	Aktiengesetz (<i>Austrian or German Act on Joint Stock Corporations</i>)
All ER	All England Law Reports
All ER (Comm)	All England Law Reports (Commercial Cases)
ALM	Arbitration Law Monthly
Am Rev Int Arb	The American Review of International Arbitration
amend., amends	amendment(s)
Ann Dr Lux	Annales du Droit Luxembourgeois
AnwBl	Anwaltsblatt
Arb	Arbitration
ArbSlg	Sammlung arbeitsrechtlicher Entscheidungen
ARD	ARD-Betriebsdienst
arg.	<i>argumentum</i>
ASA	Association Suisse de l'Arbitrage
AWD	Außenwirtschaftsdienst des Betriebsberaters
B	Publications of the EHR Court; Pleadings, Oral arguments and Documents (1975–1995)
BauR	Baurecht (Zeitschrift für das gesamte öffentliche und zivile Baurecht)
BayObLG	Bayrisches Oberstes Landesgericht (<i>Bavarian Court of Appeal</i>)
BB	Der Betriebsberater
BCLC	Butterworths Company Law Cases

BFH	Bundesfinanzhof
BG	Bundesgericht (<i>Swiss Supreme Court</i>)
BGB	Bürgerliches Gesetzbuch (<i>German Civil Code</i>)
BGE	Entscheidungen des Schweizerischen Bundesgerichts
BGES	Bundesgesetz über die elektronische Signatur (<i>Swiss Law on Digital Signatures</i>)
BGH	Bundesgerichtshof (<i>German Supreme Court</i>)
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen
BJM	Basler Juristische Mitteilungen
BlgNR	Beilagen zu den stenographischen Protokollen des Nationalrats (<i>Attachments to the Minutes of the Sessions of the Austrian Parliament</i>)
BLR	Building Law Reports
Bull ASA	Bulletin de l'Association Suisse de l'Arbitrage
Bull Civ	Bulletin Civil
Bull.	Bulletin
BVerfG	Bundesverfassungsgericht (<i>German Constitutional Court</i>)
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
B-VG	Bundesverfassungsgesetz (<i>Austrian Constitutional Law</i>)
CA	(<i>English or French</i>) Court of Appeal
Cah Arb	Les Cahiers de l'Arbitrage (Supplement of the Gazette du Palais)
Cass.	Cour de Cassation (<i>French Supreme Court</i>)
CC	Code Civil (<i>French Civil Code</i>)
CD	Collection of Decisions and Reports of the EHR Com. (1960–1974)
CEPANI	Centre belge pour l'étude et la pratique de l'arbitrage national et international
cf.	confer
Ch	Chancery
Ch.D.	Chancery Division
ch., chs	chapter(s)
CIArb	Chartered Institute of Arbitrators
CILL	Construction Industry Law Letters
CLC	Company Law Cases
CLR	Commonwealth Law Reports
CMLR	Common Market Law Review
Comm. Ct	Commercial Court
ConLR	Construction Law Reports
CPC	Civil Procedure Code (<i>Austria or Germany</i>)
CPR	Civil Procedure Rules
Croat Arb YB	Croatian Arbitration Yearbook
D aff	Dalloz affaires

DAC	Departmental Advisory Committee
DAS	German Arbitration Committee
DB	Der Betrieb
DIS	Deutsche Institution für Schiedsgerichtsbarkeit (<i>German Institution of Arbitration</i>)
DP	Requiel périodique et critique Dalloz
DR	Decisions and Reports of the EHR Com. (1975–1995)
DRdA	Das Recht der Arbeit
DStR	Deutsches Steuerrecht
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECR	European Court Report
ECT	European Community Treaty
ed., eds	editor(s) or edition(s)
EEC	European Economic Community
EFSlg	Ehe- und familienrechtliche Entscheidungen
EG	Estates Gazette
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch (<i>Introductory Law to the German Civil Code</i>)
EGLR	Estates Gazette Law Reports
EHR Com.	European Commission for Human Rights
EHR Court	European Court of Human Rights
EHRC	European Convention on Human Rights
Einf	Einführung (<i>Introduction</i>)
EO	Exekutionsordnung (<i>Austrian Enforcement Code</i>)
ESA	European Space Agency
et seq.	and following pages
EuZW	Zeitschrift für Europäisches Wirtschaftsrecht
EvBl	Evidenzblatt
EWCA Civ	Court of Appeal, Civil Division (England & Wales)
EWHC	England & Wales High Court
EWiR	Europäisches Wirtschaftsrecht
EWS	Europäisches Wirtschafts- und Steuerrecht
FamRZ	Zeitschrift für das gesamte Familienrecht
fasc.	fascicle
fn., fns	footnote(s)
FS	Festschrift (<i>Liber amicorum</i>)
GAAP	Generally Accepted Accounting Principles
GAFTA	Grain and Feed Trade Association
Gaz Pal	Gazette du Palais
Gaz Pal Rec	Gazette du Palais Recueil bimestriel
GesRZ	Der Gesellschafter

GG	Grundgesetz (<i>German Constitutional Law</i>)
GH	Gerichtshalle
GIUNF	Sammlung von zivilrechtlichen Entscheidungen des k.k. Obersten Gerichtshofes Neue Folge
GmbHG	Gesetz über Gesellschaften mit beschränkter Haftung (<i>Austrian or German Law on Limited Liability Companies</i>)
GP	Gesetzgebungsperiode (<i>legislative period of the Austrian parliament</i>)
HansOLG	Hanseatisches Oberlandesgericht (<i>Appellate Court of Hamburg</i>)
HL	House of Lords
HL Cas	House of Lords Cases
HRLR	Human Rights Law Review
IBA	International Bar Association
IBA Rules of Evidence	IBA Rules on the Taking of Evidence in International Commercial Arbitrations
IBL	International Business Lawyer
IBLJ	International Business Law Journal
ICC	International Chamber of Commerce
ICC ICArb Bull	The ICC International Court of Arbitration Bulletin
ICCA	International Council for Commercial Arbitration
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Rev	ICSID Review, Foreign Investment Law Journal
IRLR	Industrial Relations Law Reports
Int & Comp Law Q	International and Comparative Law Quarterly
Int ALR	International Arbitration Law Review
Int Arb Rep	International Arbitration Report (Mealey Publications)
IPrax	Praxis des internationalen Privat- und Verfahrensrechts
IPRE	Entscheidungen zum internationalen Privat- und Verfahrensrecht
IPRG	Internationales Privatrechtsgesetz (<i>Austrian Federal Statute on Private International Law</i>)
IPRspr	Die deutsche Rechtsprechung auf dem Gebiet des Internationalen Privatrechts
J.	Judge
J Trans L & Pol	Journal of Transnational Law and Policy
JBl	Juristische Blätter
JCP	Juris-Classeur Périodique
JCP Cah DE	JCP Cahiers de Droit de l'Entreprise (supplement of JCP Entreprises et Affaires)

JCP ed. E	JCP Entreprise et Affaires
JCP ed. G	JCP Édition générale
JCPC	Juris-Classeur Procédure civile
JDI	Journal de Droit International (Clunet)
JIA	Journal of International Arbitration
JR	Juristische Rundschau
JPS	Jahrbuch für die Praxis der Schiedsgerichtsbarkeit
JW	Juristische Wochenschrift
JZ	Juristenzeitung
KartG	Kartellgesetz (<i>Austrian Cartel Act</i>)
KB	Law Reports King's Bench
KBD	King's Bench Division
KG	Kammergericht or Kommanditgesellschaft (<i>limited liability partnership</i>)
KSchG	Konsumentenschutzgesetz (<i>Austrian Consumer Protection Act</i>)
KTS	Konkurs-, Treuhand- und Schiedsgerichtswesen
L & TR	Landlord and Tenant Review
L.J.	Lord Justice
LCIA	London Court of International Arbitration
LDP	lois de police
LG	Landesgericht (<i>regional court, Austria</i>), Landgericht (<i>regional court, Germany</i>)
LGDJ	Librairie générale de droit et de jurisprudence
LGZ	Landesgericht für Zivilrechtssachen (<i>Austrian regional court for civil matters</i>)
LIBOR	London Interbank Offer Rate
Lloyd's Rep	Lloyd's law reports (after 1951)
LI LR	Lloyd's law reports (before 1951)
LLP	Limited Liability Partnership
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LPG	Landpachtgesetz (<i>Austrian Act on Agricultural Leases</i>)
LT	Law Times Reports
marg. no., marg. nos	margin number(s)
MDR	Monatsschrift für Deutsches Recht
MietSlg	Mietrechtliche Entscheidungen
MRG	Mietrechtsgesetz (<i>Austrian Rent Act</i>)
publ.	publisher
NCPC	Nouveau code de procédure civile (<i>French Civil Procedure Code</i>)
NILR	Netherlands International Law Review
NJW	Neue Juristische Wochenschrift

NJW-RR	Neue Juristische Wochenschrift, Rechtsprechungs-Report
no.	number
ObLG	Oberstes Landesgericht (<i>court of appeal, Germany</i>)
OG	Bundesgesetz über die Organisation der Rechtspflege (<i>Swiss Federal Judicial Organization Act</i>)
OGH	Oberster Gerichtshof (<i>Austrian Supreme Court</i>)
OHG	Offene Handelsgesellschaft (<i>unlimited commercial partnership</i>)
OJ	Official Journal (EU)
ÖJZ	Österreichische Juristen-Zeitung
OLG	Oberlandesgericht (<i>court of appeal, Austria; court of appeal, Germany</i>)
OVG	Oberverwaltungsgericht
para., paras.	paragraph(s)
PMMBl	The Swiss Patent, Industrial Design and Trademark Gazette (<i>Schweizerisches Patent-, Muster- und Markenblatt</i>)
pt	part
QB	Queen's Bench
QBD	Queen's Bench Division
Q.C.	Queen's Counsel
RabelsZ	Rabel Zeitschrift für ausländisches und internationales Privatrecht
RDAI	Revue de Droit des Affaires Internationales
RdL	Recht der Landwirtschaft
RdW	Österreichisches Recht der Wirtschaft
ref., refs	reference(s)
Report	Reports of Judgements and Decisions, publication of the case law of the EHR Court and the EHR Com. (as from 1996)
Rev Arb	Revue de l'arbitrage
Rev Crit DIP	Revue critique de droit international privé
RTD Comm	Revue trimestrielle de droit commercial et de droit économique
RG	Reichsgericht (<i>former German Supreme Court</i>)
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
RIBA	Royal Institute of British Architects
RIW	Recht der Internationalen Wirtschaft
RPS	Recht und Praxis der Schiedsgerichtsbarkeit (Beilage des Betriebsberaters)
Rsp	Rechtsprechung
RV	Regierungsvorlage (<i>government bill</i>)
RZ	Österreichische Richterzeitung

sec., secs	section(s)
seq.	and following page
SJ	Solicitors' Journal
SJZ	Schweizerische Juristenzeitung
SLT	Scots Law Times
SPIL	Swiss Act on Private International Law
SSt	Entscheidungen des österreichischen Obersten Gerichtshofes in Strafsachen und Disziplinarangelegenheiten
StGG	Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger (<i>Austrian Human Rights Act</i>)
subs.	subsection
Supp.	Supplement
SZ	Entscheidungen des österreichischen Obersten Gerichtshofes in Zivil- (und Justizverwaltungs-) sachen
T & CC	Technical and Commercial Court
TC	Tribunal de Commerce
TGI	Tribunal de Grande Instance
TIL	The International Lawyer
TLR	Times Law Reports
Trav. Com. fr. DIP	Travaux du comité français de droit international privé
Tul J Int & Comp Law	Tulane Journal of International and Comparative Law
UKPC	United Kingdom Privy Council
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
v.	<i>versus</i>
VAT	Value Added Tax
VG	eidgenössisches Versicherungsgericht (<i>Swiss Insurance Court</i>)
VIAC	Vienna International Arbitration Center
vol.	volume
WBI	Wirtschaftsrechtliche Blätter
WIPO	World Intellectual Property Organisation
WL	Westlaw
WLR	Weekly Law Reports
WM	Wertpapiermitteilungen
YB Com Arb	Yearbook of the International Council for Commercial Arbitration
ZBl	Zentralblatt für die juristische Praxis
ZfRV	Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und Europarecht
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht

ZIP	Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis
ZPO	Zivilprozeßordnung (<i>Austrian, German, or Zürich Civil Procedure Code</i>)
ZR	Blätter für Zürcherische Rechtsprechung
ZVR	Zeitschrift für Verkehrsrecht
ZZP	Zeitschrift für Zivilprozeß

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