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GROUNDS FOR REFUSING TO ENFORCE INTERNATIONAL ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION: A REVIEW OF LAW AND PRACTICE

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Abstract:

This article delves into the world of international arbitration and provides a brief review of the law and practice covering the grounds for refusing to recognise and enforce foreign or international arbitral awards under Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Through a comprehensive analysis of court decisions from diverse jurisdictions, including the UK, the US, Uzbekistan and Europe, the article is intended to shed light on the nuances of interpretation and application of the grounds for refusal, including the invalidity of the arbitration agreement, incapacity of the party, procedural irregularities, the right to be heard, non-arbitrability and public policy. In this respect, a greater focus is given to the frequently-asserted and often-misunderstood issues such as the validity of arbitration agreements, arbitrability and public policy. This article also relies on the writings of legal thinkers who are well-known and highly qualified in the field of international arbitration so as to analyse and explain the refusal grounds of the Convention with more clarity. Overall, it seeks to contribute to the never-ending debate over the Convention by analysing an important aspect of international dispute settlement that is of crucial importance to academics, practitioners and legislators.

Keywords: International arbitration, arbitral awards, recognition, enforcement, arbitration agreement, public policy, non-arbitrability.

I.INTRODUCTION

In international commerce, arbitration is usually preferred as a dispute resolution mechanism because arbitral awards are enforceable in over 170 jurisdictions thanks to the legal framework established by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. This pro-arbitration instrument provides a limited range of grounds to refuse the enforcement of an arbitral award, making it a reliable option for parties seeking to resolve disputes. This is the reflection of the central objective of the New York Convention that arbitral awards are presumptively valid and their finality must be respected.

However, parties should be aware of these limited grounds to refuse recognition and enforcement of an arbitral award under the New York Convention, both before and after a dispute arises. These grounds are prescribed in Article V of the Convention. The grounds for challenge are especially procedural in their nature. Consequently, the party resisting the recognition of the award cannot generally challenge the award with respect to its merits. By carefully considering the limited potential grounds to challenge arbitral awards under the New York Convention and preparing accordingly, parties and their counsels may boost their chances of reaching a successful outcome and enjoy the benefits of international arbitration. In spite of the pro-arbitration bias of the New York Convention, Article V is most susceptible to misinterpretation and open to abuse by national courts [*10, p. 108*]. Therefore, this article discusses the application of the grounds for refusing foreign or international arbitral awards by the courts of the Contracting States of the New York Convention.

It is also worth noting that Article V provides that "the recognition and enforcement of arbitral awards *may* be refused if the person against whom it is invoked proves" one or more of the following grounds. Thus, even in the event that one of the refusal grounds is fulfilled, the court may still enforce the award [*8, ¶24-024*; *20*]. The challenging party bears the burden of proof with

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respect to the existence of the grounds. These grounds are as follows:

(a) The arbitration agreement was invalid;
(b) A party to the arbitration agreement was under incapacity;
(c) The right to be heard was not observed;
(d) The arbitral tribunal acted in excess of its powers;
(e) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or the law of the seat;
(f) The arbitral award is not binding on the parties;
(g) Non-arbitrability;
(h) Public policy.

A. Invalid arbitration agreement

Article V(1)(a) of the Convention provides that enforcement of an arbitral award may be refused if the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

In order to form a valid arbitration agreement, the parties must reach an agreement on the essential points. Put differently, where the conditions set forth in Article II of the Convention and Article 7 of the Model law (or a comparable provision of the relevant domestic law) are satisfied, the agreement to arbitrate shall be binding and valid. There is a writing requirement for the validity of arbitration agreements under Article II. There are generally two approaches with respect to the interpretation of this writing requirement. Some authors argue that it imposes minimum form requirements as to the formal validity of arbitration agreements whereas others support the position that it imposes a maximum form requirement. An author classified these approaches as "ceiling" and "floor" requirements [*9, p. 219*]. The better approach is to treat this provision as a "ceiling" or maximum form requirement. Because Article II requires the Contracting States to recognise arbitration agreements in written form. But it does not say that the oral agreements shall not be recognised or enforced. Furthermore, Article VII of the Convention reads: "[t]he provisions of the present Convention shall not…deprive any interested party of any right he may have to avail himself of an arbitral award in a manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon". Therefore, if the domestic law in question provides more lenient requirements as to the form of an arbitration agreement, then that arbitration agreement is to be recognised and enforced under the Convention.

In the judgment by the Genoa Court of Appeal dated 3 February 1990, the parties concluded a charter-party that included a clause reading: "General average/arbitration, if any, in London in the usual manner." When a dispute arose, one party initiated litigation in Italy. The Court of First Instance found that it has jurisdiction since the arbitration clause is null and void under Article 809 of the Italian Code of Civil Procedure reading: "There may be either one or more arbitrators, provided that their number be always uneven. The arbitration clause shall state who are to be arbitrators, or specify the number of arbitrators and the manner in which they are to be appointed [*6, pp. 336-337*]. However, the Court of Appeal reversed this decision since the validity of the clause was to be regulated by the law of the seat - English law in that case which contains no comparable rule in regard to Article 809 [*6, p. 336; 36*]. Therefore, the governing law of the arbitration agreement is of great importance.

1. The applicable law

Parties usually ignore selecting the applicable law of the arbitration agreement [*5, p. 491*]. As a result, the court may have to apply the choice-of-law rules to determine the applicable law. This law is either *lex contractus* or *lex arbitri*. English courts tended to apply the law of the seat over the law of the underlying contract [*13; 14; 15*]. The selection of the law of the seat is also in conformity with the two-prong test established under the article V [*5, p. 356*]. However, this approach has been reversed by the recent decisions of the UK Supreme Court [*11; 12*]. In *Kabab-Ji SAL v. KFG* case, the English court refused to enforce the arbitral award rendered by an ICC tribunal seated in Paris. Because there was no valid arbitration agreement between the parties since respondent "KFG" was not bound by the arbitration clause under English law. This decision was affirmed by the Court of Appeal and the Supreme Court [*11*]. Hence, parties are advised to specify the applicable law of the arbitration agreement, along with the applicable law of the contract, when concluding the contract.

2. Connection with Article IV and burden of proof

Article IV of the Convention prescribes that in order to obtain the recognition and enforcement of the award, the party must supply "..the original agreement referred to in article II or a duly certified copy thereof". Some courts have established strict and highly formalistic

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ISSN: 2749-3601

interpretations of this provision. For instance, a few courts have rejected applications that failed to meet the requirements of the Convention and did not allow the award creditor to fix the flaws of the application [*21*; *32*, ¶3]. Instead, the applicant had to submit a new application one more time. Additionally, some courts interpreted this provision as if it required the award creditor to prove the existence of a formally and substantively valid arbitration agreement. These forms of application of the provision are legally incorrect. Because there is no ground to decline the corrections to the initial defects of the application. Secondly, Article IV does not impose the burden of proof on the award creditor with respect to the validity of an arbitration agreement. The award creditor is only required to submit any piece of text that *prima facie* shows the purported existence of an arbitration agreement between the parties. Courts cannot refuse the application to enforce the award even if this instrument is invalid unless the award debtor invokes and proves this issue under Article V(1)(a). Based on this analysis, the requirements vis-a-vis arbitration agreements set forth in Article II are not applicable in order for the arbitration agreement to be valid for the purposes of Article IV. The requirements of Article II are only relevant when the debtor refuses the enforcement of the award under Article V(1)(a) and the burden of proof regarding the validity of the arbitration agreement lies on the resisting party. This analysis finds support from several authorities [*24*; *25*].

B. Lack of capacity

Article V(1)(a) also provides that an award may be refused recognition on the basis that a party, under the law applicable to them, to the arbitration agreement lacked the capacity to conclude a valid arbitration agreement. This presumably applies to the scenario where the party in question was a minor or suffered from other incapacitating factors or was precluded from concluding an arbitration agreement by law [*8, ¶24-024*]. The question arises as to the determination of the law applicable in such situations since the Convention does not provide an applicable choice of law rule. It is usually the personal law of the party that determines its capacity. However, where the question of capacity arises in international commercial arbitration, the "validation" principle may be applied [*5, p. 527*]. Accordingly, the party in question may be precluded from challenging the award based on the lack of capacity if it has capacity under at least one of the applicable laws. Put differently, A and B concluded an agreement under the law of Danubia, and then B challenged the validity of the agreement since it did not have capacity under its personal law. Based on the validation principle, if B has capacity under the law of Danubia, it may not be permitted to rely on its national law to contest its capacity.

The issues of capacity may also involve sovereign immunity and lack of proper authorisation [*9, p. 218*]. Sovereign immunity defence may be raised by a State or state-owned enterprises in international arbitration. It is true that States have immunity from the jurisdiction of foreign courts in international law. Nonetheless, this principle is only applicable when States are acting in their governmental capacities. Therefore, where a State has entered into an arbitration agreement with a private company, the defence of immunity is irrelevant.

C. The right to be heard.

Pursuant to Article V(1)(b), where the party against whom the arbitral award is invoked was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present their case. The aim of this provision is to uphold the right to be heard in international arbitration which is a general principle of law. In circumstances where this principle is not observed, the recognition and enforcement of the award may be refused in order to protect the fundamental principles of due process and fairness in arbitral proceedings [*16*].

The arbitral award may not be enforced if the party did not receive a reasonable notice [*9, p. 220*]. In this regard, the practice of Uzbek courts is of relevance. Uzbek courts give special importance to the proof of whether the party against whom the award was invoked was properly notified on the date and place of arbitral proceedings and hence they have refused to enforce arbitral awards on the ground of Article 256(1)(2) of the Economic Procedural Code of Uzbekistan which is a virtually verbatim adoption of Article V(1)(b) [*37*; *38*]. But, the mere proof of notice should not be sufficient. Enforcing courts should also inquire about the reasonableness of the timing of the notice [*5, ¶26.05[C][3][f]*]. Because the due process principle requires that the party must have sufficient time to appoint the arbitrator, collect evidence and prepare its defence. In practice, courts do not give proper consideration as to the sufficiency of the timing so as to enable the party to appoint the arbitrator or submit a response to the notice of arbitration so long as the time period is in accordance with the rules of an arbitral institution [*23, ¶¶19-27*].

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ISSN: 2749-3601

The second defence found in Article V(1)(b) is a full or reasonable opportunity to present one's case. Accordingly, an arbitral award may be annulled if the tribunal does not provide the losing party with an equal and reasonable opportunity to present its case during the arbitral proceedings [*7, ¶16.03(3)*]. This ground has been enacted into the domestic laws of all Contracting States. A case in point, section 10(c) of the US Federal Arbitration Act provides that an award may be denied recognition "[w]here arbitrators are guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced". In one case, the respondent party was asked to provide summaries of evidence. But the tribunal decided against them on the ground that they did not produce original documents. In this case, a US court refused to recognise the arbitral award because the losing party was deprived of a reasonable opportunity to present its case. This decision of the first instance court was also affirmed by the appellate court [*17*].

D. Excess of power

When arbitral tribunals act in excess of their powers, their awards may not be enforceable. This is provided in Article V(1)(c). According to this provision, the enforcement of the award may be refused if: "[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration…" This provision applies when there was a valid arbitration agreement, but the questions decided by the tribunal did not fall into the scope of that agreement, or the tribunal failed to address the issues submitted by the parties [*7, ¶17.05[B]; 34, p. 781*].

A case in point, a US court refused to enforce a portion of an arbitral award pursuant to Article V(1)(c), reasoning that the tribunal exceeded its authority when it bound a non-signatory party [*22*]. But, the court enforced the remaining parts of the award with respect to the other parties who were bound by the arbitration agreement. Additionally, where the Convention is applicable, courts will usually have the presumption that arbitral tribunals act within their powers and hence the award is valid [*18; 24*]. Thus, defences based on the excess of power have rarely been successful.

But, according to Prof. M. Moses: "[t]he U.S. Supreme Court breathed new life into the 'excess of authority' ground for vacatur…" [9, p. 221]. In this case, the Court overturned the decision of a lower court under the finding that the tribunal exceeded its powers. She thinks that the Court had a bias against the finding of the tribunal, and, solely for this reason, refused the recognition of the award. Although this case was a purely domestic one and decided under the Federal Arbitration Act, the ground is comparable to that of Article V(1)(c). Hence, there is a possibility that in the future courts may apply this case by analogy and refuse to recognise foreign awards that they do not like under Article V(1)(c) [*19*].

E. Irregular procedural conduct of the arbitration

Article V(1)(d) provides for the non-enforcement of an arbitral award where "[T]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place".

The arbitral award may be unenforceable if the agreed procedure for the constitution of the tribunal is not observed. For example, where the number of arbitrators or the qualifications of arbitrators were not in accordance with the provisions of the arbitration agreement, the court may not recognise the final award [*7, ¶17.05[D][1*]. This defence is virtually never used in practice.

The Disregard of the agreed procedural rules may also result in the nonenforcement of the award. For instance, if the arbitration agreement sets out a time limit, the failure to comply with this requirement may provide a ground for refusal to recognise. Several courts held that the disregard of the contractual time limits will render the award non-recognisable [*7, ¶17.05[D]*].

F. Not binding award

Article V(1)(e) permits the nonenforcement of the award where: "[t]he award has not yet become binding on the parties…or has been set aside by a competent authority". This provision is indeed a pro-arbitration one because it does not require the complete finality of the award. Geneva Convention of 1927 contained this finality requirement which required that the award must be confirmed by the courts of the arbitral seat before it can be enforced abroad [9, p. 222]. This procedure was called *double exequatur*. Under the New York Convention, the award need not be completely final, but sufficiently binding [*7, ¶17.05[G]*]. In one case, the defendant applied to reject the enforcement of an arbitral award, alleging that it has not become binding on the parties yet. There was an appeal before the courts of France with respect to the award. The question was whether the appeal procedure allowed the appeal on the substance of

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Volume-21 April -2023
ISSN: 2749-3601

the award. If the appeal was on the merits, then Article 36(1)(a)(v) of the Model Law was applicable (this provision is comparable to Article V(1)(e) of the Convention) [*2*]. The court found that the appeal is only possible on the procedural aspects of the award and hence rejected the application of the defendant [CLOUT case 530].

In another case, the defendant sought nonenforcement of the award under Article V(1)(e) because the award was set aside by the competent court of the seat of arbitration [*20*]. However, the court ruled that Article V(1)(e) gives the enforcing court a discretionary power to refuse the enforcement whereas Article VII imposes a mandatory requirement that "[t]he provision of this Convention shall not deprive any interested party of any right he may have to avail himself of an arbitral award to the extent allowed by the law". Therefore, the court reviewed the award under its own law and concluded that the award is enforceable pursuant to US law. This decision proves the point stated above that Article V gives the court the right to refuse the award, but it does not entail any obligation.

G. Non-arbitrability

As discussed above, the grounds stipulated in Article V(1) are of procedural nature while Article V(2) provides two substantive grounds for the nonenforcement of arbitral awards.

Article V(2)(a) permits the non-enforcement of the arbitral award if the subject-matter of the dispute is not capable of settlement by arbitration. This article provides an escape device just like public policy. It allows the Contracting States to define certain subject matters as nonarbitrable and refuse the recognition of awards that deal with these matters. Although there is no uniform or internationally accepted list of subject matters that are not capable of settlements by arbitration, there are a few disputes that almost all jurisdictions categorise as non-arbitrable. For example, criminal, employment and bankruptcy matters are classified as non-arbitrable by most jurisdictions [*5, ¶26.05[C][10]*]. In this respect, the actual intent of the legislators is of primary importance. Canadian Supreme Court decided that the copyright disputes are arbitrable because "[I]f the Parliament had intended to exclude arbitration in copyright matters, it would have clearly done so." [*26, ¶46*].

A distinction must be made between disputes that are non-arbitrable in domestic and international settings. Because, in many legal systems, the scope of non-arbitrable issues is significantly broader in the domestic context [*5, ¶6.03[C][2]-[4]*]. This is important since domestic exceptions do not apply to international arbitration. Consequently, enforcing courts cannot refuse the recognition of a foreign arbitral award under the non-arbitrability rules which apply in the domestic setting. For example, Article 9 of the law "On Arbitration Courts" of Uzbekistan, which applies to domestic arbitration disputes, provides that disputes involving administrative, family and employment matters are non-arbitrable. The law "On International Commercial Arbitration", on the other hand, generously set out "...disputes arising from all relations of commercial nature, both contractual and non-contractual, may be submitted to international commercial arbitration…" But, it does not provide the categories of subject matters which cannot be arbitrated. Based on this analysis, the courts of Uzbekistan practically cannot refuse the enforcement of foreign or international awards under Article 256(2)(1) of the Economic Procedural Code of Uzbekistan (enactment of Article V(2)(a) of the Convention). Rather, they may refuse the enforcement of the awards that dealt with employment, criminal or administrative matters under the public policy escape device.

H. Public Policy

Recognition and enforcement of an award may be refused if the competent court where the recognition and enforcement are sought finds that, "[t]he recognition and enforcement would be contrary to the public policy of that country" [*1, Article V[(2)(b)*]. Public policy exception applies where the award is '...contrary to "principles of law" and…violative of "fundamental principles of law.' [*6, p. 1251*]. Thanks to the pro-enforcement bias of the Convention, courts usually interpret the notion of public policy narrowly [*35, p. 11*]. To this end, the courts who are in favour of narrow interpretation distinguish between domestic and international public policy [*27*]. Violation of the domestic policy may be permitted in order to encourage the smooth flow of international commercial activities [*35, p. 12].* This is also supported by Prof. G. Born: "Article V(2)(b) provides for the application of international, rather than domestic public policies…[a]lthough this requirement is not express in the text of the Convention…" [*5, ¶26.05[C][9][e][ii]*]. Still, this is one of the most frequently-invoked bases for nonenforcement of arbitral awards. According to Prof. J. Paulsson's viewpoint, public policy exception "...has been interpreted erratically by courts and probably most misused ground of all" [*10, p. 113*]. A the end of the day, it is up to the courts to define what constitutes the public

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Volume-21 April -2023
ISSN: 2749-3601

policy of that country and hence some courts specifically refer to pure internal policy [*28*; *33*]. For example, a German court explained the concept as follows [*33; emphasis added*]:

"...An arbitral award violates public policy when it violates a norm that regulates basic principles of the *German state and economic life* in a manner that is mandatory and outside the parties' scope of action."

US courts interpret the concept of public policy in a narrow manner, but they refer to domestic policy, rather than international public policy. A number of US court decisions held that the public policy is to be "construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice." [*29*; *30; 31*].

Put differently, the Convention has established a good balance between its pro-arbitration bias and the sovereignty of the Contracting States. This escape device may be a good tool to exploit in order to refuse foreign arbitral awards. But, if applied correctly and narrowly, it equips the courts with the power to protect the most basic principles of law and morality.

II. CONCLUSION

The New York Convention is the bedrock of international commercial dispute settlement, providing a reliable framework for the recognition and enforcement of foreign or international arbitral awards. As discussed above, the Convention provides a limited range of grounds for refusing to recognise arbitral awards, including, but not limited to, an invalid agreement to arbitrate, incapacity of the party, and public policy. The review of the court practice shows that there is a degree of consensus regarding the interpretation of the grounds for refusal under Article V of the Convention so as to safeguard the finality and enforceability of arbitral awards. However, there are still some issues that should be further researched so that the international dispute settlement framework of the Convention will be more responsive to the needs of the contemporary world. In particular, the public policy ground should be defined clearly and a catalogue of potential breaches and irregularities which may violate the public policy of a country should be adopted. This would prevent arbitrary approaches to the recognition and enforcement of arbitral awards.

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