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RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

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Abstract:

This article delved into the important aspects of the recognition and enforcement process of foreign arbitral awards across different jurisdictions. The role of the New York Convention as the legal framework that establishes a foundation for the recognition and enforcement of foreign arbitral awards and its main provisions were thoroughly studied and analyzed. The grounds for refusal of recognition and enforcement of arbitral awards were discussed in detail. It also studied the challenges that may arise in the recognition and enforcement procedures of foreign arbitral awards. In addition to the challenges, the practices and strategies of several countries concerning the recognition and enforcement policy of foreign arbitral awards were investigated.

Keywords: *International Commercial Arbitration, Arbitral Awards, Recognition and Enforcement, New York Convention, UNCITRAL Model Law, ICSID, Panama Convention, European Convention 1961.*

INTRODUCTION

As a method of dispute resolution, arbitration is the preferred way of settling disputes arising in the sphere of international commerce and investment. Among several benefits of arbitration, the worldwide recognition and enforcement of foreign arbitral awards attract corporations to have their disputes resolved. It is thanks to the New York Convention in which there is a clear legal basis that awards made by arbitral tribunals are binding upon the parties to the dispute and shall be enforced in the Contracting State where such award is sought. With respect to the notion of an arbitral award, no legal instrument provides a clear definition. However, a common understanding of the key elements of an arbitral can be derived from the NYC: 1) the award may be given by ad hoc or institutional tribunals (Article I, para 2); 2) the award must result from an arbitral agreement so that it can be arbitrated (Article II); 3) the award must fulfill certain minimal formal characteristics (Article IV).[1]

The New York Convention, as its formal name suggests, primarily regulates the recognition and enforcement of foreign arbitral awards. The legal power of the convention remains undisputed since more than 170 states are a Party to it, meaning that they agreed to ensure respect and comply with its provisions. The main objective of the convention is that foreign and non-domestic arbitral awards will not be discriminated against and it binds parties to ensure that such awards are recognized and generally capable of being enforced in their jurisdiction in the same way as domestic awards. To that end, it is crucial that States cooperate in the jurisdictional dimensions; that is to say if a country fully respects party autonomy and enforces all valid jurisdiction or arbitration agreements, while the enforcement country does not have the same policy to give effects to party autonomy, judgments made by the country of origin is not likely to be enforced.[2]

It is also crucial to determine the difference between recognition and enforcement. Recognition is a defensive process and the aim to obtain recognition of an arbitral award lies in avoiding new proceedings raising the same issues as those dealt with in the award in respect of which recognition is sought. Enforcement, on the other hand, goes a step further than recognition. In an enforcement proceeding, the successful party seeks the court's assistance to ensure that the award is complied with and to obtain the redress to which it is entitled. An award may be recognized without being enforced. However, if a court orders its enforcement, then the court has logically recognized it.[3]

THE LEGAL FRAMEWORK FOR RECOGNITION AND ENFORCEMENT

The foundational instrument that facilitates the recognition and enforcement of foreign arbitral awards is the New York Convention, formally known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It was adopted by the United Nations after a diplomatic conference that took place in May and June of 1958 at the United Nations headquarters in New York and it entered into force on

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June 7, 1959. Pursuant to the Convention, each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon (Article 3, NYC). While this convention establishes an effective and reliable mechanism for dispute resolution all around the world, there is also another renowned convention that was adopted in the realm of international commercial arbitration in 1961, named as European Convention on International Commercial Arbitration. Although the European Convention is not universal, it is the pivotal instrument that applies in the territory of European States. ICSID Convention is also one of the major tools that binds Parties to recognize and enforce the pecuniary obligations imposed by arbitral awards (Article 54, ICSID).

Prerequisites for Recognition and Enforcement of Foreign Arbitral Awards under the New York Convention

There are certain requirements that a party seeking an enforcement of an arbitral award under the conditions of the New York Convention should fulfill. The party holding an arbitral award is required to provide the following evidence in order for that award to be enforced and executed (Article IV, NYC):

1) the duly authenticated original award or duly certified copy of the award;
2) the original agreement or a duly certified copy of the agreement;
3) when not made in the official language of the country where the award is sought, the translated agreement or award is certified by an official or sworn translator or by a diplomatic or consular agent.

An agreement must be submitted to arbitration in writing meaning that it shall contain an arbitral clause signed by the parties in which they agreed to have their dispute resolved by means of arbitration in case of any differences that have arisen or may arise between them with regard to their defined legal relationship (Article II, NYC).

Any party applying for the enforcement of an arbitral award is required to provide the above documents; that is to say no other document or supporting evidence may be demanded by the court in charge of performing such an award. Nevertheless, there should be included the issues decided and the relief granted by the tribunal; otherwise, there would be nothing to enforce, thereby making an award ineffective or inoperative.[4] Then the court to which one of the parties submitted the above-mentioned documents for the enforcement and execution shall recognize an award as binding and enforce it in accordance with its procedures (Article III, NYC).

Grounds for Refusal of Recognition and Enforcement

According to the New York Convention, recognition and enforcement of an arbitral award may be refused if the opposing party proves the existence of one of the following conditions:

a) The parties to the agreement were, under the applicable law to them, either under some incapacity, or the 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;

Legal capacity is to be discussed to understand the first ground for refusal. The parties to a contract or arbitration agreement must have legal capacity, without which the contract or arbitration agreement is considered invalid. The parties may be individuals, corporations, partnerships, states, and state agencies. If one of the parties does not possess the legal capacity to enter into an arbitration agreement, the requesting party may ask the competent court to refuse the recognition and enforcement of the award on the ground that one of the parties to the arbitration is under some incapacity under the applicable law.[5]

b) The party against whom the 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;

Three violations of due process emanating from this provision can be grounds to refuse the enforcement of an arbitral award: 1) no proper notice of appointment of the arbitrator, 2) no proper notice of the arbitration proceedings, and 3) the inability of a party to present its case.[6] It is intended that the maxims of due process are complied with and the parties are accorded a fair hearing. This is the most vital ground for refusal as it is pointed at ensuring that the arbitration itself is properly held with procedural fairness and proper notice to the parties.[7]

c) The 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, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced;

This could be called an excess of jurisdiction of a competent tribunal. That is to say if the award exceeds

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what was initially agreed upon, the portions which were originally agreed by the parties to be submitted to the arbitral tribunal can be recognized and enforced. However, parts that were not provided in the arbitration agreement can be challenged by the respondent and may be refused by the tribunal in accordance with this provision.

d) The 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.

According to the wording of the text, the agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure stands first, meaning that only if there is no agreement on those matters, the national arbitration law of the country where the arbitration took place can be taken into account. Enforcement could be frustrated if it were to be refused in cases where the composition of the arbitral tribunal and the arbitral procedure agreed upon by the parties did not follow in all details the requirements of a national arbitration law.[8]

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.

This provision might seem controversial because the award made by the arbitral tribunal has to be accepted as final and binding upon parties to arbitration.[9] As long as there is no resort to appeal, an arbitral award should be regarded as binding and recognized in the seat of the arbitration as well as the country where the recognition and enforcement of such award is sought. Another mismatch may also arise concerning the setting aside and suspension of an award by a competent authority of the country in which that award was made. Even though an award has been set aside or suspended in one country, it may be granted by another. The explanation for this may be that the language of the above provision is permissive in the sense that it gives discretion rather than imposing an obligation if we look at the wording: "recognition and enforcement may be refused". For example, the United States, Belgium, France, and Austria, in several instances, have expressed their preparedness to accord the recognition and enforcement of an award although it was set aside or suspended in the seat of arbitration in another country.[10] Specifically, the French Court enforced an award that was set aside in Switzerland in the well-known case named Hilmarton[11], and the United States Federal Court for the District of Columbia enforced an award that had been set aside in Egypt in the Chromalloy case[12].

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement are sought finds that:

a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country.

One of the requirements to settle the dispute arising between parties by way of arbitration is that the subject matter of a dispute shall be capable of settlement by arbitration.[13] The New York Convention does not explicitly provide any criterion of arbitrability but alludes to the lex fori (the law of the country in which the recognition and enforcement of an award is sought) to determine whether the subject matter of the dispute can be settled by arbitration.

b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Public policy is considered as one of the irregularities that the New York Convention lists as a way of not giving effect to the enforcement of arbitral awards. It allows national courts to deny an award that the fundamental principles of the forum state's legal system. The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (UNCITRAL Model Law) includes a similar provision, which expresses that an arbitral award may be refused on the grounds that "the recognition or enforcement of the award would be contrary to the public policy of this State".[14] The New York Convention's language allows state courts to enjoy wide discretion on the application of public policy. Public policy may be subject to the moral, cultural, economic, and social essentials of each state, thus being an ambiguous concept and not having an established definition.[15]

Arbitration Law and Practice of Different Nations

England, Wales and Northern Island

The combined jurisdiction of England, Wales, and Northern Ireland (hereinafter, England) can be seen as one of the prominent jurisdictions in international arbitration. The Arbitration Act of 1996, which regulates arbitration proceedings within the jurisdiction of England, was enacted and entered into force in 1997. This Act is extensive and comprises 110 sections. The Act promotes the principle of autonomy, the purpose of which is to give more freedom to parties and arbitrators. The distinguishing feature of the English arbitration regime is the participation of barristers in arbitration

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proceedings as arbitrators and counsel to parties. Although there will be a conflict of interest if a barrister serves as an arbitrator in arbitration proceedings in which a member of his law firm represents one of the parties, English courts hold that barristers who work for the same chambers are independent from their colleagues. There are a number of leading arbitral institutions in England: the London Court of International Arbitration (LCIA), the Centre for Effective Dispute Resolution (CEDR), and the London Maritime Arbitrators Association (LMAA).

Switzerland

Arbitration in Switzerland is divided into two different and independent legal systems which are international and domestic. While international arbitration is governed by the 12th Chapter of the Swiss Private International Law Act (PILA), domestic arbitration is regulated by the 3rd title of the Swiss Civil Procedure Code (CPC). Arbitration is classified as "international" if at least one of the parties to the arbitration agreement is domiciled or habitually resident outside Switzerland at the time of the conclusion of the arbitration agreement.[16] However, parties to an international arbitration dispute may opt for the provisions of the CPC to apply to their dispute. Similarly, parties to a domestic dispute may declare the provisions of the PILA to apply to the arbitration dispute.

The effective management of arbitration in Switzerland is administered by the Swiss Chambers' Arbitration Institution and arbitration courts, such as the Court of Arbitration for Sport (CAS) and the Swiss Arbitration Association.

France

France also has a long-standing and firmly established history of arbitration practice. The sources of French arbitration law include the Code of Civil Procedure, Decrees, and case law. Besides, France is the contracting party to many international instruments, such as the New York Convention, the Washington Convention, and the European Convention.

With the Decree of 1980, amendments concerning domestic were made to the Code of Civil Procedure, and the Decree of 1981 concerning international arbitration. The principle of party autonomy and the restriction of courts' intervention in arbitral proceedings were introduced by those Decrees. They also accorded arbitrators the authority to determine jurisdictional questions. As observed in the Decrees, similar to Switzerland, France also adopts two separate legal regimes for domestic arbitration and international arbitration. The New Decree was enacted in 2011 which brought new changes to the framework of arbitration.[17] It leaves the parties with more autonomy to organize arbitration according to their wills. Moreover, the New Decree gives a very limited basis for denying the recognition and enforcement of international awards; that is, if the arbitration award or agreement contradicts international public policy, the award may be granted enforcement.

The United States of America

Before the New York Convention was ratified by the U.S. Congress in 1970, international arbitration in the U.S. was only regulated by the 1925 Federal Arbitration Act (FAA). The FAA which laid down a foundation for international commercial arbitration was enacted with a view to eliminating the unwillingness of the judicial bodies to enforce arbitral agreements.

At the same time with the ratification of the New York Convention, the FAA was amended to be in line with the NYC. Following this in 1990, it was broadened by the introduction of Chapter 3 concerning arbitration governed under the Panama Convention. The U.S. courts often refer to the FAA for proving their competence on many judicial matters regarding arbitration, such as the enforcement of arbitral awards, the appointment of arbitrators, and appealing some orders concerning arbitration. Furthermore, the FAA gives federal jurisdiction in issues regarding international arbitration which has emerged under the New York and Panama Treaties.

Uzbekistan

Arbitration law is a new, but growing field of law. Tashkent International Arbitration Center (hereafter – TIAC) was established in 2018 at the Chamber of Commerce and Industry in the Republic of Uzbekistan and the Law "On International Commercial Arbitration" was adopted in 2021. TIAC handles disputes arising between parties in relation to commerce or trade. TIAC is governed by its own Arbitration Rules which are based on the ICC (International Chamber of Commerce) Arbitration Rules. TIAC's decisions are final and enforceable under the legislation of the Republic of Uzbekistan. The parties are given the freedom to select the place of arbitration, the language of arbitration, and the applicable law, and the arbitration proceedings are conducted in accordance with the principles of confidentiality and economy.

CONCLUSION

Arbitration has developed as an effective and preferred method of dispute resolution, which can be attributed to the fact that the awards rendered by arbitral tribunals are most likely granted recognition and enforcement worldwide. Even though several grounds could be justified for refusing to enforce arbitral awards, such cases of refusal are less common in practice thanks

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to the adoption of the New York Convention. With the adoption of the New York Convention, international arbitration law has advanced to a new level and it universally established the specific norms regulating the recognition and enforcement of foreign arbitral awards. The Convention intends to prevent the national courts from denying the enforcement of such awards without reasonable grounds for refusal. Those grounds for refusal to recognize and enforce arbitral awards are enshrined in Article V of the NYC. In short, the requirements of due process, public policy, and procedural burdens are enumerated as reasons for denying the enforcement of awards in the forum state. As we have analyzed the practices of different states, the enforcement of arbitral awards may not easily be rejected.

Together with the New York Convention which is already internationally recognized, States have their national laws and regulations that handle matters associated with commerce and focus on settling disputes arising between parties. The main purpose of national laws is to reinforce the implementation of the NYC and they do not contradict the rules therein. As seen above in several states' experiences, the national legislation goes in accordance with international legal instruments and recognizes the superiority of international norms.

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