

Harmonisation on the Performance of International Arbitral Awards

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Introduction

Arbitration has gained significant importance and become widely effective in international commerce during the last decades, paralleling the rise of globalization. The main reasons for the reputation of arbitration are based on having the following advantages over litigation: it is generally more neutral, more confidential, faster, more flexible, cheaper and its decisions are accepted as final and binding on both parties. In addition, arbitration awards have international validity as a result of multinational treaties. To create a uniform arbitration system worldwide, there have been amendments to national laws and institutional arbitration rules, improvements in the Model Law, and a contemporary approach and interpretation of convention rules. The question arises whether harmonization has been completed for the performance of arbitration awards.

General approach of the national laws towards arbitration

Due to the development of international arbitration, the modern approach in national laws is that court intervention should be in limited in nature and only under certain circumstances.¹ The Model Law states² “in matters governed by this Law, no court shall intervene except where so provided in this Law.” Many national laws, such as that

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¹ Claude Reymond ‘The Channel Tunnel Case and The Law Of International Arbitration’ 1993 L.Q.R. 109(JUL), 337-342.

² UNCITRAL Model Law on International Commercial Arbitration (1985) (as adopted by the United Nations Commission on International Trade Law on 21 June 1985) (UNCITRAL Model Law) Article 5

of Austria,³ adopt the same attitude. The English DAC reported the current position of the English Law and stated that⁴ “courts nowadays generally only intervene in order to support rather than displace the arbitral process.”⁵ The United States view was described in *Mitsubishi Motor Corporation v. Solar Chrysler-Plymouth Inc.*: “We are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative measure of dispute resolution.”⁶

Performance of Award

As a method of dispute resolution, the purpose of arbitration is to provide a final and binding award for the parties in the dispute. Once the arbitral award is granted, there is a fair expectation that the award will be in effect immediately and performed by the parties involved, since there is an implied term in arbitration agreements that the award given by the arbitral tribunal will be carried out by the parties without any delay. In addition, the international and institutional rules expressly provide the performance of arbitral awards.⁷ The finality of an arbitral award is vital in international trade to provide a certain degree of predictability and certainty.

Most of the arbitration awards are implemented on a voluntarily basis.⁸ Questions are likely to arise when one of the sides involved fails to carry out the arbitral award voluntarily. The successful party should be willing to take the steps necessary to fulfill the obligations arising from the award. At the initial stage, certain forms of pressure can be used on the respondent. For instance, if there is a continuing relationship, the non-performing party risks losing business relations and goodwill. Where the defendant is a state or a state agency, there might be diplomatic pressure for enforcement or non-performance can have negative effects on direct foreign investment. Furthermore, the claimant or related trade association can make adverse publicity about the non-performance of the arbitral award which might discourage other business partners to get involved with the party that is responsible for the non-performance of the award.

Other than this, the tribunal or the arbitration institute would not deal with the enforcement process of the awards. Although most of the arbitration institutes provide that the parties of the arbitration should implement the award without any undue delay,⁹ there is no guarantee by any arbitration body that the parties involved will carry out the final decision.

³ Austria Civil Procedure Code section 578.

⁴ UK Department Advisory Committee on Arbitration (DAC) Law Report, para. 22.

⁵ Alan Reid highlighted that the grounds for challenging the award under the English Law are still wider than those in Model Law. ‘The UNCITRAL Morel Law on International Commercial Arbitration and the English Arbitration Act: Are the Two System Poles Apart?’ *Journal of International Arbitration* 21(3) at p. 227–238.

⁶ *Mitsubishi Motor Corporation v. Solar Chrysler-Plymouth Inc* [1985] 473 U.S. 614 at 627.

⁷ Arbitration Rules of the United Nations Commission on International Trade Law (Adopted by the General Assembly on December 15, 1976) (UNCITRAL Arbitration Rules) Article 32.2, International Chamber of Commerce Arbitration Rules 1998 (ICC Arbitration Rules) Article 28.6, London Court of International Arbitration (LCIA) Arbitration Rules Article 26.8.

⁸ Pierre Lalive ‘Enforcing Awards, in *International Arbitration, 60 Years of ICC Arbitration: A Look at the Future*’ (ICC Publishing, Paris, 1984) p. 315.

⁹ LCIA (London Court of International Arbitration) Arbitration Rules Article 26.9.

Still, if there is a party that does not honor the arbitral award voluntarily, court assistance may be required, since there is a requirement to convert the arbitral award to a judgment or a court award. The only option for the claimant for the performance of the arbitral award is to take action in the national court for the recognition and enforcement of the award and get a legal sanction against the party that is holding up the award. There is a tendency to have the arbitration awards to be recognized and/or enforced by the national courts, unless there is an evident shortcoming in the due process or contradiction to public policy.

Recognition and enforcement of Arbitration Awards

The enforcement of an arbitration award can be applied for in a linked country, such as where the debtor has assets. There is an assumption that the recognition and enforcement of a foreign judgment is easier than the recognition and enforcement of a foreign arbitral award, on the grounds that the arbitration award is made by the private tribunal whose authority comes from the agreement between the parties. However, the recognition and enforcement of awards can be easier with multinational conventions, particularly the New York Convention of 1958¹⁰ that provides a relatively easy enforcement system for the international arbitration awards.¹¹ Besides, there are some other regional conventions and bilateral treaties for the enforcement of foreign arbitration awards.¹² On the contrary,¹³ there is no international convention that provides for the recognition and enforcement of a foreign court's decisions, except EC Regulation No. 44/2001¹⁴ that applies in EU countries. It is suggested that the claimant should consider with the legal environment of the prospective forum state before making his application for enforcement.¹⁵

I. International Conventions

Contrary to national courts, the arbitral tribunals lack coercive powers for the enforcement of their awards. Unless the defendant carries out the arbitration award voluntarily, the award must take place through the national court. International conventions, particularly the New York Convention, aim to make uniform the recognition and enforcement in international arbitration all over the world. Thus, it is essential to discuss the international conventions. The Geneva Protocol of 1923¹⁶ and the Geneva Convention of 1927¹⁷ have influential value

10 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (The New York Convention) Article IV and V.

11 Hunter M. 'International Commercial Dispute Resolution In The 21st Century: Changes And Challenges' Inaugural Victoria University of Wellington Foundation's Annual Dispute Resolution Lecture, delivered on 15 March 1999 at the Law Faculty in Wellington, New Zealand.

12 Amman Arab Convention on Commercial Arbitration of 1987, OHADA Treaty on the Harmonization of Business Law in Africa of 1993.

13 Lew J, Mistelis L and Kröll S *Comparative International Commercial Arbitration* (Kluwer, 2003) p. 693.

14 Council Regulation 44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, OJ 2001 L 12, 1. Replaced the Brussels Convention of 1968.

15 Redfern A, Hunter M *Law and Practice of International Commercial Arbitration* (4th edn Sweet & Maxwell London 2004) ch 10-14.

16 Geneva Protocol On Arbitration Clauses 1923 (The Geneva Protocol of 1923).

17 Convention for the Execution of Foreign Arbitral Awards, Geneva 1927.

for the acceptance of worldwide enforceability of arbitration awards. Even though both the Geneva Convention of 1923 and the Geneva Protocol of 1927 are almost superseded by the New York Convention, they have a historic importance for the recognition and enforcement of arbitration agreements and awards.

The Geneva Protocol of 1923 made a primary contribution to international arbitration. It presented the enforceability of the arbitration agreements among the signatory countries and the awards at the seat of arbitration. The main problem with the Geneva Protocol is that it only provided for the enforcement of domestic awards. The Geneva Convention of 1927 expanded the application and provided for the enforcement of arbitration awards made internationally in the signatory countries. However, under the Geneva Convention, the arbitral awards were required to be final at the seat of arbitration and the burden of proof was on the party seeking enforcement. The requirement for finality of the award at the place of arbitration caused the problem of *double executatur*. Furthermore, the Geneva Convention required the suitability of the arbitration award within the principles of the law of forum country, other than the compatibility with public policy.¹⁸ That requirement also prevented the interruption of the local courts in arbitration.

The New York Convention was adopted in the United Nations Conference on Commercial Arbitration in New York in 1958. The New York Convention has a significant importance in international arena; not only are most of the trading countries, including all European Union members, signatories,¹⁹ but also it provides a simple and efficient method of recognition and enforcement system for arbitral awards. The New York Convention has been referred to as the “most effective instance of international legislation in the entire history of commercial law.”²⁰ The New York Convention made constructive changes to the Geneva Arbitration Convention of 1927, shifting the burden proof to the defendant and limited the grounds for refusal of enforcement. Moreover, there is no need for authorization at the place of arbitration, in order to enforce the award in other signatory countries.²¹ It can be argued that both the Geneva Protocol of 1923 and the Geneva Convention of 1927 have been replaced by the New York Convention of 1958 and almost all signatory states of the Geneva Protocol and Geneva Convention became a party to the New York Convention.

The Washington Convention of 1965²² that has 155 signatory countries, specifically dealing with disputes between governments and

18 Geneva Convention of 1927 Article 1.e.

19 There are currently 144 signatory countries to The New York Convention of 1958, www.uncitral.org/english/status/status-e.htm

20 Mustill 'Arbitration: History and Background' (1989) 6 *Journal of International Arbitration* 43; and Schwebel 'A celebration of the United Nations' New York Convention' (1996) 12 *Arbitration International* 823.

21 New York Convention of 1958 Article V.1.e.

22 Convention on the Settlement of Investment Disputes between States and Nationals of Other States - International Centre for Settlement of Investment Disputes (Submitted to Governments by the Executive Directors of the International Bank for Reconstruction and Development, Submitted: March 18, 1965, Washington, Entered into Force: October 14, 1966).

private foreign investors.²³ The Convention provides its own enforcement procedures and puts the signatory countries under an obligation to recognize the Convention awards.²⁴ ICSID is an independent international institution established under the Washington Convention.²⁵ It is responsible for settling investor-state disputes and promoting foreign investment. Unless an ICSID award is revised or annulled under its internal procedures, the signatory countries are under an obligation to enforce it as a final court decision.²⁶

Aside from the multilateral conventions mentioned above, there are some regional conventions and bilateral treaties for the recognition and enforcement of foreign awards, such as the European Convention, the Moscow Convention and the Panama Convention. The European Convention on International Commercial Arbitration of 1961²⁷ promotes the development of trade and simplifies the procedural problems in international commercial arbitration within European Union. Furthermore, several bilateral conventions deal with the recognition and enforcement of foreign arbitral awards rendered in the contacting states.²⁸

II. The Scope of New York Convention of 1958

The focus of this article is the New York Convention of 1958, due to its being the primary enforcement instrument for international arbitration awards and to keep the material within appropriate limits. The New York Convention has made the greatest contribution to the internationalization of commercial arbitration²⁹ and makes arbitral awards simple, unified and internationally enforceable. The question arises whether harmonization is achieved for the recognition and enforcement of arbitration awards.

The scope of the New York Convention is set out in Article 1; the convention applies to arbitral awards made in the territory of a State other than the State where recognition and enforcement is sought. Even though the title of the Convention refers to “foreign” arbitral awards, the convention extends its applicability with the second criterion;³⁰ it is also applicable to the awards that are not considered as a domestic under the law of forum country.³¹ Therefore, it might be possible to enforce an award at the place of arbitration under the New York Convention, provided that it is not accepted as a domestic award under the applicable law.

23 <http://www.worldbank.org/icsid/constate/c-states-en.htm>, 143 States has ratified in their national laws.

24 Washington Convention of 1965 Article 53 and 54.

25 International Center for the Settlement of Investment Disputes Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings Entered into force October 14, 1966.

26 Washington Convention of 1965 Article 54.1.

27 European Convention on International Commercial Arbitration of 1961, done at Geneva, April 21, 1961 (European Convention of 1961).

28 Matscher 'Experience with Bilateral Treaties' ICCA Congress Series no 9, 452.

29 Redfern A, Hunter M p 36.

30 The New York Convention Article I.

31 The New York Convention also contains Art VII: "The provision of the present Convention shall not affect the validity of multinational or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the contracting states not deprive any interested party of any right he may have avail himself of the arbitral award in the manner and to extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

The formalities of the recognition and enforcement of the Convention award are straightforward.³² The winning party is required to submit the duly authenticated original award, its duly certified copy and the original arbitration agreement as referred in Article II, or its duly certified copy. In addition, if the award and the arbitration agreement are not in the official language of the country in which recognition and enforcement is sought, it is required to submit certified translations. The Convention provides an easy process for enforcement; the court of a contracting state should enforce the arbitral award on the face of the documents. Besides, the New York Convention in Article III provides that the contracting states should not impose more complex regimes for the enforcement of foreign arbitral awards compared to domestic awards. On the other hand, the New York Convention does not deal any further for the procedure of enforcement.

Under the New York Convention,³³ signatory states can make reservations on the application of the Convention, namely reciprocity and commercial reservations. The first reservation is reciprocity as set out in the Article I.3.a of the New York Convention of 1958. The recognition and/or enforcement of an award is possible only if it is made in the territory of a signatory country. Many countries including Turkey, the United States and the United Kingdom have applied the Convention on reciprocity basis. The Model Law provides a more arbitration friendly system and allows the recognition and enforcement of the arbitral awards irrespective of the place where it is made.³⁴ However, as the number of countries that are signatories increase gradually, the effects of such reservations become less significant.³⁵

Commercial reservation is another type of reservation that is likely to be applied by a signatory state.³⁶ It is provided that the contracting states can limit the application of the Convention to arbitral awards arising out of a legal relationship that is considered commercial.³⁷ The application of the commercial reservation causes some problems, since the interpretation of the meaning of commercial may differ from country to country.³⁸

III. Refusal of Recognition or Enforcement of Arbitral Awards

In principle, an arbitral award should be enforced by the national courts without any delay. However, the losing party can seek to resist the enforcement of the arbitral award. The most significant reform brought about by the New York Convention is the requirement of proof of the grounds for refusal from the party who opposes the enforcement.³⁹

³² The New York Convention Article IV.

³³ The New York Convention Article I.3.

³⁴ UNCITRAL Model Law Articles 35 and 36.

³⁵ There are 144 states had adhered to the New York Convention.

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

³⁶ Commercial reservation is not adopted by the English law, but by Turkey.

³⁷ The New York Convention Article I.3.

³⁸ There are 44 contracting states that made commercial reservation.

³⁹ Redfern A, Hunter M para 10-27.

The court may decide not to enforce an arbitral award in exceptional cases – where the award is so defective in form or substance or the enforcement would be contrary to public policy.⁴⁰ Those grounds are accepted as exclusive grounds⁴¹ and should be interpreted narrowly.⁴² Other than the public policy non-arbitrability, those refusal grounds are related to the procedure of the arbitration and do not authorize state courts to reexamine of the merits of the dispute.⁴³ It has been commented that there are some difficulties arising out of the application of the grounds for refusal, especially the public policy ground, on the basis that “the local courts or the local bureaucracy are unfamiliar with international arbitration and perhaps even suspicious.”⁴⁴ It should be noted that the courts always have the last say on the application of an award for enforcement. According to the Article V of the Convention, although the defendant may prove a ground for refusal of a decision, the courts maintain the discretion to enforce an award.

The Grounds for Refusal of the Recognition and Enforcement of Awards

There are two groups of grounds on which the application for enforcement may be declined. The first group is procedural grounds, and is related to the right of the losing party to a fair arbitration. The burden of proof is on the party who claims procedural irregularity.⁴⁵ In addition, a national court may only refuse the enforcement or recognition of the arbitral award if the losing party has objected for the same known ground to the tribunal during the proceedings. The other two grounds are related to arbitrability of the dispute and public policy of the forum state which might be invoked by the national court on its own motion.⁴⁶

PROCEDURAL GROUNDS

The procedural grounds for refusal of recognition of an international arbitral award in the New York Convention are: incapability of a party or invalidity of the arbitration agreement; violation of due process; absence of the jurisdiction; unauthorized or illegal arbitral procedures; and awards have not been made binding, have been suspended or have been set aside.

Incapacity of the parties or invalid arbitration agreement

The capacity of the parties is a requirement to have an enforceable arbitration agreement. As a general principle, the parties must have legal capacity to enter into a contract; otherwise that contract will be invalid. The New York Convention,⁴⁷ like the Model Law,⁴⁸ provides

40 The New Convention Article V.

41 *Eco Swiss China Time Ltd v Benetton International NV* European Court of Justice [1999] Case C-126/97.

42 Van der Berg *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Deventer: Kluwer, 1981) p. 267.

43 *Ulyses Compania Naviera SA v Huntington Petroleum Services Ltd and others (The Ermoupolis)* [1990] 1 Lloyd's Rep 160.

44 Redfern A, Hunter M para 10-35.

45 The New York Convention, Art.V.1.

46 The New York Convention, Art.V.2.

47 The New York Convention Article V.1.a.

48 UNCITRAL Model Law Article 36.

that the court may refuse to enforce the arbitral award if it is proven that the parties concerned do not have the capacity, or the agreement is not valid under the applicable law or, failing any indication thereon, under the law of the seat of arbitration.

There is a possibility of difficulties arising concerning awards involving a state or a state agency. By way of illustration,⁴⁹ in *Fougerolle SA (France) v Ministry of Defence of the Syrian Arab Republic*, the Administrative Tribunal of Damascus refused to enforce an ICC arbitral award on the grounds that the arbitration agreement was invalid. The court held that there was a requirement to take initial advice from the Committee of the Council of State on the referral of the dispute to arbitration. In addition, the Court of First Instance of Tunis accepted that the party was under incapacity when he invoked his sovereignty immunity related to a governmental capacity in a non-commercial dispute.⁵⁰ In foreign trade transactions, the party may also need specific permission to enter that arbitration agreement. Thus the parties of an agreement must be very careful whether the other party has the capacity to fully represent and to enter into an arbitration agreement.

The invalidity of the arbitration agreement is another ground for challenging an arbitral award, and it may occur where the arbitration agreement is ambiguous or not validly signed by the parties.

Violation of due process

New York Convention deals with procedural fairness and requires that, in addition to a fair hearing, the parties of the arbitration should be given proper notice on the composition of the arbitral tribunal, arbitration proceedings and hearings.⁵¹ It should be noted the context of fair hearing is decided under the national law of the forum state.⁵²

It has been observed that applications for a refusal to enforce on the grounds of violation of due process have been rarely successful.⁵³ In the case of *Minmetals Germany v. Ferco Steel*, the English court heard argument on whether asking the respondent for disclosure of his evidence and submission of his arguments was enough to provide a fair hearing. The court held that the he had given an opportunity to present his case and failing to use this to his advantage did not constitute lack of fair hearing.⁵⁴

In arbitration, fairness in due process is acknowledged as the impartiality and independence of the arbitrator. Most modern national or institutional rules require that⁵⁵ an arbitrator must be impartial and independent. In addition, the Model Law⁵⁶ gives a duty to the arbitrator

49 *Fougerolle SA (France) v Ministry of Defence of the Syrian Arab Republics* [1990] XV Yearbook Commercial Arbitration.

50 *Societe tunisienne d'Electricite et de Gaz (STEG) v Societe Entropese (France)* [1978] III YBCA 283, 22 March 1976.

51 The New York Convention Article V.1.b.

52 *Parsons & Whittemore Overseas Co. Inc. v Societe Generale de l'Industrie du Papier (RAKTA)* 508 F.2d 969 (2nd Cir. 1974) 975 the "provisions essentially sanctions the application of the forum state's standards of due process."

53 Liebscher C, *The Healthy Award* (Kluwer Law International, Hague, 2003) Ch.VIII, paras 2.2 and 2.3.

54 *Minmetals Germany v Ferco Steel*, Vol. XXIV (1999) *Yearbook Commercial Arbitration* 739.

55 ICC Rules Article 11, UNCITRAL Arbitration Rules Article 10.1, LCIA Arbitration Rules Article 5.2, 10.3 and AAA International Rules Article 8.1.

56 UNCITRAL Model Law Article 12.1.

to disclose all circumstances that are likely to give justifiable doubts to his independence and impartiality.⁵⁷ It has been stated that an impartial arbitrator means an entity that not biased in favor of or against a party or the case: It is a subjective test;⁵⁸ independence might be related to the prior or current personal, social or business contract between the party and the arbitrator.

Jurisdictional Issues

The authority of the arbitration tribunal comes from the agreement between the parties. The tribunal can only determine the disputes which the parties have specified. One of the few reasons to set aside or refuse to recognize an arbitral award is the absence of the jurisdiction of arbitration. It might arise when the arbitral tribunal exceeds its power within the terms of the arbitration agreement or deals with a dispute that was not submitted to arbitration.⁵⁹ There is a general assumption in arbitration law that the arbitrator acted within its power.⁶⁰ For instance, a US court refused to deal with the defense that the consequential loss was expressly excluded in the underlying agreement. It was held that the national court could not deal whether the breach of contract would lead to grant a consequential loss, since it was a substantial issue.⁶¹

The arbitral tribunal was not constituted properly or the procedure of arbitration did not comply with the arbitration agreement

The fourth ground for refusal involves the composition of the tribunal or the arbitration procedure and whether it is in accordance with the agreement of the parties or failing such agreement, the law of the place of arbitration.⁶² There was a rare successful case in Italy.⁶³ The court refused to enforce the award on the basis that the arbitral tribunal was constituted by two arbitrators where the agreement required three.

Awards are not binding, suspended or set aside

The Convention accepts the view that recognition or enforcement may be refused if the award has been set aside, has been suspended or is not binding on the parties.⁶⁴ That provision was criticized for making arbitration awards subject to local standards,⁶⁵ since the grounds to set aside may differ from country to country. Moreover the national court of the seat of arbitration may impose local requirements that are not acceptable in the country of enforcement. The court at the place of en-

57 International Bar Association drafted an ethical guideline. International Bar Association (IBA) Rules of Ethics for International Arbitrators www.ibanet.org/pdf/InternationalArbitrationGuidelines.pdf.

58 Redfern A, Hunter M, p. 684.

59 The New York Convention Article V.1.c.

60 Van den Berg 'Court Decisions on the New York Convention' Swiss Arbitration Association Conference, February 1996, Collected Reports at 86.

61 *Libyan American Oil Company (LLAMCO) v Socialist Peoples Libyan Arab Yamahirya, formerly Libyan Arab Republic*, Vol.VII (1982) Yearbook Commercial Arbitration 382.

62 The New York Convention Art V.1.d.

63 *Rededi Aktiebolaget Sally v Termarea srl*, [1979] IV YBCA 294, Corte di Appello Florence.

64 The New York Convention Article V.1.e.

65 Van der Berg 'The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation' (Deventer Boston, Kluwer Law and Taxation, 1981) p. 355.

forcement has also an option to postpone its decision when an award has been set aside or suspended.⁶⁶ The question arises whether the arbitral award can be enforced even if it has been set aside or suspended by the court at the seat of arbitration. It has been suggested that “local standard annulments should only be given local effect and should be disregarded internationally.”⁶⁷ In some countries, such as France and Belgium, it is possible to recognize and enforce a foreign award even if it was set aside by the court of seat of arbitration.⁶⁸ In *The Hilmarton*,⁶⁹ the French court enforced an arbitral award that was set aside in Switzerland. Similarly in *Chromalloy*⁷⁰, the United States Federal Court for the District of Columbia enforced an award made in Cairo, regardless of having been set aside in Egypt. However, national courts are still more likely to decline the enforcement if the award has been annulled at the seat of arbitration.⁷¹

SUBSTANTIVE GROUNDS

There are two further grounds for refusing recognition or enforcement of foreign arbitral awards: a) the subject matter of the dispute is not capable of settlement by arbitration, under the law of the country; or b) the recognition or enforcement of the award is contrary to the public policy of that country.⁷²

Arbitrability

This issue relates with the qualification of the dispute by arbitration and the willingness of a national legal system to reserve a specific topic of interest for themselves. The arbitrability of a dispute may differ from country to country in accordance with their political, social and economic policies.⁷³ Criminal matters, such as illegal underlying contract or bribery, and matters affecting the status of the party, such as bankruptcy or insolvency, are considered to be not arbitrable.

The arbitrability of a dispute may prove to be problematic given the different attitudes of national legal systems towards each specific topic of dispute. For instance, in a dispute between a German and a Belgian company, although there was an arbitration clause in the distribution agreement between the parties, the Belgium Court of Cassation held that under national law the dispute was not capable of settlement by arbitration. Moreover, many Arab countries reserve the jurisdiction of agency agreements for only national courts. In *Eco Swiss China Time Ltd v Benetton International NV*,⁷⁴ the European Court of Justice accepted that Article 81 of the European Treaty was a matter of public

66 The New York Convention Article VI.

67 Paulsson J 'The case for disregarding local standard annulments under the New York Convention' (1996) 7 The American Review of International Arbitration (Columbia University), No.2, p. 99.

68 Hamid G. Gharavi 'The International Effectiveness of the Annulment of an Arbitral Award' (Kluwer, Hague, 2002).

69 *Hilmarton Ltd v Omnium de Traitement et de Valorisation (OTV)* [1994] Revue de l'Arbitrage 327.

70 *Chromalloy Aeroservices Inc. v Arab Republic of Egypt*, 939 F. Supp 907 (D.D.C. 1996).

71 *Baker Marine (Nig.) Ltd v Chevron (Nig.) Ltd* 191 F. 3d 194 (2d Cir. 1999).

72 The New York Convention Article V.2.

73 Redfern A, Hunter M p. 164.

74 *Eco Swiss China Time Ltd v Benetton International NV* Case C-126/97 [1999] XXIV Yearbook Commercial Arbitration 629.

policy. Additionally, the *Mitsubishi* case⁷⁵ held that the claims under antitrust laws were not capable of being subject to arbitration.

Public Policy

The violation of public policy has long been a ground for refusing recognition or enforcement of awards. The concept of public policy may differ from state to state and from time to time, reflecting the changing values of society.⁷⁶ For instance, public policy is defined as ‘essential to the moral, political or economic order’ by the Cour Supérieure de Justice of Luxembourg.⁷⁷ Swiss law holds up the public policy argument for the issues that are incompatible with the Swiss legal and economic system.⁷⁸ In addition to the grounds in Swiss law, German law⁷⁹ accepts that the issues in conflict with fundamental notions of justice will violate public policy. The Ontario court held that the issue of public policy would arise when the award is contrary to the most basic and explicit principles of justice, fairness and essential morality, or intolerably ignores or corrupts one of the parties.⁸⁰ It has been argued that while a totally comprehensive definition of public policy has never been proffered, public policy reflects the fundamental economic, legal, moral, political, religious and social standards of a state.⁸¹ The International Law Association⁸² discussed the sub-categories of rules and norms of substantive grounds of public policy: a) mandatory laws (*lois de police*) b) fundamental principles of law, c) public order/good morals, and d) national interests/ foreign relations. Moreover, corruption and bribery are general grounds for refusal on an international level.⁸³

The public policy exception to enforcement is an acknowledgement of the right of the court’s ultimate control over the arbitral process. There is conflict between national interests and the finality of foreign awards. To resolve the conflict, certain laws⁸⁴ apply a narrower concept of public policy, referred to as international public policy (or *ordre public international*).⁸⁵ For instance, the French Code of Civil Procedure does not accept purely domestic public policy view.⁸⁶ The goals of the application of international public policy are to preserve party autonomy, to provide an easy and efficient arbitral process and

75 *Mitsubishi Motors Corp v Soler Chrysler Plymouth Inc* [1985] 473 US 614.

76 Yu ‘The Impact of National law elements on international commercial arbitration’ [2001] 4.1 Int ALR 17 19 “Each country has its own rules, which may be different from those of other states. At the same time public policy shifts with time, reflecting the changing values of society.”

77 *Kersa Holding Company Luxembourg v Infancourtage and Famajuk Investment and Isny* [1996] XXI YBCA 617 at 625.

78 Swiss Federal Supreme Court September 18,2001 [2002] ASA Bulletin 311.

79 Anne Hoffmann ‘Duty of Disclosure and Challenge of Arbitrators’ (2005) ASA Bulletin Volume 21 Number 3.

80 *United Mexican States v Marvin Roy Feldman Karpa*, Ontario Supreme Court file no 03-cv-23500 at para 87.

81 Lew J, *Applicable Law in International Commercial Arbitration* (Oceana 1978) p. 532.

82 Committee on International Commercial Arbitration, International Law Association New Delhi Conference (2002) *Arbitration International* Vol 19 No 2 LCIA, 2003.

83 Julian DM Lew “*Contemporary problems in international arbitration*” (Martinus Nijhoff Publishers, Lancaster 1987).

84 France Code of Civil Procedure Articles 1498 and 1502, Portugal Code of Civil Procedure Article 1096(f), Spain The Court of Appeal of Milan 4 December 1992, reported in [1997] XXII *Yearbook* 72

85 International Law Association (ILA) Report London 2000.

86 French Decree Law Article 1471 and 1495.

to promote the finality of arbitral awards.⁸⁷ The New York District Court, in *Parsons & Whittemore Overseas Co. Inc. v Socit Gnrale de l'Industrie du Papier (RAKTA)*, stated that the public policy defense should be interpreted narrowly and that enforcement should only be refused where it would violate the forum state's most basic notions of morality and justice. In *K s AG v CC SA*, Swiss courts accepted to apply a more restrictive approach to public policy for foreign arbitral awards: "we find that a procedural defect in the course of the foreign arbitration does not lead necessarily to refusing enforcement even if the same defect would have resulted in the annulment of a Swiss award (with the obvious exception of the violation of fundamental principles of our legal system, which would contrast in an unbearable manner with our feeling of justice.)"⁸⁸ On the contrary, public policy argument might be used merely for national interests in some countries. Therefore the place of application for the enforcement of award has a significant importance in international arbitration.

It has been further argued that, besides the referred grounds for the refusal of the enforcement or recognition of arbitral award that stated in New York Convention or Model Law, 'state immunity' might also be another ground for refusal at the level of jurisdiction or execution.

State Immunity

It is not unusual for a state or state agencies to enter into an arbitration agreement. It is argued that although there is no clear reference to the state immunity as a ground for the refusal of enforcement, it can be seen as a grounds for refusal in practice particularly at two levels: jurisdiction and execution.

Immunity from Jurisdiction: When a state or state agency is a party to an arbitration agreement, the claimant might face an objection to the jurisdiction of the arbitral tribunal. However, there is a tendency that the written arbitration agreement is deemed as a waiver of state immunity from jurisdiction and the state is bound by the arbitration agreements for that subject matter. That theory is accepted by many western countries.⁸⁹

Immunity from Execution: A problem may occur at during the recognition and enforcement stage of an arbitral award where the defendant is a state or state agency who does not wish to perform the award voluntarily. Although the existence of an arbitration agreement is deemed as a waiver of immunity from jurisdiction, it is not normally accepted as a waiver of immunity from execution.

In the case of international commercial awards, some western countries such as Austria, England, France,⁹⁰ Germany, as well as the

87 Serrano F M 'Towards a Transnational Procedural Public Policy' Arbitration International, Volume 20 Number 4.

88 *K.S.A.G. v C.C. SA* Vol.XX (1995) *Yearbook Commercial Arbitration* 762. Camare di Esecuzione e Fallamenti Canton Tessin, 19 June 1990.

89 United Kingdom State Immunity Act of 1978 Section 9.

90 *Sté Eurodif v.Rép. Islamique d'Iran* Cour de cassation, 1^{ère} Chambre civile, 14 March 1984.

United States⁹¹ allow the waiver of immunity from execution against the commercial assets of the defendant state.⁹² However, the States commonly do not apply the enforcement against other State's assets or bank accounts in their country, unless it is proven that they are merely for commercial purposes.⁹³ For instance, an English court held that the property of a state's central bank should not be regarded as intended for commercial purposes.⁹⁴

Enforcement Procedures in National Laws

While international conventions, particularly the New York Convention of 1958, aims to make uniform the recognition and enforcement of international arbitration awards, it seems that there are still gaps left for national laws. Apart from the various applications of the New York Convention rules and the grounds for refusal of arbitration awards, there are different applications on enforcement procedures. Article 3 of the Convention states: "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." Therefore, the procedure of recognition and enforcement in a forum state will be under the procedural rules of that state. There are detailed forms of procedures for the recognition and enforcement of arbitral awards which may vary from country to country. Some of the countries adopt the New York Convention directly; some of them require additional procedural steps. It is argued that one of the main shortcomings of the New York Convention is "the obvious lack of an efficient, universal enforcement procedure."⁹⁵ Therefore, the parties of the arbitration should cautiously consider the forum country and international conventions.

There are solutions offered to the referred lack of harmonization on the enforcement of arbitration awards. It has been argued that there can be a model law on implementing the New York Convention relating to the enforcement procedure of an arbitral award⁹⁶ or a supplementary convention to the New York Convention⁹⁷ or a fresh convention. It should be noted that a new convention for the recognition and enforcement of international awards or a supplementary convention will need to be signed and ratified by the countries, which might be problematic in practice.

It should be noted that the New York Convention⁹⁸ allows the parties of the arbitration to apply the enforcement of international awards under more favorable convention, multi-lateral or bi-lateral treaty or even local law. There might be more simple and effective methods of

91 Foreign Sovereign Immunities Act, 28 U.S.C. s 1610(a).

92 Lew J, Mistelis L and Kröll S p 754.

93 *Alcom Ltd v Republic of Columbia and others* [1984] A.C. 580.

94 *AIG Capital Partners Inc. and another v. Republic of Kazakhstan and others* [2005] EWHC 2239, [2006] 1 All ER 284.

95 Robert Briner 'Philosophy and objectives of the Convention' 1999 United Nations Publication E.99 V2.

96 Pieter Sanders 'The Making Of The Convention' 1999 United Nations Publication E.99 V2.

97 Veeder V 'Provisional and Conservatory Measures' 1999 United Nations Publication E.99. V2.

98 The New York Convention Article VII.1.

enforcement, provided by other treaties or national laws in the country where enforcement is sought. By way of illustration, the European Convention,⁹⁹ French law¹⁰⁰ and Dutch law¹⁰¹ provide more limited grounds for the refusal of enforcement. The author believes that modern approaches and interpretation of the convention rules, as well as the Article VII.1 of the Convention that allows the enforcement under more favorable rules, might be an opportunity for a solution on the lack of harmonization on the enforcement of arbitration awards.

Conclusion

The recognition and enforcement by the national courts gives official validity to arbitral awards. The modern approach to arbitration undertakes the national courts to recognize and enforce the award without any delay,¹⁰² unless it fails to satisfy the elemental requirements. The international conventions, especially the New York Convention of 1958 provide a uniform, modern, easy and efficient way of enforcement of international awards.

On the other hand, there are still certain problems at the enforcement stage of arbitration. The acceptance of tribunal decisions, in the meaning of New York Convention award is still argumentative, particularly the enforcement of interim decisions in national courts. Moreover, the New York Convention of 1958 states that the procedure of the recognition and enforcement takes place in accordance with the rules of the territory where the award is relied upon.¹⁰³ The Convention only holds that the national laws should not impose heavier conditions or higher fees for the enforcement of foreign awards compare to domestic awards. Thus, the remaining issues related to procedure are under the law of forum country. It is also undesirable that the limitation period for enforcement varies depending on the national law. In addition, the interpretation and application of the refusal grounds for enforcement, such as public policy and jurisdictional grounds, is under the law of the state where recognition and enforcement is sought, which may vary in different signatory States.¹⁰⁴ The cases discussed also illustrate that national courts might have different approaches to same articles of the New York Convention.

To conclude, harmonization in the enforcement of international awards has not been accomplished yet. The national law of the forum country is still crucial for a successful arbitration. Therefore, the parties of arbitration should not only consider whether the country of the place of enforcement is a party to international or regional treaties, but also the position of the competent court to enforce the results of the international arbitration.

99 European Convention of 1961 Article IX.

100 France New Code of Civil Procedure Article 1502.

101 Netherlands Code of Civil Procedure Article 1076.

102 UNCITRAL Arbitration Rules (1976) Article 32.2.

103 The New York Convention of 1958 Article III.

104 The New York Convention of 1958 Article V.