Problems with Enforcement of Foreign Arbitral Awards

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Abstract: *This article concerns the enforcement of arbitral awards that are implemented under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It examines some of the contemporary challenges associated with NYC implementation and uses various economic cases of states as an example to illustrate these challenges.*

Keywords: *New York Convention, law, arbitration, foreign arbitral award.*

There are various conflict resolution techniques more frequently the more developed the nation is economically or the more individuals from diverse cultural and economic backgrounds there are in private businesses. With certainty, we can state that the United States is one of the nations that is most driven to employ alternative dispute resolution methods like arbitration, mediation, and so on. For the last ten to fifteen years, despite their security, usefulness, and practicability as well as the supervision of states over the regulation of litigation, they were regarded as the primary creators of economic and structural demands in the world's capitalist and more developed nations[1].

As a result, in the early days of arbitration, numerous nations signed a variety of regional and international treaties governing the international recognition and execution of arbitral rulings. The UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted in New York in 1958, was the most favourable. There are 144 contracting states in this agreement. One of the key reasons for the arbitrage exchange's continuous expansion as the preferred means of dispute settlement in international commercial and financial activity is the Convention's worldwide system of enforcement[2].

Furthermore, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is one of the few examples of a transnational commercial law document developed by one of the specialized intergovernmental concepts of transnational commercial law and its various sources such as international and regional instruments, judicial or legislative parallelism, standard contracts, the United Nations was a real success story. In general, the single most important advantage of arbitration over litigation as a way of settling cross-border business disputes is the degree of confidence a party has that the award would be accepted and enforced nearly anywhere in the world following World War II[3]. This feature makes the Convention very viable and useful as a unifier of arbitration issues. This page will clarify where the Convention needs to be amended or where states are having difficulty interpreting it. Because one of the Convention's unique aspects is the enforcement of arbitral rulings, there are significant gaps that need to be filled and improved in this area.

[1] Bakhramova, M. (2020). Perspectives Of Development Of Arbitration Legislation And Law Enforcement Practice In Uzbekistan. *European Journal of Molecular & Clinical Medicine*, *7*(1), 3586-3593.
[2]Herbert Kronke, Patricia Nacimiento, Dirk Otto Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary. Kluwer law International. (2010y) P 19.
[3] Ibid 2

Arbitration, rather than adversarial litigation, has become the favored method of resolving international business disputes. International organizations have made major contributions to the international arbitration mechanism's standardization. Despite these attempts, international arbitral awards enforcement remains an Achilles' heel[4]. Under this system, this article is precisely described. Almost many arbitral awards are carried out in good faith simply because that is how business works. However, there are situations when parties are unable to justify their disagreement and refuse to comply with arbitral rulings. At such times, the state that interprets the Convention and must comply with the awards may refuse to enforce the awards simply because the arbitration procedure was not carried out properly, the awards are not covered by state law, the awards are inconvenient for public law, and other reasons covered by Article 5 of the Convention.

Article 5 (1a) of the New York Convention makes it clear that if the parties choose a state in their agreements, they must realize that if there is a dispute, the judgments may not be carried out because the subject of the dispute is not recognized legally or at all in the country's legislation. This means that, in addition to the parties' personal status, the legitimacy of the arbitration agreement will be determined principally by the law to which the parties have agreed to submit it. The parties' will, expressed either explicitly or implicitly, takes precedence. The judge should only use the law of the nation where the decision was taken if this criterion leads to nothing in the absence of any indication[5].

Arbitrators occasionally overstep their bounds, going beyond the scope of the claim and their competence. This can often derail the entire process because the parties will be unable to meet their responsibilities as a result of the judgment because the judges overstepped their authority. Article 5 of Section 1 contains such an interpretation (c). This might be interpreted as a quasi-collision. This section mostly demonstrates jurisdictional objections to the enforcement courts, if arbitration proceedings are initiated under an object that is not covered by the parties' agreement. The Commercial Court of England construed this clause in the context of Minmetals Germany GmbH v. Ferco Steel Ltd, declining to sanction and enforce the award. However, if the judgment is not competent, even such decisions can be carried out. In the case of Fertilizer Co. v. IDI MGMT, for example, an arbitration panel decided on a matter involving indirect homicide. The Parties, on the other hand, did not include any such queries. This reading of section s is not only different, but it also opposes court engagement in the process. And this case is a perfect example of that. If the provision does not contain such a restriction, the arbitrators can readily impose one and provide a new remedy[6].

Arbitrators occasionally overstep their bounds by reaching decisions that go beyond the scope of the claim. This may occur if the arbitrators hear the party that need assistance. The Hamburg Court of Appeal, for example, has resolved situations in which the court granted interest after the judgement was rendered, notwithstanding the plaintiff's desire for payment before the agreements were accepted. When the defendant refused to fulfill his obligations, the court dismissed his claims, citing the fact that the court has jurisdiction to check items[7].

Any arbitration awards that have been set aside by the competent authority of the state in which the arbitration was to take place are refuted and rejected under Article 5 section 1(e). At first look,

[4] Chaman Lal Bansal and Shalini Aggarwal Public policy paradox in enforcement of foreign arbitral awards in BRICS countries: a comparative analysis of legislative and judicial approach International Journal of Law and Management (2017) p2

[5] Mark Mangan With the globalisation of arbitral disputes, is it time for a new Convention? International Arbitration Law Review (2008) p3

[6] Mark W Friedman Jurisdictional Limits on Enforcement of New York Convention Awards Practical Perspectives on Recognition and Enforcement in a Modern World Papers from the 11th IBA International Arbitration Day and United Nations New York Convention Day (2008) p2

[7] Ibid 3

this appears to be a nice concept, but it is unclear because several states, such as France, Belgium, and Austria, have repeatedly honored arbitral awards, even when they were overturned by the courts in the arbitration venue. This leads to confusion, because such a phenomenon strengthens arbitral awards' delocalization. A good example is the Hilmarton case. The arbitration award was rejected by a Swiss court, but it was recognized in France[8].

Public policy is one of the problematic interpretations in Article 5. This is the most significant issue with respect to the execution of arbitral awards. Because the entire state understands it according to their own preferences, and it frequently alludes to international politics. National courts are increasingly applying public policy from an international perspective, focusing on "the judicial state's most fundamental concepts of morality and fairness." A Turkish court, however, declined to recognize the Zurich verdict in one case, claiming that the court's claimed refusal to respect the parties' choice of procedural law was a breach of public policy[9].

Furthermore, several state legislatures appear to have given their courts the authority to refuse to recognize or enforce arbitral verdicts on reasons other than public policy. While it may simply be a matter of language, Japanese law, for example, applies the criterion of "public policy or good morals" in the law enforcement process; Vietnamese law requires a decision not to conflict with Vietnamese law's basic principles; and in China, public policy protection can be used to protect what some may consider purely local interests.

International politics plays a significant influence here. For example, there is currently a dispute between Russia and Ukraine, and we can observe how the percentage of arbitral rulings that are enforced in both countries has fallen. After rapidly dropping over the previous five years, the enforcement rate of all international arbitral judgments in Russia fell to roughly 50% in 2018. In the case of Agropromservice and Commonwealth-soy, for example. The Russian court denied the award, citing public policy as the reason. When the decision directed damages to a party for not obtaining goods after the Russian state had banned their import, enforcement was denied on public policy grounds. In the case of Agropodeksport against Vikeit Plius, the Federal Financial Monitoring Service ruled that the deal in question could have been a sham transaction intended at avoiding currency control laws and probably money laundering[10].

The Convention has made this clause exceedingly vague, allowing state to interpret it as they see fit rather than how the Convention sees fit. The fact that this component can draw political attention at any point makes the Convention very weak in terms of arbitration processes execution.

Arbitral awards are enforced differently in the United States than in other countries. Personal jurisdiction and personal jurisdiction are the two branches that define them. For the court to exercise its powers, both branches must be satisfied at the time of execution. Because such a term is not defined by convention, this has a fascinating impact on the enforcement of arbitral rulings.

In the United States, the Constitution takes precedence over any treaty or federal statute. As a result, personal jurisdiction is founded on the US Constitution's guarantees. This means that no convention, including the 1958 Convention, can exclude a court from having to establish personal jurisdiction. Minimal contacts indicate that the respondent used the forum on purpose. A federal court, for example, invalidated the executions in Glencore Grain Rotterdam BV v Shivanath Rai Hamarain Co. because there was no personal jurisdiction. The plaintiff attempted to argue that the Convention has no such obligation in connection to the rejection of the arbitral award's execution.

[8]Mark Mangan With the globalization of arbitral disputes, is it time for a new Convention? International Arbitration Law Review (2008) p3
[9]Ibid 4
[10] William R. Spiegelberger the Enforcement of Foreign Arbitral Awards (2018) p3

The court, however, determined that the US Constitution is fundamental, and that no convention or treaty can supersede it[11].

Personal jurisdiction is a difficult procedure to recover. Despite the fact that nothing has changed in recent years, you must know which connections qualify as required. The plaintiff in Northwest Airlines v. R&C Koh Sa argued that the defendants were subject to personal jurisdiction in Minnesota since the defendant's owner was in the state during the settlement process. Because the defendant's contractual relationship with the corporation situated in the United States did not demonstrate that the defendant knowingly exercised US privileges, contacts were required to support the plaintiff's enforcement action. Meeting the minimum contact criterion in an international arbitration system can be difficult, as these cases demonstrate. Because many of them have accounts or shares in multiple countries[12].

Personal jurisdiction, as previously said, is a complex issue that is difficult to establish. In such instances, the plaintiff has more power over award enforcement. A plaintiff can claim quasi-remembrance jurisdiction even though he or she lacks personal jurisdiction. If the defendant's property is within the court's jurisdiction, the judgment is enforced. However, there is one condition: the jurisdiction's subject matter must be identified before the plaintiff can sue for quasi-proprietary jurisdiction. For example, in CME v. Zeleny, the total amount of execution was $23 million, but the court only enforced 5 cent decisions from a US bank because that was the amount in the quasi-proprietary jurisdiction at the time. The question is whether the court can compel the other party to produce information before asserting jurisdiction. Proponents of a strict enforcement regime argue that a party seeking enforcement based on the defendant's property being present in the state's territory should be entitled to jurisdictional discovery on the same grounds as plaintiffs in other types of claims[13].

In practice, quasi-proprietary jurisdiction has a high level of specificity, but can it be used to enforce a foreign arbitral award? Is it feasible that quasi-proprietary jurisdiction to extend to objects that are completely unrelated to the dispute? The Fourth Court concluded in Base Metal Trading v. Novokuznetsk Aluminum Plant that the existence of property that is unconnected to the plaintiff's cause of action does not sustain jurisdiction[14].

In the global area, there have been various judgments concerning the execution of arbitral awards. Because the Convention has not been updated in a long time, some of them can be implemented; otherwise, the problems would continue to grow.

The structural construction of a Court of Appeal for appeal and enforcement in accordance with the United Nations Convention is one typical method for the execution of arbitral judgements. This instantly eliminates the participation of national courts, reducing the process's length, expense, and unpredictability. As a result, by taking over the role that national courts already serve, the proposed court would not threaten the finality of arbitral rulings to the extent that it is currently achieved. Furthermore, statistics show that 54 percent of Fortune 500 companies in the United States are unable or scared to use arbitration because of the appeals limitations. Users of international arbitration in England and Wales, for their part, have deemed it reasonable to have the right to appeal legal questions. Mattel v. Hall Street is a good example, where the parties argued that the US Supreme Court should have interfered and prevented the situation more than once. Whether or whether one agrees with the majority's assessment of the parties' incapacity to

[11] Mark W Friedman Jurisdictional Limits on Enforcement of New York Convention Awards Practical Perspectives on Recognition and Enforcement in a Modern World Papers from the 11th IBA International Arbitration Day and United Nations New York Convention Day (2008) p4
[12] Ibid 5
[13] Ibid 6
[14] Ibid 7

broaden the grounds for review by treaty, the reality remains that some users of international arbitration demand more appeal powers than are currently available. The parties may be given a choice if a Court of Appeal and Enforcement is established. The typical grounds for contesting an award are jurisdiction, procedural fairness, and public policy. However, the parties could authorize the court to accept broader grounds of appeal, either as part of their contract or after a disagreement had developed[15].

The country's public policy is one of the most significant obstacles to enforcing arbitral rulings. As previously stated, this is not a particularly clever moment. This is because arbitrators are not required to consider each state's public policy while deciding a dispute. In truth, this technique is for states as the state's most fundamental ideals about morality and justice, which are a single concept. Many countries' courts have acknowledged that when assessing the enforcement of a foreign arbitral award, they must consider it from an international rather than an internal perspective. The French legislature has gone so far as to say that a foreign judgement can only be refused recognition or enforcement if it is harmful to "international public policy." Furthermore, the French Court of Cassation recently confirmed that non-recognition of a foreign arbitral award can only be justified by violations of international public order that are "clear, effective, and precise[16]." This mindset has the potential to end the global problem and harmonize the entire procedure of arbitral award enforcement.

For several years, quasi-proprietary jurisdiction has demonstrated the ease with which arbitral awards can be enforced. In order to extract fraud or systematic incompetence of the state or parties, an alternative should be included in the Convention. Make such conditions contractually binding when they are imposed. This is because even if the defendant manages to get the arbitration case dismissed in the state where it was filed. However, the defendant cannot get out of the clearly specified property that corresponds to the agreements in any way.

To draw a conclusion, the Convention is still a component of the international legal system. National courts continue to determine the framework's effectiveness. While the New York Convention has mostly achieved its purpose of boosting post-judgment asset recovery and raising plaintiffs' trust, recent enforcement decisions reveal that US courts are still attempting to strike the right balance between quick enforcement and other legal difficulties. This serves as a reminder that, notwithstanding the Convention's extraordinary success, support for arbitration is needed at both the national and international levels. The creation of a permanent International Arbitration Court of Appeal and Enforcement under a UN treaty to which sovereign governments have acceded will ensure that commercial disputes are addressed by professionals in a neutral forum, privately, and in the expected way. Be more predictable, less expensive, more efficient than existing international commercial arbitration procedure However, arbitrage is incredibly efficient by nature and displays the most recent statistics. The traits of flexibility and party autonomy, according to Adapting Arbitration to a Changing World, allow it to evolve and adapt to user needs. For 90% of respondents, international arbitration is the preferred means of resolving cross-border conflicts, either alone (31%), or in combination with alternative dispute resolution (ADR) (59 percent). This means that, even in the face of such difficulties, arbitration is regarded as the primary regulator in the sphere of international business law dispute resolution[17]. And, just think, if scientists changed the Convention to reflect today's circumstances, the Arbitration would become the most significant aspect. However, this could spell the end of national court unification.

[15] Mark Mangan With the globalization of arbitral disputes, is it time for a new Convention? International Arbitration Law Review (2008) p4
[16] Ibid 5
[17] 2021 International Arbitration Survey: Adapting arbitration to a changing world (lsbu.ac.uk)

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