

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

Dispute Settlement

International Commercial Arbitration

5.7 Recognition and Enforcement of Arbitral Awards: The New York Convention



NOTE

The Course on Dispute Settlement in International Trade, Investment and Intellectual Property consists of some forty modules.

This Module has been established on the basis of a first draft prepared by Mr. Petar Šarčević at the request of the United Nations Conference on Trade and Development (UNCTAD). The views and opinions expressed in this paper are those of the author and not necessarily those of the United Nations, WTO, WIPO, ICSID, UNCITRAL or the Advisory Centre on WTO Law.

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WHAT YOU WILL LEARN

This Module surveys the basic features of the recognition and enforcement of foreign arbitral awards under the New York Convention of 1958 (hereinafter: NYC). The recognition and enforcement proceedings constitute the final stage of any arbitration whenever the arbitral award is not executed voluntarily.

Since the arbitrators are private persons, national courts are necessarily involved in the recognition and enforcement of arbitral awards. In 1958, the attempt by the ECOSOC to adopt uniform rules on the recognition and enforcement of foreign arbitral awards resulted in the most important international instrument in the field – the New York Convention. Since then, the Convention has had a significant impact on arbitration practice, as well as on the court practice in connexion with arbitration. This is best witnessed by the fact that, to date, 133 countries have become party to the Convention. Thus it can be said that the NYC successfully fulfills its purpose of facilitating the recognition and enforcement of foreign awards.

While a court seized with a request for the recognition and/or enforcement of a foreign arbitral award may not examine the award on its merits, it may refuse to recognize or enforce the award on the basis of some grounds provided by the NYC. The grounds for refusal are intended to protect the vital interests of the enforcing State or to provide internationally recognized procedural standards for the protection of the parties. Of these grounds, it appears that the formal validity of the arbitration agreement no longer meets the needs of modern business transactions, thus calling for possible amendment.

The harmonization achieved in the field of recognition and enforcement of arbitral awards is due mainly to the worldwide acceptance of the NYC, which is growing annually. In 2002 alone, five more countries became Contracting States to the Convention.

1. INTRODUCTION

This Chapter deals with the recognition and enforcement of arbitral awards under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.¹ Despite considerable progress made by the Convention in harmonizing the enforcement of foreign awards, the enforcement process is sometimes considered the “weakest link in the entire chain of international dispute resolution”.² Indeed, the enforcement proceedings are still dependent on national rules, which differ in many aspects in different parts of the world. Nonetheless, the New York Convention has considerably improved the situation. With 132 countries presently party to the Convention,³ it has become one of the most successful multilateral conventions in the field of international commercial law and, of commercial dispute resolution in particular.

Brief history

When international commercial arbitration was first being established at the beginning of the twentieth century, it relied on domestic arbitration laws that differed considerably from each other, thus proving inadequate for the needs of international arbitration. The main problem was the non-enforceability of arbitral clauses referring future disputes to arbitration. After World War I, a multilateral convention - the Geneva Protocol on Arbitration Clauses of 1923⁴ - was negotiated in the framework of the League of Nations, with the aim of unifying the position of the signatory States on this matter. To this end, Article 1 of the Geneva Protocol stipulated that arbitration agreements are valid “whether relating to existing or future differences”.

This, however, was only the first step. After resolving the issue of the validity of arbitration agreements, it became necessary to provide certainty that arbitration awards would be enforced in foreign countries where assets of the award-debtor were located. Once again, a new convention was drawn up under the auspices of the League of Nations: the Geneva Convention on the Execution of Foreign Awards of 1927.⁵ This Convention governed the enforcement of arbitral awards rendered on the basis of arbitration agreements falling under the Geneva Protocol. Although the Geneva Protocol of 1923 and the Geneva Convention of 1927 made significant progress in the area of unification, they failed to meet the needs of the international commercial community. Therefore, immediately after World War II, the International Chamber of Commerce (ICC) launched a project to draft a new international arbitration convention. The Draft Convention, which incorporated the ideas of the Geneva Treaties, was presented by the United Nations Economic and

¹ The text of the New York Convention is published in 330 United Nations Treaty Series, No. 4739 (1959), p. 38.

² BLESSING, Marc, “The New York Convention: The Major Problem Areas”, in: *The New York Convention of 1958*, ASA Special Series No. 9 (1996), p. 20.

³ This Chapter was completed in autumn 2002.

⁴ Published in 27 League of Nations Treaty Series (1924), p. 158.

⁵ Published in 92 League of Nations Treaty Series (1929-1930), p. 302.

Social Council (ECOSOC) at the Conference held in New York from 20 May to 10 June 1958. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards was adopted on the last day of the Conference.

Voluntary execution of awards

Today, it is widely accepted that in most case arbitral awards are voluntarily executed by the parties. It has been reported, for example, that over 90 percent of ICC arbitral awards are executed by the parties on a voluntary basis. The reasons for this are manifold; most importantly, business people are unwilling to put their reputations at risk by refusing to comply with the decision of an arbitral tribunal that they have voluntarily agreed upon.

Some arbitration institutions, such as the ICC, request the parties to comply with the award without delay. In this sense, Article 28(6) of the ICC Rules of Arbitration⁶ reads:

“Every award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their rights to any form of recourse insofar as such waiver can validly be made.”

This obligation has encouraged the parties to perform spontaneously, thus enhancing the enforceability of the award. This, however, does not mean that the award will be regarded in all countries as “a waiver of all recourses in respect of possible violation of due process, international public order or the competence of the Arbitral Tribunal”.⁷ On the other hand, some recent court decisions support the idea that such a waiver should be regarded as the parties’ agreement to end the arbitration with the decision of the arbitral panel.

“ the award is proper as a matter of U.S. law, and that the arbitration agreement between Egypt and CAS precluded an appeal in Egyptian courts... A decision by this Court to recognize the decision of the Egyptian Court would violate... U.S. public policy.”

Absence of voluntary

If the award debtor fails to voluntarily comply with the award, in many countries

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