Journal Sharia and Law

Volume 2011
Number 47 *Year 25, Issue No. 47 July 2011*

Article 8

July 2011

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Wafa Janahi
College of Law - Bahrain University, wjanahi@uob.edu.bh

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Janahi, Wafa (2011) "The Problem of Enforcing Arbitral Awards An Analytical Study," *Journal Sharia and Law*: Vol. 2011 : No. 47 , Article 8.
Available at: https://scholarworks.uaeu.ac.ae/sharia_and_law/vol2011/iss47/8

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The Problem of Enforcing Arbitral Awards An Analytical Study

Cover Page Footnote

Wafa janahi Master of Private Law- Research Assistant- College of Law - Bahrain University.
wjanahi@uob.edu.bh

This article is available in Journal Sharia and Law: https://scholarworks.uaeu.ac.ae/sharia_and_law/vol2011/iss47/8

Problems and Weaknesses Arising from the Enforcement of Foreign Arbitral Awards in National Courts*

Wafa Janahi*

Abstract

Despite efforts made to facilitate the enforcement of foreign arbitral awards internationally and the great success achieved by the New York Convention (1958) for the enforcement of foreign arbitral awards within contracting states' territories, there remain issues that complicate the enforcement proceedings. Reliance on the national procedural rules for the enforcement of foreign awards, which vary in several aspects from one country to another, is one of the main issues that could undermine the effectiveness of arbitration. The problems that complicate the enforcement of foreign arbitral awards in national courts can be classified into two types: the first one can be called "general problems" that related generally to the legal system and the background of the state where the award is to be enforced and its national mandatory procedural rules. The second type, however, related specifically to the interpretation of the New York Convention's provisions by national courts. This paper will first briefly discuss the general problems that can make the enforcement of arbitral awards more difficult and consequently undermine the effectiveness of the arbitral process as an accessible means of resolving commercial disputes. These problems focus more on the enforcing court and its trend toward the enforcement of foreign arbitral awards. The research paper will then examine the influence of national laws under the NYC on the enforcement of foreign award and the practical problems that arise with respect to the

* Teacher and Research Assistant, University of Bahrain-School of Law..

* Accepted for publication 7.10.2010.

interpretation of the New York Convention's provisions in national courts. Finally, the paper ends with suggested solutions.

1. Introduction

Resorting to international arbitration as an accessible means of resolving commercial disputes has increased and developed because of its contractual nature, and its greater speed and confidentiality than the traditional national courts process. Parties typically contract to arbitrate disputes in order to avoid the courts' long proceedings and maintain amicable and confidential relationships with their commercial partners.

However, the arbitration process will not be effective unless the enforcement of arbitral awards is ensured; enforcement is of fundamental importance in practice, not only because it serves as a means of ensuring the effectiveness of the arbitral process, but also as a key factor favoring the use of arbitration in preference to other modes of dispute resolution. The enforcement of an award as a procedural matter can be defined as "applying legal sanction to compel the party against whom the award was made to carry it out"(1); it can take many forms depending on the nature of the assets owned by the losing party.

There are two methods of enforcing an international arbitral award. First, the arbitral award could be carried out voluntarily by the party against whom the award is rendered.(2) In fact, voluntary execution is generally accepted since parties to arbitration agreement are usually business people who do not wish to be in a situation that might affect their reputation in commercial life as a result of not enforcing the award. Secondly, in the absence of voluntary execution or enforcement, the successful party could seek more complex, compulsory execution through national courts. It is important to bear in mind that once the award has been made, the arbitral tribunal jurisdiction will be exhausted. Consequently, only the courts have compulsory authority to enforce the award through legal sanctions.

(1) Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration (4th ed.) Sweet & Maxwell, London, (2004) 517.

(2) For example, UNCITRAL Arbitration Rules, Art 32 (2) and ICC Arbitration Rules, Art 28 (6), state that the award shall be binding on parties and they should carry it out "without delay".

Accordingly, national courts are authorized to enforce the award by applying their own national procedural rules even though it is a foreign and not a domestic award. This has been stipulated in many international arbitration model rules(3) and, more importantly, in the New York Convention on the recognition and enforcement of foreign arbitral awards (1958).

However, reliance on the national rules for enforcing foreign awards, which vary in several aspects from one country to another, would lead to certain risks and difficulties at the enforcement stage. Consider an arbitral tribunal rendering an award in Paris: the claimant wants to enforce the award, but the respondent has property in Pakistan, Egypt, the UK and USA. The claimant could enforce the award in any or all of these countries, and here the problem begins. The claimant has to resort to local courts in the USA, UK, Egypt and Pakistan, but these countries have different laws relating to enforcement; the award may be enforced by USA courts and refused in the other three countries. Thus, enforcement is sometimes considered as the "weakest link in the entire chain of international dispute resolution".(4)

This subject is potentially broad, so this paper will briefly discuss the general problems resulting from enforcement of arbitral awards by national courts, and then examine the risks and defects that arise with respect to interpretation of the New York Convention's provisions. Finally, solutions are suggested.

2. Problems and weaknesses arising from the enforcement of foreign arbitral awards

2.1 In General

Despite efforts made to facilitate the enforcement of foreign arbitral awards internationally, there remain issues that complicate the enforcement proceedings. These issues are usually based either on the application of the national enforcement rules of the enforcing state, as matters of procedure are governed in most legal systems by the *lex fori* (5), or on the legal system of the

(3) For example, UNCITRAL Model Law, Art 36

(4) Blessing Marc, "The New York Convention: The Major Problem Areas", in: The New York Convention of 1958, ASA Special Series No. 9 (1996) 20

(5) For more detail on this see C.M.V. Clarkson and Jonathan Hill, *The Conflict of Laws* (3rd ed.) OUP, Oxford, 2006, 466.

state's court where the award is to be enforced. These issues may include the following:

2.1.1 Lack of Familiarity with Arbitration and Enforcement of International Arbitration Awards by the Courts

The most practical problem complicating enforcement procedures is the court's lack of familiarity with or understanding of arbitration in general, and of international enforcement treaties such as the New York Convention (NYC)(6), as illustrated by the situation in China:

In China as a whole, lack of a basic knowledge regarding arbitration among some local judicial personal – the standard practices of arbitration as well as the New York convention – is a general phenomenon. Some local judges still have little understanding of how the convention works and the uniform judicial interpretation of its provisions accepted by courts worldwide. It is still necessary to organize relevant judicial personnel to earnestly and systematically study the New York Convention and international practices regarding enforcement of awards, and duly and conscientiously implement it.(7)

This problem may be aggravated in countries where English is not spoken and used.

2.1.2 Failure and Inaccuracy of the Legislature to Enact Implementing Legislation

A further key factor is the inaccuracy of the legislature to enact subject to international convention. Although some states have ratified the New York Convention, the problem remains if it has not yet been enforced(8), or if it took effect inadequately, prejudicing generally accepted principles in arbitration.(9) In

(6) Michael Hwang and Yeo Chuan Tat, 'Recognition and Enforcement of Arbitral Awards' in Michael Pryles and Michael Moser (eds), *The Asian Leading Arbitrators' Guide to International Arbitration* (2007) Chapter 16, 453

(7) ibid 454

(8) E.g some African States like Tanzania, Kenya, and Lesotho, although ratified the Convention, have not yet promulgated specific implementing legislation in their local laws. It should be noted on this respect that the New York Convention as an International soft law is not a transnational law and it cannot be legally enforced before it has been incorporated in the national law.

(9) Redfern (n 1) 529

Indonesia, for example, although the country acceded to the NYC in 1981, the implementing legislation was defective and contrary to the minimum conditions provided for in the NYC; enforcement is not granted by Indonesian courts unless the applicant submits a statement from the Indonesian diplomatic mission in the awarding state, in order to ensure that diplomatic relationships exist with Indonesia;(10) this is also likely to cause further delay. Some states, however, have ratified the NYC without enacting local legislation along the lines of the UNCITRAL Model Law; in this case, the previous arbitration legislation of the state prevails despite its potential incompatibility with the Convention.(11) There are also oddities of legislation, such as those provisions of the law in India (now repealed) and in Pakistan, which stated that where the governing law was that of India (or Pakistan, as the case may be), the ensuing award was deemed to be a domestic award, even though the seat of the arbitration was in a foreign state and although such an award is normally regarded as foreign (or international) under the New York Convention and to be governed by its provisions.(12)

Moreover, although the interesting feature of enforcement of a foreign award is that there is no statutory appeal provided against any decision of the court rejecting objections to the award, an appeal only lies if the court in the enforcing state holds the award to be non-enforceable(13); this general principle was therefore considered by some national constitutional courts to be unconstitutional.(14) For instance, article 58 (3) of the Egyptian Arbitration Law(15) provides parties with the right to appeal against the court's judgment rejecting the enforcement of a foreign arbitration award within 30 days of receipt of the judgment; no such right is founded against the enforceability order. However, this provision, although complying with the pro-enforcement

(10) Michael Hwang (n 6) 415

(11) E.g Qatar Civil and Commercial Procedure Code (1990)

(12) Redfern (n 1) 529

(13) It should be noted here that the right of appeal from the decision of the execution court in regard to the enforcement of arbitral award depends on whether the law of the state where the recognition or enforcement is sought establishes or contains any provision for challenging or appealing against the court's judgment either on confirming the award or refusing its enforcement.

(15) Egyptian Arbitration Law No 27 1994, Egypt has adapt the UNCITRAL Model law with some amendments; see also UAE Civil Procedure Code, Arts 217(1) (2).

bias of the NYC, was considered by the Egyptian Constitutional Court as unconstitutional because it does not provide for an appeal against the Court's order confirming the enforcement of arbitral award because there will be no equal right for both parties.(16) This decision could, therefore, run against the purposes and spirit of the NYC, which came into force in Egypt in 1959.

In Bahrain, the arbitration proceeding is subject to Chapter VII of the Civil and Commercial Procedures Law of 1971, according to which the recourse by way of appeal for the annulment of awards is permissible in accordance with the rules established for the annulment of the courts' judgments and within 30 days of the date the award is notified to the arbitration parties. This means that the award could be judicially reviewed by the appellant court on it merits, as is the case in the judicial review of the court's judgment. However, the arbitration rules set out in Chapter VII of the Civil and Commercial Procedures Law are now applied only for domestic arbitration and not for international arbitration, which has become subject to the Arbitration Act No 9 of (1994), identical to the UNCITRAL Model Law rules. This can be inferred from Article (2) of the 1994 Arbitration Act which states that the provisions of Chapter VII of the Civil and Commercial Procedures Law issued by Legislative Decree No. (12) of 1971 on arbitration, does not apply to any international commercial arbitration subject to the provisions of this law, nor do the other provisions of the Civil and Commercial Procedures Law apply to such arbitration except to the extent that these provisions are not incompatible with the provisions of this Act; the 1994 Arbitration Act overrides any domestic law conflicts with its provisions.

2.1.3 Review of Merits of the Case by the Courts

However, we should not confuse the appeal of the court judgment enforcing the arbitral award (an order confirming the arbitral award) which is considered above and which must be made in a court in any State where the enforcement is sought, with the appeal or "challenge" of an arbitral award itself which may only be made in a court in the State where the award was rendered(17). The latter position is, in fact, addressed in the Model Law which lists exhaustively the

(16) Case No 92, Constitutional Court, rendered on 6/01/2001

(17) "Appeals against an award", "recourse to a court of law against an award", "application for setting aside the award", and "challenge of arbitral award" all have the same meaning.

grounds on which an award may be set aside. According to Article 34 (2), there are two categories of grounds. The first, which are to be proven by one party, are as follows: lack of capacity of the parties to conclude an arbitration agreement; lack of a valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present its case; the award deals with matters not covered by the submission to arbitration; the composition of the arbitral tribunal or the conduct of arbitral proceedings are contrary to the effective agreement of the parties or, failing such agreement, to the Model Law. The second category, however, is to be considered by the court of its own initiative. So, the court may not enforce the foreign arbitral award (a) if the subject matter of the difference is not capable of settlement by arbitration under the law of the country where the enforcement is sought; and/or (b) if the enforcement of the award would be contrary to the public policy of the state. Challenging of the arbitration award on the grounds stipulated in the said Article is only available for procedural issues. None of these grounds is intended to permit the enforcing court to re-examine the merits of the arbitral award. They all relate in one way or another either to procedural matters, due process or public policy issues. This means that whilst it may be possible to challenge an arbitral award, the available options are likely to be limited.

There is no provision in the UNCETRAL (the United Nations Commission on International Trade Law) Model Law for any form of appeal from an arbitral award, on the basis of mistake of fact or law or any judicial review of the award on its merit. If the tribunal has jurisdiction, and followed the correct procedures and formalities, the award, of whatever quality, is final and binding on the parties. Consequently, the law of many countries, reflecting the policy of the New York Convention and Model Law, allows appeal against foreign arbitral award only on those grounds maintained in the Model Law. However, some states with a long tradition of arbitration have taken the view that it is should be open to the parties to appeal against an arbitration award if the arbitration contains a serious mistake of law.(18) This view is reflected in the English 1996 Arbitration Act. As such, English law allows a party to appeal on a question of law arising out of an arbitral award. The right of appeal is upheld by section 69

(18) However, almost all states with developed laws of arbitration refuse to allow appeals from arbitral tribunals on issues of fact.

of the Act, but it is not without restrictions. Apart from requiring a right of appeal to be granted only on question of English law, and the question to be one of "general importance", the Act provides that "[a]n appeal shall not be brought under this section except-

(a) with the agreement of all the other parties to the proceedings, or

(b) with the leave of the court."

The right to appeal is also subject to the restrictions in section 70(2) and (3).

There has been considerable debate over the issue of whether parties should be able to contract for expanded judicial review.

It has been argued that allowing a broader appellate review of an arbitration award provides a safeguard, ensures "a better chance of justice in arbitrations"(19) and operates as an incentive for the arbitrator to write a bulletproof award because arbitrators are human and, like judges, can make mistakes.

Despite these strong reasons in favour of expanding the role of the court to review the arbitration award on questions of law, commentators have long criticized the English approach because expanding the scope of judicial review of an arbitral award on errors of law, either by agreement or by law, would partially destroy what attracts some parties to the arbitration(20), allowing national courts to review the merits of the award and, more importantly, making enforcement of the award more difficult. Therefore, it is perhaps better to find a balance between the finality of the arbitral award and the intervention of the national court to review the award. The court should exercise only minimum control over international arbitral awards and in very specific cases. The UNICTRAL Model Law confirms this view when it proclaims that:

(19) For further details see Mariam M El-Awa, 'Steps Forward in Egyptian Arbitration Law' (2009) Pt 2, 245 Int'l Constr.L.Rev 157; Roger Holmes and Michael O'Reilly, ' appeals from Arbitral Awards: Should Section 69 be repealed?' (2003) The Journal of the Chartered Institute of arbitrators 6-9

(20) Parties to an arbitration agreement are trying to avoid the cost and delays inherent in the court system.

In matter governed by this law, no court shall intervene except where so provided in by this Law.(21)

2.1.4 Broad Reliance on Pubic Policy Exception by the Courts

The broad interpretation of the public policy exception by the national courts, and the application of domestic public policy known as public order in civil law countries, explained in detail below, are further major problems that obstruct the enforcement of international arbitral awards. The term "public policy" stipulated in Article V (2) 2 of the NYC is that of the state where the enforcement is sought. While some states give a narrow interpretation of public policy defence by limiting such a concept to the state's "most basic notions of morality and justice"(22), others, however, give a wider interpretation to such a defence, which may include purely national interests.(23) For instance, Article 58 (2) of Egyptian Arbitration Law of 1994 stipulates that the award shall not be enforced if it is incompatible with a prior judgment made by an Egyptian court *res judicata* or contrary to the rules of public order in Egypt.(24) It is clear that this Article allows the Egyptian courts to refuse the enforcement of foreign arbitral award on grounds other than those maintained by UNCETRAL in the Model Law. Undoubtedly, reliance on the broad interpretation of public policy defence as a means of refusing enforcement for political reasons could lead to unjustified non-enforcement of international awards.(25) Therefore, adopting the Model Law as a basis for the Egyptian Arbitration Law ensured the achievement of a law that fairly conforms to the international understanding of arbitration.

Furthermore, in interpreting the public policy concept, some national courts examine the domestic public policy of the enforcing state in order to show

(21) The UNCITRAL Model Law, Article 5

(22) *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier* 508 F.2d 969 (2d Cir. 1974)

(23) ibid

(24) Or if the party against whom the award is invoked was not given a proper notice under the law of the Egypt.

(25) See May Lu, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the United States and England' (2005) AJICL 770

whether the arbitral award is contrary to or conflicts with this state's public policy. For example, in states that do not tolerate gambling or in which the production, sale and consumption of alcohol is prohibited, the enforcement of foreign arbitral award in a dispute related to the above issues may not be confirmed on the grounds that they violate their domestic public policy.

2.1.5 The Defence of State Immunity

Equally importantly, the defence of state immunity could reasonably be considered as another reason for not enforcing the award, especially where the losing party is a state or state agency. This defence is often invoked on the grounds that the contract between the state and foreign investor is governed by public, not private law, or that the subject matter of the contract is of a public nature and not commercial.

A notable example is the case of *Creighton v. Qatar*.[(26)] In 1982 a contract existed between the Government of Qatar (Ministry of Municipal Affairs and Agriculture) and Creighton, a US private company, for building a hospital in Doha. The dispute arose in connection with the performance of a contract submitted to ICC arbitration as agreed between them. An award of around 12 million QAR to be paid to Creighton by Qatar authorities was issued in Paris. Creighton attempted to enforce the award by seizing assets held by the Qatar National Bank in the name of the Qatar Ministry of Municipal Affairs and Agriculture. The Qatar authority argued, before the first instance and on appeal in France, that such enforcement would violate Qatar's sovereign execution immunity. Although both courts agreed that a state's immunity could only be waived if the activity was of an economic or commercial nature, and building a hospital is an activity of a public nature, the Court of Cassation held that the immunity from execution is waived in most situations if the state has agreed to submit any dispute arising out of the contract to institutional arbitration.[(27)] In other words, the waiver of jurisdictional immunity results in a waiver of the execution immunity as well. In my opinion, the enforcement of arbitration award against the assets of the state in which the enforcement is sought, and especially against those assets used for the state's public functions, is not always

(26) *Creighton Ltd v Ministry of Finance of the State of Qatar*, French *Court of Cassation*, 1st Civil Chamber, 2000 (Pourvoi A 98-19.068).

(27) ibid.

easy; it may cause diplomatic difficulties and affect relationships between the countries. Therefore, most states will take into consideration the practical consequences and drawbacks arising from the enforcement of an arbitral award against another state's assets before deciding to enforce the award.

In this context, one could also argue that the award would lack enforcement in the court of the home state if the contract or the subject matter of the dispute is non-arbitrable under its national arbitration law.(28) National courts frequently interpret the contract concluded between their state and the other party (individual or company) as a public contract, which is not subject to arbitration according to their understanding of the law. The distinction between public and private contract is often indicated in the national laws. Section 1 of the Swedish Arbitration Act, for example, provides that only contractual disputes "of which the parties can reach a settlement"(29) and enjoy full freedom are arbitrable; accordingly, matters of public law, including administrative contracts, are not subject to arbitration unless otherwise provided by the law.

It follows that the enforcement of foreign awards depends primarily on the national courts where the enforcement is sought. Thus, to ensure an enforceable award, the successful party should select carefully where to enforce the award. This might be effective when the losing party's assets are located in more than one state. In this case, other factors should be taken into consideration in selecting the most suitable forum: whether the NYC has been ratified by the concerned state, which is fundamental for pro-enforcement(30); and the attitude of the state's courts with regard to arbitration, enforcement of foreign awards and the procedures required by the national court for enforcing foreign awards. This can all be deduced from the previous decisions made by the court or from the experience of lawyers in this field. Finally, the time limit for enforcing an award, which may differ from one state to another and even within a single state,(31) is another factor to be taken into consideration when selecting the country where the award is to be enforced.

(28) The Model Law does not regulate arbitrability; this issue was left to be governed by the domestic laws of the state where the enforcement is sought.
(29) Swedish Arbitration Act of 1999, Sec 1
(30) Redfern (n 1) 518
(31) In the US, for example, the time limit varies from state to state.

2.2 The Influence of National Laws under the New York Convention on the Enforcement of Foreign Awards

Despite the existence of some regional conventions in the field of the enforcement of foreign arbitral awards, such as the European and Panama Convention, because of its widespread adoption the New York Convention has became the most successful instrument.(32) It came into force in 1959 to remedy the defects of the Geneva Protocol of 1923 and the Geneva Convention of 1927, which failed to "meet the need of the international commercial community"(33), and to encourage the recognition and enforcement of commercial arbitration agreements in international contracts.

This section will focus on the practical problems that arise under the provisions of the NYC with regard to enforcement, and will examine to what extent national laws influence the enforcement of foreign awards.

One of the main shortcomings of the NYC is lack of uniform enforcement procedural rules; these are left to the enforcing state's national rules. According to Article III, in addition to the formal enforcement requirements provided in Article VI (34), the enforcing state is allowed to apply its own procedural rules for the enforcement of foreign awards which, in fact, should not be "more onerous" than those applying to domestic awards. The NYC thus refers the parties to domestic laws already in place with respect to enforcing awards. If

(32) The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958) UNTS

(33) UN Conference on Trade and Development, 'Recognition and Enforcement of Arbitral Awards: The New York Convention' PP 3.

(34) Article VI provides that:

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
   (a) The duly authenticated original award or a duly certified copy thereof;
   (b) The original agreement referred to in article II or a duly certified copy thereof.
2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by diplomatic or consular agent.
3.

domestic awards are difficult to enforce, the NYC does not make the enforcement of foreign awards any easier.(35)

Some states apply the same national procedural rules for both domestic and foreign awards; this might clash with the aim of the NYC to facilitate the enforcement of foreign awards in the signatory states, especially when the domestic award itself is difficult to enforce.(36) Other states, however, impose additional requirements for the enforcement of foreign awards. For example, US courts require both subject matter jurisdiction and personal jurisdiction in order to enforce a foreign award.(37)

However, the ICSID(38) Convention on the settlement of investment disputes avoids such a problem; Article 54 (1) of this convention states that the award rendered pursuant to ICSID arbitration rules should be enforced in signatory states "as if it were a final judgment of a court in that State". This is because the Convention established its own procedural rules under Chapter VI of the ICSID arbitration rules.

In fact, when considering the enforcement of an award under the NYC, it is significant that the enforcing state has been given a major role in enforcing the foreign award.(39) In addition to the ability of the court to apply its own procedural rules of enforcement, the national court can refuse to enforce the award if one of the defences provided in the Convention exists in the eyes of the court. These defences are likely to affect the pro-enforcement bias of the NYC since no universal or uniform interpretation is applied. The following sections will consider the defences provided in the NYC for not enforcing an award.

(35) Ramona Martinez, *Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: the "Refusal" Provisions*, 24 INT'L LAW. 487, 496 (1990).

(36) R. Doak Bishop and others, 'Enforcement of Foreign Arbitral Awards' 11 <http://www.kslaw.com/library/pdf/bishop6.pdf> accessed 5 February 2009

(37) The Federal Arbitration Act 1970, Chapter 2, Section 203.

(38) The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965).

(39) In fact, the New York Convention, which is its major vehicle, has caused-and even encouraged-diversity in interpretation of its provisions by national courts.

2.2.1 Non-Arbitrability

Pursuant to Article V 2 (a) of the New York Convention, the court might refuse to enforce an award granted in a dispute that is unarbitrable according to its own laws. Since the arbitrable matters differ from country to country, an award capable of enforcement in one country is not certain or necessary to be enforced in another country. It is clear that this Article empowers national courts to refuse to enforce foreign awards subject to arbitration under the law of the arbitration seat *lex arbitri*, but unarbitrable according to its domestic law although the latter has nothing to do with the arbitration proceedings that took place in a foreign country.

One example of invoking such defence was in *Libyan American Oil Co v. Socialist People Libyan Arab Jamahirya*.(40) The US court refused to enforce the award granted against Libya because the nationalization of LIAMCO's assets by Libya was considered as an act of state and consequently incapable of settlement by arbitration. The court remarked that enforcing this award would violate the Act of State doctrine. Similarly, in *Scherk Enterprises A.G. v. Societe des Grandes Marques*, the Italian court refused to enforce an award on the grounds that examining the validity of trademarks used in Italy is subject to prosecution and not arbitration.(41)

Although some progress has been made in favour of enforcing awards through distinguishing between domestic and international disputes(42), some states still maintain their rigid approach. The remedy is to categorize those matters which are internationally accepted as arbitrable in a supplementary convention or in an international agreement.

2.2.2 Anti-Public Policy

As maintained above, the concept of public policy defence is inaccurate and varies from state to state. The Geneva Convention of 1927, Article 1(e) states that the award should not be "contrary to the public policy or to the principle of the law of the country in which it is sought to be relied upon".(43) However, in

(40) 482 F. Supp. 1175 (D.D.C. 1980), 684 F.2d 1032 (DC Cir. 1981)
(41) *Scherk Enterprises A.G. v. Societe des Grandes Marques*, Corte di Cassazione (Sez. Un.) (1977) no 3989.
(42) See UN conference (n 33) 37
(43) Geneva Convention of 1927, Art 1(e)

the New York Convention this condition was narrowed by referring only to "public policy".(44) Although this was a commendable step aimed at eliminating state intervention, the problem of misinterpretation of the public policy defence by national courts continues and could diminish the effectiveness of the NYC because the convention did not attempt to establish a unified global standard of public policy exception.

According to Article V 2(b) of the New York Convention(45), recognition and enforcement of an arbitral award may be refused if the competent court in the country where recognition and enforcement is sought finds that "[t]he recognition or enforcement of the award would be contrary to the public policy of that country". It is clear that the public policy maintained in this Article is of "that country" where the enforcement is sought. Therefore, applying the public policy defence depends greatly on whether the national court of the state where the enforcement is sought gives a wide or narrow interpretation of the scope and meaning of public policy. Many national courts tend to apply domestic public policy rather than international public policy. Lack of impartiality by the arbitrators, lack of reasons for the award and irregularities in the arbitral procedure are deemed to constitute a violation of public policy in some national courts(46). Thus, caution should be taken in this respect because giving a broad interpretation to the public policy exception would be inconsistent with the spirit of pro-enforcement bias of the New York Convention. Therefore, it could be said that the uncertainty and inconsistencies concerning the interpretation and application of public policy by State courts encourage the losing party to rely on public policy to resist, or at least delay, enforcement.

Moreover, the terminology in referring to "public policy" used in national legislations varies greatly. Some states adopt the wide construction of the public policy defence by referring to additional notions in their domestic legislation. Indonesia's 1999 regulation, for example, states that the enforcement would be granted only if the foreign award did "not violate public order in terms of all

(44) New York Convention, Art V 2 (b)
(45) See also Article 36 (b) (ii) of the UNCETRAL Model Law on International Commercial Arbitration.
(46) See Redfern n (1) 541.

underlying principles of the legal system and society in Indonesia".(47) Other states, including Japan(48), Qatar(49) and UAE,(50) have adopted a different formulation of "public order and good morals". Although the grounds for refusal in article V of the New York Convention are exhaustive, the defence of public policy may itself include a wide range of issues as a result of a state's changing policy. For example, some states require the arbitrators to be of a certain religion and male.

Other states, however, make reference to "the principles of international public policy"(51). The national courts of these states distinguish between domestic and international public policy and apply narrower public policy criteria when it comes to international cases, thereby favouring their enforceability. For example, Lebanon adopted the international concept of public policy in 1983, even before its ratification of the New York Convention in 1998. Likewise, the US and England both "recognise the doctrine of international comity"(52) in regard to enforcing the NYC award. In *Omnium de Traitement et de Valorisation S.A. v Hilmarton Ltd*(53), the English court noted that "there is nothing which offends English public policy if an arbitral tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might have taken a different view."(54) Accordingly, English courts often give a narrow interpretation of the public policy defence, taking into account other states' views. However, enforcement could be refused on public policy grounds only in extreme cases; if for example, the award was obtained by fraud through presenting perjured evidence at arbitration.(55)

(47) Indonesian Judgment, 86/PDT.G/2002/PN.JKT.PST 26, 27
(48) Civil Procedure Code 1996, Article 118 (3)
(49) Civil and Commercial Procedure Code 1990, Article 380 (4); see also Talal Al-Emadi, 'Qatar arbitration law: some central issues' (2008) 69 Int. ALR 78
(50) Civil Procedure Code 1992, Articles 23 (vi)
(51) Lebanon Decree-law No 90 (1983), Article 817(5); Fench Decree Law No 81-500 (1981), Article 1502 (5)
(52) May Lu (n 25) 778
(53) *Omnium de Traitement et de Valorisation S.A. v Hilmarton Ltd.* QBD Com Ct [1999] 2 Lloyd's Rep 222.
(54) ibid 225
(55) *Westacre Investments Inc. v Jugoimport-SPDR Holding Co Ltd* [2000] QB 288.

Nevertheless, the international public policy concept, which should be adopted by the NYC states with regard to enforcing foreign awards, contains "fundamental rules of natural law, the principles of universal justice, *jus cogens* in public international law and the general principles of morality accepted by what is referred to as civilised nations."(56) This view can also be found in *Allsop Automatic Inc.* v. *Techoski snc*, where "the consistency with public policy is to be examined".(57) The Corte di Appello (Court of Appeal) of Milan defined the notion of international public policy as follows:

Reference must be made to the so-called international public policy, being a "body of universal principles shared by nationals of similar civilizations, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions".(58)

Although adopting international public policy seems to be an effective way of avoiding non-enforcement of international awards for merely domestic or national considerations, confusion still exists because there is no precise definition of domestic and international public policy. My personal feeling is that the national courts of the enforcing states must by their discretionary power interpret public policy principle in favour of the pro-arbitration and pro-enforcement policy.

2.2.3 Dispute not Commercial

A further obstacle arising at the enforcement stage of a New York Convention award is the ability of the contracting states to narrow the scope of the Convention by declaring their desire to apply it only with regard to matters "which are considered as commercial"(59) under their own national laws. This commercial reservation given to contracting states creates conflict since the word "commercial" may carry different meanings, not only between civil and common law states, but also between states with the same system of law.

(56) Van Den Berg and Albert Jan, *The New York Arbitration Convention of 1958, Deventer/Netherlands(1981)*
(57) *Judgment of 4 December 1992, published in* YCA, *Vol. 22 (1997), pp. 725-727*
(58) Ibid.
(59) NYC, Art I (3).

In this context, it has been asserted that enforcement under the New York Convention requires the dispute to be of a commercial character according not only to the law governing the agreement but also to the law of the place where the enforcement is sought.(60) For example, in *Taieb Haddad and Hans Barett* v. *Société d'Invesstissement Kal*(61), the Tunisian court refused to enforce an award granted by the ICC on the grounds that architectural and urbanization works are not considered to be of a commercial nature under its national law.

The general trend is to give the broadest possible application to the Convention by defining the word "commercial", for purposes of the reservation, as referring to any legal relationship that has a business purpose.

2.2.4 Lack of Reciprocity

Another reservation set out in the NYC which also narrows its application is that the state will only enforce the award if it was made in another contracting state.(62) This means that if the award was granted in a non-signatory state the possibility of enforcing such award in a signatory state of the Convention would be small. At present, however, this reservation has no significant effect since most countries have ratified the convention.(63) Nonetheless, it should be noted that the convention is inapplicable if the award is made at the same place as it is sought to be enforced, irrespective of the parties' nationalities and even if they are nationals of signatory states of the NYC.

2.2.5 Breach of due process

According to the Convention, the enforcing state *may* refuse to execute the foreign award when one or more of the exhaustive defences set out in article V (1) is pleaded by the losing party(64); the most controversial grounds are lack of due process. Pursuant to Article V (1) (b),(65) the court may refuse the enforcement of the award if the party against whom the award is invoked (a)

(60) Redfern (n 1) 525.
(61) [1993], excerpts published in YCA, Vol. 23 (1998) 770,773.
(62) NYC, Art 1(3).
(63) At present,144 states are members of the NYC.
(64) However, the court has discretion whether to refuse or enforce the award even when these grounds are established.
(65) See also the UNCITRAL Model Law, Article 34.

was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings; or (b) was otherwise unable to present his case. There is no uniform definition of the concepts of due process and proper notice. Thus, the question that may arise is under which law the due process should be examined. In *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*(66), it was noted that the New York Convention "essentially sanctions the application of the forum state's standard of due process" while determining the validity of the award.

The Convention drafters failed to mention the law applicable to the due process objection. Therefore, the competent court in the state where the enforcement is sought usually applies its national procedural rules to examine whether or not arbitration was conducted properly or whether or not there was a fair hearing when the unsuccessful party pleaded that he "was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was unable to present his case".(67) However, while scholars maintain that the due process grounds should be interpreted as a uniform convention rule, the courts believe it should be construed with reference to domestic notions (*lex fori* of the place of enforcement) of due process violations. Italian courts, for example, refused to enforce an award for its insufficient reasons(68), which would not be significant in another legal system. Accordingly, it is understandable that a proceeding which constitutes a breach of due process in one country does not necessarily constitute the same in another country.

Finally, it should be noted that there is a significant relationship between due process and public policy defence, since both involve serious violations of fundamental principles of justice.(69)

(66) 508 F.2d 969 (2d Cir. 1974) 975
(67) NYC, Article V (1) (b).
(68) [1987] Corte di Cassazione, YB Comm Arb XVII (1992) 529.
(69) See Pilar Perales, 'Case law on the recognition and enforcement of arbitral awards under the UNCITRAL Model Law on International Commercial Arbitration' (2004) 191 Int ALR 198.

3. Conclusion

Despite the great success achieved by the New York Convention in regard to the enforcement of foreign arbitral awards within contracting states' territories, the Convention remains open to criticism since it relies heavily on the national law of the place of enforcement and on the national court's approach. Although internationally harmonizing rules of enforcement procedures would be a good means of eliminating the problems caused by applying the national rules of the forum state, drafting new conventions or amending the NYC is not easy. The New York Convention has been applied for almost 50 years and 144 states are parties to it, so amendment would mean suspending the broad acceptance of the New York Convention.

The best solution, which might indirectly help the acceleration of international trade and investment, is to draw up general principles accepted by all states, such as the pro-enforcement principle, the narrow interpretation of the New York Convention's provisions and the adoption of an international public policy concept among all member states. This could be achieved through training and awareness sessions for national judges of the signatory states, or through distributing leaflets on the importance and effectiveness of the NYC within contracting states' territories. It is also essential to consult lawyers experienced in the arbitration law of the state in which enforcement is sought. Moreover, to ensure an enforceable award, we have to draft the arbitration agreement carefully and conduct the arbitration with enforcement under the New York Convention in mind.

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صعوبات ومعوقات تنفيذ أحكام التحكيم في المحاكم الوطنية

"دراسة تحليليه"

الأستاذة/ وفاء جناحي

مساعد بحث وتدريس

كلية الحقوق- جامعة البحرين

يتناول هذا البحث موضوعاً في غاية الأهمية، ألا وهو مجال التحكيم الدولي والصعوبات والمعوقات التي يواجهها تنفيذ حكم التحكيم الأجنبي في المحاكم الوطنية، وأثر ذلك على التحكيم كوسيلة بديلة وسريعة لحل النزاعات التجارية والإدارية.

تنبع أهمية تنفيذ حكم التحكيم من أهمية التحكيم الذي يمثل طريقاً بديلاً وسريعاً لحل النزاعات، حيث يُعدُّ تنفيذ حكم التحكيم الغاية الرئيسية التي يسعى إليها المتخاصمون لفض نزاعاتهم. وضمان تنفيذ حكم التحكيم، هو ضمان للتحكيم نفسه كوسيلة بديلة للتقاضي.

ولن يكون للتحكيم جدوى إذا انتهى الأمر بعدم تنفيذ حكم التحكيم أو التأخير في تنفيذه من قبل المحاكم الوطنية المناط بها أمر تنفيذ أحكام التحكيم.

لذلك تأتي أهمية هذه الدراسة من خلال تسليط الضوء على بعض أهم المشاكل والمعوقات التي يواجهها تنفيذ حكم التحكيم في المحاكم الوطنية.

فبالرغم من النجاحات العظيمة التي حققتها اتفاقية نيويورك الخاصة بالاعتراف بقرارات التحكيم الأجنبية وإنفاذها (١٩٥٨)، فإن المشاكل المتعلقة بتنفيذ أحكام المحكمين في المحاكم الوطنية مازالت قائمة، ومن أكثر المشاكل التي تعيق تنفيذ حكم التحكيم الأجنبي هو تطبيق قواعد الإجراءات الوطنية على عملية التنفيذ، وكذلك اختلاف القوانين الخاصة بإجراءات تنفيذ حكم التحكيم بين الدول قد يشكل عائقاً أمام تنفيذ حكم التحكيم الأجنبي، كما أنه من الممكن أن يقبل تنفيذ حكم التحكيم في دولة معينة، ولا يقبل تنفيذ ذات الحكم في دوله أخرى.

والاختلاف في تنفيذ أحكام التحكيم الأجنبية بين الدول قد يرجع لعده أسباب من أهمها: اختلاف القواعد الإجرائية الآمرة من دوله لأخرى، واختلاف تفسير نصوص الاتفاقية بين المحاكم، وقد يكون من بين الأسباب ما هو متعلق بالدولة ذاتها، ومدى دعمها للتحكيم، وكذلك مدى وعي القضاة الوطنيين بأهمية التحكيم، وبنصوص الاتفاقيات الدولية الموقعة من قبل دولهم بشأن تبادل الاعتراف بأحكام التحكيم، كما أن دقة المشرعين الوطنيين قد يكون له تأثير بالغ في تنفيذ أو عدم تنفيذ حكم التحكيم من خلال إصدار قوانين تتوافق مع أهداف التحكيم وتضمن فعاليته.

ومن الأسباب الرئيسية أيضاً هو اختلاف تفسير الدول لمفهوم "النظام العام أو السياسة العامة" التي قد تشكل في اغلب الأحوال السبب الجوهري في رفض تنفيذ حكم التحكيم الأجنبي في المحاكم الوطنية.

وبناء عليه، فإن هذا البحث سوف يناقش في شقه الأول المشاكل العامة التي تعيق تنفيذ أحكام التحكيم، وهي في الأغلب تتعلق بمدى وعي المشرعين والقضاة الوطنيين بالتحكيم كوسيلة قانونيه معترف بها دولياً ومحلياً، ومدى حرصهم ووعيهم بتطبيق نصوص اتفاقيه نيويورك، وكل ما من شأنه أن يضمن فعالية تنفيذ حكم التحكيم.

هذه المشاكل تشمل:

١. فشل المشرع في تشريع قوانين للتحكيم أو عدم دقه المشرع في تشريع نصوص تتوافق وأهداف التحكيم.
٢. دخول المحاكم في موضوع الدعوى.
٣. الاعتماد الواسع على مبدأ "النظام العام أو السياسة العامة" كمبرر لعدم تنفيذ أحكام التحكيم في المحاكم الوطنية.
٤. الدفع بحصانه الدولة ضد التنفيذ عندما يكون حكم التحكيم التجاري صادر ضد احد أجهزة الدولة بوصفها شخص عادي.

وفي شقه الثاني تناول المشاكل الناتجة عن تفسير بعض نصوص اتفاقية نيويورك. فقد تركت الاتفاقية بعض الأمور والمفاهيم الرئيسية ليتم تفسيرها حسب قانون المحكمة المراد تنفيذ حكم التحكيم فيها والذي قد يساهم بشكل أو بأخر في تعقيد عملية التنفيذ. من هذه المفاهيم:

١. غير قابلية موضوع النزاع للتحكيم "عدم إمكانية تسوية موضوع النزاع بالتحكيم".
٢. تعارض حكم التحكيم مع السياسة العامة.
٣. النزاع "غير تجاري".
٤. المعاملة بالمثل.
٥. خرق الإجراءات القانونية ألواجبه أو عدم مقدره احد أطراف النزاع على عرض دفوعه.

تم اقتراح بعض الحلول للمشاكل المطروحة في خاتمة البحث.