AN ANALYTICAL OVERVIEW OF THE NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS[*]

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Due to the globalization and the tremendous amount of technology growing exponentiall day after day, the fate of humans relies on finding solutions to every single problem they encounter in the fastest possible way. Confronting a technical issue that caused harm to a certain field can be solved quickly and easily, but the case gets more complicated when it comes to legal proceedings and courts. Our daily lives are directly related to a cycle that is dominated by commerce and money, a world that depends highly on speed and confidentiality. Besides, international commerce relies on the quickness of transactions, where all people are trying to work as fast as they can, where most of the work is no longer restricted by local transactions. Nevertheless, no matter how perfect business relationships or partnerships can get, there is always a significant chance that a disagreement will occur, and lead to a dispute that parties will try to solve amicably or via legal authorities like State courts. The latter requires a long process that can take years, and nowadays this process does not suit most of the companies, entrepreneurs, business partners, or even States. Hence, when making business, parties agree in advance to solve any differences that might arise via arbitration. However, despite the fact that arbitration is the best alternative to solve disputes quickly and confidentially, the enforcement of the award constitutes the most important part of the process. Such an award must be enforced in order to produce effects, and its' recognition and enforcement highly depend on the national law where the enforceability is sought, but it can also be subject to an international legal instrument, especially when the award contains transnational elements, that requires coordination of various legal regimes. The present study analyses one of these international legal instruments, which is the New York Convention for recognition and enforcement of arbitral awards.

Introduction

Commercial arbitration is a private form of binding dispute resolution, conducted before an impartial tribunal, which emanates from the agreement of the parties, but which is regulated and enforced by the State (Latham & Watkins 2017, 3). Thus, the will of the parties can determine whether the arbitration procedure will fall under the scope of a certain national law, some procedural rules for arbitration set by a convention or an international arbitral tribunal (for example "International Chamber of Commerce" Arbitration Guidelines, UNCITRAL Arbitration Rules, etc.), or under a specific set of rules chosen by the parties themselves.

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However, the arbitration award must be recognized and enforced by the national court of the State where enforcement is sought. Dario Moura Vicente thinks that the most compelling reason for the enforcement of arbitral awards is the reliance on the respect owed to the party. In fact, if States allow parties, under prescribed conditions, to agree on arbitration as an alternative dispute resolution mechanism, then it would frustrate their legitimate expectations if public judicial bodies were to deny enforcement of an award validly rendered pursuant to such an agreement (Vicente 2019, 3). Nevertheless, parties seeking recognition or enforcement of an arbitral award shall rely on a national or an international legal instrument that can provide such a basis, and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is one of the keystones to do so.

„The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (New York Convention), is described as the most successful treaty in private international law. It is adhered to by more than 160 nations."[2] The Convention deals with recognition and enforcement, but it is primarily the enforcement of an arbitral award „*made in the territory of a state other than the state where the recognition and enforcement is sought*" that the Convention tries to improve and facilitate (Sanders 1979, 269). Almost 60 years after its creation, the New York Convention continues to fulfil its objective of facilitating the recognition and enforcement of foreign arbitral awards, and in the years to come, will guarantee the continued growth of international arbitration and create conditions in which cross-border economic exchanges can flourish (UNCITRAL Secretariat 2016, 4). But, as Pieter Sanders stated, the problem with any legal instrument, no matter how carefully drafted, is that it will, in its application, show gaps or need interpretation.

In my study, I am looking to thoroughly examine the context of the New York Convention, which is considered the most reliable international instrument for the recognition and the enforcement of arbitral awards. Therefore, I have accomplished an analysis of the articles stipulated by the convention, and its' practical application in the field of case-law in order to understand the possible gaps and evaluate its' efficiency.

1. Requirements for the application of the convention

The Analysis of the context of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards can lead us to a clear and unanimous set of requirements or criteria. Hence, in order that the arbitral award can be recognized and enforced by the State court, the parties' agreement, the arbitral proceedings, and the award per se shall meet the requirements imposed by the convention. The crux of the matter lies in determining precisely what those requirements should be, and the extent to which the arbitral award is to be scrutinized by State courts in order to ensure compliance with them (Vicente 2019, 3).

The interpretation of the requirements embodied in the convention differ from one national legal system to another, and for that reason, each requirement will be examined

[2] For more info, see the following webpage: In Brief, *New York Arbitration Convention*, https://www.newyorkconvention.org/in+brief [accessed May 30, 2021]

separately with various examples showing how the same provision can be interpreted differently depending on the legal system.

Article 1[3] mainly discusses the scope of application of the New York Convention, and analyzing it can reveal many requirements that are considered crucial for the application of the convention.

1.1. The "recognition" and "enforcement" criteria

Although the aforementioned notions are considered essential for the framework of the New York Convention, the document does not provide any definition for neither "*recognition*", nor "*enforcement*", and few case-law precedents have interpreted these terms. However, in 2011, in *Drummond Ltd. v. Ferrovias en Liquidación*, the Supreme Court of Justice in Columbia has held that "*enforcement*" concerns recognizing the legal force and effect of an award, and *"recognition*" concerns the forced execution of an award previously recognized by the same State. Conversely, on the 8th of October, 1981, in *Compagnia Italiana di Assicurazioni (COMITAS) S.p.A., Società di Assicurazioni Gia Mutua Marittima Nazionale (MUTUAMAR) S.p.A. and others v. Schwartzmeer und Ostsee Versicherungsaktiengesellschaft (SOVAG), Bundesgerichtshof [BGH],* the interpretation led by the German Supreme Court has categorized both notions as inseparable, arguing that "*recognition and enforcement*" cannot be sought separately.

1.2. Defining the term "arbitral awards" per se

Despite the importance of the above-mentioned notion, the New York Convention does not define "*arbitral awards"*. Hence, the interpretation falls under the jurisdiction of the national court of the State where the recognition and enforcement are sought.

This suggests that it is up to the courts of the Contracting States where recognition and enforcement is sought to determine when a decision can be characterized as an "*arbitral award"* under the New York Convention (UNCITRAL Secretariat 2016, 11). In 1999, in *Merck & Co. Inc., Merck Frosst Canada Inc., Frosst Laboratories Inc. v. Tecnoquimicas S.A.* the Colombian court upheld that the term "*arbitral award*" shall be interpreted in accordance with the spirit of the New York Convention. Courts have found that in order for a decision to be considered an "*arbitral award*" under the New York Convention it needs to be made by arbitrators, resolve a dispute or part thereof in a final manner, and be binding (UNCITRAL Secretariat 2016, 12). Charles Jarosson, one of the most important commentators in the domain of international arbitration has

[3] *„2. The term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.*
3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration." Article I, The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). New York., 10 June 1958. https://www.newyorkconvention.org/english [accessed May 30, 2021]

vouched for the first criterion, considering that unless the dispute was adjudicated by arbitrators, the New York Convention cannot apply (Jarosson 1987). As for the second and the third criterion that a dispute should be fully or partially resolved in a final manner, this requirement was supported by the decision of the Supreme court of Queensland in 1993, in *Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums, Pty. Ltd*, where the arbitral award was enforced under the New York Convention, when part of the dispute was resolved in a final manner.

Additionally, "*procedural orders*" and "*awards on jurisdiction*" are subject to enforcement and recognition under the New York Convention. As to the first concept, in 2000 in *Publicis Communication v. Publicis S.A., True North Communications Inc.,* a decision that was made by the United States Court of Appeals for the Seventh Circuit, by which a "*final*" procedural order was given by an arbitral tribunal, obliging one party to turn over some tax records to the other party, and it was enforceable under the provisions of the Convention. As to the second concept, the practice has revealed an issue regarding the enforceability of a certain type of awards are referred to as "*awards on jurisdiction*". The concept was differently interpreted by State courts in various legal systems, however there was a common ground regarding its' enforceability, where the State courts acknowledged enforceability of such an award if the proceedings led to a partial or complete solution of the matter of dispute, regardless whether the award has accepted or denied the jurisdiction. In 2000, in *Austin John Montague v. Commonwealth Development Corporation*, a decision rendered by the Supreme Court of Queensland, Australia, granted enforceability under the New York Convention for an interim award, in which the jurisdiction claim was refused, but the award contained a final decision regarding some financial costs.

Furthermore, the enforceability of a "*partial*" or an "*interim*" award was controversial and the State courts in different legal regimes have divergently interpreted the New York Convention regarding the enforceability of such an award. On one hand, the German court in *Drummond Ltd. v. Instituto Nacional de Concesiones – INCO et al.* has upheld the enforceability of an interim award, which contained a binding decision on some of the claims of the dispute. On the other hand, in *ECONERG ltd. V. National Electricity Company*, the fifth Civil Department of the Bulgarian court has held the partial award does not amount to an award, thus it cannot be enforceable on the grounds of the New York Convention, due to the lack of the "*finality requirement*", because the dispute was not finally settled.

1.2.1. "The domestic" and the "non-domestic" criteria

Article I (1) of the New York Convention stipulated the following: *„This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought."* The interpretation of this paragraph is crucial to determine the scope of application of the convention; hence two criteria were concluded, based on which the award can be classified as a domestic or a non-domestic one, in order to know if it can be enforceable under the provision of Art I (1) of the convention. Moreover, the

interpretation of the article varied from one national legal system to another across the globe, and has resulted in two different schools.

On one hand, some of the regimes have interpreted the text strictly, whereas the arbitral award cannot be enforced under any circumstances, unless it is a non-domestic award, rendered in a contracting State other different from the one where the enforcement is sought. Thus, in several jurisdictions – including Australia, Brazil, Cameroon, England, Germany, Luxembourg, the Netherlands, and Spain – an award falls within the scope of the New York Convention only when it is made in a State other than the State where recognition and enforcement is sought (Secretariat 2016, 20). This approach to arbitration, which has often been described as a form of territorialism, still prevails to a large extent in English law. It was in fact enshrined in the UK Arbitration Act 1996, albeit in a rather attenuated form, inter alia by stating in Section 2(1) that: „*The provisions of its Part I apply where the seat of the arbitration is in England and Wales or Northern Ireland"* (Vicente 2019, 7).

On the other hand, other legal regimes have interpreted that even if awards are made in the same State where recognition is sought, they can be classified as non-domestic, and thus will be enforceable under the provisions of the New York Convention. China is an example of a State who followed the latter approach while applying the New York Convention, when in 2008, in *Duferco S.A. v. Ningbo Arts & Crafts Import & Export Co., Ltd,* the court has ruled that an award that was rendered in Beijing, based on the International Chamber of Commerce arbitration rules, was categorized as a non-domestic arbitral award, thus it was enforceable under the provisions of the New York Convention. Moreover, The United States of America, has also adopted this approach in the section 202 of the second chapter of the Federal Arbitration Act, where the following is stated: „*An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States."* As a brief result, the courts of the United States of America consider that even if the arbitral award is made within its own State, it can still be classified as a non-domestic award and enforced under the provisions of the New York Convention, if the arbitrable dispute involves one or more international elements (place of business, place of the execution of the contract, nationality of the parties, etc.)

2. Refusal provisions

Article 5 of the New York Convention stipulates an exhaustive list which constitutes the grounds on which a party or a state court can rely to turn down the recognition or the

enforcement of an arbitral award.[4] We are going to be discussing some of these grounds, accompanied by some case-law examples for better understanding.

One of the grounds for refusal stipulated by Article 5 (1) (b) is that if the party against whom the award is being invoked was not given notice about the appointment of the arbitrator. An example of this is a famous case, *Imperial Ethiopian Gov't v. Baruch-Foster Corp*, where the Ethiopian Government was awarded its' claim against an American company who claimed that the arbitrator was not impartial, because he participated in writing the Civil Code of the Ethiopian State twenty years before the date of the case.

Moreover, according to Article 5 (2), an arbitral award can be invoked if: (a) the subject matter cannot be settled by arbitration under the law of the country; (b) its' recognition and enforcement would be contrary to the public policy of the country. If the judge finds that recognition and enforcement of the foreign award would be contrary to the public policy of his country, he may refuse recognition and enforcement; the same is true when the subject matter of the dispute would not be suitable for settlement by arbitration in his country, which is merely another way of saying that recognition and enforcement would be against public policy (Sanders 1979, 270). Thus, for a better application of the New York Convention, many countries have adopted the method of differentiation between domestic and international public order. In *Scherk v. Alberto-Culver Co*, the Supreme Court of the United States contrary to its' previous domestic decision in the *wilko* case, upheld the arbitration clause. Meanwhile, Alberto Culver was relying on the *Wilko v. Swan* case to claim that the arbitration clause shall not be valid, because it concerns the sale of the securities. The Supreme Court referred to the New York Convention, and stated that the main goal of the convention is to encourage the recognition and the enforcement of the foreign arbitral award.

Furthermore, Art 5 (1) (e) set the grounds for refusal of an arbitral award if the award did not become binding, or it was set aside by a competent authority. The word "*binding*" in Article V(e) of the New York Convention replaces the word *"final"* as used in the Geneva Convention of 1927. Many court decisions have stated that the New York Convention does not require a double exequatur (Sanders 1979, 275). Moreover, double exequatur can be defined as follows: „*If a party is seeking to enforce an award, it has to prove simultaneously, that it had become 'final' in the country it was made, and the country in which enforcement is sought.*" Right here, a big dilemma came to light: the approach used depends purely on the national law of the State in which the recognition and the enforcement is sought. The New York Convention was trying to replace the world "*final"* with "*binding*" so State courts can facilitate the recognition and the enforcement of a foreign arbitral award, but some legal regimes require an act of exequatur as a requirement for enforcement. The French law has stipulated this requirement in its Code of Civil Procedure (Code de procédure civile), Article 1516, Paragraph 1: „*La sentence arbitrale n'est susceptible d'exécution forcée qu'en vertu*

[4] Article 5, *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.* New York, June 10, 1958. https://www.newyorkconvention.org/english [accessed May 30, 2021]

d'une ordonnance d'exequatur émanant du tribunal judiciaire dans le ressort duquel elle été rendue ou du tribunal judiciaire de Paris lorsqu'elle a été rendue à l'étranger."[5]

Conclusions

After analyzing the content of the New York Convention for the Recognition and the Enforcement of Foreign Arbitral Awards, I have realized that drafting an international instrument to serve such a purpose is a tough mission to accomplish. It is certainly undeniable that no matter how good the convention is, many issues will arise due to the nature of the convention per se.

The articles mentioned throughout the study, regarding the scope of the application of the convention, its' recognition and enforcement, and the refusal provisions constitute a solid comprehensive text, and not a hard one to apply, but the complications arise when the texts are interpreted by the State courts according to their national law, giving them a discretionary power to construe matters for their convenience. Not to mention, the different legal regimes around the world, some of which are in total contradiction with each other, thus applying the same text of the convention to deal with the same issue might give birth to two or more different outcomes. It is understandable that when drafting a theoretical international instrument, a lot of issues will start to appear in the practice, but what cannot be tolerated is how such a reputable commission did not take solid steps to treat the gaps that were revealed throughout time, and criticized by commentators and authors.

Furthermore, regarding arbitration, no matter how solid the text is, its' interpretation and application will always be directly related to the national law of the state where the recognition is sought, thus a window of discretionary power will always be available for the State courts. However, some articles and notions should be superseded, moreover, the convention should be altered in a way to more closely resemble a unified law and to feel less like a leeway. What is more, electronic arbitration (E-arbitration) is a contemporary mechanism that was recently introduced and proved its' efficiency, especially after Covid-19's outbreak, which made the world acknowledge the importance of online platforms to confront unforeseeable situations. Hence, if the commission intends to amend the convention's text in the upcoming years, it should also take into consideration to insert all the notions and the explanations that might be related to electronic arbitration.

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[5] The first paragraph states the following: *„In order to enforce the arbitral award, it should be recognized and approved by the French State Court who rendered it if the award is considered a national one. Conversely, if it is a foreign arbitral award, it should be approved by the Paris Court of First Instance."*

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