Analyzing Potential Challenges and Strategies in the Enforcement of Foreign Awards

Farah Deeba*[1]

Original Article

1. Assistant Professor, Department of Law, University of Sahiwal
Email: farah.law@pu.edu.pk

Abstract

The enforcement of foreign awards serves as a crucial aspect of international arbitration, ensuring the efficacy and integrity of cross-border dispute resolution mechanisms. However, this process is not without its challenges. This research delves into the complexities surrounding the enforcement of foreign awards, analyzing potential hurdles and strategies for overcoming them. Through an in-depth examination of legal frameworks, case studies, and scholarly literature, this study identifies key challenges such as jurisdictional issues, procedural complexities, and resistance from local courts. Moreover, it explores various strategies employed by parties and practitioners to navigate these challenges, including proactive measures during arbitration proceedings and tactical approaches during enforcement proceedings. By shedding light on these critical aspects of international arbitration, this research aims to provide valuable insights for practitioners, policymakers, and stakeholders involved in cross-border dispute resolution. Ultimately, by understanding and addressing potential challenges, stakeholders can enhance the effectiveness and reliability of the enforcement process, fostering confidence in the international arbitration regime.

Keywords: Foreign Awards, Enforcement, International Arbitration, Challenges, Strategies, Legal Frameworks

Introduction

In the initial ages, there were many restrictions in order to recognize and enforce the arbitration agreements and foreign awards. Numerous legeal jurisdictions do not find any soft corner for an agreement for the settlement of a future dispute. The potential difficulties relating to the arbitration agreements and awards were commendably eradicated with Geneva Convention 1923 and Geneva Convention 1927, both of these tries recognize and enforce the foreign arbitration process. But later, it was found that Geneva Convention 1927 is not a comprehensive legislation as party enforcing the award had to prove that conditions for the recognition of award have been fulfilled. In this regard ICC revised and amended the Geneva Convention 1927 and prepared a new draft in this regard, which we find today in the shape of New York Convention. Whereby courts of the signatory states were called to recognize and enforce the foreign awards. This convention acts as the foundational instruments for International Arbitration. Each state has a different method of executing International Convention in its territory the parties participating in international commercial arbitration and contracts faces tedious tasks to figure out the varying laws of various jurisdictions involved (Bansal, 2012). This paper examines and highlight thesome additional problems for recognition and enforcement of foreign arbitral awards. Albert Jan evaluated the recognition and enforcement of Foreign awards under the New York Convention in his book “New Horizons in International Commercial Arbitration and Beyond” where he expressed his views the percentage of the cases in which enforcement is refused or the award is subject to annulment seems, however, to be increasing. With the passage of time, this is especially with reference to

developing countries, where the number of annulled arbitration awards and of the court decisions and attitudes is refusing to grant enforcement is practically impossible to examine with precision.

Technical Hitches

Lack of Transparency

If the "pro-enforcement bias" in favor of enforcement of arbitral awards is lustrated by certain decisions rendered by domestic judges eager to provide an attractive image of their openness to the international arbitration community and demonstrating to the public their availability to serve, others, who still form the vast majority of domestic judges, remain reluctant to let third parties obtain photocopies of their judgments. This is particularly problematic since there are no court Reports published in many developing countries even on the court of appeal level. Research into the rare rulings rendered by the Supreme Court (cour de cassation) in certain countries, such as Egypt, cannot lead to conclusive results, since-apart from being published with three to four years delay- the court Reports omit to publish certain important decisions as illustrated by the Harbottle case to which reference is made later (El-Kosheri, 2005). Another source of difficulty relates to the fact that when adhering to A.K Bansal "International Commercial Arbitration Practice and Procedure" for the Enforceability of Awards-Some Additional Problems, certain countries either forget to reproduce the text of the Convention in their "Official Gazette" or to publish a translation. This could lead to difficulties in practice due to discrepancies between the official English or French text, on one hand, and the country's official language, such as the exclusively Arabic version which was published in the Egyptian Official Gazette.

Attitude of the Courts

The existence of a valid arbitration agreement, the admissibility of the request for arbitration, as well as the coming to an end of arbitral proceedings due to the lapse of time-limits imposed by the lex arbitri in the absence of an agreement to prolong them by the parties, are areas in which more and more unreported cases are emerging. This is due, not only to the lack of precision in the newly introduced arbitration laws or in the regulations of newly created arbitration centers, but to more profound reasons. It can hardly be denied that there is natural tendency among arbitrators to reject preliminary objections raised with regard to an alleged lack of jurisdiction, inadmissibility of the arbitration request, or the expiry for the limitation of final award. This tendency is perfectly understandable from a psychological aspect of human motivations, since the opposite ruling would frustrate the financial expectations of the arbitrators in question. From the other side, there has been a reluctance by the courts in the name of liberalism, to strictly exercise their power of control over the precise scope of the arbitration agreement rationi persona, rationed materiel as well as tationi temporis. These matters should, in my opinion, be assessed with precision in a manner that takes into consideration that the courts are entrusted with the task of ensuring, that awards are in conformity with the New York convention, that arbitration award was decided with respect to parties and with regard to issues covered by the arbitration agreement and not exceeding the limits of this agreement. Without entering into details, it is sufficient to indicate that the court scrutiny to be exercised in this respect should follow the seizes model, often described as "classical" and not the French relaxed approach. This latter approach tends to avoid as much as possible the annulment of award, even deviating from the exact meaning of the wording provided for in the agreement regarding arbitration in relation to identification of contracting parties the conditions for having properly filed and arbitration request by duly authorized persons and respecting all time- limits either for filing or for rendering the final award (El-Kosheri, 2005).

Public Policy

It also acts as a major constraint turning to the delicate issue pertaining to the international commercial arbitration. It has to be understood and applied under the provisions of New York Convention, where it may be assumed that any clear distinction is provided between the domestic public policy and the international public policy. The Austrian court decision and the High Court in Delhi ruling both referred to in Albert Jan's Report, as well as the other examples concerning arbitrability or lack impartiality by an arbitrator, are simply an illustration of a profound division which exists among two groups: countries fully developed to face the requirements of a global world community, and others which are still in search of ways and means to find their place in the present changing world structure. As to the first group, it may be sufficient to quote the words of the Swiss Federal Tribunal in its decision dated 8 December 2003 (Fertilizantes, et al V. INDAGRO S.A.) which reads: "Il y a violation de l'ordre publique lorsque la reconnaissance ou execution d' one decision etrangere heurte de maniere les conceptions suisses de la justice. Une decision etrangere peut etre incompatible aves l' ordre juridique Suisse non seulement a cause de son contenu material, mais aussi en raison de la procedure don't elle est issue. A cet egard l' ordre public Suisse exige le respect des regles fondamentales de la procedure deduties de la constitution, tells que le droit a un process equitable et celui d etre entendu. Ces principes s' appliquent egalement en matiere de reconnaissance et d'execution des sentences arbitrals etrangers" With regard to the second group, I refer to an unpublished judgment rendered by the Egyptian court of Cassation on 21 May 1990, in Recourse No. 815 for the 52nd Judicial year (Harbottle Coal Co V. Misr Foreign Trade co.) it may be interesting first to note that the award in favor of the claimant was rendered in London on 29th November 1978 dondemning the defendant mainly 62 See supra note, 2 at p 338 to pay the sum of US dollars 264,000 with 8 percent interest as of 29 july 1976. The case was brought to court early in 1979 and was the first case ever where the New York Convention was invoked before the Egyptian Courts. The South Cairo District Court, on 19 May 1980, refused to enforce the award, Cairo Court of Appeal on 21 January 1982, ordered the enforcement of the principal sum but refused to enforce the award of interest.

A recourse was lodged before the court of cassation on 2 March 1982 and It took over another eight years to decide, allocating to the claimant five percent interest instead of eight percent as provided in the award, on the basis that exceeding the five percent maximum interest rate "provided for in commercial matters" is found to be inconsistent with public policy in Egypt according to the provisions of New York Convention.

In the context of application of Art. V of New York Convention, the court was reminded under the pleadings of case that the banking law in Egypt which authorized the central Bank to fix the interest rates led in practice to admit interest rates over ten percent, but the court totally neglected to comment in its judgment on this argument and its significance in relation to the public policy and upon the assumption that under such a banking transaction something alien to the Egyptian legal system is going on (El-Kosheri, 2005).

O. How an award that has been set aside in the country of origin can be enforced:-

The following subject treated by Albert Jan in his Report relates to what he described as "an undesirable development" related to the enforceability of awards in France in spite of the fact that the said awards were annulled in the country of origin. The two decisions rendered in the Baker Marine and Spier cases referred to in the Report are sufficient evidence that Judge June L. Green's ruling in the Chromalloy case was an isolated mistake. This is particularly so since the judge was under the false impression that the recourse before the Cairo court of Appeal was "an appeal"

which opens the entire case for retrial, not realizing that it was in reality a recourse for annulment under Art.53 of the Arbitration Law of the for limited grounds. A new development in this respect occurred recently, which hopefully would lead to putting the record straight in that controversial issue. In 2004, the US Court of Appeal of 5th Circuit gave a very important judgment in this regard in Karaha Badas Co. V Pertamina Case, in which the court confirmed, inter alia that an action against the setting aside of award can only be brought before the court, where the arbitral forum locates.

According to the court: "under the New York Convention, the parties arbitration agreement and this record Switzerland had primary jurisdiction to adjudicate over the Award. Because Indonesia did not have primary jurisdiction to set aside the award, this court affirms the district courts conclusion that the Indonesian courts annulment ruling is not a defense to enforcement under the New York Convention".

In the light of a pertinent analysis of New York Convention, made by the court, it is worth being cited in Toto that reads: "The New York convention provides a carefully structured framework for the review and enforcement of international arbitral award. Only a court in a country with primary jurisdiction over an arbitral award may annul that award, courts in other countries have secondary jurisdiction; a court in a country with secondary jurisdiction is limited to deciding whether the award may be enforced in that country. The Convention 'mandates very different regimes for the review of arbitral awards (1) in the [countries] in which, or under the law of which, the award was made, and (2) other [countries] where recognition and enforcement are sought. Under the convention the country in which or under the [arbitration] law of which, [an] award was made is said to have primary jurisdiction over the arbitration award. All other signatory states are secondary jurisdiction, in which parties can only contest whether the state should enforce the arbitral award". Hopefully, the above-quoted judgment will bring an end to the abusive interpretation that was given by the French courts in both the Hilmarton and the Chormalloy cases, and the writers who advocated that heretic idea and stability of international commercial arbitration under a unified and harmonious applicability of New York Convention.

Forum Non-Convenient

With regard to the second point, the question can be put in a manner that requires investigating whether any country adhering to the New York Convention has an obligation to exercise its "secondary jurisdiction" whenever its domestic courts are seized by a national of another member state requesting to recognize and enforce the award in its territory or said country can decline such request invoking the doctrine forum non convenience. This issue became a reality and not merely theoretical in a recent case brought before the US Court of Appeal for 2nd Circuit. In 2002 it rendered a renowned judgment, which introduced such a new dimension within the arbitration process as it rejected the petitioners stance regarding the applicability of the doctrine of Forum Non Convenience was precluded by terms of the New York Convention. In Monegasque de Reassurances S.A.M ("monde Re") v. Naftogaz and state of Ukraine (Monegasque de Reassurances, 2000), Monde re sought enforcement in New York of an arbitral award rendered in Moscow, On the basis of the said doctrine, District Court for Southern New York dismissed the petition. While affirming the applicability of the doctrine in question, the doctrine in question the court of appeals mainly stated that: "if that requirement is met, whatever rules of procedure for enforcement are applied by the enforcing state must be considered acceptable, without reference to any other provision of the convention. The doctrine of forum non conveniences, a procedural rule, may be applied in domestic arbitration cases brought under the provisions of the Federal

Arbitration Act. And it therefore may be applied under the provisions of the convention. In addition, we reject Monde Re's contention that the application of the doctrine of forum non convenience flouts the intent of the convention and runs the risk of invalidating its purpose".

Administrative Contracts & Arbitration

The validity of arbitration agreement having a close nexus with the issue of non arbitrability of administrative contract in certain countries. This issue gave rise to a long- lasting controversy in countries which inherited the French legal concepts that formerly confined exclusive mandatory jurisdiction in this domain to the Conseild'Etat. The nullity of arbitration clauses included in BOT (built, operate, transfer) contracts concluded between the State of Lebanon and mobile phone companies was pronounced by the Lebanese Conseil d'Etat in two decisions rendered on 17 July 2001. This led subsequently to the adoption of special legislation in order to avoid such embarrassing situations for the Government (Madame Sfeir, 2002).

The same problem was confronted earlier in Egypt, where in a similar fashion in 1997 the legislator introduced a special bill as Law Relating to Arbitration in Civil and Commercial Matters (Arbitration Law) in order to explicitly provided that disputes pertaining to administrative contracts are arbitral. However, this legislative amendment did not put an end to the controversies, since the debate was simply removed to another area as witnessed in the annulment by the Egyptian Court of Appeal of rendered the Chromalloy case, where in order to obtain annulment due to the non-application of the applicable law provided for in the contract. The Lebanese and Egyptian examples are not unique, and it seems that the same cultural background is behind the complex problems faced in the eight recent ICC arbitrations between the foreign telephone operating companies and the Turkish public authorities within the process of privatization.

Judicial Review and Remand of Arbitral Award

The New York Convention envisages two possibilities when a court in a Member State is seized by the request and demand for the enforcement of Arbitral award rendered in another member state: Under New York Convention, there are two methods to treat an award as whether to grant or to deny enforcement and no other alternative is provided under the said convention. While domestic courts may undertake a review of award on the ground of going beyond the provisions provided for in the Convention, or remand (i.e., return) the award to the arbitral panel for the purpose of adding thereto or clarifying what amounts to ambiguities therein. These problems became of great importance in recent years as illustrated by the following American and British cases.

The US Court of Appeals 9th Circuit in its decision rendered on 23 July 2002 (in Kyocera v. Prudential-Bache Trade Services), dealt with reversing the consequences of a previous decision of the district court's order confirming an ICC award and remanded the award in to arbitrator, on the ground that parties have further agreed in the agreement that they shall cause the higher scrutiny of award by the courts.

Fifth Circuit court held that federal courts "can expand their review of an arbitration award beyond the FAA's grounds, when (but only to the extent that) the parties have so agreed. Court has power, not only to confirm or vacate an award, but also to modify or correct it [7] (Mealey's, 2002). On a somewhat different issue, in response tothe objection according to which the authority of an arbitrator is exhausted and he is functus officio once he has rendered his award, the court relied on a previous precedent in favor of the proposition that it can remand to an arbitrator for clarification within the judicial enforcement proceedings, and accordingly, the court came to the conclusion that: "court did not err in seeking clarification for the (arbitral) (Mealey's, 2002).

In an Order rendered by the US District Court, Eastern District of Michigan, Southern Division, on 13 June 2001 (M&C Corporation v. Erwin Behr GmbH), Judge Gadola, having found months before that the Eighth Arbitration Award did not fully adjudicate an issue that had been submitted to the ICC arbitrator, ordered that the award should be remanded to the arbitrator himself and not be referred to the ICC Court Arbitration. Rejecting the argument that the ICC rules are silent on the issue of remanding an award to particular arbitrator, Court of Appeals 6th Circuit indicated that it remanded only the Eighth Arbitration Award "for clarification on the amounts under that award", and this remand "simply will require (the Arbitrator) to complete his duties by applying his reasoning to the facts and does not reopen the merits of the case". Subsequently, said court made its decision rendered on 21 April 2003 (M&C, 2003) ordered: to REMAND this case to the district court with instructions to enter an order specifying in what respects the Eighth Award is unclear as to its application". According to New York convention despite of the fact the convention does not contain no position for a remand after an arbitration award is rendered. However, in the case law in November 2002 the U.K high court of justice, commercial court in the case of Lesotho highlands Development Authority v. Impregicao S.P.A. and others, Judge Morison found no default in stating: "I do not think that the (arbitral) Tribunal had the power to make an award in currencies other than those stipulated for in the contract and that by purporting to exercise a discretion which they wrongly believed was conferred on them by the Act, they were asserting a power which they did not possess. Accordingly, in relation to the currency of the Award, I should remit the matter back to the Tribunal so that they may produce an Award which accords with the contractual provisions." Judge Morison further observed: M&C Corporation v. Erwin Behr GmbH 326 F.3d (6th Cir 2003) at p 772. "Again for the same reasons a supplied to the currency of the award, I consider that the (arbitral) Tribunal have exceeded their powers under section 68 of the Arbitration Act and the issue of interest will have to be re-considered by them having regard to the terms of this judgment." Therefore, the Judge ordered that the ICC Award be remitted to the arbitrators for their reconsideration in respect of: (a) the currency of the award, and (b) the award of interest.

In undertaking such reconsideration, they are directed to treat both issues of currencies and interest as matters of substantive law (not procedural) subject to the Law of the Kingdom of Lesotho governing the contract and similar to the terms of contract.

Cultural Challenges

To date, within our globalized arbitral world, lawyers of different jurisdiction have substantially invoked cultural difference to mean a clash of legal cultures. Legal Culture does not exist in an intellectual vacuum, it is rather the product or the result of fundamental values of a given society, based on history, language, perception of justice and quit specific social norms and understanding of which has significant qualitative of consequences of arbitration in 1996 the eminent legal scholar [Prof. Ahmed El-Kosheri] expressed his views beyond the traditional legal perspective on "Culture" in the context of Arab World: "In general, the legal community throughout the Arab world is still manifesting its hostility to transnational arbitration… the continuing attitude of certain western arbitrators being characterized by a lack of sensitivity towards the national laws of developing countries and their mandatory psychological superiority complexes, negatively affecting the legal environment required to promote the concept of arbitration in the field of international business relationships." (Helpful non-legal language in the arbitration context) (Slate,2005).

Following are the key factors which relevant with the cultural impacts, these have a relevance to resolution of conflicts and having a close nexus with the international commercial arbitration.

Cross Cultural Communication Issues

Lack of understanding about communication is the most important cause problems in the process of dispute resolution. Various Cultures have verbal and non-verbal communication system and each country's vocabulary reflects its primary value. "Words spoken in one country may well not have the same meaning once translated into another language; therefore, there is a need to design guidelines to improve cross cultural communication in ICA (Van, 2005).

Impact of Religion or Politics in Differing Cultures

In some countries, religion is the very foundation of the government and a dominant factor in business, political, governmental and educational decisions. People's perception of other religions, due to political or historical factors, might have a damaging influence on arbitration and ADR. "And there is need to accommodate these individual beliefs and promote long term peace and understanding through dispute resolution methods (Van, 2005).

Cultural Biases in International Commercial Arbitration

People from different countries hold definite stereotypes of each other based on ethnicity, national origin or race. However, the growth in international trade in recent past demands a better understanding of customs and expectations in cross-cultural negotiations. There should be identified the cultural biases of the arbitration and ADR processes itself that may assist neutrals to identify cultural lenses, in order to offer a more dynamic adjustable process (Van, 2005).

Cultural Differences in Conflict Resolution

There is no single, universal model for negotiation. On the contrary, many experts described two different models, each equally valid in their own terms.

"The first model has been defined as low context, the predominantly verbal and explicit style typical of individualistic societies such as the United States; the second model as high context, a style associated with nonverbal and implicit communication more typical of interdependent, collectivist societies, such as Japan and other Asian countries. Obviously, these distinctions are oversimplified, but they do serve to highlight the areas of conflict in inter-cultural encounters, and specifically the negotiation process (Van, 2005).

Conclusion

In conclusion, the analysis of potential challenges and strategies in the enforcement of foreign awards underscores the complexity and significance of this aspect of international arbitration. Throughout this research, we have identified key hurdles including jurisdictional issues, procedural complexities, and resistance from local courts, which can impede the enforcement process and undermine the efficacy of cross-border dispute resolution mechanisms. However, amidst these challenges, there exists a range of strategies that parties and practitioners can employ to navigate the enforcement process effectively. These strategies include proactive measures during arbitration proceedings, such as carefully drafting arbitration agreements and selecting arbitration-friendly jurisdictions, as well as tactical approaches during enforcement proceedings, such as engaging local counsel with expertise in international arbitration law and leveraging international conventions and treaties. By understanding and addressing these challenges through strategic planning and proactive measures, stakeholders can enhance the reliability and effectiveness of the enforcement process. Moreover, collaboration between practitioners, policymakers, and stakeholders is essential to foster a conducive environment for international arbitration and ensure the continued success of cross-border dispute resolution mechanisms. As the landscape of international

arbitration continues to evolve, it is imperative that stakeholders remain vigilant in identifying emerging challenges and adapting strategies accordingly. By doing so, we can strengthen the enforcement regime for foreign awards, uphold the integrity of international arbitration, and foster confidence in the resolution of cross-border disputes

References

Bansal, A.K. (2012). International Commercial Arbitration Practice and Procedure (p. IX).

El-Kosheri, A.S. (n.d.). Enforceability of Awards-Some Additional Problems. Vice President of the ICC Court of International Arbitration; Member of ICCA

El-Kosheri, A.S. (n.d.). Enforceability of Awards-Some Additional Problems. Vice President of the ICC Court of International Arbitration; Member of ICCA

El-Kosheri, A.S. (n.d.). Enforceability of Awards-Some Additional Problems. Vice President of the ICC Court of International Arbitration; Member of ICCA

Monegasque de Reassurances S.A.M ("monde Re") v. Naftogaz and State of Ukraine, [2000]

Sfeir-Slim, Madame. (2002). Le Timide Sursaut du Legislation Libanais. Revue de l'Arbitrage, 2002(3)

Mealey's International Arbitration Report, 17(8), [2002].

Mealey's International Arbitration Report, 17(8), [2002].

M&C Corporation v. Erwin Behr GmbH, 326 F.3d 772 (6th Cir., 2003).

Slate II, W.K. (2005). Luncheon Address: The Impact of Culture on International Commercial Arbitration [Address]. American Arbitration Association.

Van den Berg, A.J. (2005). New Horizons in International Commercial Arbitration and Beyond (pp. 11-13).

Van den Berg, A.J. (2005). New Horizons in International Commercial Arbitration and Beyond (p14).

Van den Berg, A.J. (2005). New Horizons in International Commercial Arbitration and Beyond (p13).

Van den Berg, A.J. (2005). New Horizons in International Commercial Arbitration and Beyond (p 14).