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Public Policy as A Ground for Refusing Recognition and Enforcement of Foreign Arbitral Awards: New York Convention, UNCITRAL Model Law and Afghanistan Arbitration Law Perspectives

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Abstract

This article aims to examine the grounds for refusing the recognition and enforcement of foreign arbitral awards based on public policy considerations. It analyzes this issue from the perspectives of three different sources of law: the New York Convention, the UNCITRAL Model Law, and the Afghanistan Commercial Arbitration Law. It discusses the limited scope of the public policy exception under the Convention and the level of discretion given to national courts in applying this ground for refusal. Next, the article explores the UNCITRAL Model Law, which serves as a basis for legislation in many jurisdictions and is often incorporated into domestic arbitration laws. It examines the approach taken by the Model Law towards the public policy exception and compares it to the New York Convention. Finally, the article looks at the perspective of Afghanistan's Commercial Arbitration Law. It analyzes the specific provisions in this law that deal with the recognition and enforcement of foreign arbitral awards based on public policy grounds. Through this analysis, the article aims to provide a comprehensive understanding of how public policy considerations can impact the recognition and enforcement of foreign arbitral awards under different legal frameworks.

Keywords: *Arbitration, public policy, awards, recognition, enforcement, exceptions*

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INTRODUCTION

The use of arbitration to resolve commercial dispute has been significantly increased and it has even become the most preferred method for commercial dispute resolution both nationally and internationally (Born, 2011). One of the international legal documents which has remarkably contributed to the common acceptance of commercial arbitration as a commercial dispute settlement mechanism and the enforceability of its awards is the New York Convention on the Recognition and Enforcement of Foreign Arbitral awards. This document obliges contracting states to provide with the legal ground for the recognition and enforcement of foreign arbitral awards in their territories. Until 2019, overall (158) states have singed the New York Convention on the recognition and enforcement of foreign arbitral awards and likewise they have provided legal ground for the recognition and enforcement of foreign arbitral awards in their domestic laws (P, 1959). However, contracting states' obligation to provide with the legal ground for the recognition and enforcement of foreign arbitral awards is not limitless, and in particular situation and circumstances it can be refused and invoked.

The awards most often invoked in violation of public policy or commonly called public policy exception (R., 1986). The NYC has accepted the refusal of foreign arbitral awards when the issuance and enforcement of such awards violates states' public policy. Following the NYC, contracting states to the convention have also provided with the ground to refuse enforcement of foreign arbitral awards based on their public policy matters. Afghanistan is also one of the signatories to the NYC, which has provided with ground for the recognition and enforcement of foreign arbitral awards as well as with ground to refuse enforcing arbitral awards based on its public policy exception. But, to what extent this exception is adopted and what matters public policy constitute in Afghan legal system? This paper first discusses public policy exception rules in light of NYC and the UNCITRAL Model law and then evaluates the public policy exception from Afghan arbitration law's perspective.

GENERAL UNDERSTANDING OF PUBLIC POLICY

It can be very obviously known from the public policy definition proposed by courts and academic scholars that there is no clear and precise accepted definition of public policy. However, they provide meaningful insights to the notion and concept; they still fail to grasp the appropriate meaning of it (Milhem, 2012). For instance, public policy has been defined as the "fundamental moral convictions of legal and moral values in the concerning country". This is actually a kind of conceptual description which only gives an idea of public policy rather than to define it in a meaningful way (Milhem, 2012). They courts are still not able to provide factors of public policy to distinguish public policy from other pertinent issues particularly, from public policy rules and normal law. It's also defined as common term, meaning the moral, social and/or economic considerations which are applied by courts as grounds for refusing enforcement of an arbitral award (Maurer, 2013). Similarly, International Law Association in its recommendation of 2002 on the application of public policy as ground for refusing recognition and enforcement of international awards. International Law Association provides the definition of public policy as "the body of principles and rules recognized by a state, which by their nature may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition and enforcement of said award would entail their violation on account either of the procedure pursuant to which it was rendered (procedural

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international public policy) or of its contents (substantive international public policy)." (International Law Association, 2002).

The International Law Association specifically does not say that which rules can be determined as public policy, rather it distinguishes procedural public policy from the substantive one and at the same time it gives every state the capacity to determine what they consider as their public policies. The ILA committee to the extent implicitly acknowledges that a conceptual and meaningful definition for public policy is hard to provide. Hence, it seems logical to give the states the power to determine their public policies through their domestic legislation and laws (R., 1986).

The existed insignificancies of the definition that have so far been demonstrated by courts or provided by scholars, show only the versatility of the public policy which is one of its curial characteristics. Since each contracting state is committed towards enforcing foreign arbitral awards in its territory under New York Convention, it also deserves the right to refuse the enforcement of foreign awards based on its public policy ground which is defined in domestic laws (Mistelis, 2000). Adoption of such a refusing ground of public policy constitutes and protects the basis of respective legislation and domestic laws. But this does not mean that countries have a broad and unlimited right and power to refuse the enforcement of foreign arbitral awards based on whatever they may simply call it public policy. Because, if the states possess unlimited power and right to refuse recognition and enforcement of arbitral awards, they may create even more uncertainty with respect to the enforcement of foreign arbitral awards beyond those that have already been created.

PUBLIC POLICY UNDER NYC

The New York Convention has been one of the most successful international treaties among the states which made a significant improvement in international commercial arbitration and enforcing the arbitral awards in contracting states (Born, 2011). One of the main goals of the convention was to make it easier for the states to enforce arbitral awards in its jurisdiction rather than in state where the awards is made. Through this, NYC imposed obligation on contracting states to recognize and enforce arbitral awards in their territories, at the same time it proposes a limited ground for the non-recognition and enforcement of the awards (Maurer, 2013). Article V (2) of the convention generally lists the ground for the non-recognition and non-enforcement of arbitral awards while section (b) of the NYC on the recognition and enforcement of foreign arbitral awards specifically provides the public policy as a limit for the refusing recognition and enforcement of the awards (P, 1959). The article explicitly states that an arbitral award is not valid if the losing party was not given proper notice. The arbitral award deals with a dispute beyond the scope of the parties' arbitration agreement; that the composition of the arbitral authority or its procedures were not in accordance with the parties' arbitration agreement; that the award is not capable of settlement by arbitration; or that the enforcement or the recognition of the award would be contrary to the public policy of the enforcing state (P, 1959).

As mentioned above, section (b) of the NYC specifically states that "a state may refuse to enforce a foreign arbitral award, if doing so would be contrary to the public policy of the state in which the awards is sought." (New York Convention, 1958). However, the concerning article of the convention clearly gives the states the power to refuse enforcing arbitral awards if it would be in contrary with their public policies, it does not provide any specific definition for the terms

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"public policy". However, as per 2023, one of the main obstacles towards application of the conventions is lack of specific definition of the public policy.; some scholars define it by reference to the moral, political, or economic order of the state, or to basic notions of justice and morality as mentioned above. (Badah, 2016). Even scholars compare it with an unruly horse which you once get across it then you cannot know where it carries you. It may even lead you to an unpredictable outcome which you might not expect. Despite lack of clear definition, it still remains a reality and basis to annul arbitral awards if it violates the public policy of a country in which the enforcement is sought. States may relay on the purpose of the public policy which is to allow judges in contract states of the convention not to give effect to the awards which are made against the fundamental principles of a country's legal system and social values in which the enforcement of the awards is sought.

PUBLIC POLICY IN LIGHT OF UNCITRAL MODEL LAW

The United Nations Commission on International Trade Law (UNCITRAL) Model Law on international commercial arbitration is one of the most essential legislative rules upon international commercial arbitration. The law has been adopted in a significant number of contracting states and is accepted as their official domestic laws for purpose of legislative and judicial decisions (Born, 2011). The model has truly been effective towards developing international commercial arbitration and promoting the enforceability of arbitral awards. However, the model law covers the arbitration, arbitration agreement, arbitration clauses, recognition of the awards, enforcement of the awards, and ground for setting aside the awards. It also talks about the non-recognition and non-enforceability of the arbitral awards if the awards violate the public policy of a state. The law dictates the reasonable validity of international arbitral awards, subject to a limited, restricted list of grounds for annulment of foreign arbitral awards. These grounds are precisely the same as those of the New York Convention's exceptions as a public policy defense.

Article 34 (2)(b)(ii) of the Model law provides that an award may be annulled if the pertinent court realizes that 'an award is in contrary with the public policy of a particular state". This exception is identical to Article V (2)(b) of the New York Convention and has close parallels in other national arbitration systems (UNCITRAL Model Law on Commercial Arbitration, 1975). Considering the term 'public policy', used in international conventions and treaties, particularly the 1958 New York Convention, it covers the fundamental principles of law and justice both substantively and procedurally. Thus, the issues of bribery, fraud, and corruption would constitute grounds for setting awards aside. Article 36 of the UNCITRAL Model law, like article V.2 (b) of the New York Convention, refers to the public policy of the state in which enforcement is sought UNCITRAL Model Law on Commercial Arbitration, 1975). Again, there is no obvious attempt to harmonize the definition or application of the term 'public policy'. Alike, the New York Convention, the Model Law also does not provide the definition of "public policy". With respect to these insignificancies towards the definition of public policy, in October 2015, the International Bar Association released a Report on the Public Policy Exception in the New York Convention that reaffirmed that public policy remains an imprecise and evolving concept that resists precise definition.

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PUBLIC POLICY EXCEPTION IN AFGHAN ARBITRATION LAW

Afghanistan has enacted its arbitration law in the light of New York Convention and the UNCITRAL Model law, thus, to the noticeable extent it's in compliance with the model law, even most of its provisions are copied from it (Ata & Zamani, 2023) Alike UN model, Afghan arbitration law has provision upon the accepting arbitration agreement, arbitration clauses, recognition and enforcement of arbitral awards and so on. It also provides with ground for setting aside an arbitral award or refusing the enforcement of the awards based on the public policy matters.

Afghan arbitration law deals with the public policy matters in different ways. First, it states the immunity of the arbitrator from inquiry and interrogation related to his actions and inactions. However, the law accepts immunity for the arbitrator, at the meantime it limits his immunity for some public policy matters. For instance, the law says that an arbitrator is not immune if his actions or inactions are derived of undue influence, conflict of interest and bribery (Afghan Arbitration Law, 2007). According to the law undue influence, conflict of interest as well as taking bribery from the arbitration parties or one of the parties are considered as limits to the public policy. If such situation occurs, arbitrator's immunity no longer exists, and he ultimately entitles to inquiry and interrogations for his violation of public policy matters.

Likewise, Afghan arbitration law in its chapter seven mentions the circumstances for setting aside the arbitral awards as well the circumstances to refuse the enforcement of arbitral awards. To a noticeable extent, the law proposes the same circumstances for both setting aside the awards and refusing to enforce them. But, both of the issues cover some public policy matters as exceptions of non-recognition and non-enforcement of the awards. For instance, article fifty-three of the law says that "an arbitral may set aside by a court based on the request or based on the objections of a party if a party to the arbitration is under legal incapacity; Arbitration Agreement has subjected the parties to a law that is not valid under the Laws of Afghanistan (commercial arbitration law of Afghanistan 2007). If the party who made the application was not given proper notice of the appointment of an arbitrator of the arbitral proceedings or was otherwise unable to present his or her case as provided by this law.

If an Arbitrator was bribed, subject to undue influence or had a material conflict of interest with respect to a party, witness or the subject matter of the arbitration that was not timely disclosed to the parties pursuant to this law. If the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement or contains decisions on matters beyond the scope of the submission to arbitration, but if the decisions on matters beyond the scope of the Arbitration can be separated from those not beyond the scope of the arbitration, then only that part of the award which contains decisions on matters beyond the scope of the arbitration may be set aside. If the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless the agreement of the parties was in conflict with a provision of this law from which the parties cannot deviate; or the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Afghanistan or the Award is in conflict with the public [State] policy of Afghanistan. However, the law explicitly mentions some public policy matters as circumstances for setting aside an award such as receiving bribes, material conflict of interest undue influence over the parties or one of the parties, despite it also

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specifically mentions that an award will be set aside if it was in conflict with state public policy of Afghanistan (Afghan Arbitration Law, 2007).

Alike, the circumstance of setting aside an arbitral award, the Afghan arbitration law also provides with the situation in which the recognition and enforcement of the awards may be refused by the Afghan competent courts. Article of the law, however, says that “an arbitral award irrespective of the country in which it was made shall be enforceable” (commercial arbitration law of Afghanistan 2007). It also says that it may also be refused in some situation and cases. for instance, the law mentions that “an arbitral award may be refused if a party to the arbitration agreement is under some incapacity. If the award has not been issued subject to the law set forth in the agreement by the parties; if the awards is issued under the law which is invalid. If the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his or her defense as provided for in this law.

If the award deals with a dispute not contemplated by the arbitration agreement or not falling within the scope of its applicability, or it contains decisions on matters beyond the scope of the submission to arbitration, but if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters submitted to arbitration may be enforced. If the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place. If the award has not yet become binding on the parties and has been set aside or suspended by a Court of the country in which, or under the law of which, that award was made; and if the subject-matter of the dispute is not capable of settlement by arbitration under the law of Afghanistan or enforcement of the award would be contrary to the laws and regulations of Afghanistan (Afghan Arbitration Law, 2007).

As mentioned earlier, Afghan arbitration law however, accepts the refusal of the recognizing and enforcing arbitral awards based on the public policy matters, it almost provides with the same ground for refusal provision as it has provided for setting aside an award. Even, it does not provide any slight differences between them. But, still, the Afghan law recognizes the refusal ground for the non-recognition and non-enforcement of arbitral awards in a very plain

CONCLUSION

Alike the New York Convention and UNCITRAL Model law, under Afghan arbitration law, the public policy exception may be invoked to refuse the recognition and enforcement of foreign arbitral awards that are contrary to the fundamental principles of Afghan law and public policy. This exception is set out that a foreign arbitral award may be refused recognition or enforcement if it is contrary to the fundamental principles of Islamic law and the laws of the Islamic Republic of Afghanistan. The term "fundamental principles" of Afghan law and public policy has not been defined explicitly in the law, and so its interpretation is left to the discretion of the courts and arbitrators. However, it is likely to encompass such principles as human rights, morality, public health, and local customs and traditions. It is also important to note that the public policy exception is to be applied narrowly, so as not to undermine the legitimacy and effectiveness of the international arbitration system. The burden of proving that an award is contrary to the fundamental principles of Afghan law and public policy lies with the party seeking to resist

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recognition and enforcement. However, the law has lots of uncertainties and controversies upon other arbitration pertinent issues; its language is so plain and clear upon provisions about the ground for refusing enforcement and recognition of arbitral awards.

RECOMMENDATIONS

This paper recommends that there should be a uniform definition of public policy in international legal instruments based on which the arbitral awards are being refused. Likewise, there should be very clear limitations for public policy exception for the sake refusing recognition and enforcement of foreign arbitral awards. The paper also recommends that Afghan courts and pertinent laws should also define public policy very clearly limits the legal framework in a very justifiable manner for refusing recognition and enforcement of arbitral awards.

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