

The Recognition and Enforcement of Foreign Arbitral Awards: The New York Convention and The Afghan Law Perspectives

Rafiullah Ata, Abdul Hadi Zamani

Nangarhar University, Afghanistan

rafi.ata@gmail.com, abdulhadi.zamani@gmail.com

Abstract. The aim of this paper is to determine whether Afghanistan comply with terms of New York Convention on the Recognition and Enforcement of Foreign Arbitral award. Particularly, it discusses whether Afghan arbitration law provides with the legal ground upon recognition and enforcement of foreign arbitral awards in Afghan territory. Since Afghanistan is a party to the NYC based on which its courts are expected to recognize and enforce foreign arbitral awards. Doing so is vital for Afghanistan to encourage and maintain greater foreign investment which ultimately contribute to the economic growth of the country.

Keywords. Arbitration, Recognition, Enforcement, Reciprocity, Awards

Introduction

International arbitration has been globally considered a preferred and effective mechanism to resolve commercial dispute.¹ However, without the ability to enforce foreign arbitral awards, in a situation where a party to the arbitration failing, refusing, or not honouring the award, international arbitration would no longer remain effective rather it even becomes meaningless.² Hence, the possibility of recognition and enforcement of foreign arbitral awards pursuant to the New York Convention of 1958 on the recognition and enforcement of foreign arbitral awards has become of exceptional value and vital importance.³

Afghanistan entered New York Convention in 2004. This obviously means that Afghanistan has agreed to provide the legal ground for the recognition and enforcement of foreign arbitral awards in its territory, and similarly, Afghan courts are legally expected to recognize and enforce foreign arbitral awards made in other contracting states, except the cases which would be in contrary with the laws and public policies of the country.⁴ following the NYC, Afghanistan enacted its arbitration law in 2007⁵. Article first of the Afghan arbitration

¹ Gary B. Born, *International Commercial Arbitration: Law and Practice*, (3d. ed. 2010).

² *Supra* note 1 at 7

³ Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, (2d. ed. 2012).

⁴ Qanuni Hakamyati Tejarati Afghanistan [Afghanistan Commercial Arbitration Law] 1386 [2007] (Afg.).

⁵ Una Au et al., *An Introduction to Commercial Law of Afghanistan*, (Will Havemann et al. 2d. ed. 2011) available at: <http://alep.stanford.edu/wp-content/uploads/2011/02/Intro-Book-3d-Edition.pdf>

law reads the purpose of the law which says that it is enacted “to facilitate and encourage prompt, fair, and neutral resolution of commercial and economic dispute through arbitration, with respect to the agreements signed between Afghanistan and other states on commercial and economic arbitration, and to regulate the relevant affairs”.⁶

While the Afghan arbitration law marks some progress, it continues to leave substantive and procedural uncertainty about how courts should recognize and enforce foreign arbitral awards. This uncertainty not only fails to comply with the terms of the New York convention, it also has the potential to discourage both national and foreign investment, ultimately threatening economic growth in Afghanistan.

General Rules about Recognition and Enforcement of Foreign Arbitral Awards Under New York Convention

Article I of the convention sets out in a very wide range of the scope of the New York Convention. Article I (1) provides that the convention applies to the recognition and enforcement of foreign arbitral awards “made in the territory of a state, other than the state where the recognition and enforcement of such awards is sought, and arising out of the differences between person, whether physical or legal”.⁷ It also provides that the NY convention applies to awards that are “not considered as domestic awards in the state where their recognition and enforcement are sought”.⁸

Based on the cited provision of the convention, an arbitral award may qualify as being “foreign” in two ways: When the award is made in the territory of another state, or when it is not considered as domestic award in the state where recognition and enforcement is sought.⁹

The question whether an award is domestic or foreign is an issue of exceptional importance because the proceedings of recognition and enforcement of domestic and foreign awards are different in many jurisdictions. Due to such diversity of approaches upon enforcement of arbitral awards including ground for the non-enforceability of the awards in national legal systems of the countries, it sometimes occurs that an award might be refused in one state while it may still be granted enforcement in another country.¹⁰ Despite two criteria mentioned in NYC regarding the recognition and enforcement proceeding of an award upon determining whether an award is foreign, however the criteria for considering an award as domestic or foreign is not always obviously defined which mostly matters in comparative national legislations.

Regarding the question upon which awards fall under NYC, article I (1) of the conventions clearly provides that it applies to all foreign awards irrespective of the country where they were made.¹¹ Hence, a foreign arbitral award will be recognized and enforced by a contracting party to the convention regardless of determining whether the award was rendered inside or beyond the territory of another contracting state. This presumes that the concerning award satisfies the entire requirements laid down in the Convention.¹²

⁶ Supra note 3 at 1

⁷ U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, [New York Convention], 1958-06-10, 330 UNTS 38

⁸ New York Convention on the recognition and enforcement of foreign arbitral awards

⁹ Supra note 5 at 10

¹⁰ *Id.* at 10

¹¹ U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, [New York Convention], 1958-06-10, 330 UNTS 38

¹² *Supra* note 5 at 4

Article I (2) of the convention states that the term “arbitral awards” shall include not only award made by the appointed arbitrators for each case but also those made by the permanent arbitral bodies to which the parties have submitted”.¹³

Recognition and Enforcement Procedure for the Arbitral awards

Article III of the Convention deals with the recognition, state obligation as well as the enforcement procedure of the of foreign arbitral awards. It obliges the contracting states to recognize and enforce an arbitral award in accordance with conditions laid down in article III of the convention. Article III provides:

Each contracting state shall recognize arbitral awards as binding and enforce them in accordance with rules of procedures of the territory where the award is relied upon, under the condition laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of the arbitral awards to which this convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.¹⁴

Article III of the Convention expresses the pro-enforcement policy of NYC and it sets forth a general obligation upon the contracting parties to recognize the arbitral awards as binding and enforce it. In this case, foreign arbitral awards are entitled to prima facie right upon recognition and enforcement in the contracting states¹⁵. Likewise, the article does not allow the state parties to substantially impose extra charges and fees upon recognition and enforcement of the awards.

Request for the Recognition and Enforcement of the Awards

Article IV of the Convention requires the requesting party to meet specific requirements while obtaining recognition and enforcement of an arbitral awards before the competent court of its choice. These requirements are already determined by the convention; hence it does not allow for additional and different requirement of the national laws of enforcing countries. Article IV reads:

To obtain the recognition and enforcement mentioned in the preceding article, the party applying for the 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 the official language of the country in which the awards is relied upon, the party applying for the 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 a diplomatic or consular agent.¹⁶

Article IV of the convention sets forth two formal requirements upon recognition and enforcement of the award and must therefore be met by the party who seeks recognition and enforcement. The first requirement is to supply the “duly authenticated original” or “duly certified copy of the award, and the original arbitration agreement or a “duly certified copy” of it.¹⁷ it means the award must be authenticated, i.e. the signature must be attested to be true; and

¹³ *Id.*

¹⁴ *Supra note 6 at 8*

¹⁵ Ei Ei Khin, *Enforcement of International Arbitral Awards in the United Kingdom, the United States and Singapore* (2008).

¹⁶ NEW YORK CONVENTION art. 1 (2)

¹⁷ *Id. At. 9*

if the copy of it is submitted, it must also be certified, i.e. the copy must be attested to be genuine copy of the original award. The same is true upon arbitration agreement if a copy of it is submitted.

Recognition and Enforcement of Arbitral Awards under Afghan Arbitration Law

Afghanistan has signed the NYC based on both reciprocity and commercial reservations which means that it will apply the convention only: “to recognition and enforcement of awards made in the territory of another state; and (ii) differences arising out of legal relationships whether contractual or not which are considered as commercial under the national law of Afghanistan”.¹⁸ However, the Afghan arbitration law regulates the arbitration which are signed or being signed between Afghanistan and other states on commercial and economic arbitration.¹⁹ Similarly, article 4 of the law under the scope of application provides “The provisions of this Law, except ARTICLES 11 and CHAPTER 7, apply only if the place of Arbitration is Afghanistan”.²⁰

Article 11, which is exempted from application within the Afghan territory, talks about the immunity of the arbitrators from inquiry/interrogation regarding their actions, inactions or awards, unless their action, inactions or awards are resulted from undue influence, bribery and conflict of interest.²¹ Also, chapter 7 of the law provides with circumstances and situation to recourse an award.²²

Recognition of Arbitral Award under Afghan Laws.

However, Afghan arbitration law clearly does not mention anything upon recognition of foreign/international arbitral awards. It just provides with some ground with international arbitration signed or being signed between Afghanistan and other states on commercial and economic arbitration, the definition of the international arbitration as well as the enforcement of international arbitral awards in Afghan territory.²³ For instance, upon the definition of the international arbitration article 3 of the law says that an arbitration can be conducted in two ways, domestic and international. An arbitration is international: (i) if in the contract it is described as such; and (ii) if the transaction occurs between two or more countries although this has not been mentioned in the agreement.²⁴ The law has not used the word “recognition” even for a single time. Likewise, it has not used the term “foreign arbitral award”, however, the terms “foreign” and “international” are not absolute synonyms of each other in terms of arbitration.

Enforcement of Foreign Arbitral Awards under Afghan Laws

Unlike recognition of foreign arbitral awards, Afghan laws provide with clear substantive provisions upon enforcement of arbitral awards. For instance, article 56(1) of the Afghan arbitration law states: “an arbitral award, irrespective of the country in which it was made, shall be enforceable”.²⁵ The arbitration law provides with clear substantive provision upon enforcement of arbitral awards even one step beyond the responsibility that Afghanistan

¹⁸ *Id.*

¹⁹ *Supra* note 3 at 1.

²⁰ COMMERCIAL, ARBITRATION Law art. 4 (Afg.).

²¹ *Id. art. 11.*

²² *Id.*

²³ *Id.*

²⁴ *Id. art. 3.*

²⁵ *Id. art. 56 (1).*

has before the NYC. Because, Afghanistan has signed the convention based on the reciprocity reservation, but the law provides the enforcement ground for the arbitral awards irrespective of their countries where they are made. The concerned article of the law is in obvious contradiction with Afghanistan's reciprocity reservation of the convention. Beyond the arbitration law, the Afghan law on foreign investment also provides with enforcement of arbitral awards in Afghan territory. For instance, article 30(3) of private investment law says: "any award resulting from arbitration between the parties shall be final and also enforceable by the government upon application of any party to such arbitration".²⁶ Similarly, article 88 of Afghan law on contracts and sales of goods also reads: parties shall enforce the decision or arbitral awards or mediation agreement.²⁷ If any of the party fails to enforce it or does not perform its obligation, the competent court issues an order for its enforcement based on the request of the concerning party".²⁸

Notwithstanding the above explicit substantive provisions upon enforcement of arbitral awards, none of the concerning laws provides with the procedural mechanism for the enforcement and execution of the arbitral awards. However, both NUY and UNCITRAL Model law have submitted the national laws with the discretion to enact procedural mechanism upon the enforcement arbitral awards based on their own legal systems.

Conclusion

Although the Afghan arbitration law is enacted in light UNCITRAL Model law and to a notice able extent the law meets the terms of New York Convention and the UNCITRAL Model law. It continues to leave some substantive and procedural uncertainties in regard to the recognition and enforcement of foreign arbitral awards. First, the law lacks substantive provision upon recognition of foreign arbitral awards, even the law does not mention the term "foreign" for a single time. In the whole law there is no explicit provision about foreign arbitral to be recognized by the competent commercial court. Even, there is no implicit provision that the issue of recognition of foreign award could be inferred form. Mostly, the law deals with domestic arbitration procedures for instance the issues of arbitration agreement, its validity, appointing arbitrators, challenging arbitrators, selection of arbitral tribunal, protection measures, arbitration proceedings and so on. Second, regarding the enforcement of arbitral awrd however there is a clear substantive provision which says foreign arbitral awards irrespective the countries where they are made are enforceable. The law still continues to leave some underlying uncertainties upon procedure of enforcing of the arbitral awards. There are few instances that enforcement of some foreign arbitral awards was pending for years as the courts did not know how and based on which procedures, they should enforce the foreign arbitral award. So, to comply with terms of NYC as well as to encourage and maintain greater for investment in Afghanistan, the Afghan State (whichever is) needs to amend its arbitration law and bring with effective changes in terms of uncertainties and controversies upon recognition and enforcement of foreign arbitral awards. It most specially needs to provide with explicit procedural mechanisms for the enforcement of foreign arbitral awards so that the Afghan arbitration system changes into an effective and trusted system and consequently contributes to economic growth through promoting foreign investments in Afghanistan. Also, the law has not clearly mentioned that the recognition and enforcement of foreign awards is the competency of

²⁶ Qanuni Sarmayaguzai Khososi [Law on Private Investment] 1386 art. 3 (3) [2007] (Afg.).

²⁷ Qanuni Qarardadha wa faroshe amwar [Law on Contracts and Sales of Goods] 1385 [2015] art. 88 (Afg.).

²⁸ Supra note 24 at 3

the court. Rather it just defines the competent court as commercial court from which it can also be inferred that the recognition and enforcement would be done by the commercial court, but very explicit provision upon giving the commercial court the

References

- [1] Gary B. Born, *International Commercial Arbitration: Law and Practice*, (3d. ed. 2010).
- [2] This is an authoritative 3,950-page treatise, in three volumes, providing the most comprehensive commentary and analysis, on all aspects of the international commercial arbitration process, that is available.
- [3] Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, (2d. ed. 2012).
- [4] Qanuni Hakamyati Tejarati Afghanistan [Afghanistan Commercial Arbitration Law] 1386 [2007] (Afg.).
- [5] *The Principles and Practice of International Commercial Arbitration* provides the reader with immediate access to understanding the world of international arbitration.
- [6] Una Au et al., *An Introduction to Commercial Law of Afghanistan*, (Will Havemann et al. 2d. ed. 2011) available at: <http://alep.stanford.edu/wp-content/uploads/2011/02/Intro-Book-3d-Edition.pdf>
- [7] Ei Ei Khin, *Enforcement of International Arbitral Awards in the United Kingdom, the United States and Singapore* (2008).
Available at:
<https://www.academia.edu/people/search?utf8=%E2%9C%93&q=requirements+for+the+enforcement+of+foreign+arbitral+awards>
- [8] <http://alep.stanford.edu/wp-content/uploads/2011/02/Intro-Book-3d-Edition.pdf>
- [9] *Law on Commercial Contracts and Sales of Goods, Afghanistan*.
- [10] Qanuni Sarmayaguzai Khososi [Law on Private Investment] 1386 art. 3 (3) [2007] (Afg.).
- [11] U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, [New York Convention],
- [12] www.newyorkconvention.org, www.uncitral.org