

Recognition and Enforcement of Foreign Arbitral Awards: Implications of the Grounds for Refusal in the Context of the New York Convention

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Abstract

本稿は、外国仲裁判断の承認及び執行における拒否事由を検討し、そこからミャンマーなどの発展途上国が国内法において整備すべき点について検討したものである。本稿では外国仲裁判断の承認及び執行に関する条約（1958年のニューヨーク条約）に規定されている拒否事由を手がかりに、まずその規範内容を条約規定及び関連する国内判例から検討した。ニューヨーク条約における拒否事由は手続面及び実体面の双方に関わるものがあり、特に「国の公の秩序(public order)」については国内法でも用語法や射程が一様ではないことが指摘される。ミャンマーでは近年仲裁法が改正されたが、条約及び関連する各国の国内事例を踏まえて将来的には外国仲裁判断の承認及び執行に関する事案に対処する必要がある。

Keywords: recognition and enforcement, foreign arbitral award, grounds for refusal

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1. Introduction

International commercial arbitration is an important area in international commercial transactions.¹ Arbitration, a form of alternative dispute resolution, is one of the main instruments for resolving disputes in international commercial transactions. In an arbitration, disputes are resolved through a decision by arbitrators, and the decision is legally binding. In international commercial arbitration, the dispute has usually arisen between individuals or enterprises from different states, or between individuals and a foreign state.²

In general, the parties voluntarily comply with an award without further challenge.³ In the case of non-compliance by one party, the other party will seek to enforce the arbitration award before a national court. The party seeking enforcement has to resort to enforcement proceedings to collect its money or to enforce the non-pecuniary aspects of the award. On the other hand, the respondent may seek a refusal of the enforcement of the award, and there are some grounds on which enforcement of an award can be refused. National proceedings for the recognition and enforcement of foreign arbitral awards are subject to different legal enforcement regimes. In such cases, it is certainly true that the judicial enforcement of foreign arbitral awards plays an important role, both for obtaining remedies through arbitration, and for resisting an award on the basis of a national court's refusal to enforce it. It is in this context that the recognition and enforcement of foreign arbitral awards plays a significant role in international arbitration rules. In response to international commercial arbitration awards and the recognition and enforcement of such awards before national courts, most states have enacted national arbitration legislation. Accordingly, national court systems play an important role in the recognition and enforcement of foreign arbitral awards.

In the present article, the grounds for the refusal of the recognition and enforcement of foreign arbitral awards are the topic for analysis. Signatories to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "the New York Convention" or simply "the Convention"),⁴ are obliged to observe the terms of the Convention through their national arbitration legislation. However, the terms of the Convention cannot be interpreted and applied uniformly by all the contracting states.⁵ States have to interpret

and apply the grounds for refusal enshrined in the Convention, and make decisions in accordance with the notions of the Convention.

In this regard, national courts have to interpret the grounds for a refusal to recognize and enforce a foreign arbitral award in line with international practice. Therefore, the present article aims to answer the following question:

How should national judicial enforcement regimes interpret and apply the grounds for refusing to recognize and enforce foreign arbitral awards under the New York Convention?

In the discussion below, this article will not attempt to classify all possible reasons under each ground; the analysis will be limited to the procedural and substantive grounds for refusal, including fundamental notions such as “due process” and “public policy”.

In order to answer the question above, the article will first examine the theoretical background to the grounds for the refusal of the recognition and enforcement of a foreign arbitral award, as enshrined in the New York Convention (Chapter 2). In response to the theoretical analysis, the case law will provide a framework for considering occasions on which the grounds for refusing to recognize and enforce a foreign arbitration award have actually been discussed (Chapter 3). Cases dealing with due process and public policy issues will be analyzed to reveal interpretations in different jurisdictions and potential differences in interpretation. Finally, the article concludes with a suggestion for how national courts should interpret and apply the grounds for the refusal to recognize and enforce a foreign arbitral award, especially in the context of due process and public policy (Chapter 4). The discussion here mainly deals with the New York Convention, together with other related international conventions, model laws, and national court decisions in different jurisdictions.

2. A theoretical approach to the recognition and enforcement of foreign arbitral awards under the New York Convention

First, a theoretical approach to the recognition and enforcement of foreign arbitral awards will be presented. In this section, the scope of the New York Convention is shown, with some references to related international instruments.

The New York Convention primarily deals with certain principles for the recognition and enforcement of foreign arbitral awards. It is one of the most important treaties in the area of international trade law, and it is a cornerstone for the international arbitration system.⁶ The objective of the Convention is the mutual recognition and enforcement of foreign arbitral awards throughout the world and the provision of a common legislative

standard for the recognition of arbitral awards. The Convention is widely recognized around the world, and as of April 2018 the number of states that had ratified the Convention was 159.⁷ The Convention prevails over the 1923 Geneva Protocol on Arbitration Clauses (hereinafter “the 1923 Geneva Protocol”),⁸ and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards (hereinafter “the 1927 Geneva Convention”).^{9 10}

The 1927 Geneva Convention was the first international convention to specify the grounds for the refusal to recognize and enforce an international commercial arbitral award. However, it had some shortcomings; for instance, neither the 1927 Geneva Convention nor the 1923 Geneva Protocol was applicable to an award in a state that was not party to the 1927 Geneva Convention.¹¹ In addition, even under these instruments, an order from both countries (the country that had rendered the award and the country that was enforcing it) was required.¹² Moreover, the 1927 Geneva Convention laid a strict burden of proof on the applicant seeking to enforce the award, whereas a defendant could easily avoid the enforcement of the award by resorting to delaying tactics.¹³ Therefore, in order to remove the legal difficulties in the recognition and enforcement of international commercial arbitral awards, the New York Convention was adopted in 1958. The Convention mainly deals with the recognition and enforcement of foreign arbitral awards, and the member states of the Convention have the right to enforce an arbitral award that was made in a country other than the country in which the winning party is seeking enforcement.¹⁴

The New York Convention strengthened the legal framework by providing for national courts to be obliged to refer disputes to arbitration if there is a valid arbitration agreement, and by making provision for the enforcement of arbitral awards.¹⁵ Although the Convention was prepared prior to the establishment of the UNCITRAL (United Nations Commission on International Trade Law)¹⁶ in 1966, the Convention influenced on the 1976 UNCITRAL Arbitration Rules¹⁷ and the 1985 UNCITRAL Model Law on International Commercial Arbitration (hereinafter “UNCITRAL Model Law”).¹⁸ For instance, the UNCITRAL Model Law directly cited from the Convention, namely Article 35 and Article 36, on the recognition and enforcement of awards. These two sets of UNCITRAL rules prompt states to reform their domestic arbitration procedures to take into consideration the particular features and needs of international commercial arbitration. Legislation based on the UNCITRAL Model Law has been implemented by a large number of jurisdictions.¹⁹ The UNCITRAL Model Law covers all stages of arbitral proceedings, including the recognition and enforcement of arbitral awards.²⁰

The New York Convention is the most significant international instrument for the recognition and enforcement of arbitral awards. However, according to Article VII(1), the provisions of the Convention do not

affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the contracting states.²¹ In other words, other international treaties or the national law of the enforcing country, if they relate to the recognition and enforcement of foreign arbitral awards, will also be applicable. The New York Convention does not affect the validity of other treaties.²²

2.1. Rules on the recognition and enforcement of foreign arbitral awards

This section will deal with the fundamentals of the recognition and enforcement of an arbitral award under the New York Convention. First, the meaning of an arbitral award and a foreign arbitral award will be examined under the New York Convention. Then, the concepts of, and the procedural requirements for, recognition and enforcement will be discussed, and finally the grounds for the refusal to recognize and enforce under the New York Convention will be presented.

2.1.1. The meaning of “arbitral award” and “foreign arbitral award”

The meaning of the terms “arbitral award” and “foreign arbitral award” under the New York Convention is important in order to identify the scope of the awards covered by the Convention. If an award falls within the definition of a foreign arbitral award, it will be governed by the New York Convention.²³

Article I(2) of the New York Convention states:

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.

The text of the Convention does not define what constitutes an “*arbitral award*”. In the drafting process for Article I of the Convention, it was suggested that whether a decision could be considered as an “arbitral award” should depend on the determination of the courts of the contracting state in which recognition and enforcement were sought.²⁴ This suggestion meant that the national courts of the enforcing states determine whether a decision can be treated as an “arbitral award” under the New York Convention.²⁵ In addition, the UNCITRAL Model Law defines the terms “arbitration”²⁶ and “arbitral tribunal”²⁷, but not the term “arbitral award”. In order for a decision to be considered as an “arbitral award” under the New York Convention, the national courts have found that it must (i) be made by arbitrators, (ii) resolve a dispute or part thereof in a final manner, and (iii) be binding.²⁸ Some national laws simply provide a definition of “arbitral award”, while some provide statutory definitions that are not particularly instructive.²⁹ For instance, section 3(1) of the International Arbitration Act of Australia and section 27(1) of the Singapore International Arbitration Act provide definitions

of “arbitral award”.³⁰ Section 1 of the Israeli Arbitration Law just states that an “arbitral award” is “an award made by an arbitrator, including an interim award.”³¹ Some jurisdictions have left it to the courts and scholars to define the term.³²

From the discussion above, the contracting states to the Convention should consider and define the term “arbitral award” either in their legislation or in their case law.

Article I of the Convention highlights the characteristics of an arbitral award that mean that it can be considered as a *foreign arbitral award*. Article I(1) states:

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, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

Several jurisdictions determine whether an award falls within the scope of the Convention by using the territorial standards in the first sentence of Article I(1).³³ For instance, Section 100(1) of the Arbitration Act 1966 of the United Kingdom³⁴ provides that “[a] New York Convention award means an award made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention.” Also, Section 3 of the 1974 Australian International Arbitration Act,³⁵ amended in 2011, states that a “foreign award means an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the Convention applies”. This means that “foreign award” means an award made in a state other than the state where recognition and enforcement is sought.

In addition to the above-mentioned territorial criterion, the non-domestic standard is set out in the second sentence of Article I(1). The New York Convention does not provide a specific definition of the term “non-domestic award.” As a result, states have decided whether an award should be considered as a non-domestic award by relying on their own legislation.³⁶ In the leading U.S. case, *Sigval Bergesen, as Owners of the M/T Sydfonn and others v. Joseph Muller Corporation*,³⁷ the U.S. Court of Appeals for the Second Circuit held that “the definition appears to have been left out deliberately in order to cover as wide a variety of eligible awards as possible.” The court adopted the view that the New York Convention left room for each state to define which awards are to be considered non-domestic.

Since the Convention does not define the term “non-domestic award,” it is apparent that this leaves states a

discretion to decide whether an award is or is not domestic. In some circumstances, national courts have considered whether an award should be regarded as a non-domestic award by looking at Article I of the Convention. When an award is made in one state but enforcement is sought under the procedural law of another state, the award is non-domestic within the meaning of Article I. For example, in *RZS Holdings AVV (United States) v. PDVSA Petroleos S.A. et al.*,³⁸ it was held that an award rendered in the United States was non-domestic since it was made according to a foreign procedural law and the ICC Arbitration Rules. In addition, when an award was made in the state in which enforcement is sought under the arbitration law of that state but involves one or more international elements, the award is non-domestic. In *Sigval*,³⁹ it was held that “inasmuch as it was apparently left to each state to define which awards were to be considered non-domestic, [...] Congress spelled out its definition of that concept in section 202.”⁴⁰

In defining whether an award is a foreign arbitral award, the territorial criterion and the non-domestic criterion as provided in Article I are important factors to be considered by contracting states. Pursuant to the New York Convention, the words “awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought,” and “awards not considered as domestic awards in the State where their recognition and enforcement are sought” should be interpreted broadly in the national legislation of the enforcing state.

2.1.2. Concept of recognition and enforcement

According to Article I(1) of the New York Convention, the “recognition and enforcement” of awards falls within the scope of the Convention. This term was used in Article 2 of the 1927 Geneva Convention and is frequently used in the New York Convention, but no definition is provided in either of these. The term “recognition” usually refers to a decision by the court where the recognition is sought on an issue already resolved in the arbitral proceedings.⁴¹ By contrast, the term “enforcement” refers to the process of accomplishing the decision of the arbitral tribunal, and not merely recognizing the legal effect of the award.⁴² The scope of these terms has been discussed in some cases. “Recognition” concerns recognizing the legal force and effect of an award, and “enforcement” concerns the forced execution of an award previously recognized by the same state.⁴³ The terms “recognition” and “enforcement” are linked, and whether a party must seek them together or separately has been decided in certain cases in different jurisdictions.⁴⁴ In some court decisions it has been held that recognition can be requested separately from enforcement.⁴⁵

The New York Convention does not define the terms “recognition” and “enforcement,” and they are rarely

interpreted in the case law. When an application for the recognition and enforcement of a foreign arbitral award is submitted, the national court of the enforcing country has to consider whether the applicant must seek recognition and enforcement together or separately. The meaning of the terms should be interpreted by the national legislation or the case law of the enforcing state, and the procedure for each action should be provided in the rules of the national legislation. In addition, the national law should provide the authority for the recognition and enforcement of foreign arbitral awards in a single court that focuses on that type of case and can be relied upon to resolve such cases appropriately and consistently.

2.1.3. Place

Under the New York Convention, the place for the recognition and enforcement of an arbitral award plays an important role. In principle, unless the arbitral award is considered to be non-domestic, the recognition and enforcement of the award cannot occur in the country in which the award was made.⁴⁶ The party seeking enforcement can select the appropriate place for the enforcement if the assets of the respondent are located in more than one country.⁴⁷ In choosing the place of recognition and enforcement, the attitude of the national court of the country in which the enforcement is sought, the applicability of public policy by the courts of that state, and the links between the place of enforcement and the place of arbitration (where the award was made) are important factors to be considered by the parties.⁴⁸

2.1.4. Applicable procedures

Pursuant to Article III of the New York Convention, the contracting state in which recognition and enforcement is sought must recognize an arbitral award as binding and must enforce it under the procedural rules of that state. In practice, national arbitration legislation procedures are not unified, and they differ from one country to the next.⁴⁹ In some countries, the procedures for the recognition and enforcement of foreign arbitral awards are regulated by specific enacted rules. If the state has no specific procedures, the rules that apply to the enforcement of domestic awards or the enforcement of court judgments might be considered.⁵⁰

Under the New York Convention, the party applying for recognition and enforcement must produce a duly authenticated original award and the original arbitration agreement, or a duly certified copy of those documents.⁵¹ Where the language of the award or the arbitration agreement is not an official language of the country in which enforcement is sought, a certified or sworn translation must also be produced.⁵²

These are the only requirements that must be fulfilled under the New York Convention by the party seeking enforcement of an award. Under Article V(1), the burden of proof that the requirements are not met lies on the challenging party. In this regard, the party seeking enforcement must ensure that the formal and procedural requirements are fulfilled.

According to Article III of the Convention, the contracting states are prohibited from imposing higher fees or charges for the recognition and enforcement of foreign awards than those that apply to domestic awards. The Convention aims to ensure there is no discrimination between domestic and foreign awards in the contracting states.

As a result of the differences in the procedures in the contracting states, the applicant seeking the recognition and enforcement of a foreign arbitral award must consider the diversity of the legislation in different states. Since states can act independently in relation to the procedures for the recognition and enforcement of foreign arbitral awards, simplifying these procedures might facilitate the recognition and enforcement process.

2.1.5. Time limits

An applicant for the recognition and enforcement of an award must also be careful to respect the time limits for the application. According to Article IV of the New York Convention, the documents must be supplied at the time of the application. If the applicant fails to submit all the documents at that time, a later submission may be problematic.⁵³ For example, the Italian courts have held that a failure to submit the necessary documents at the time of the application leads to a rejection of the application for recognition and enforcement.⁵⁴ Other courts have held that an applicant can provide the required documents in the course of the proceedings.⁵⁵

The New York Convention does not have time limitations for applications for enforcement. It is the national legislation that determines the exact time constraints for recognition and enforcement, and the time constraints differ from state to state.⁵⁶ For instance, the time limit under the U.S. Federal Arbitration Act is three years from the date when the award is made.⁵⁷ Under the Arbitration Act of the United Kingdom, the time limit is six years.⁵⁸

The above-mentioned rules for the recognition and enforcement of foreign arbitral awards under the New York Convention are the basic factors to be implemented through the national legislation of the contracting states. Since the terms “arbitral awards,” “foreign arbitral awards,” and “non-domestic awards” are not defined in the Convention, contracting states should define and interpret these terms in their national legislation. Meanwhile, although the term “recognition and enforcement” of foreign awards falls within the scope of the

Convention, it is not defined in the Convention. Although “recognition and enforcement” looks like a single concept, the national legislation of the contracting states should provide for the interpretation of each term and should contain procedures for applications for each of them. Moreover, the place of the recognition and enforcement of a foreign award is important for the parties in the arbitration. The enforcement proceedings, applicable procedures, and time limitations mainly depend on the national legislation and the jurisdiction of the country where enforcement of the arbitral award is sought. Thus, the national legislation and case law of the contracting states of the New York Convention should define and interpret in detail the terms and provisions for the recognition and enforcement of foreign arbitral awards.

2.2. Grounds for refusal of recognition and enforcement of foreign arbitral awards under the New York Convention

The New York Convention⁵⁹ and the UNCITRAL Model Law⁶⁰ both list the grounds for the refusal of the recognition and enforcement of foreign arbitral awards. The New York Convention encourages the enforcement of international arbitration awards by limiting the grounds for refusal.⁶¹ It contains limited procedural and substantive grounds for challenging the enforcement of an award. Article V(1) of the Convention contains procedural grounds for refusal, while Article V(2) contains substantive grounds.⁶² The burden of proof lies on the party objecting to the enforcement of the award.⁶³

2.2.1. Procedural grounds

The procedural grounds for refusing enforcement under Article V of the New York Convention can be summarized as follows:⁶⁴

- (a) invalidity of the arbitration agreement;
- (b) violation of due process;
- (c) the arbitrator exceeding his authority;
- (d) irregularity in the composition of the tribunal or in the arbitral procedure; and
- (e) award not being binding, or having been suspended or set aside, in the country of origin.

Several provisions, such as subsections (a), (b), and (d), concern due process.⁶⁵ If a party was subject to incapacity, or the arbitration agreement was not valid, the recognition and enforcement of the award may be refused under these clauses.⁶⁶

The contracting states of the New York Convention have accepted the due process defense as grounds for

refusing the recognition and enforcement of a foreign arbitral award. However, this defense may be rejected or accepted by the national courts. In this context, some cases dealing with the due process defense and its interpretation will be discussed in detail in the next chapter.

2.2.2. Substantive grounds

Moreover, Article V(2) of the New York Convention contains two substantive grounds that may be raised in an application for refusal. A court may apply its own law regarding these two grounds, which are (i) that the subject matter of the dispute cannot be submitted to arbitration, and (ii) that recognition and enforcement would be contradictory to public policy.⁶⁷ These grounds constitute the main argument for refusing the recognition and enforcement of an arbitral award. However, the Convention does not define the word “public policy”, leaving this to the domestic legislation. On a practical basis, the public policy defense denotes both of the substantive defenses.⁶⁸

The public policy ground for refusal is controversial, and the specific meaning of the concept is hard to pin down.

A theoretical understanding of this impediment and an understanding of how it is applied in practice is certainly vital in a country where an applicant seeks to enforce an arbitral award. The concept of public policy and the interpretation and application of this defense in the courts will be analyzed in the next chapter by reference to relevant cases.

In summary, this chapter discusses the interpretation of certain terms, certain procedural issues in relation to the recognition and enforcement of foreign arbitral awards, and the grounds for refusal under the Convention.

In the application of the New York Convention, the drafting and implementation of national legislation vary. If terms are not comprehensively defined in the national legislation, the national courts may fail to apply the Convention or may apply it incorrectly, and this may be undesirable in relation to the purpose of the Convention. Since the notion of an arbitral award is not defined in the Convention, it is questionable whether interim or provisional measures delivered by an arbitral tribunal constitute an arbitral award and are subject to recognition and enforcement under the New York Convention. In addition, to decide whether an award is domestic or foreign within the meaning of the Convention, the national legislation of the enforcing state should consider the place of arbitration and the procedural framework governing the arbitration.

As noted, the recognition and enforcement of foreign arbitral awards and the grounds for refusal lie at the root of the New York Convention. Since the terms “recognition” and “enforcement” are not defined in the

Convention, they should be interpreted by the national legislation or case law of the enforcing state. Detailed procedures for recognition and enforcement should then be set out in the rules and regulations of the national legislation.

Moreover, it should be recognized that the procedural requirements to be followed for the enforcement of a foreign arbitral award vary depending on the national legislation of the enforcing state. Detailed rules of procedure, such as provisions on the submission of the required documents and the time limits for an application for enforcement, should be made under the national arbitration law, the rules on arbitration law, procedural laws, and other related laws.

Likewise, the New York Convention allows the national courts to deny the recognition and enforcement of foreign arbitral awards. However, the national courts of the enforcing state have the discretion to recognize and enforce an award despite there being grounds justifying a refusal to do so. In this context, the judicial application and interpretation of the New York Convention regarding procedural and substantive issues relating to the recognition and enforcement of foreign arbitral awards has to be analyzed by studying cases from different contracting states. For this reason, the next chapter provides an analysis of cases in which applications were accepted or refused under the Convention.

3. Case law analysis of the grounds for refusal of recognition and enforcement of foreign arbitral awards under the New York Convention

In this chapter, the procedural grounds for refusal as a result of the due process defense under Article V(1), and the substantive grounds under Article V(2) regarding the public policy, will be discussed. With this objective, cases from different jurisdictions will be considered.

3.1. Case law analysis in relation to procedural grounds: due process defense

In the United States, the courts have refused to enforce arbitral awards only when the due process violations have been obvious. One particular case in which the court refused to enforce an arbitral award on the grounds of due process is that of *Iran Aircraft Industries and Iran Helicopter Support and Renewal Co. v. Avco Corp.*⁶⁹ The U.S. Court of Appeal for the Second Circuit refused to enforce an Iran–US Claims Tribunal award under Article V(1)(b) of the New York Convention.

In the case, Iran Aircraft and Avco had concluded many contracts for repairing aircraft engines. When the dispute was referred to the Iran–US Claims Tribunal, Avco asked the Tribunal, in a prehearing conference, how

it could prove a large number of invoices. The Tribunal allowed the defendant's audited accounts of invoices to be submitted instead of the invoices themselves, which would have weighed many kilos.⁷⁰ At the hearing stage, a new arbitrator questioned the method of proof, but Avco was not asked to produce the actual invoices. During its deliberation, the Tribunal refused to allow Avco's claims, and made an award accordingly. When Iran Aircraft tried to enforce the award in the U.S. district court, Avco defended the application on the grounds that it had not been able to present its case to the Tribunal. The U.S. district court accepted Avco's submission, and refused to enforce the award. The U.S. Court of Appeal for the Second Circuit confirmed the refusal, stating that the Tribunal had denied the defendant the chance to present its claims in a meaningful manner, as required by U.S. procedural due process laws, which provided that "the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."⁷¹

One judge argued in his dissenting opinion that the defendant was placed on notice by the new judge's repeated questioning regarding the method of proof, because it therefore was aware that the Tribunal might choose not to rely on the invoice summaries. In this judge's opinion, the defendant could have submitted the actual invoices to the Tribunal and was therefore able to present its case. The dissenting judge maintained that the due process defense should be narrowly construed, and that it only requires the parties to have had proper notice and an opportunity to respond.⁷²

This case reveals that the due process defense under Article V(1)(b) of the New York Convention should be narrowly construed in the United States. The U.S. district court also relied on Article V(1)(b) of the Convention in another case, and refused to recognize the arbitral award because the third party, arguing against the arbitral award, had not received proper notice of the arbitral proceedings.⁷³

However, most U.S. courts have rejected the due process defense. For instance, in *Fitzroy Engineering, Ltd. v. Flame Engineering, Inc.*,⁷⁴ the U.S. district court for the northern district of Illinois confirmed the award even though the party resisting the enforcement argued that a conflict of interest between its attorney and the other party undermined the award's validity. In this case, Fitzroy and its subcontractor Flame had concluded a contract for building an airport. When some errors occurred during the building, the parties attempted to settle their dispute by arbitration according to the contract. Flame appointed Bell Gully to represent it at the arbitration proceedings. Bell Gully told Flame that there was no conflict of interest. However, subsequent to the arbitration, Flame discovered that Bell Gully had acted for Fitzroy in unrelated claims. Flame claimed that by reason of that conflict Flame should not have appeared before the arbitrator. The court found that Flame had proper notice of the proceedings and no reason not to attend before the arbitrators, although the connection between Flame's

attorney and the operating company was questionable. Accordingly, the court rejected the due process defense of Flame, stating that a party's inability to present its case should be narrowly construed.⁷⁵

In the case of *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*,⁷⁶ the applicant ("Overseas") sought a refusal of an application for the enforcement of a foreign arbitration award under Article V(1)(b) of the New York Convention, but the U.S. court enforced the award, stating that the arbitral tribunal had not violated the party's due process rights by refusing to postpone the proceedings to accommodate the speaking schedule of a witness, where the tribunal had accepted and considered the witness's affidavit.⁷⁷

In the case of *Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Med. Instrument Co.*,⁷⁸ the grounds for refusal under Article V(1)(b) of the Convention were found to be inapplicable where the defendant could have presented a claim to the arbitral tribunal that the rights and liabilities under a sale commission agreement had not yet matured, but voluntarily absented itself from the proceedings.⁷⁹

In the case of *Licensor (Finland) v. Licensee (Germany)*, the German Court of Appeal dismissed the respondent's objection that the arbitrator had violated the principle of due process under Article V(1)(b) of the Convention. The court found that the right to due process in arbitration required that the arbitral tribunal took the statements of the parties into consideration. The court reasoned that the respondent had had a full opportunity to present its case.⁸⁰

Generally, the national courts review the procedural aspects of an award on the basis of the procedural nature of the due process. Courts have only refused to enforce a foreign arbitral award as a result of a due process defense in a few cases. The national courts of both common law and civil law countries have not generally accepted the due process defense,⁸¹ and this defense has been interpreted narrowly by the national courts.⁸² In deciding on a claim for the enforcement of a foreign arbitral award, the enforcing court has to consider the notions on procedural law of the enforcing country, and should narrowly construe the procedural defenses. If the national court of a contracting state finds that there has been a breach of due process, it has to consider the request of the losing party to refuse the recognition and enforcement of the foreign arbitral award. The courts of the contracting states should interpret the due process defense strictly in order to encourage the recognition and enforcement of foreign arbitral awards.

3.2. Case law analysis in relation to substantive grounds: public policy defense

Here, the public policy defense will be discussed by presenting some cases.

One notable case in which the court recognized and enforced a foreign arbitral award is *Parsons*.⁸³ In this case, a contract for the construction of a mill in Egypt with the assistance of the United States Agency for International Development (USAID) was concluded between an American corporation (“Overseas”) and an Egyptian corporation (“RAKTA”). There was an arbitration clause and a *force majeure* clause in the contract. The Arab–Israeli Six Day War took place before the commencement of the project, and as a result the diplomatic relationship between Egypt and the United States was interrupted and USAID assistance was withdrawn. RAKTA claimed damages for breach of contract, and began arbitration proceedings. Even though Overseas argued that the *force majeure* clause should apply, the final award was in favor of RAKTA. At the enforcement stage of the arbitral award in the U.S., Overseas sought to reject the enforcement, arguing that it would violate U.S. public policy. The Second Circuit court confirmed the award and dismissed the objection raised by Overseas. The court stated that the New York Convention’s public policy ground should be construed narrowly, and that the enforcement of arbitral awards may be denied only when enforcement would breach the most basic concepts of morality and justice in the United States.⁸⁴ The court held that the public policy exception must be construed in a narrow way and should only be invoked with care. In the words of the court, public policy would not be violated by enforcing an award rendered against a U.S.-based company for failing to complete a project in Egypt because of a break in diplomatic relations between two countries.⁸⁵

From this case, it can be said that interpretation of the public policy defense should not allow it to be converted from a defense with a narrow scope into a major loophole; the public policy defense should be narrowly construed. The enforcement of an award can be denied only when the forum state’s most basic notions of morality and justice have been violated.⁸⁶

On the other hand, there are some cases in which the national courts have refused to enforce arbitral awards on public policy grounds, although the national courts have rarely done so in respect of foreign arbitral awards. The case of *Laminoirs-Trefileries-Cableries de Lens SA v. Southwire Co.*^{106 (ND Ga., 1980)}⁸⁷ is one of the rare cases in which a United States court has refused to enforce a foreign arbitral award under the New York Convention on public policy grounds. In this case, Laminoirs, a French company, and Southwire, a U.S. corporation based in Georgia, had concluded a purchase agreement, and agreed to sell products at “world market price.” The contract contained an arbitration clause, and it stated that the law of Georgia was the governing law insofar as those laws were in accordance with French laws.⁸⁸ When a dispute arose over the interpretation of “world market price” and the products began to deteriorate, Laminoirs instituted arbitration proceedings according the contract. The arbitration tribunal held that Southwire should pay Laminoirs the higher world

market price, in addition to interest at the French legal interest rate.⁸⁹ Moreover, the interest rates would rise by five percent every two months from the date of the award, in accordance with French statute. When the U.S. District Court in Georgia enforced the award, Southwire argued that French interest rate went against the enforcing forum's public policy because it was exorbitant. The court noted that the French legal interest rate was not in conflict with Georgia's most basic notions of morality and justice, so that it was not contrary to public policy.⁹⁰ However, the court refused to enforce that part of the award which levied five percent interest in addition to the ordinary French interest rate if payment was late by more than two months. The court held that the additional interest violated public policy because it constituted a penalty rather than being compensatory and, therefore, that that portion of the award would not be enforced.⁹¹ According to public policy in Georgia, "[a] foreign law will not be enforced if it is penal only and relates to punishing of public wrongs as contradistinguished from the redressing of private injuries."⁹² Therefore, the court enforced the award regarding the French interest rate, but refused to impose the additional five percent interest.

In conclusion, the United States courts have refused to enforce a foreign arbitral award under public policy grounds, with some limitations.

In the English case of *Soleimany v. Soleimany*,⁹³ the English Court of Appeal refused to enforce an award on the basis of public policy. The case was based upon an illegal contract between a father and a son who were Iranian Jews. The son arranged to export carpets from Iran to England in a way that was contrary to Iranian law. The father and son entered into an agreement to split the profits of the sale.⁹⁴ The export of the carpets constituted smuggling because it breached Iranian revenue laws and export controls.⁹⁵ The father and the son fell into a dispute about their contract, and arranged for the issues to be resolved according to Jewish law (which was the governing law for the arbitration agreement).⁹⁶ An arbitral award was rendered in favor of the son, and he tried to enforce the award in England.⁹⁷ The father resisted the enforcement on the grounds that the award resulted from an illegal act and so was contrary to English public policy.⁹⁸ The High Court of England rejected the father's application, on the grounds that the arbitral procedure attributed no significance to the illegality and therefore the award became enforceable. The father then appealed to the Court of Appeal. The Court of Appeal of England and Wales first addressed the separability doctrine: not all illegal contracts will infect and void an arbitration agreement, and not all arbitration agreements will be valid regardless of whether there is a valid contract.⁹⁹ The court recited the rule that "it is contrary to public policy for an English award . . . to be enforced if it is based on an English contract which was illegal when made."¹⁰⁰ The court held that the contract was obviously illegal, and said that the parties would not be allowed to hide their illegal act by abusing the arbitration

proceedings and judicial process.¹⁰¹ In conclusion, the English court has refused to enforce a foreign arbitral award under public policy grounds.¹⁰²

As mentioned above, the decisions of courts around the world vary from case to case as regards the public policy defense under Article V(2)(b) of the New York Convention. The enforcing court does not review the reasoning of the tribunal, but only examines whether the recognition and enforcement of the foreign arbitral award would violate public policy. From the international concepts and notable cases regarding the notion of public policy, it can be said that there is no uniform definition of public policy and that the concepts and definitions of public policy are different in different countries. The narrow interpretation of the public policy defense has been developed widely in the case law of the United States, and courts in several other countries have cited U.S. cases when enforcement is being challenged on public policy grounds.¹⁰³ Similarly, the courts of both common law and civil law countries have construed the international public policy grounds strictly, and have refused to recognize and enforce arbitral awards in only a few cases.¹⁰⁴ The enforcement of awards has been refused on the basis of a narrow interpretation. However, in general, the reason for the existence of the public policy defense is to protect the essential principles and morals of the society in question. The basic fact is that every state has its own fundamental interests within which it has to consider a foreign arbitral award. However, these grounds should not be misinterpreted,¹⁰⁵ as contracting states have a general authority to restrict or prevent the recognition and enforcement of foreign arbitral awards.

3.3. Public policy and natural justice

Generally, the national legislation follows very closely the ideas of the New York Convention. Even though countries have relied on the public policy exception in their jurisdictions, some use the word “natural justice,” not “public interest” or “public policy”. In addition, while some developing countries have enacted a national arbitration law pursuant to the New York Convention, proceedings for the enforcement of foreign arbitral awards are still unknown to them. For instance, the Myanmar Arbitration Law provides a public policy defense (the Myanmar term is *Amyo Thar Akyo Si Pwar*).¹⁰⁶ Even though the term used in the Myanmar language is very similar to “public policy,” no additional definition of the concept of “public policy” is provided in the Myanmar Arbitration Law. Instead, the Myanmar Civil Procedure Code has an exception for the violation of “natural justice,” not on the grounds of “public interest” or “public policy.”¹⁰⁷ Some contracting states of the New York Convention acknowledge this issue in their legislation. For instance, the Arbitration Acts of Singapore,¹⁰⁸ Malaysia,¹⁰⁹ and New Zealand¹¹⁰ provide that a breach of natural justice is involved in the

concept of public policy.

It has been generally accepted that the expression “contrary to the public policy of that country” in Article V(2)(b) means “contrary to the fundamental conceptions of morality and justice” of the forum state, as mentioned above in section 3.2 in relation to the *Parsons & Whittemore Overseas Co v Societe Generale de L’Industrie du Papier (RATKA)* case.¹¹¹ In a notable case, *Amalal Corporation v. Maruha (NZ) Corp Ltd*,¹¹² the New Zealand court considered that a breach of the rules of natural justice in the arbitral proceedings would be regarded as being in conflict with the public policy of the state, which is a ground for setting aside the award.¹¹³ Moreover, in one Australian case, *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd*,¹¹⁴ it was held that if the breach of natural justice occurs regarding the making of the award, the award is contrary to the public policy of Australia in accordance with the International Arbitration Act 1974.

Therefore, it is apparent that the term “natural justice” is the same as the term “public policy” in the New York Convention. It has already been noted that the public policy notion is not precisely defined in countries around the world. To address this point, countries should consider that a breach of the rules of natural justice falls within the concept of public policy, or define the terms “public policy” and “natural justice,” or provide additional explanations in their national legislation.

To sum up, by studying cases from different countries, one can conclude that the national judicial enforcement regime plays a significant role in the recognition and enforcement of foreign arbitral awards. The interpretation of the procedural grounds for refusal, concerning the due process defense, and the substantive grounds, regarding public policy, mainly depends on the national legislation and the national court system of the enforcing country. When faced with an application for the enforcement of a foreign arbitral award, the judges of the enforcing court should handle the application with discretion and support the enforcement of arbitration awards with knowledge of international commercial arbitration practice. The national courts should decide whether to accept or refuse the foreign arbitral award, without discussing the merits of the award. A court’s willingness to interpret the grounds narrowly is important for the reciprocal enforcement of foreign arbitral awards, which is in the best interests of the contracting states.

4. Conclusion

In the area of international commercial transactions, international commercial arbitration is an important mechanism for resolving disputes. By means of the New York Convention, disputes over international commercial agreements can be resolved, and arbitral awards rendered by arbitral tribunals can be enforced,

more effectively. However, the provisions of the Convention cannot be interpreted and applied uniformly by all the contracting states, and the national arbitration laws and national court systems have to define the terms and interpret the concepts in relation to the grounds for the refusal to enforce a foreign arbitral award.

Chapter 2 of the present article describes the fundamentals of the recognition and enforcement of foreign arbitral awards under the New York Convention. It includes the definition of “arbitral award” and “foreign arbitral award,” the concept of recognition and enforcement, and the applicable procedures of the Convention and international jurisdictions. While the New York Convention leaves room for the contracting states to define certain terms, the national legislatures should use this opportunity and define the terms comprehensively in their national arbitration and procedural laws, even if the interpretations may vary according to the national legal system. If terms are not clearly defined in the national legislation, the national courts may apply the law imperfectly, and this may be adverse to the purpose of the Convention. Again, detailed provisions on the procedural rules should be contained in the national arbitration law and the related rules and procedures.

As for the grounds for refusal, as mentioned in Chapters 2 and 3, it is recognized that the national courts usually accept the decisions of arbitral tribunals and rarely refuse to enforce a foreign arbitral award. Most of the national courts have not accepted a wide definition of the due process defense or the public policy defense, which means that these defenses have been interpreted narrowly.

Concerning the public policy defense, a narrow interpretation of the defense has generally been recognized in the United States. Similarly, courts in several other states have construed the public policy ground strictly, and they have quoted U.S. cases when confronted with a public policy challenge to enforcement. Since there is no uniform definition of public policy, and the concepts and definitions of public policy are different in different countries, public policy is to be determined according to national law. It can be concluded that the public policy defense should be narrowly construed, so that there is not a broad interpretation. The enforcement of an award can be denied only when the enforcing state’s most basic notions of morality and justice are violated. In general, public policy is highly reliant on national fundamental interests and national legal principles. The public policy grounds should not be misinterpreted, although the contracting states have general authority to prevent the recognition and enforcement of foreign arbitral awards. To improve the enforceability of foreign awards in developing countries like Myanmar, some additional guidance should be provided in the Arbitration Law or other related laws about what is covered by the public policy concept. Countries whose courts accept an extensive interpretation of public policy can generally be considered to be less investor-friendly.

Finally, the conclusion of the present article is that the research question of this paper can be answered in

summary as follows:

The national legislation and national court system of the enforcing state should interpret the procedural grounds, such as the due process defense, and the substantive grounds, such as the public policy ground, narrowly so as not to allow a broad interpretation. These defenses should not be misinterpreted in the national interest of the enforcing state. The enforcement of an award should be refused only when the enforcing state's most basic notions of morality and justice are violated. In doing so, the national arbitration laws, other laws related to arbitration and the procedural laws of the enforcing state should contain comprehensive definitions of the terms and additional guidance or explanation of the exceptions, or the grounds for refusal of the recognition and enforcement of foreign arbitral awards under the New York Convention.

Endnotes

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- 34 www.legislation.gov.uk (last accessed on October 20, 2018).
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- 38 RZS Holdings AVV v. PDVSA Petroleos SA, 598 F. Supp. 2d 762 (E.D. Va. 2009).
- 39 Sigval v. Joseph supra note 37.
- 40 9 U.S.C. § 202 (1925). Section § 202 of the United States Federal Arbitration Act provides for the Convention to govern the recognition and enforcement of awards arising out of a relationship, whether contractual or not, that involves a party that is not a citizen of the United States or that “involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.”
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104 Amro, supra note 1, at 164.
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