Review of a Foreign Arbitral Award by National Courts: A Comparative Study in Common Law and Civil Law Countries

Ihab Amro*

Abstract
The New York Convention on the recognition and enforcement of foreign arbitral awards of 1958 (hereinafter “the NYC”) gives a national court the right to review the arbitral award before enforcing it in its own territory. In addition, national arbitration laws in the Contracting States grant courts the right to review the arbitral award in order to ensure that it meets the requirements for enforcement. Such judicial review differs from state to state and even from one court to another within the same state. The main grounds for the refusal of recognition and enforcement of a foreign arbitral award are exhaustively enumerated in Article V of the NYC. The additional grounds for the award’s review that may arise upon the request of the opposing party are mainly derived from Articles III and VII of the NYC. Those additional grounds include discovery of evidence, estoppel and waiver, counterclaims and set-offs and a period of limitation for enforcement. This article deals with the review of a foreign arbitral award by national courts of both common law and civil law countries including additional grounds for the award’s review, that is, USA and UK as common law countries; France, Germany and Greece as civil law countries.

1 Introduction
This article, focusing on the review of a foreign arbitral award in national courts of both common law and civil law countries as stated above, has two objectives. On the one hand, this article has a theoretical objective: it focuses on the theoretical matters relating to the review of a foreign arbitral award. These theoretical matters have a great impact on the efficacy of the arbitral process generally, and on recognition and enforcement particularly. On the other hand, this article

* Assistant Professor at Birzeit Law School (Palestine); an arbitrator. He holds a Ph.D degree from the Athens Law School in Greece.

has a practical objective: it focuses on the review of a foreign arbitral award in selected common law and civil law countries under the NYC by dealing first hand with many old and new courts’ decisions regarding the refusal of recognition and enforcement of arbitral awards in those countries based on some grounds aside from the above additional grounds, that is, in a case of non-binding arbitral award, lack of authentication and lack of burden of proof. It also analyses those decisions and the judicial errors that could have been avoided if the judges paid more attention to the procedural aspects of the arbitral process and the related laws and conventions. Therefore, this article discourages the strict judicial interpretation of the NYC and inclines toward adoption of a more liberal regime in favour of recognition and enforcement of arbitration agreements and foreign arbitral awards in the Contracting States’ courts.

In this article, I will deal with the recognition of a foreign arbitral award as binding, copies of agreement and award, burden of proof, discovery of evidence, estoppel or waiver, counter claims and set-offs against an award and a period of limitation for enforcement of an award. The article concludes with findings regarding the main ideas of the topic, and recommendations that draw up mechanisms for facing the new challenges of recognition and enforcement of arbitration agreements and foreign arbitral awards in the global economy; provisions that might be considered in the future in case of amendment of the NYC, de lege ferenda as opposed to de lege lata.

2 Recognition of a foreign arbitral award as binding

Each Contracting State shall recognize an arbitral award as binding and enforce it in accordance with its own rules of procedure. Awards are recognized and enforced in the Contracting States unless one of the grounds enumerated in Article V exists. Partial awards can also be recognized and enforced under the NYC. An arbitral award is binding; this means that the award is not open for any arbitral or judicial review under the law applicable to the award, either in the country of origin or in the country of enforcement. A court may only review the award itself, not the merits, as the NYC does not have a provision allowing such review. In any case, if the award has not yet become binding, the court has a discretionary power to refuse to recognize and enforce the award at the request of the opposing party, in accordance with Article V(1)(e) of the NYC. In practice, courts of common law and

1 Albert Jan van den Berg noted that the word “shall” has been left out in the text of the Convention as published in U.N.T.S 330. According to him, this must be considered as a printing error. See ‘Index of Court Decisions New York Convention 1958’, V Yearbook Commercial Arbitration (1980), (hereinafter YB), p. 281.

2 NYC, Art. III. This part of Art. III of the Convention will be the basis for analysis of the additional grounds for refusing recognition and enforcement.

3 NYC, Art. V(1)(3).