УДК 341.63(73)"1958"

A. LISTOVSKA,
L.L.M.
research associate at the South Regional Center
of the National Academy of Legal Sciences of Ukraine

GROUNDS FOR REFUSAL OF RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION OF 1958

Summary. Article is devoted to the legal research of the grounds for refusal of recognition and enforcement of arbitral awards under the New York Convention of 1958, their theoretical explanation by both foreign and national scholars, and analysis of the relevant case law, including Ukrainian court practice.

Keywords: grounds for refusal, recognition and enforcement, arbitral award, lex fori grounds, ex officio grounds, arbitrability, public policy, case law.

Relevance of the topic. Due to the growing development of an arbitral mechanism for dispute resolution, a number of problems with proper recognition and enforcement of arbitral awards appeared, particularly regarding grounds for refusal of such recognition and enforcement. The core instrument in this field is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereinafter — the New York Convention). Although the conventional mechanism regulating these issues was established in the second half of a previous century, a question on its analysis remains crucial for both law scholars and practitioners. Besides, this Convention became an integral part of national legislations worldwide, and Ukraine is not an exception, that causes not only the relevance of the topic, but also its practical importance.

Analysis of recent research and publications. A significant contribution to the study of the grounds for refusal of recognition and enforcement of foreign arbitral awards in international commercial arbitration has been made by such scholars and practitioners in the sphere of international arbitration as Albert Jan van den Berg, E. Gaillard, M. Kronke, F. Redfern, A. Tweeddale, M. Selivon, I. Pobirchenko, M. Malskyy, Zakharchenko T., H. Tsirat, S. Kravcov, V. Kisil, A. Dovhert and others.

Main material. Under the New York Convention the court may refuse to enforce and recognize the one at the request of the party against which it is invoked. To avoid any abuses, Article V of the Convention established a fixed list of grounds for refusal, which are generally considered to be exhaustive. They are as following (*lex fori grounds*) [1]:

(a) the parties to the agreement were under some incapacity or the agreement is not valid;

(b) a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was not able to present its case;

(c) the award deals with a matter outside the reference to arbitration;

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, if no agreement, in accordance with the law of the country where the arbitration took place;

(e) the award has not yet become binding, or has been set aside or suspended.

Two more grounds form a separate group, taken into consideration by a competent court on its own discretion, those called *ex officio*:

(a) the subject matter of the difference was not capable of settlement by arbitration in the country where enforcement is being sought; or

(b) the recognition or enforcement of the award would be contrary to the public policy of the country where enforcement is being sought.

These grounds are mirrored in Article 36 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law, Kiev Agreement on Procedure of Settling Disputes of 1992 (Article 9), Code of Civil Procedure of Ukraine (Article 396), and the Law of Ukraine «On international commercial arbitration» (Article 36).

According to Zakharchenko T., the first group of grounds may be divided into the following two subgroups: 1) Jurisdictional grounds related to the objections against the validity of the arbitration award and competence of arbitration (a, c); 2) Procedural grounds related to the shortcomings within arbitration proceedings (b, d) as well as to the entry into force of the arbitration award and its contesting (e) [9].

The first ground refers to the incapacity and invalidity issues. Article V (1) (a) of the New York Convention permits a party to challenge the enforcement of an award on two bases. First, where one of the parties is under some incapacity; and, second, where the agreement is invalid under the law to which the parties had subjected it or, if not subjected to a law, under the law of the country where the award was made. This ground is, however, rarely used in application to resist enforcement of an arbitral award. Issues of capacity or validity are usually raised at the outset of the arbitration and a party that does not raise an issue of capacity or validity at the outset may find that it is stopped from later arguing this issue before the enforcing court.

In relation to challenges for invalidity a party must show that the constituent elements necessary to create the arbitration agreement do not exist. In *Encyclopedia Universalis SA v Encyclopedia Britannica Inc* the agreement was subject to the law of New York. The court held that in order to show that the arbitration agreement was invalid a party had to prove that the agreement was either impossible or frustrated. The event giving rise to the invalidity therefore had to amount to a 'virtual cataclysm'.

The second ground has an important practical meaning and should be analyzed wider. As follows, under the Article V (1) (b) the recognition and enforcement of a foreign arbitral award may be refused at the request of the party against which it is invoked, only if that party furnishes proof to the competent authority where the recognition and enforcement is sought that it was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case. For the purposes of the Convention, a due process violation is considered fundamental if its touches the issues of

fairness or concerns the independence and impartiality of arbitral tribunal. It is a fundamentally that there must be a fair resolution of the issues by an independent and impartial tribunal, and adversary proceedings, also referred to *as audi et alteram partem* [7].

The question when a notice can be considered as proper depends on the facts of the case. It is generally accepted that, arbitration being a private manner of settlement of disputes, the notice need not be in an official form as is laid down in certain laws. In Ukraine, for instance, according to Art.3 of the Law of Ukraine on International Commercial Arbitration, any written notice shall be deemed received by the party if delivered to the addressee personally or to the addressee's commercial enterprise at his/her permanent place of residence or mailing address, and if such may not be established by way of reasonable inquiries, the written notice shall be deemed received if mailed to the last-known location of the commercial enterprise, permanent place of residence or to the mailing address by registered mail or otherwise with the registration of such notice delivery attempt.

As practice demonstrates, the parties objecting to the recognition and enforcement of awards often refer to the lack of proper notification of the party. In *Rangedale Limited v. South Airlines Limited Liability Company* case the Primorskyy District Court of Odessa City considered an issue of due violation. The Ukrainian company stated that the notification, given by the claimant (Rengedale Limited) is not in accordance with the Rules on the Provision of Postal Services, and that neither official of the South Airlines did not receive a proper notice of the proceedings, so was deprived of the right to participate in the arbitration and provide evidence in defence of their interests. The Court found arguments of the respondent on the issue acceptable and therefore refused to enforce the arbitral award [3].

There were interesting practices in the United Kingdom, case *Bernuth Lines Ltd v High Seas Shipping Ltd*, when the court found serving the notice by email as effective means. The email was ignored by the staff of the respondent as it was received as spam, but the court nonetheless considered it a valid, stating that «there was no reason why delivery of a document by email — a method habitually used by businessmen, lawyers and civil servants — should be regarded as essentially different from communication by post, fax or telex». The relevant case is in Ukrainian practice as well — *Nibulon SA v Nasynnya-Agrokhim*, where the notice by e-mail was considered as proper and the award of GAFTA Tribunal was recognized. Such an approach is more positive practically and one can say that it generally supports the use of arbitration, where it has been agreed between the parties.

From all mentioned above the following thesis derives: the violation of a due process as the ground for refusal may be interpreted widely by courts, but in every relevant case, firstly, that is the burden of proof is still fell upon the party against which an arbitral award is invoked, and secondly, it is in the best interests of the winning party to ensure that arbitration process fully complies with all related legal means.

The third ground for refusal deals with questions of scope of jurisdiction. Art. V (1)(c) states that enforcement may be refused where the «award deals with difference not contemplated by or not falling within the terms of the submission to the arbitration». Then

it includes the provision whereby if the award can be separated then those parts that are within the jurisdiction of the arbitral tribunal should be enforced. In each case it will be a question of fact whether the arbitration agreement is sufficiently wide to cover the disputes that have been referred to arbitration. In *Ministry of Defense of Iran v Cubic Defense Systems* Cubic claimed that an award should not be enforced under Article V(1)(c) because the award dealt with arguments not advanced in the legal submissions of the parties. The court stated that the question was whether the award exceeds the scope of the arbitration agreement, and concluded that: "The ICC Award resolves the parties' claims arising from these Contracts and the fact that the Award is not based on the same legal theories as stated in the pleadings cannot be a basis for refusing to confirm it".

The fourth ground relates to the irregularity in the composition of the arbitral tribunal or arbitral procedure. Under Article V(1)(d) the respondent may oppose recognition and enforcement on the ground that the composition of the arbitral tribunal or the arbitration proceedings did not comply with the parties' agreement or, where there is no agreement, that it did not comply with the law of the country where the arbitration took place [4]. Andrew Tweeddale in his book considers this ground in three scopes: 1) The gravity of the breach of procedure (e.g. *Karaha Hodat Co LIX. v Perusahaan Pertambangan Minyak Dan Gas Burnt Negara*); 2) Conflicts between the agreed procedure and the law of the place of the arbitration (e.g. *Metex Andelslag VS v Turkiye Electrik Kumuru Genel Mudurlugu General Directorate*); 3) Arbitrator bias and partiality (e.g. *Commonwealth Coating Corp v Continental Casualty Co*).

The recognition and enforcement of the award may also be refused if "the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made" [1]. As we see, all of three grounds are alternative.

It is not entirely clear what situations the drafters of the New York Convention had in mind when they included the provision regarding an award being suspended. In *Apis AS v Fantazia Kereskedelmi KFT* the English commercial court considered an issue, and stated that an award may be suspended by a competent authority in the country in which the award was made. The power to suspend an award pending the resolution of an application to set aside has been recognized in a number of other countries. In *Gabon v Swiss Oil Corp* the Grand Court of the Caymen Islands held that the decision to suspend was a function of courts of law and those awards were not suspended simply because a party had lodged an appeal or challenged the award in the courts of the place where the award was made [6].

The issue of when an award becomes binding is determined in different ways by different countries. One opinion is that an award becomes final solely following the consideration of the application to reverse an arbitration award and the refusal to satisfy such application. Along with this opinion and the practice of international commercial arbitration, there is another approach, whereby an arbitration award becomes final immediately upon the rendering of such award, since appealing against such an award on merits is

not permissible [2]. In the majority of countries, including Ukraine, the last approach is invited.

In addition to the five grounds of challenge, Article V(2) sets out a further two on which a court may refuse to enforce an arbitration award. The first one relates to the arbitrability of the dispute and the second one to issues of public policy. They provide the court with some latitude to review an award in order to ensure that the award meets that enforcing country's basic requirements of fairness and equity, and that the dispute was capable of settlement by arbitration under its law.

There is no internationally accepted definition as to what issue are or are not arbitrable. For instance, criminal cases or cases affecting the rights of the third parties are generally not arbitrable. National legal systems have reserved a number of issues for adjudication by the judiciary, thus making them non-arbitrable. Classic examples include antitrust, the validity of intellectual rights, family law and the protection of weaker parties, all of which differ from country to country [4].

As a means of limiting court control of the arbitrability of a dispute, more and more countries are making a distinction between the arbitrability of domestic and of international disputes. According to Gaillard and Savage, such a distinction enables "a dispute to be found non-arbitrable under a country's domestic law, without necessarily preventing the recognition in that country of a foreign award dealing with the same subject matter" [5].

As Ukrainian scholars admit, disputes that can be referred to international commercial arbitration and thus, can be deemed arbitrable under the law of Ukraine are generally outlined in the Law of Ukraine on International Commercial Arbitration. For instance, disputes arising from contractual and other civil law relations connected with foreign trade and other types of international business, when the place of business of at least one party is located abroad, as well as disputes involving enterprises with foreign investments and international associations established on the territory of Ukraine, can be referred to international arbitration on the parties' consent. At the same time, pursuant to the Code of Economic Procedure of Ukraine a dispute that lies within the jurisdiction of economic courts can, be submitted by the parties to be settled by arbitration, except for disputes related to the invalidation of acts and disputes arising from the conclusion, amendment, termination and implementation of commercial agreements related to the satisfaction of the needs of the state.

On the basis of examined information, a clear conclusion could be made that the non-arbitrability of an award is determined according to the law of the country where recognition and enforcement is sought.

The final ground to analyze is the violation of rules of public policy that is of vital importance while protecting public interest. Public policy is a functional concept; therefore it is particularly difficult to give a uniform definition of it. The question arises whether the notion of public policy is to be interpreted in the same way in both domestic and international cases. Although paragraph 2(b) is not explicit on this point, the view prevails that the reference in that provision to public policy is «in fact a reference to the international public policy of the host jurisdiction». For example, the United States District Court of Pennsylvania in its decision in *CBS and others v. WAK*

Orient Power & Light Ltd, found: "The public policy exception is very narrow... The courts have held that the exception is only applicable when enforcement would violate the forum state's most basic notions of morality and justice".

There is one more view, which is in the minority, that the Court of Appeal of Milan defined the notion of international public policy in *Allsop Automatic Inc. v. Techoski snc* as follows: "...the so called international public policy, being a body of universal principles shared by nationals of similar civilizations, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions" [8].

As for the Ukrainian legislation, it has the following provisions related to international public order. Pursuant to Article 12 of the Law of Ukraine on International Private Law, a legal norm of a foreign state shall not be applied when the application of such results in consequences that are clearly incompatible with fundamental law and order (public order) of Ukraine. In view of the above, it can be concluded that the notion of public order is identified with the notion of fundamental law and order, which, as is widely known, is established by the Constitution of Ukraine. When considering applications for the recognition and enforcement of arbitration awards in Ukraine, the courts were, for quite a while, governed by Resolution No. 12 of the Plenum of the Supreme Court of Ukraine from 24 December 1999, where public order was perceived as the legal order of the state and fundamental principles which form the basis for the order existing in the state (regarding its independence, integrity, autonomy and immunity, fundamental constitutional rights, freedoms, guarantees, etc.).

For instance, there was a decision of the Kyiv Court of Appeal of 22 April 2009 on the case between Russian joint-stock and Ukrainian limited liability company, where it concluded that the award can be recognized as such that is contrary to public order if the enforcement of such award will result in actions that are either directly prohibited by the law or will damage the sovereignty or security of the state, actions related to the interests of large social groups and incompatible with the principles of the development of an economic, political and legal system of the state, as well as actions that conflict with fundamental constitutional human rights and those of its citizens.

It could be summarized on the matters of grounds for refusal of recognition and enforcement of arbitral awards, that the one must be very careful to apply every clause of Article V of the New York Convention, as the majority of issues are still determined according to the laws of the country where recognition and enforcement is sought, and judges, in turn, should thoroughly study the experience of the courts practice in the pro-arbitration European and American countries to make the whole arbitration process on the stage of recognition and enforcement of arbitral awards more successful.

LIST OF REFERENCES

1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards [E-source]. — New York, 1958.

2. Брунцева Е.В. Международный коммерческий арбитраж : учеб. пособ. для высш. юрид. учебн. заведений. — СПб. : Изд. дом. "Сентябрь", 2005. — С. 255.

3. Єдиний державний реєстр судових рішень [E-source]. — Mode of access: http://www.reyestr.court.gov.ua/ Review/25657583.

4. Albert Jan van den Berg, T.M.C. Asser Instituut. The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation // Kluwer Law & Taxation, 1994. — P. 322.

5. Gaillard E., Goldman B., Savage J., Fouchard, Gaillard, Goldman on International Commercial Arbitration. — Kluwer Law International, 1999. — 1280 p.

6. Kronke H. Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention. — Kluwer Law International, 2010. — P. 236.

7. Tweeddale A. Arbitration of Commercial Disputes: International and English Law and Practice / Andrew Tweeddale, Keren Tweeddale. — Oxford University Press Inc, New York, 2005. — 1010 p.

8. UNCTAD/EDM/Misc.232/Add.37 [E-source]. — United Nations, 2003. — Mode of access: http://unctad.org/en/docs/edmmisc232add37_en.pdf

9. Zakharchenko T. The Recognition and Enforcement of International Arbitration Awards in Ukraine: Theory and Practice / T. Zakharchenko, M. Tepliuk // Law of Ukraine. — Kyiv, 2011, № 2. — C.167-190.

Лістовська А.В.

Підстави для відмови у визнанні та виконанні арбітражних рішень за Нью-Йоркською конвенцією 1958 р.

Анотація. Дана стаття присвячена правовому дослідженню підстав для відмови у визнанні та виконанні арбітражних рішень відповідно до положень Нью-Йоркської Конвенції про визнання та виконання арбітражних рішень 1958 року. Звертається увага на теоретичне обґрунтування таких підстав як іноземними, так і вітчизняними науковцями, а також аналізується релевантна судова практика, у тому числі українських судів.

Ключові слова: підстави для відмови, визнання і виконання арбітражного рішення, підстави lex fori, підстави ex officio, арбітрабільність, державна політика, судова практика.

Листовская А.В.

Основания для отказа в признании и исполнении арбитражных решений по Нью-Йоркской конвенции 1958 г.

Аннотация. Данная статья посвящена правовому исследованию оснований для отказа в признании и исполнении арбитражных решений в соответствии с положениями Нью-Йоркской Конвенции о признании и исполнении арбитражных решений 1958 года. Обращается внимание на теоретическое обоснование таких оснований как иностранными, так и отечественными учеными, а также анализируется релевантная судебная практика, в том числе украинских судов.

Ключевые слова: основания для отказа, признания и исполнения арбитражного решения, основания lex fori, основания ex officio, арбитрабильность, государственная политика, судебная практика.