Recognition and Enforcement of Foreign Arbitral Awards in Theory and in Practice

Recognition and Enforcement of Foreign Arbitral Awards in Theory and in Practice: A Comparative Study in Common Law and Civil Law Countries

By

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To the soul of my sister Rania who left this life early

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INTRODUCTORY NOTE

This book, which is originated from a doctoral thesis presented by the author at the Athens Law School in Greece in 2011 under the supervision of Prof. Dr. C. Polyzogopoulos, deals with the fundamentals of international commercial arbitration in a global economy, and addresses the question of which international conventions apply to the recognition and enforcement of foreign awards, and how the New York Convention on the recognition and enforcement of 1958 deals with the matters concerning recognition and enforcement of foreign awards. In addition, this book addresses the question of whether the New York Convention meets the practical needs of those involved in international commercial transactions. This book also addresses the question of whether national acts of arbitration in both common law and civil law countries deal with the matters pertaining to recognition and enforcement liberally, and to what extent they adopt the New York Convention as an integral part of their national laws. In terms of practice, the book addresses the question of how national courts in both common law and civil law countries apply the New York Convention, and whether courts apply the provisions of national acts of arbitration liberally, especially those provisions that concern recognition and enforcement of foreign arbitral awards.

On the one hand, the book has a theoretical importance because it focuses on the theoretical matters relating to recognition and enforcement of foreign arbitral awards. These theoretical matters have a great impact on the efficacy of the arbitral process generally, and on recognition and enforcement particularly. Such matters include the fundamentals of recognition and enforcement of foreign arbitral awards; the role of the international arbitration institutions as to recognition and enforcement; recognition and enforcement of foreign awards under the international treaties and conventions, especially the New York Convention of 1958. Apart from that, the theoretical matters deal with recognition and enforcement in light of national acts of arbitration in both common law and civil law countries, namely, the Federal Arbitration Act in the United States of 1925 and the English Arbitration Act of 1996 as common law countries and the New Code of Civil Procedure of 1981 in France as amended in 2011, the New German Arbitration Law of 1998 and the

Greek law on international commercial arbitration of 1999 as civil law countries.

On the other hand, the book has a practical importance because it focuses on the issues of recognition and enforcement of foreign arbitral awards in selected common law and civil law countries under the New York Convention of 1958. That is, the book deals firsthand with a lot of old and new courts decisions regarding recognition and enforcement of arbitration agreements and arbitral awards in the above common law and civil law countries. It also provides an analysis of 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 book discourages the strict judicial interpretation of the New York Convention 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.

The main reason for selecting this topic relates to the importance of international commercial arbitration as a method for solving international commercial disputes between private parties. It also relates to the importance of the New York Convention for the business world, and the differences that may arise in its application in national courts of both common law and civil law countries. An additional reason for selecting this topic is the necessity for providing new materials on international commercial arbitration, for those academics, arbitrators, legal practitioners, corporate counsels, practicing lawyers and law students around the world, who are interested in international commercial arbitration and in international investment arbitration. The final reason for selecting this topic is that the book may constitute a good source for business people involved in international trade, and who are willing to solve their disputes through arbitration, so that they can reinforce their knowledge of the fundamentals of international commercial arbitration, and know the best ways for recognizing and enforcing foreign arbitral awards.

The book has a substantive scope because it deals only with recognition and enforcement of foreign arbitral awards. That is to say, it excludes the matters relating to the enforcement of foreign judgments, domestic judgments or domestic awards. Thus, the book focuses on the New York Convention of 1958 which is, as some commentators say, the main pillar in the edifice of international commercial arbitration. The book also has a territorial scope because it deals with recognition and enforcement of foreign awards in some common law and civil law

countries, namely, the United States, the United Kingdom, France, Germany and Greece. Rather, the book excludes national acts of arbitration and courts decisions of other common law and civil law countries. Even though the book reviews a number of cases in relation to recognition and enforcement of a foreign arbitral award in the above countries, it is beyond the scope of the book to provide a review of all cases in those countries. Finally, the book has a conceptual scope because it conceptualizes recognition and enforcement in those cases where no possibility for dealing with this topic based on the territorial approach is available.

The book depends on the following methods of research:

1. Descriptive or informative study: the book reflects the descriptive method of research through dealing theoretically with the fundamentals of recognition and enforcement of foreign arbitral awards, the international conventions relating to recognition and enforcement and with national acts of arbitration in some common law and civil law countries.
2. Case study: through study of cases from common law and civil law countries based on case-by-case analysis, the book covers many issues relating to recognition and enforcement of foreign arbitral awards. These cases focus on the application of the New York Convention in national courts of both common law and civil law countries, and the differences arising out of such application. As such, the book provides many arguments that oppose or support different propositions.
3. Comparative study: the book compares national acts of arbitration in both common law and civil law countries to the New York Convention of 1958. It also compares courts decisions that apply the New York Convention in common law countries to those in civil law countries. In some situations, the book compares between courts decisions of the same state.
4. Analytical study: this kind of study depends on the substance and procedure more than formality. Therefore, this book mainly focuses on the substantive and the procedural issues of recognition and enforcement of foreign arbitral awards.

The book mainly consists of two parts: the first part concerns the international legal framework of recognition and enforcement of foreign arbitral awards. This part encompasses three chapters. Chapter one involves a theoretical approach on recognition and enforcement of foreign arbitral awards including the role of the International Arbitration

Institutions. Chapter two deals with the relevant international arbitration Treaties and Conventions and their application to recognition and enforcement of foreign arbitral awards. Chapter three addresses firsthand the liberalization of national arbitration acts in the above common law and civil law countries through examining issues that are related to recognition and enforcement of foreign arbitral awards.

The second part concerns the judicial application of the New York Convention on the recognition and enforcement of foreign arbitral awards in the above common law and civil law countries. This part also consists of three chapters. Chapter one involves a practical approach on the New York Convention of 1958 including the preliminary provisions derived from the convention, and the validity of an arbitration agreement as a prerequisite for recognition and enforcement of foreign arbitral awards. Chapter two concerns the judicial review of foreign arbitral awards in national courts. Chapter three is devoted to the refusal of recognition and enforcement of foreign awards and its application in national courts.

The book concludes with findings regarding the main ideas of the topic, and recommendations that draw up the mechanisms for facing the new challenges of recognition and enforcement of foreign arbitral awards in the global economy, that is, provisions that might be considered in the future in case of amendment of the NYC or national laws of arbitration, *de lege ferenda* as opposed to *de lege lata.*

LIST OF ABBREVIATIONS

Art	Article
Arts	Articles
ASA	Arbitration Society of America
AAF	American Arbitration Foundation
ADR	Alternative Dispute Resolution
AAA	American Arbitration Association
CCP	Code of Civil Procedure
CCI	Chambre de Commerce Internationale
CIETAC	China International Economic and Trade Arbitration Commission
EC	European Community
ECOSOC	United Nations Economic and Social Council
Et al	And Others
FAA	Federal Arbitration Act
F.R.	Federal Republic
GLICA	Greek Law on International Commercial Arbitration
GCCP	Greek Code of Civil Procedure
GCC	Greek Civil code
ICCA	International Council for Commercial Arbitration
IBA	International Bar Association
ICA	International Commercial Arbitration
ICDR	International Centre for Dispute Resolution
ICSID	International Centre for the Settlement of Investment Dispute
ICC	International Chamber of Commerce
Infra	Below
Int'l Law	International Law
LCIA	London Court of International Arbitration
NCCP	New Code of Civil Procedure
NYC	New York Convention
No	Number
Neth	Netherlands
ODR	Online Dispute Resolution
PCA	Permanent Court of Arbitration
P	Page

Para	Paragraph
PR	People Republic
Sec	Section
§	Section
Supra	Above
TOR	Terms of Reference
UNCITRAL	United Nations Commission on International Trade Law
U.N.T.S	United Nations Treaty Series
U.S.	United States
U.K.	United Kingdom
Vol.	Volume
WTO	World Trade Organization
WIPO	World Intellectual Property Organization
YB	Yearbook Commercial Arbitration
ZPO	Zivilprozeßordnung “German Code of Civil Procedure”

PART I

THE INTERNATIONAL LEGAL FRAMEWORK FOR RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

The concept of international commercial arbitration (ICA) is considered a major part of private international law, especially in the area of international commercial transactions. ICA is one of the preferred methods for solving the cross-border commercial disputes that often arise in the area of international trade law.[1] This is attributable to the emergence of international investment, and the shift in economic development policies in many countries, from socialist to neo-liberal development policies.[2] Furthermore, the growth of ICA relates to the new developments in world trade including e-commerce. This growth has encouraged national legislations to intervene, mainly for protecting private parties involved in international commercial arbitration.

Parties have other ways to solve their commercial disputes aside from arbitration. The first way is to submit the dispute to a court of law (Litigation), and the second way is to use alternative dispute resolution techniques (ADR) such as Negotiation, Mediation,[3] Conciliation, Mini-trial, Expert Determination, Neutral Evaluation and Adjudication.

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[1] The recent term is world business law as it is used by the international arbitration institutions including the ICC Institute of World Business Law.

[2] For the historical developments of arbitration *see:* TRWIANOS/ SP/BELISSAROPOYLOY/ KARAKWSTA, History of Law, 3rd edition, Sakkoulas Publishers, pp. 25-31 (author's translation). The edition in Greek: (ΤΡΩΙΑΝΟΣ, ΣΠ/ΒΕΛΙΣΣΑΡΟΠΟΥΛΟΥ, / Ι, ΚΑΡΑΚΩΣΤΑ, ΙΣΤΟΡΙΑ ΔΙΚΑΙΟΥ, Τρίτη Έκδοση). ΑΘΗΝΑ-ΚΟΜΟΤΗΝΗ, ΕΚΔΟΣΕΙΣΑΝΤ. Ν. ΣΑΚΚΟΥΛΑ, 2002, Σ. 25-31.

[3] Commentators generally divide mediation into two kinds: judicial mediation and non-judicial mediation. The judicial mediation occurs inside the court, and the judge performs the role of the mediator judge in order to help parties reach a settlement for their dispute (judicial compromise) whereas non-judicial mediation occurs out of the court, and be performed by a private mediator.

ICA differs from litigation in many aspects. ICA is a private mechanism in which the parties have their own judges[4] and can agree on the applicable arbitration rules and the substantive law governing the dispute. ICA is more flexible, easier, quicker, confidential, informal and neutral. Most notably, ICA is more efficient and conclusive than litigation. Furthermore, business people consider ICA an attractive and comparative method of solving international trade disputes. ICA also has technocratic (technical and political) advantages in comparison to litigation.[5] Finally, ICA comprises the commercialism and the internationalism; thus, the notion of the international arbitration consists of judicial and economic concepts.[6] It also consists of ethical and procedural concepts.

Alternative Dispute Resolution mechanism (ADR), also known as "Amicable Dispute Resolution" is a possible alternative to international commercial arbitration. This mechanism of solving disputes aims at finding a solution between parties in different ways but without a binding award, unlike arbitration, which guarantees that an award will be enforced when it meets the basic requirements of enforcement. In addition, through ADR, it is possible to find a solution for partial disputes between parties, whereas arbitration requires a real and complete dispute. It is also possible through ADR to solve some kinds of disputes that cannot be arbitrable, such as family law disputes and criminal law disputes.[7] ADR does not give parties the right to appeal whereas arbitration allows parties to set aside the award. Finally, unlike arbitration, ADR does not have many international rules yet.[8]

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[4] Co-operation between arbitrators and parties constitutes an additional feature of arbitration, in comparison to litigation.

[5] Regarding the technocratic advantages of arbitration *see*: SHALAKANY, Amr A. "Arbitration and the Third World: A Plea for Reassessing Bias Under the sector of Neoliberalism", Harvard International Law Journal, Vol. 41, Number 2, spring 2000, pp. 434-437.

[6] For the criterion of commercialism and the criterion of internationalism of international arbitration *see*: DE BOISSESON, Matthieu. "The French Law of Arbitration–Domestic and International–", GLN- edition, 1990 (author's translation), pp. 416-427. The French edition: (Le droit français de l'arbitrage-interne et international-, GLN-éditions, 1990).

[7] In Austria for example, such disputes can be solved by mediation.

[8] The advantages of ADR in comparison to litigation-according to some commentators- as the following:
1- saving of expenses 2- avoidance of the rule that says everything or nothing that is applied in the court, which depends basically on the legal criterion solution as known as (interest-based rather than rights – based) 3- ability for entrance of a

In addition to international arbitration, commercial arbitration also includes domestic arbitration. The primary difference between international and domestic arbitration is that each has different rules or provisions. Moreover, the definition of international arbitration differs from the definition of domestic arbitration. International arbitration usually takes place between parties from different states or between one party from one state and a government of a foreign state, whereas domestic arbitration usually takes place between citizens or residents of the same state. Arbitration is considered international when the parties have their places of business in different states and if the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.[9]

In this context, recognition and enforcement of a foreign arbitral award is very important as it occurs within the framework of international and regional arbitration conventions. As a result, most countries have enacted national arbitration legislations for solving the commercial disputes.

I will begin this Part with a theoretical approach focusing on the fundamentals of recognition and enforcement and the institutional framework of recognition and enforcement of foreign arbitral awards.

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third person to the dispute 4- re-conciliation between the parties 5- in ADR there is consensus, continuity, control, confidentiality.

[9] *See*: Art. 1(3) of the Model Law on International Commercial Arbitration of 1985 (United Nations document A/40/17, annex 1), adopted by the United Nations Commission on International Trade Law on 21 June 1985. The Model Law has been amended in 2006. The amendments related to articles 1(2), 7, and 35(2), a new chapter IV A to replace article 17 and a new article 2 A were adopted by UNCITRAL on 7 July 2006. The revised Model Law will be dealt with in detail in chapter three of this Part.

CHAPTER ONE

A THEORETICAL APPROACH ON RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

If parties comply with an arbitral award, the award is enforced amicably. When one of the parties does not voluntarily comply with the award, the other party may seek to recognize and enforce such award in the country in which the other party has assets. The losing party in the arbitration has the right to set aside the arbitral award. The challenge of an award aims to modify or to set aside the award[10] whereas recognition and enforcement aims to put the award into effect.

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention, hereafter "NYC") is considered the foundation for the enforcement of foreign arbitral awards. Under the Convention, parties from different countries and legal systems have the right to settle their commercial disputes through the legal system in a third country, and to enforce an arbitral award in any other NYC Member State. The NYC applies to arbitral awards made in a country other than the country in which the winning party seeks enforcement. The NYC deals primarily with recognition and enforcement of foreign arbitral awards, and partially with recognition and enforcement of the arbitration agreements.

Many international, regional and national arbitration institutions have been established during the last century in order to facilitate the settlement of the commercial disputes between persons or companies from different nations. International Arbitration Institutions that provide administrative services are very important for recognition and enforcement of foreign

[10] The difference between setting aside the award, and recognition and enforcement of an award is clear. Domestic awards can be set aside, while foreign awards may or may not be recognized and enforced. In practice, the applications for setting aside the award and for recognition and enforcement may be filed at the same time as we will see in the second Part of the book.

awards. Some of these institutions scrutinize the arbitral award based on their own rules of arbitration in order to ensure its enforceability.[11]

In this chapter, I will deal with the fundamentals of recognition and enforcement of an arbitral award under the NYC, and with the role of the international institutions that administer the international commercial arbitrations and the international investment arbitrations.

A. The fundamentals of recognition and enforcement

I. The concept of recognition and enforcement of a foreign arbitral award

Though recognition and enforcement of foreign awards looks like a single concept, the recognition differs from the enforcement: recognition of an award is a defensive process used by the winning party, which may object that the dispute has already been determined asking the court to recognize it as valid and binding upon the losing party.[12] In other words, recognition occurs when the losing party asks a court to decide on issues already resolved in the arbitral proceedings. Subsequently, the winning party may argue that these issues have already been decided by the court, and may ask for the recognition of an award over the other party. Therefore, the recognition of an award will stop court proceedings with respect to the matters that have been already decided. The enforcement of an award is a different process; when the court is asked to enforce an award, it is asked not only to recognize the legal effect of that award, but also to ensure that it has been carried out by using the existing legal sanctions.

The following example illuminates the difference between the recognition and the enforcement. One party from the United States signed a contract to purchase copy machines from a company based in Germany. The contract included an arbitration clause, which provided that "any dispute arising in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules." When the delivery of the machines did not occur in accordance with the contract, the buyer submitted the dispute to

[11] Scrutiny process made by the ICC International Court of Arbitration will be discussed later.

[12] *See*: REDFERN, Alan / HUNTER, Martin, "Law and Practice of International Commercial Arbitration", 2nd edition, London, Sweet & Maxwell, 1991, p. 448.

arbitration, and afterwards the Tribunal made an award in favour of the buyer. The buyer asked the competent court in the country of enforcement to recognize the award as valid and binding upon the seller (the company). The court recognized the foreign award, yet has not decided to enforce it.

II. The place of recognition and enforcement of a foreign arbitral award

The place of recognition or enforcement of an arbitral award is important in practice. In principle, recognition and enforcement cannot occur in the country of origin,[13] except in the case that an arbitral award is not considered as domestic.[14] Furthermore, the losing party may have assets in several places, so that the winning party can choose the suitable place for the enforcement. On that basis, the arbitral award might be recognized and enforced in one of the Contracting States, even when such award was rendered in the territory of a Non-Contracting State.[15] Therefore, parties to arbitration must consider the following factors in selecting the place of recognition and enforcement:[16]

1. The attitude of national courts regarding requests for recognition and enforcement of a foreign award, where their outlook is likely to be international.
2. The applicability of the doctrine of State Sovereign Immunity17 when recognition and enforcement is being sought against the government or a state owned entity.
3. The applicability of public policy or public order by the Contracting States courts with respect to recognition and enforcement of an arbitral award.
4. The link between the place of recognition and enforcement, and the place of arbitration, where the award was made.

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[13] The country of arbitration in which or under the law of which the award was made.
[14] NYC Art. I(1).
[15] *Ibid.*
[16] *Ibid.*
[17] Regarding this doctrine *see*: LEW QC, JULIAN DM / MISTELIS A, Loukas / KROLL M, Stefan, Comparative International Commercial Arbitration, The Hague/London/New York, Kluwer Law International, 2003, Chapter 27, pp. 733-760.