



ISSN: 2382-9753

UCTjournals



Enforcement of Foreign Arbitral Awards among Silk Road Countries: China, Indonesia, and Iran

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ARTICLE INFO

Article history:

Received 01 Oct 2017

Received in revised form 02 Nov 2017

Accepted 18 Nov 2017

Keywords:

Arbitration,

New York Convention,

Foreign Award,

Enforcement of Foreign Award

ABSTRACT

Objective: This paper examines arbitration law of each state relating to foreign awards enforcement among Silk Road Countries. It aims to familiarize foreign lawyers with law and regulations among Silk Road Countries, specifically China, Indonesia, and Iran. **Methodology:** It first identifies enforceability of international awards under the New York Convention by considering its major role in delivering uniform legislative standards for court recognition and enforcement of foreign and non – domestic awards. **Results:** The results demonstrate that those countries take distinctive approach in enforcing foreign award, but basically they consider similar grounds for refusing the enforcement of foreign award. **Conclusion:** It is also found that certain state has more comprehensive rules than the other country, but essentially each state has shown its effort to advance or improve its arbitration law in order to support the enforcement of foreign award in its territory.

1. Introduction

The “Silk Road” is a network of ancient overland trade routes that extended across the Asian continent and connected China to the Mediterranean Sea (Elisseff, 2001). It has existed for thousands of years, passing through many different empires, kingdoms, reigns and societies throughout history. The Silk Road has further enriched the countries it passed through, transporting cultures, religions, languages and of course material goods into societies across Europe, Asia and Africa, and uniting them all with a common thread of cultural heritage and plural identities (Countries alongside the Silk Road Routes). Additionally, the term “Silk Road” was invented by German geographer, Ferdinand von Richthofen in 1877 as China’s silk was the major trade product (A Brilliant Plan: One Belt, One Road).

Today, there are over 40 countries alongside the Silk Roads. People in these countries have been interacting with each other and much of interaction has involved commerce, especially trading in goods. Some of these interactions inevitably led to disputes, up to and including wars (Cameron III, 2015). It must have become evident to at least some of these early traders and diplomats that a regular mechanism for dispute resolution would be useful. Recent evidence further indicates that international arbitration has received widespread endorsement from scholars and commentators and is becoming the preferred method of resolving the conflicts, which often arise between the parties in commercial transaction (McLaughlin, 1979), especially when the parties have diverse nationality and cultural background. The reason is that it provides them an option to choose a neutral, just, confidential, organized, and cost effective means of resolving their commercial disputes (Ozumba, 2010).

At the end of the arbitral process, arbitrators generally render an award, like a judgment of a national court, disposes of the parties’ respective claims. On the basis of anecdotal evidence at least, it appears that currently the vast majority of international arbitration awards are complied with voluntarily (Saunders and Solomon, 2014), thus they do not require judicial enforcement (Born, 1996), presumably due to the availability of enforcement mechanisms and negative

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publicity which would result from non – compliance. Nevertheless, in fact, an unsuccessful party may wish to avoid the execution of the award while the success of international arbitration depends on the ability to enforce it universally. It is only if an award can successfully be enforced that a successful claimant can ensure that it will actually recover damages awarded to it. In addition, it is only if an award will be recognized that a successful respondent can ensure that new litigation on previously arbitrated claims is not commenced against it by a frustrated claimant. Therefore, judicial enforcement of the awards is crucial in the case of inexistence of voluntary compliance by the relevant parties.

Ultimately, the enforceable awards play a vital role in guaranteeing parties or enterprises' investment success overseas. To acquire the enforceable awards, it is then essential for foreign lawyers to familiarize themselves with the laws and regulations in relevant countries. Referring to such issue, the discussion of the enforcement of the awards in this paper will be limited to only three countries alongside the Silk Roads whose law is of special interest, namely China, Indonesia, and Iran. Before proceeding to the discussion of foreign awards enforcement in those countries, a few words will be necessary with respect to the enforceability of international awards under the New York Convention by considering its major role in delivering uniform legislative standards for the court recognition and enforcement of foreign and non – domestic awards (United Nations, 2015).

2. Materials and methods

2.1 Enforceability of Foreign Awards under The New York Convention

The New York Convention's (hereinafter "the Convention") principal aim is that foreign and non – domestic awards will not be discriminated against and it obliges parties to ensure such awards are recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards. Almost all the major international trading nations are parties to the Convention (Sanders, 1979), including China, Indonesia, and Iran, the three states that will be further discussed in this paper.

Article I of the Convention provides that it shall apply to awards made in the territory of a state other than that where recognition and enforcement is sought. It shall also apply to arbitral awards not considered domestic in the state where their recognition and enforcement are sought (Harnik, 1983). It means that an award can be enforced in the country in which it was made.

In this regard, the Convention also stipulates that these countries are allowed to invoke either one or both of two reservations offered in Article I(3). The first so – called reciprocity reservation limits recognition and enforcement of awards to those made in a Contracting State. The second so – called commercial reservation limits recognition and enforcement to differences that are considered commercial under the national law of the forum in which enforcement is sought. In the present case, China, Indonesia, and Iran ratified the Convention with both reservations (United Nations, "Contracting States", New York Arbitration Convention).

As Contracting States, they are required to "recognize the awards as binding" and to enforce the awards according to the State's own rules of procedure pursuant to Article III of the Convention. A State may not impose "more onerous conditions or higher fees or charges" for the recognition or enforcement of awards under the Convention than it would impose for a domestic award (The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958). Further, the procedure for acquiring enforcement of an award is straightforward under Article IV of the Convention. The party seeking enforcement must supply the court with a "duly authenticated original award" and either the original or certified copies of the arbitration agreement. The continued strength of the Convention lies in Article V, which recognizes only seven grounds for refusing enforcement of an arbitral award (McLaughlin, 1986). A party wishing to block the enforcement of an award bears the burden of proving that one of the seven grounds for refusing enforcement exists (Van Den Berg, 1981).

2.2 Implementation of the New York Convention in China

Recognition and Enforcement of Foreign Awards in China

China acceded to the New York Convention on 22 January 1987 (United Nations, 2015). At the time China joined the Convention, it made a "reciprocity" and "commercial" reservation to its membership (J. Chinese, 1989). In 1987, the Supreme People's Court issued a Circular on the Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China (hereinafter "SPC's Circular") as the implementing regulation succeeding China's accession to the Convention. The SPC's Circular expressly stipulates that China will recognize and enforce awards made in other contracting states, which is also in line with Article 282 of the Civil Procedure Law of the People's Republic of China (2012 Amendments) (hereinafter "the PRC Civil Procedure Law") based on the principle of reciprocity (Circular of Supreme People's Court on the Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China). It goes on to provide that where there is any conflict between the provisions of the Convention and the provisions of the PRC Civil Procedure Law, the Convention shall prevail (The Second Amendment of Civil Procedure Law of the People's Republic of China, 2012).

Article 4 of the SPC's Circular afterward describes that Chinese courts should enforce a Convention award if none of the grounds for refusing enforcement as set out in Article 5(1) and (2) of the Convention apply:

1. Article 5(1) of the Convention:
 - a. The parties to the arbitration agreement were under the law applicable to them under some incapacity, or that the arbitration agreement is not valid under the law to which the parties have subjected it or, failing which, under the law of the country where the award was made;

- b. The party against whom the enforcement is sought was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
 - c. The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced;
 - d. The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing which, was not in accordance with the law of the country where the arbitration took place;
 - e. The award has yet to become binding on the parties or has been set aside or suspended by a competent authority (usually the courts) of the country in which, or under the law of which, the award was made.
2. Article 5(2) of the Convention:
- a. The subject matter of the dispute is not capable of settlement by arbitration under the law of the PRC; or
 - b. The recognition or enforcement of the award would be contrary to the public policy in China.

In the case of non – convention awards, Chinese courts would not recognize a foreign award from a non – contracting state unless a treaty to which China is a signatory requires recognition, or the other country recognizes and enforces CIETAC arbitration awards (J. Marshall, 1994-1995).

Then, moving to the commercial reservation, it means that the provisions of the Convention is applied only to disputes arising from legal relationships, whether contractual or not, which are considered commercial under Chinese law. According to Article 2 of the SPC's Circular, "contractual and non-contractual commercial legal relationship" specifically refers to the economic rights and obligations resulted from contract, infringement or arising according to law, such as sale of goods, lease of property, project contracting, processing, technology assignment, joint adventure, joint business operation, exploration and development of natural resources, insurance, credit, labor service, surrogate, consultation service, marine/ civil aviation/ railway/ road passenger and cargo transportation, product liability, environment pollution, marine accident, dispute over ownership, etc., and it does not include the dispute between foreign investors and the host government. Accordingly, another form of disputes, falling beyond the scope of this Article, is not within Chinese jurisdiction. In addition, arbitration in China is primarily also governed by Arbitration Law of the People's Republic of China (hereinafter "the PRC Arbitration Law") besides the SPC's Circular and the PRC Civil Procedure Law (Pisacane et al., 2016). Referring to the PRC Arbitration Law, the provisions are apparently inconsistent with the provisions of the PRC Civil Procedure Law. For instances, Article 70 and 71 of the PRC Arbitration Law refer to Article 260 of the PRC Civil Procedure Law to indicate the grounds for which the award can be set aside or unenforceable while the Article of 260 of the PRC Civil Procedure Law (2012 Amendments) no longer regulates the grounds to set aside the award (emphasis added). Now, the grounds to reject the application of award enforcement are stipulated under Article 282 of the PRC Civil Procedure Law.

The aforementioned circumstance subtly shows that even if China has shown its commitment to assure legal certainty of foreign award enforcement by joining the Convention, China has not yet maintained consistency within the national laws to which the Convention will refer in enforcing foreign awards. If the government in the future can neither agilely update the legislations nor provide clear legal procedure to carry out the Convention's mandates, it will lead to legal uncertainty to the enforcement of foreign awards, plus limited online resource making it more arduous to be verified, consequently the Convention would have had little effect. Therefore, to the case at hand, the up-to-date Chinese legislations are undeniably essential as the implementing rules to the Convention to support future recognition and enforcement of foreign awards in China.

Conditions for Recognition and Enforcement

The Chinese government has long adhered to the principle that foreign awards would be recognized and enforced under certain conditions (J. Chinese, 1989), as stipulated in Article 282 of the PRC Civil Procedure Law. Ren Jianxin, the Former President of the Supreme People's Court of the PRC and was then Deputy Head of China Council for the Promotion of International Trade further asserted that:

"As to the enforcement of foreign arbitral awards in China, ... the enforcement is in fact fully secured so long as [the awards] are fair and not in violation of the Chinese laws and policies. There are also provisions in some bilateral treaties and agreements ... guaranteeing the enforcement of arbitral awards on a reciprocal basis. In fact, Chinese corporations and enterprises will execute foreign awards voluntarily."

This passage summarizes the necessary conditions for recognition and enforcement of foreign awards, as well as China's claim of voluntary compliance to such recognition and enforcement. These conditions are that the foreign awards sought to be enforced be fair, consonant with Chinese laws, consistent with Chinese policies (The Civil Procedure Law of the People's Republic of China), and the internationally commonplace requirement of reciprocity.

3. Discussion and results

3.1 Implementation of the New York Convention in Indonesia

Indonesia ratified the Convention through Presidential Decree Number 34 of 1981 with both reservations. Indonesian government declared that it will apply the Convention on the basis reciprocity (The Supreme Court Regulation No. 1 of 1990 on the Enforcement Procedures of Foreign Arbitral Award), to the recognition and enforcement of awards made only in the territory of another Contracting State and that it will apply to the Convention only to differences arising out of legal relationship, whether contractual or not, which considered as commercial (Indonesian Arbitration Law, 1990) under Indonesian Law.

Supporting this ratification, Indonesian Supreme Court promulgated Supreme Court Regulation No. 1 of 1990 on the Enforcement Procedures of Foreign Arbitral Award (hereinafter “the SCR”) as the implementing regulation, setting forth criteria and procedures for enforcing foreign awards in Indonesia under the Convention. Then, on 12 August 1999, Indonesia promulgated its new and in fact its first comprehensive Arbitration Law, Law No. 30 of 1990 on Arbitration and Alternative Dispute Resolution (hereinafter “the Indonesian Arbitration Law”). Although the Indonesian Arbitration Law does not specifically rescind the provisions of the SCR, pursuant to *lex superior derogate legi inferior* principle, in which a law higher in the hierarchy repeals the lower one, thus, to the extent that the two are inconsistent, the provisions of Indonesian Arbitration Law will prevail.

To enforce foreign awards in Indonesia, the requirements regulated under Article 3 of the SCR must be met. These requirements have been more affirmed in Article 66 of the Indonesian Arbitration Law. This article indicates that the award, in which Indonesia is one of the disputing parties, may only be enforced after obtaining an order of Exequatur from the Supreme Court of the Republic of Indonesia, which order is then delegated to the District Court of Central Jakarta for execution. But, if Indonesia is not one of the disputing parties, the District Court shall be the court vested with the authority to handle matters of the recognition and enforcement of International Arbitration Awards.

Furthermore, Article 4(2) of the SCR stipulates that *exequatur* (i.e. court order to enforce the foreign arbitral award) will not be granted by Indonesian Supreme Court if the Foreign Arbitral Award is against the underlying principles of the Indonesian legal system and society (public policy), which is also stressed in Article 66 of the Indonesian Arbitration Law. This provision appears to be mandatory (Baker and McKenzie, 2012). Unlike Article V of the Convention, the text of Article 66 does not appear to give discretionary power to the state judicial body to recognize and enforce foreign awards if they violate public policy. The SCR then defines public policy in Indonesia as “clearly in contradiction with the fundamental principles of the Indonesian legal system and social system in Indonesia.” In practice, Indonesian courts have broadly interpreted the notion of public policy. Subsequently, ensuring that the award will not violate Indonesian public policy is crucial to acquire an enforceable award in Indonesia.

3.2 Implementation of the New York Convention in Iran

Recognition and Enforcement of Awards in Iran

Iran acceded to the New York Convention on 15 October 2001 with both commercial and reciprocity reservations. It means that Iran will apply the Convention only to the commercial disputes whether contractual or non – contractual and only to the awards issued in another Contracting State. Before its accession, Iran has earlier adopted Law on International Commercial Arbitration (hereinafter “LICA”), applying to international arbitrations (Gharavi, 2001). Iranian authorities claim that the LICA closely follows the UNCITRAL Model Law (hereinafter “Model Law”) thus undoubtedly similarities exist between the two rules both structurally and substantively (Gharavi, 1999).

As suggested in the Model Law, the term “commercial” is broadly defined to include “the sale and purchase of goods and service, transportation, insurance, financial matters, consulting services, investment, technical cooperation, representation, commission agency, contract work and other similar activities (Law on International Commercial Arbitration). Accordingly, it provides more flexibility for foreign investors or lawyer to establish the subject matter jurisdiction under LICA.

To enforce foreign awards, it is first necessary to differentiate between domestic and foreign (international) awards. In other words, the nationality of the award should be firstly determined. Article 1 of the Model Law explains that an arbitration is considered “international” if place of business of the parties is in different states at the time of conclusion of the arbitration agreement; or the place of arbitration is in a different state than the parties’ states; or if the place of performance of the subject matter of the agreement is in a third state. Meanwhile, Article 1(b) of the LICA explicates that arbitration is considered “international” when one of the parties at the time of conclusion of the arbitration agreement is not “Iranian” under the laws of Iran. This article shows that LICA as the domestic law of Iran, an adoption of the Model Law, has taken a different approach in comparison with the Model Law and has not reckoned the seat of arbitration as relevant element for recognition of the arbitration as “international” or “foreign”. Article 2(1) of the LICA also states another condition to consider arbitration award as foreign that the dispute should have been raised with respect to “international commercial relations” of parties. Aforesaid facts elucidate that the subject matter of arbitration and disputing parties take significant role for recognition of the award as “international”. Correspondingly, if a dispute arises between two Iranians whose place of business is not in Iran or if one of the parties holds double nationalities, their dispute does not qualify as “international” under LICA (Iranshahi, 2014). If the award is considered domestic under Iranian Law, the Convention cannot apply and thus the award could not be requested to be enforceable in Iran under the Convention.

a. Grounds for Setting Aside and Refusal of Enforcement of Awards

Article 33(1) of the LICA contains the same grounds for both the setting aside and refusal of enforcement of arbitral awards. The following grounds, any of which will lead to the annulment or refusal of enforcement of the award, must be raised by the party seeking annulment or resisting enforcement of the award:

- a. A party to the arbitration agreement was under some incapacity;
- b. The arbitration agreement is not valid under the law to which the parties have subjected it or failing any indication thereon, under the Iranian law;
- c. The provisions of the LICA concerning the proper notice of the appointment of an arbitrator or arbitration request are not observed;
- d. The party resisting enforcement or seeking annulment of the award was - due to reasons beyond his control - unable to present his case;

- e. The arbitrator rendered an award beyond the scope of his authority. Should the decisions on matters submitted to arbitration be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration will be set aside or refused enforcement;
- f. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties and/or in the silence of or failing such agreement, was not in accordance with the LICA;
- g. The arbitration award includes the affirmative view of the arbitrator whose replacement has been accepted by the court located in the provincial capital where the seat of arbitration is located;
- h. If the award of the arbitral tribunal relies on a document which, according to a final judgment, was falsified;
- i. A document is found, after the issuance of the award, proving the rightfulness of the party resisting enforcement or seeking annulment of the award and which is proven to have been or caused to have been concealed by the other party.

Additionally, Article 34 of the LICA stipulates the following grounds, any of which will lead to the annulment or refusal of enforcement of the award, must be raised ex-officio by the judge:

- 1. The subject matter of the dispute is not capable of settlement by arbitration under Iranian law;
- 2. The award is in conflict with the Iranian public policy or good morals and/or the mandatory provisions of the LICA;

The arbitral tribunal's award with respect to immovable properties located in Iran is in contradiction with laws of Iran and/or valid notarial documents, unless the arbitral tribunal has the authority to- compromise in the case of the latter.

4. Conclusion

In this paper, the examination of the enforcement of foreign awards in the three countries is conducted through arbitration law analysis in each state. The results demonstrate that abovementioned countries take distinctive approach in enforcing foreign award, but basically they consider similar grounds for refusing the enforcement of foreign award. Nonetheless, the problem often arising when analyzing foreign award enforcement is that the absence of clear, comprehensive, and well – ordered national law in regulating such recognition and enforcement. Even sometimes the inconsistency among rules found, for example, in the case of amendment, another secondary law relating to the primary law has not yet been amended while the primary law has been adjusted. This matter will lead to misperception or confusion or the worst case, legal uncertainty when foreign lawyers examine the national laws relating to foreign award enforcement. It is therefore imperative for a state to ensure that the national laws are up-to-date and inclusive, and the existence of ample resources to support the interpretation of the law.

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How to Cite this Article:

Izadi A., Dzikrina R., Enforcement of Foreign Arbitral Awards among Silk Road Countries: China, Indonesia, and Iran, UCT Journal of Social Sciences and Humanities Research 5(4) (2017) 73–77.