Секция «Юриспруденция»

Public policy as a ground for Non-enforcement of Foreign Arbitral Awards: definition and application.

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One of the most arguable grounds for refusal of recognition of foreign awards is a public policy exception. According to Article V (2)(b), recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country[1]. The main problem with applying this ground is that the New York Convention does not give a definition of public policy, which leads to applying different standards by the courts of different countries. Because of this exception it is important to understand the meaning of the term "public policy" as it is used in international commercial arbitration.

Mark A. Buchanan noted that public policy is the "final parameter of the law that, while it is reflected in and often expressed by statutory and constitutional statements of law, also dictates either consent or constraint, permission or prohibition, when statutes and constitutions are silent."[7]

There are three levels of public policy that can be distinguished as follows: domestic, international and transnational ones. Domestic public policy applies territorially in the sense that it applies only to transactions or relationships which do not involve any foreign element [8]. When the arbitration proceedings have international element, such as when the parties are residents of different countries, international public policy applies. A country's international public policy may or may not be the same as its domestic public policy. For example, U.S. courts differentiate between "public" and "national" policy, which is another way of phrasing the division between domestic and international public policy [3, p. 772]. International public policy is narrower than domestic policy and represents only very basic principles of a particular country. Transnational public policy is a true international public policy representing "the international consensus on accepted norms of conduct."[3, p. 773]

The New York Convention explicitly refers to the public policy of the country where enforcement is sought [1, art.V2(b)]. However, in the context of enforcing international arbitral awards, the specific country's international (not local) standard of public policy should be used. The legislative history of the New York Convention confirms this view. The Geneva Convention of 1927 upheld a broader interpretation of public policy which was "contrary to the public policy or the principles of law of the country" in which the enforcement of the award was sought. Similarly the ECOSOC Draft Convention of 1955 provided policies that were "clearly incompatible with public policy or with fundamental principles."[4] However, following the decision that "the provision should not be given a broad scope of interpretation"[4, refer to Statement of the Chairman of Working Party no. 3, UN DOC E.CONF.26/SR.17], Working party number three suggested to limit the norm only to "public policy". This limitation was accepted by the Conference and officially adopted.

A number of cases also confirm this narrow interpretation of public policy, given by New York Convention. In Parsons Whittemore Overseas Co. [12] case the Second Circuit rejected the argument that the award violated public policy because American law forced it to abandon the contract. The Court concluded that it was international public policy that was decisive in the premises and that policy was not violated. Similarly, in Mitsubishi Motors Corp. v. Soler, the U.S. Supreme Court ruled arbitrable a dispute concerning an agreement that allegedly violated American antitrust laws [11]. The Mexican courts like American ones distinguish between international and domestic public policy. In numerous decisions they held that although the Mexican statutory provisions regarding the summoning of the party *in personam* within the Mexican public policy, these provisions should not apply in international arbitration. [4, refer to Tribunsl Superior de Justicia, 18^{th} Civil Court of First Instance of Mexico, D.F. February 24, 1977; Presse Office S.A. v. Centro Editorial Hoy S.A. (Mexico no 1); Tribunal Superior de Justicia (5^{th} Chamber) of Mexico, S.F.,August 1, 1977., p. 366.] The Committee on International Commercial Arbitration also confirmed the necessity of using international public policy in enforcement of foreign arbitral awards. [3]

The scope for public policy exceptions for arbitral awards is generally considered to be more limited than that for foreign court judgments because arbitration is voluntary. Parties who have voluntarily agreed to proceed with arbitration are typically prevented from opposing awards on public policy grounds because they are held to have adopted the procedures of the forum in which they agreed to arbitrate. [6] However some countries apply a broad definition of public policy to the enforcement of international arbitral awards. For example, Chinese law allows courts to refuse enforcement of arbitral awards that are "contrary to the social and public interests" of China. [2] Chinese courts understand this phrase broadly and use the provision to strike down awards they believe are against Chinese interests, even if the award is otherwise valid. The term includes such wide-ranging activities as those that cause "destruction to China's natural resources, heavy pollution to the environment, injury to people's health and safety, [and] deterioration and corruption of Chinese moral values."[2, p. 21]

As the International Law Association recommendations are not mandatory to states and the New York Convention does not provide any universal standards for public policy exception, the interpretation of this exception and its application varies from country to country. For example, England did not refuse enforcement of an arbitral award on the grounds of public policy until 1998. [9] In spite of the fact that Switzerland and South Korea use a narrow interpretation of public policy, both retain some focus on the interests and beliefs of the enforcing state. [9, refer to Julian D.M. Lew et al., Comparative International Commercial Arbitration, paras 26-127 to 26-129 (2003)] Other jurisdictions, including Russia, Germany, Luxembourg, The Netherlands, Italy and India, are also reported as countries which take a narrow view of the public policy exception. [10] However these countries limit the interpretation of public policy in light of their domestic state interests.

Some jurisdictions such as the previously mentioned China, together with Turkey, Japan and Vietnam still have their broad use of the public policy exception. However, this broader application of public policy has been generally criticized as destructive to the arbitration process, because of its uncertainty and lack of uniformity. [4, p. 157]]

Generally speaking, Russian cases concerned the enforcement of foreign arbitral awards show that in recent years the courts start to enforce more foreign decisions and use the public

policy exception for denial of the recognition not as often as they did before. This tendency in Russian legal practice attracts more foreign companies who do their business with Russian partners. However, the lack of legal definitions and standards for application of public policy rule still leave some questions of interpretation to the discretion of the courts.

Литература

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