

Recognition and Enforcement of Foreign Arbitral Award Under New York Convention and the Impact of the Public Policy Defense.

(Comparison between US and Saudi Law)

Introduction

In the last years the popularity of using arbitration as a method to settle complex disputes has increased, especially in international commercial disputes. The most important advantage of arbitration is its enforceability. International Arbitration awards can be forced in most countries around the world. Other advantages of international arbitral awards include the speed and cost, are its final and that it is not subjected to appeal, procedural flexibility, neutrality, and confidentiality.

Arbitral award, however, could be so complex when it comes to the recognition and enforcement due to the fact that the award must pass formal procedures of recognition and enforcement in the state court in the country where the award is supposed to be carried into the effect. In developed countries such as the United States and England, recognition and enforcement of arbitral awards is not a problem. This is because of the large volumes of commercial transactions between these countries and other countries all over the world. As a result, the legal systems of these countries encourage, recognize and readily enforce arbitral awards. However, enforcement of arbitral awards is not that easy in some jurisdictions. For example, in developing countries like Saudi Arabia coupled with the fact that it operates Sharia Law, the problem of enforcement becomes more complex.

Sharia law in Saudi Arabia causes major concerns for foreign investors due to the fact that it is considerably different from western legal systems. Therefore, the process, recognition and enforcement of the arbitration are suffering from uncertainty and ambiguity. An important aspect that should be discussed is the enforcement of foreign awards in Saudi Arabia as a contracting state of the New York Convention, which is known as the most private international law treaty due to its acceptance from many countries all over the world. New York Convention sets out certain specified grounds that states courts could use to refuse to enforce arbitral awards. Saudi Arabia recently became a signatory to the Convention and has been enforcing its provisions.

This paper will examine the grounds upon which arbitral awards can be refused. It will mirror the US system against the system in Saudi Arabia; viewing this from U.S. and Saudi courts perspective. It will also look how public policy refusal ground may affect the enforceability of the arbitral awards and proceed to make recommendations on how to improve the Saudi system, and how to achieve the goal of New York Convention.

I. The refusal of enforcing arbitral awards under New York Convention

Generally speaking, New York Convention requires contracting states to recognize and enforce arbitral awards that are made in another contracting states. This obligation is defined in Article I of the treaty. The Convention, in Article V, lists exceptions, under which, the recognition and enforcement of the arbitral award may be refused, at the request of the party against whom the award is invoked. This article allows courts to decline to support proceedings that lack of integrity or violate the public interest of the state. This article allows refusal only when there is a substantial irregularities that

occurred in the arbitration proceedings.

Article V (1) of New York Convention provides that the recognition and enforcement of arbitral award can be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- 1) There is lack of valid arbitration agreement;
- 2) Violation of due process;
- 3) Excess of arbitral tribunal's authority;
- 4) Irregularity in the composition of the arbitral tribunal or arbitral procedure; or
- 5) The award "has not yet become binding".¹

Two other grounds are mentioned in article V (2). According to this article recognition and enforcement of an arbitral award can also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- 1) The subject matter is incapable to be resolved by arbitration under the law of that country; or
- 2) If recognition or enforcement of the award violates the enforcing country's public policy.

The main feature of these grounds is that they are "exhaustive on the grounds

¹ Susan Choi, Symposium Issue, The Interaction Between National Courts and International Tribunal, Note, , New York University Journal of International Law and Politics, (Fall 1995-Winter 1996), P.175

listed in Article V due to the fact that they are exceptions to the general rule, which is that foreign awards must be recognized and enforced.” Enforcement may be refused only if the party against whom the award is invoked can prove one of the grounds that are mentioned in article V (1), or if the competent authority in the country where recognition is invoked finds that the enforcement of the award violates its public policy. Therefore, neither states nor parties can create new grounds for objection based on the representative nature of class arbitration. However, these grounds are not wholly defined, which has lead courts of different countries interpret them differently, especially the public policy defense), and this is the weak side of New York Convention as critics say.²

Other feature of this article is that the competent authority in the country where recognition is invoked “may not review the merits of the award because mistakes in the facts or law by the arbitral tribunal is not included in the grounds that are listed in this article.”³

What should be considered about this article is that it is divided into two categories. Article V (1) lists the procedural defenses that could be raised by the parties. The second category of this article provides the substantive grounds of refusal, which the court may refuse to enforce on its own motion.⁴

A. Procedural Defenses

² Albert Jan van den Berg, *The New York Convention of 1958: An Overview*, international counsel for commercial arbitration, (2008), P. 13, Retrieved from http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf

³ *Id.* at 14.

⁴ S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*. (Fall 2008), P. 56.

As stated earlier, the procedural defenses should be raised at the request of the party against whom the arbitral award is invoked. Subsequently the enforcing court could apply the procedural law chosen by the parties, the law of the country where the arbitration held the proceedings, or the law of the enforcing country.

It is important to mention that the arbitration panel is free to choose how to conduct a fair arbitral proceeding because the standards of New York Convention are not clear. Through the grounds of refusal that are listed in Article V, the enforcing court can use the enforcement stage to review the panel's procedures in order to make sure that the parties received fair hearing and due process.

1. Invalidity of the arbitration agreement [Article V (1)(a)]

In order to enforce the arbitral award, the arbitration agreement should be valid. One of the parties may claim that the arbitration agreement is invalid. Beside the agreement inexistence, several other issues can be raised to use this defense. A party may claim that the agreement is illegal or made with fraud or duress. A party may also argue that a particular party did not have the capacity to make the agreement or that the arbitration agreement was invalid under the applicable law.⁵

Article V (1)(a) provides two conflict rules to determine the law that governs the arbitration agreement. The first rule is the parties' autonomy and that the parties can choose the law that governs the arbitration agreement. The second rule is applicable law when there is no choice of law, which provides that the arbitration agreement is governed

⁵ Ramona Martinez, Recognition and Enforcement of International Arbitral Awards under the United Nations Convention of 1958: 24 International Law, (Summer 1990). P. 497

by the law of the country where the award was made. Courts have always agreed that these conflict rules are treated as internationally uniform rules, which replace the national conflict rules of the country in which the award is relied upon with respect to awards governed by the convention.⁶

It should be noted that Article V (1)(a) distinguishes between the applicable law for examining the capacity of the parties and the law under which the court will examine the validity of the agreement. Courts are free to use their own conflict of laws principles when applying the applicable law for examining the capacity of the parties to the contract. Unlike the applicable law for examining the validity of the agreement, which should be the law selected by the parties or the law of the country where the award was made when there is no choice of law as noted earlier.

2. Violation of due process [Article V (1)(b)]

Violation of due process is one of the most important defenses under New York Convention. If one of the parties has no opportunity to be heard, he or she can raise the due process defense. This ground gives parties a way to challenge the award if they feel that the arbitrator did not treat them fairly.

Under article V (1)(b) the unfair treatment to a party is not giving proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise not being able to present his case. The phrase or was otherwise unable to present his case was needed to deal with the situations where a party cannot present his case due to a force majeure or other causes that prevent him from presenting his case or if he was not given

⁶ Den Berg, *supra*, at 14.

adequate opportunity to present the case.⁷ However, this ground is very hard to define because it is hard to identify what constitutes due process in all contracting states. Courts from different countries may interpret due process differently.

This article requires that the party against whom the award is invoked to be given a proper notice of the appointment of the arbitrator or of the arbitration proceedings. Identifying whether the notice is proper or not depends on the facts of the case. The test in this case is whether the notice is adequate to inform the party of the appointment of the arbitrator or of the arbitration proceedings. The general principle is that the party must have been able to present its case.

3. Excess by Arbitrator of his Authority [Article V (1)(c)]

Pursuant to this provision, the party against whom the award is invoked can argue that the award is beyond the scope of the arbitral tribunal's authority according to the agreement. This ground justifies the refusal of the enforcement of the award if the arbitrator exceeds his mandate by awarding more than, or something different from what the parties had claimed.

According to courts decisions, the expression "the award deals with a difference not contemplated by or not falling within the terms of the submission" implies two tests. First, it requires a determination of what could constitute the scope of the arbitration

⁷ Martinez, *supra*, at 499.

clause. Second, after determining the scope, it requires a determination of the matters that the parties have submitted to the resolution by the arbitral tribunal in question.⁸

4. Irregularity of the composition of the arbitral tribunal or arbitral procedure

[Article V (1)(d)]

Under this ground, the party against whom the award is invoked can claim that enforcement should be refused if he can prove that the composition of the arbitral tribunal or arbitral procedure was not in accordance with the agreement of the parties. If there is no agreement on these matters, the respondent should prove that the arbitral tribunal or the arbitral procedure was not in accordance with the law of the country where the arbitration took place.

Pursuant to this provision, the agreement of the parties on the composition of the arbitral tribunal and arbitral procedure ranks first, and if failing an agreement on these matters, the arbitration law of the country of the arbitration should be taken into account.⁹

5. Non-Binding Award [Article V(1)(e)]

Under this defense, the party against whom the award was invoked can claim that the court should not enforce the award because it has not become “binding” under the law where it was made. New York Convention does not give a clear definition for a “binding award”, and courts in different countries may define the binding award differently. For example, in the United States the arbitral award is binding when the arbitration panel has

⁸ Den Berg, *supra*, at 15.

⁹ *Id.* at 16.

resolved all issues before it, and no other recourse to another arbitration panel exists.

England on other hand requires that the award be binding before a court will enforce it.¹⁰

This ground also gives a party a way of refusal if he can prove that the award has been suspended by the court of the country in which, or under the law of which, the award was made. According to the convention, a court can suspend its decision on enforcement if the party against whom the award is invoked applied for a suspension of the award in the country where the award was made and the application is pending in that country. According to courts decisions, the initiation of an action for setting aside the award is not enough for refusal of enforcement of the award. In order for a party to use this ground, he should prove that the suspension of the award has effectively been ordered by a court in the country of origin.¹¹

B. Substantive defense

As mentioned earlier, the difference between this category and the procedural defenses in the first category is that in this category the defense may be raised by the parties or by the court on its own motion, while in the first category only the opposing party can raise the defense.

The substantive defenses that are listed in article (V)(2) are only two narrow grounds, which include non-arbitrability and public policy defense. Under arbitrability

¹⁰ May Lu, the New York convention on the recognition and enforcement of foreign arbitral awards: analysis of the seven defenses to oppose enforcement in the United States and England, *Arizona Journal of International & Comparative Law*. (fall 2006) P. 759, retrieved from <http://www.arizonajournal.org/ajicl/archive/AJICL2006/vol233/LuNote.pdf>

¹¹ Den Berg, *supra*, at 18.

courts look for the legality of the arbitration agreement or process, while under the public policy defense, the laws that the agreement or the award might contravene will be considered.

1. Non-arbitrability [Article V (2)(a)]

Article V (2)(a) of New York Convention permits the enforcing to refuse to enforce the award on its own motion if the subject matter of the difference is not capable of settlement by arbitration under its law. The non-arbitrable subject matters vary from country to country. This defense will be raised in cases where the enforcing court finds that the law governing the enforcing country does not allow arbitration as a way of dispute resolution. There are other examples where a court may accept this defense such as when another law or act prohibits parties from referring to arbitration as a way to resolve the dispute.¹²

2. Public Policy defense [Article V (2)(b)]

Public policy defense can be raised under Article V (2)(b) of New York Convention when recognition or enforcement of the arbitral award is contrary to the public policy of the enforcing country. Therefore, if the judge of the enforcing court is persuaded by the argument that recognition or enforcement of the arbitral award may contradict public policy of the enforcing country, this defense will be accepted.

¹² Id. at 19.

This defense is the most often litigated defense against recognition and enforcement of a foreign arbitral award. However, this defense is rarely successful due to the narrow interpretation of public policy that court makes and considering the international public police concept by the enforcing courts. Therefore, claiming this defense in cases where other defenses can be raised is not a useful method to challenge enforcement of the award¹³.

Courts in some countries, however, construe public policy broadly and accept a wider interpretation of public policy. The broader interpretation weakens the strength and effectiveness of the New York Convention, and lead to a doubt on the effectiveness of international arbitration. Moreover, it will undermines the finality and universal enforceability of international arbitrational awards, which is the most important feature about arbitration.¹⁴

Defining public policy

New York Convention does not define the public policy, which leads to the fact that this ground can be interpreted in light of unique public policies of the different states,

¹³ Martinez, *supra*, at 510.

¹⁴ *Id.* at 510.

and this makes it difficult to determine the scope of the exception.¹⁵ According to Jay R. Sever, “ public policy refers to the grounds on which a receiving court may vacate an arbitral award that is contrary to the laws or standards of the court’s jurisdiction.

Domestic public policy is expressed by legislative enactments, constitutional constraints, or judicial practice within individual states. National courts may disallow arbitration agreements or awards made within their jurisdiction when enforcement of agreements or awards “would violate the forum state's most basic notions of morality and justice” to an extent that requires that the parties' freedom of contract be curtailed.¹⁶ S.I strong stated, “ It appears that there is no universally accepted definition of public policy. It is clear that it reflects the fundamental economic, legal, moral, political, religious, and social standards of every state or extra-national community.”¹⁷

Courts may consider many factors while interpreting public policy such as the “pro-enforcement spirit of the New York Convention, a respect for party autonomy, sensitivity to the needs of the international system and the desire for finality.”¹⁸

Types of public policy

¹⁵ J.M. Gaitis, Esq.; "International and Domestic Arbitration Procedure: the Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards", P.9.

¹⁶ Jay R. Sever, 1991. The Relaxation of Inarbitrability and Public Policy Checks on U.S. And Foreign Arbitration: Arbitration out of Control? P. 1664.

¹⁷ S.I. Strong, Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns. (Fall 2008), P. 76.

¹⁸ Susan Choi, Symposium Issue, The Interaction Between National Courts and International Tribunal, New York University Journal of International Law and Politics, (Fall 1995), p. 124.

According to James D. Fry, there are five types of public policy including domestic, international, transnational, regional, and truly international public policy. He categorizes them based on their source into two groups (national and supranational source). “The first two types can be categorized under the broader heading of national public policy, with the last three fitting under the heading of supranational public policy”¹⁹

1) Domestic Public Policy

According to D. Fry, national government’s legislature or court determines the domestic public policy, which is seen as being the fundamental notion of morality and justice, and which it applies to purely domestic disputes within its jurisdiction. These public policy rules can be found in the law of that state, and they are aimed to protect the public policy of the state itself and not any other private individual or entity.²⁰ These rules vary from state to state, and it is subject to discretion of the state to make laws and standards of public policy and inarbitrability.

2) International Public Policy

The enforcing court should not consider its own public policy when the arbitration has an international charter and there is involvement of different countries. In this case the enforcing court should take in account the interested nations and the needs of international commerce. International public policy is seen as being the essential notions of morality and justice that is determined by the national government’s legislature or

¹⁹ James D. Fry, *Désordre Public International under the New York Convention: Wither Truly International Public Policy*, *Chinese Journal of International Law* (March 2009), P 83.

²⁰ Id.

courts to apply to the disputes that have international elements, either from the transaction's nature or from the nationality of the parties.

According to Jay R Sever, international public policy refers to “laws and standards by which states govern arbitration of international charter. Frequently, because of the need for coherence and predictability in international commerce, a state’s laws regulating international arbitration are more liberal, that is less restrictive than those regulating domestic arbitration.”²¹

Most courts in different countries distinguish between national and international public policies. These two kinds of public policies may or may not be the same. U.S. courts, for example, take the view that “international public policy cannot be equated to that of the domestic one, but needs to be given supranational emphasis.”

3) Supranational Public Policy:

a. Transnational Public Policy

The difference between transnational public policy and international public policy is that transnational public policy represents that international consensus on accepted rules of conduct, while international public policy relies on the laws of specific countries. Since there is no consensus on the international standards of public policy, the transnational public policy is unpredictable and difficult to apply.²² However, in some infrequent cases, arbitration panels use transnational public policy into their decisions so that the enforcing court has to take it into consideration when it decides whether to

²¹ Jay R. Sever, 1991. The Relaxation of Inarbitrability and Public Policy Checks on U.S. And Foreign Arbitration: Arbitration out of Control? P. 1663.

²² Lu, supra, at 773.

enforce the award or not.

According to Sever, *supra*, this type of public policy refers to “a system of rules and principles, including standards, norms and customs that are accepted and commonly followed by world community. Violation of these rules and principles, then, are violation of transnational public policy.”²³ This notion is the body of customary legal rules that are not part of a State that can be used by an international arbitrator to avoid enforcement of an arbitration agreement or the application of the law designated as the applicable law in the underlying contract. This set of legal rules also does not belong to international law or to national law *per se*, but includes such bodies of law as *lex mercatoria*, or the law of international merchants, as well as *lex sportiva*, *lex electronica* and all other non-State bodies of law.”²⁴

There have been debates about the existence of this type of public policy. This notion has been rarely used, and there have been few arbitral and judicial cases decided only on transnational public policy.

b. Regional public policy

This type of public policy is not used in the literature discussing public policy, but it makes sense to create this category to capture public policy considerations that is shared within regions, which make them more than just national notions of public policy. These considerations are not shared more generally between the states of the international

²³ R. Sever, *supra*, at 1687.

²⁴ Fry, *supra*, at 87.

community, which make them less than the truly international notions of public policy.²⁵

c. Truly international public policy

There are different understanding of this controversial and vague term including, the fundamental notions of morality and justice of civilized countries, the fundamental notions of justice and morality of all of the interested states and international community combined with that of the enforcement state, the fundamental notions of justice and morality which the international version of the public would expect to be protected, and the fundamental notions of justice and morality as provided for by public international law generally.²⁶

Different approaches in interpreting refusal grounds

Courts in different countries may have different interpretation of the refusal grounds. Particularly some of the refusal grounds like the public policy defense. The public policy ground is so flexible, due to the fact that New York Convention does not include a definition for this defense like the others. Courts in different countries define it depending on standards related to the enforcing country's public interest. It seems like most member countries to the New York Convention interpret the grounds narrowly. The United States and other parties to New York Convention tend to "adopt the interpretation of the Convention that is most favorable to the enforcement of the arbitral award."

II. The refusal grounds under US law

Before the legislative acceptance of arbitration in 1925, the American courts had

²⁵ *Id.* at 81.

²⁶ *Id.* at 89.

been refusing to recognize and enforce arbitral awards because it was a violation of public policy due to their encroachment on powers of the judiciary. However, this approach has been changed since the United States ratified the New York Convention in 1970. From US courts perspective, “ U.S. public policy interest in a uniform international policy outweighed the U.S. public policy interest in requiring that all arbitral awards be consistent with U.S. law.”²⁷

The US courts apply the New York Convention only to arbitration awards that are made in foreign states, irrespective of the parties’ nationality. US courts favor granting enforcement of the arbitration award whenever possible. Here, the refusal grounds will be discussed in light of the United States judicial decisions.

1. Invalidity of the arbitration agreement

Because of the separability doctrine, this ground for refusing the enforcement of an arbitral award, like the others, has rarely been successful in the US courts. There has been a few courts decision about the application of this ground including, *Buques Centraamericanos, S.A. v. Refinadora Costarricense de Petroleos*. In this case the party against whom the award was invoked argued that the arbitration award was invalid because it was not approved by the legislature of Costa Rica, who was the owner of the company at the time of entering the agreement. The court agreed with the arbitrators’ findings that rejected this argument when it was raised during the arbitration, and confirmed the award.

²⁷ Roy, K., *The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defence to Refuse Enforcement of Non-Domestic Arbitral Awards?* *Fordham International Law Journal*, (1994), P. 940.

This ground has been restrictively defined by the Supreme Court's decision in *Prima Paint Corp. v. Flood & Conklin Manufacturer*. In this case the court held that “ the arbitration clause in the agreement was separable from the rest of the agreement; and allegations as to the validity of the agreement in general, as opposed to the arbitration clause in particular, were to be decided by the arbitrator.”²⁸

2. Violation of due process

This ground of refusal, like other grounds, has rarely been successful in the US courts. US courts have interpreted this ground narrowly in favor of looking at the overall result and determining whether the defendant had a fair hearing or not. Courts in the US do not “ overturn awards because the defendant was unable to present some part of his case, such as a witness, or could not cross-examine the other party's witness. Nor can the defendant complain if he had notice of the hearing and failed to attend.”²⁹

The leading case about this refusal ground is *Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier*, in which the defense of due process was raised by the American company who argued that the arbitrators had violated due process

²⁸ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)

²⁹ Ramona Martinez, *Recognition and Enforcement of International Arbitral Awards under the United Nations Convention of 1958: The "Refusal" Provisions*. 24 *Int'l Law*. 487, (Summer 1990). P. 499.

standards by refusing to postpone a hearing because one of the witnesses could not be present.³⁰

3. Excess by Arbitrator of his Authority

In the United States there is a great assumption that the arbitral panel acted within its authority. Therefore, this defense does not sanction second-guessing the arbitrator's construction of the parties' agreement. It also does not create a license to review the record of arbitral proceedings for errors of fact or law. This is true whether the award was made in the US or abroad.³¹ Thus, like others, this ground of refusal has been rarely successful in the United States.

The application and interpretation of this ground was raised in the case of *Parsons & Whittemore*. In this case the court stated that, "This defense to enforcement of a foreign award, should be construed narrowly. Once a narrow construction would comport with the enforcement-facilitating thrust of the Convention."³²

4. Irregularity of the composition of the arbitral tribunal or arbitral procedure

This ground has been frequently used in claiming that the arbitrators were biased when they violated the parties' agreement.³³ However this argument has been rarely successful because of two reasons.

³⁰ *Id.* at 500.

³¹ J. Stewart McClendon, *Enforcement of Foreign Arbitral Awards in the United States*, 4 *Nw. J. Int'l L. & Bus.* 58 (1982) P. 65.

³² *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. N.Y. 1974)

³³ Diana G. Richard, *Enforcement of Foreign Arbitral Awards under the United Nations Convention of 1958: A Survey of Recent Federal Case Law*, p. 33

First, one of the main benefits of the arbitration is that the parties are applicable to choose panel members who are experts in the same field of the dispute. Due to the great demand for a small number of renowned experts, many of the experts may jointly work on many arbitration panels, which can also be in other disputes surrounding one or both of the parties now in disagreement. Second, to improve the goals of the convention, courts will often be skeptical of broad-based assertion of bias that are not raised before the arbitral panel itself, and subsequently raised to block the enforcement of the award.³⁴

In the question of arbitrator bias, the most important case is *Commonwealth Coatings Corp. v. Continental Casualty Co.*, which concerned a review of an award under U.S.C. § 10. The arbitrator conducted business in Puerto Rico where one of his customers was the respondent in the case. There had no dealing between the arbitrator and the respondent in about a year before the time of arbitration. The petitioner was unaware about the business relationship between the arbitrator and the respondent until the award was made. In this case the court held that the arbitrators should reveal to the parties any matters that could create an impression of possible bias.³⁵ The Supreme Court set the award aside in this case.

5. Non-Binding Award

Under article V (1)(e) the award is eligible for refusal of recognition and enforcement if the award “has not yet become binding on the parties, or has been set aside or suspended by a competent authority in which, or under the law of which, that award was made.” Under the convention, the term “binding means that no further

³⁴ *Id.*

³⁵ 393 U.S. 145 (1968).

arbitration appeals are available.³⁶ Under New York Convention, it is not required for enforcement of the award to exhaust all of the appeals in the country where the arbitration took place.³⁷

In *Fertilizer Corp. v. IDI*, IDI argued that recognition and enforcement of the award should be refused under this defense due to the fact that the case was under appeal in an Indian Court. The U.S. for purposes of New York Convention, the U.S. district court rejected this claim and found that the award was final and binding. The court mentioned the comments of Professor Gerald Aksen, former general Counsel of the American Arbitration Association that “ the award will be considered “binding” for the purposes of the Convention if no further recourse may be had to another arbitral tribunal (that is, an appeals tribunal). The fact that recourse may be had to a court of law does not prevent the award from being binding.”

6. Non-arbitrability

Under this provision, if the subject of a dispute cannot be settled by arbitration under the national law of the enforcing country, the enforcing court may refuse recognition and enforcing of the award that was granted from a foreign arbitration panel. The importance of this defense is that it has been successful in several cases in the US courts. However this defense could be limited to a few areas.

³⁶ Joseph T. McLaughlin, *Enforcement of Arbitral Awards under the New York Convention - Practice in U.S. Courts*, *Berkeley Journal of International Law*, p. 299.

³⁷ Gerald Aksen & Wendy S. Dorman, *Application of the New York Convention by United States Courts: A Twenty Year Review* (65, 83 (1991)).

In the case of *Libyan American Oil Co. v. socialist People's Libyan Arab Jamahiriya*, this defense was successful. The court refused to recognize and enforce the arbitral award made in favor of the oil company against the country. The court found that “the act of state doctrine made the dispute incapable of settlement by arbitration and therefore found and article V(2)(a) defense.”

On the contrary, this defense was rejected in the case of *Parsons & Whittemore*. The defendant in this case argued that, “the dispute had a significant impact on U.S. foreign policy, and therefore, the dispute could not be placed at the mercy of foreign arbitrators who are charged with the execution of no public trust and whose loyalties are to foreign interests.” The court rejected the defendant's argument and stated that “the mere fact that an issue of national interest may incidentally figure into the resolution of a breach of contract claim does not render the dispute non-arbitrable.”

6. Public Policy defense

As mentioned earlier, New York Convention does not give any definition of the public policy, which makes it hard to determine the scope of this defense. According to Ramona Martinez when considering the goals of New York Convention he stated that “there is a strong policy in the U.S. courts favoring arbitration, especially in the context of international agreements. Arbitration clauses are to be liberally construed. Moreover, any doubts as to whether an arbitration clause may be interpreted to cover the asserted dispute are resolved in favor of arbitration. Given the narrow construction and

interpretation of the defenses allowed under the New York Convention, arbitral awards are supported by a proenforcement attitude.”³⁸

The court in *Parsons* distinguished between the public policy and national public policy in the United States. In this case Parsons argued that the award was contrary to the U.S. public policy, and the court rejected this claim. The court held that the enforcement of this award did not conflict with the American Law, and did not conflict with the rules of New York Convention. According to the court“ the public policy defense was not to be used for protection of national interest.” The court also concluded that “ the public policy defense should be construed narrowly and that enforcement of foreign arbitral awards may be denied on this basis only when enforcement would violate the forum state’s most basic notions of morality and justice.”³⁹

It seems that the United States courts are very reluctant to apply the public policy defense.⁴⁰ The consensus in the United States is to have the public policy construed narrowly, which lead the American courts to have rarely refused to enforce a foreign arbitral awards due to a public policy violation. This is what some scholars call “a strong bias in favor of enforcement of arbitral awards.”

III. The Refusal Grounds under Sharia Law

In 2012, the Kingdom of Saudi Arabia issued a new arbitration law that is based

³⁸ Martinez, *supra*, p 518.

³⁹ *Id.* P. 509

⁴⁰ Choi, *supra*, at 199.

on UNCITRAL model law. This law is intended to restrict the supervisory rule that the courts used to do under the old law. Under this law arbitrators are granted powers they were previously denied such as authority to rule on their own jurisdiction. It also increases the parties' autonomy by giving them the right to choose a substantive law that is applicable to their dispute, a foreign seat of arbitration, and a language of the arbitration.

However, the new law may not be effective in some ways due to the fact that it applies only to the provisions of Islamic Sharia and forces the parties to show that the award does not contain anything that is contrary to Sharia provisions, which is therefore will be contrary to the Saudi public policy, under which Saudi courts will find a ground to refuse to recognize and enforce the award.

Comparison between the new and old arbitration law in Saudi Arabia:

The new enforcement law has provisions that affect all aspects of enforcement of domestic and international arbitral awards. Before the new law was issued, the parties had to provide applications for the enforcement of foreign judgments and arbitration awards to the Board of Grievances. The Board of Grievances was not created to only hear enforcement requests, but also to deal with some of the more important commercial issues before Saudi courts, which make procedures become lengthy and rigid.⁴¹

⁴¹ Yusuf Giansiracusa, the new law of Saudi Arabia: an additional step toward a harmonized arbitration regime, Jones Day, (September 2013), retrieved from http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCYQFjAA&url=http%3A%2F%2Fwww.jonesday.com%2Ffiles%2FPublication%2F8a125998-ccdc-426a-9cfb-a9c622ff1616%2FPresentation%2FPublicationAttachment%2F95ac0be5-ef48-48d8-b9b7-a9c901966ff6%2FNew%2520Enforcement%2520Law%2520of%2520Saudi%2520Arabia.pdf&ei=0B5PU_OOOY6J8gH15IA4&usq=AFQjCNEe0WznQWtMEHXaI31esR4vKE6vTg&bvm=bv.64764171,d.aWw

Under the old law, the Board of Grievances used to take a full review on the merits of each award to ensure that the arbitration award was compliant with Sharia. In some cases under the old law parties have met with the possibility that their award would be refused recognition and enforcement because of the arbitrator's unfamiliarity of Sharia requirements. Moreover, the old law required that the arbitration proceedings to be conducted in Arabic to allow the review of the Board of Grievances, which leads the parties seeking enforcement of foreign award face difficulties and delays in enforcing the award.⁴²

A leading case under the old law is the case of *Jadawel Intl. v. Emaar*. In 2006, Jadawel started arbitration in Saudi Arabia, claiming damages in the amount of \$1.2 billion. Jadawel argued that Emaar breached the joint venture agreement relating to a construction project, and that it formed a partnership with another party in a breach of the joint venture agreement. Jadawel's claim was dismissed, and it was ordered to pay legal costs. However, the Board of Grievances re-examined the merits to confirm that the award was not contrary to the Sharia requirements. The award was reversed by the Board of Grievances and the damages were void. Emaar was also ordered to pay \$250 million damages to Jadawel. This situation is unlikely to occur under the new enforcement law.⁴³

⁴² Id.

⁴³ Mohammed Al-Ghamdi, John Lonsberg, Jonathan Sutcliffe and Sam Eversman, *The Dispute Resolution Review*, (April 2012), retrieved from <http://www.nortonrosefulbright.com/files/us/images/publications/20120401SaudiArabia.pdf>.

Important positive steps in the new law:

The new arbitration law promises to modernize the Saudi arbitration system in several important ways. Article 52 of the new arbitration law states that “the arbitration award issued in accordance with this law shall be valid in force.” Article 53 goes on to state that “the competent court shall issue an order for the putting into effect of the arbitration award and shall submit a request for execution of the award.”⁴⁴

A. Written guidelines for determining whether an agreement to arbitrate may be enforced

After the new law, Saudi law follows international arbitration rules where the awards are accepted as valid from their issuance and courts are obligated to recognize and enforce them except when the enforcing court is faced with a refusal ground that are listed in New York Convention. Article 49 of the new law states that “arbitration awards issued in accordance with this law are not to be challenged in any way except through the filing of a lawsuit to nullify an arbitration award according to the provision of this law.” This article sets out the instances upon which, parties can file a lawsuit to challenge the award:

1. If an arbitration agreement does not exist or such agreement is null and void or apt to be null and void or discontinued on expiry of its period.
2. If any of the arbitration parties happens to be, upon the concluding of the agreement, legally ineligible in accordance with the Law which governs the

⁴⁴ Issued by royal decree No. M/53, dated 3 July 2012.

- eligibility.
3. If it is not possible for any of the arbitration parties to submit its defense because it was not correctly informed on the appointing of an arbitrator or of the arbitration procedures or for any other reason falling beyond his control.
 4. If the arbitration award ruled out the application of any of the rules which the arbitration parties agreed to apply on the subject of the dispute.
 5. If the arbitral tribunal is formed or if the arbitrators are appointed in a manner that contravenes with this Law or with the agreement of the two parties.
 6. If the arbitration award adjudicated on matters not covered by the arbitration agreement. If the parts of the award relative to the matters which are subject to the arbitration are separated from the other matters which are not subject to arbitration, the nullity shall only fall on the parts which are not subject to the arbitration.
 7. If the arbitral tribunal does not observe the conditions that should exist in the award in a manner that affects its content or that the award relied on invalid arbitration procedures that adversely affected it.⁴⁵

These are exhaustive grounds upon which an award rendered in Saudi Arabia can be refused. Under this law courts are no longer allowed to review the facts or subject matter of the dispute when they decide the validity of any ground. This is a great development from the scope of review under the old law where courts were permitted to review the merits of the dispute.

B. Parties autonomy under the new law

⁴⁵ Id.

Unlike the old law, parties' autonomy is respected under the new arbitration law. The new law gives parties the right to agree on important aspects of their arbitration procedure including the right of parties to arbitrate under official and well-known arbitration rules like the International Chamber of Commerce (ICC) or the London Court of International Arbitration (LCIA) rules.⁴⁶

This improvement is so important because it addresses an area of uncertainty that was under the old arbitration law. Moreover, the new law respects the parties' choice of governing law, language and arbitrators. In addition, parties under the new law are no longer obligated to file their arbitration agreement with the courts for validation before starting arbitration, which was a requirement under the old law. Finally and more importantly, parties are allowed to agree on a language other than Arabic to conduct the arbitration, unlike the old law where arbitrations were required to be conducted in Arabic.

Practical Questions

Although the new arbitration law provides additional details and clarity on issues that were deficient under the old law, it is important to recognize that the new law affirms that Sharia law is supreme and awards can only be enforced if they are in compliant with sharia. Article 50(2) states that the court may reject to enforce the award if it includes provisions that violate Sharia and public policy in the Kingdom.

New York Convention provides Saudi Arabia with a safe way to reject to enforce

⁴⁶ Saud Al- Ammari and Tim Martin, Saudi Arabia modernizes arbitration laws, (November 2012), retrieved from <http://www.blakes.com/English/Resources/Bulletins/Pages/Details.aspx?BulletinID=1566>.

foreign arbitral awards which contradicts with the purpose of the convention. Article V (2)(b) of New York Convention permits Saudi Arabia to reject any foreign arbitral award that is against its public policy. In order to resolve this problem and achieve the goal of New York Convention, solutions that have been suggested should be considered:⁴⁷

1. Give the public policy defense narrow reading

Many countries, like the United States, have given the public policy defense narrow reading in order to give New York Convention full effect. As mentioned earlier, the United States courts have held that all New York Convention defenses should be given narrow reading effective only when recognition and enforcement of the award would violate the most fundamental notion of justice. For Saudi Arabia to gain the confidence of the commercial community it should consider the public policy defense narrowly. However, in considering this solution, it appears that it does not levy any new obligation against those countries that abuse this right. Thus, it leaves it the countries themselves to voluntarily consider this ground narrowly.

2. Amend the convention's public policy defense

The public policy defense could be amended to provide that a country finding an arbitral award contrary to its public policy could seek an independent body to decide whether the public policy of the enforcing country has been violated or not. Allowing a third party to decide this dispute would give the public policy its missing impartiality, and would ensure that contracting countries to New York Convention would not use this defense to justify prejudiced refusal. However, courtiers would feel that their sovereignty

⁴⁷ Roy, K., The New York Convention and Saudi Arabia: Can a Country Use the Public Policy Defence to Refuse Enforcement of Non-Domestic Arbitral Awards? *Fordham International Law Journal* 18 at 921 (1994) P. 955.

is violated when a third party intervenes, and therefore, they would not allow a foreign institution to take such decisions.

3. Remove the public policy defense from the convention

If Article V (2)(b) is removed, parties will still have remedies at law to oppose enforcement of the award. A party who supposes that the award is unfair or biased may invoke the other grounds of refusal that are listed in Article V of the convention to examine the validity of the award. However, a complete removal of the public policy defense is unlikely a solution that any country would agree upon due to the fact that the removal of such provision would disregard mandatory rules of the contracting states and consider the award to be more powerful than these rules, which is most unlikely to accrue.

Conclusion

The popularity of using arbitration as a method to settle complex disputes led to enacting the Convention of New York, which is one of the key instruments in international arbitration. The drafters of the convention accepted some grounds that courts could use to refuse recognition and enforcement of foreign arbitral awards. The New York Convention uses general terms in stating these grounds, without giving any definition of the terms of these grounds, which gives member states a broad path in interpreting these grounds and refusing recognition and enforcement of any arbitral award that violates these grounds. This leads to diversification between countries in

implementing these grounds, which diminish the purpose and objective of the convention.

In the comparison of the implementation of these grounds between the United States and Sharia law we found a significant differences in the interpretation and implementation between these two countries. When considering these differences, it can be concluded that the United States court are more willing to interpret and apply these grounds narrowly, unlike Saudi courts which had been refusing enforcement and recognition of foreign arbitral awards in most cases due to the fact that they contradict with its public policy before the issuance of the new arbitration law.

The new Saudi arbitration law provides a great development over the old law by using the Model law as its framework, which led to applying international standards to Saudi arbitration. A great improvement in the new law is that it restricts the supervisory rule that courts used to do under the old law and grants arbitrators powers they were previously denied. It also increases the parties' autonomy by giving them the right to choose a substantive law that is applicable to their dispute, a foreign seat of arbitration, and a language of the arbitration.

However, the new Saudi arbitration law does require that foreign arbitral award must be in compliance with Sharia law and the Saudi public policy. It emphasis that the court may reject to enforce the award if it includes provisions that violate Sharia and public policy in the Kingdom. This is a result of what the New York Convention public policy exception provides for members.

It is unclear whether the new Saudi arbitration law will follow the grounds of New York Convention without utilizing the public policy defense to circumvent recognition and enforcement of foreign arbitral awards. In order to provide the international community with a strict rules that require the members of the treaty to recognize and enforce foreign awards, which is the purpose of the Convention, Article V(2)(b) of the Convention should be either modified or removed.