

## **Enforcement of Foreign Arbitration Awards in Iran**

### **A. Preamble**

Arbitration is considered one of the most prevalent and valued procedures for dispute settlement in modern law and is predominantly practiced in countries that are referred to as pro-arbitration states. Although the arbitration award is considered definite and final, its enforcement, at least in non-voluntary cases, should inevitably be subject to court intervention since courts are the governmental and rule enforcing authority with the power to force parties to fulfill their obligations in a dispute. Hence, the integration of arbitration and litigation, in this sense, means that the free will of the parties in referring to arbitration requires a form of governmental supervision.

In Iran, where the traditional dispute settlement regimes including referral to the governmental courts have a long-standing status, arbitration is but a novel method of settlement whose development and stability requires concerted efforts at ratification of protective laws, regulations and education of the new generation of lawyers and judges in the judiciary.

Nevertheless, it is worth mentioning that during the recent years, Iran has taken major steps towards implementing arbitration as one of the preferred tools of dispute settlement not only because of its advantages, but also because of the high volume and traffic of files before the judiciary and the required technical expertise in different cases mainly in commercial disputes, which is normally lacking among judiciary judges.

In light of the above, Iran ratified the Law on International Commercial Arbitration (LICA) on 17 September 1997 that has been drafted based on the UNCITRAL Model Law. This law is considered the major source for the international commercial arbitration disputes in Iran. Before ratification of this law, the arbitration disputes were subject to section eight of the old Civil Procedure Code of Iran (CPCI) dated 1960. Further to revision of the CPCI, the new version of this law was ratified on 11 December 2000 in

section seven of which the arbitration clauses with only few differences from the old Code have been verified. This Code is peculiar to domestic arbitration disputes.

A huge step for recognition and enforcement of the foreign and international arbitration awards was taken in Iran through joining the New York Convention on Enforcement and Recognition of Foreign Awards dated 1958 (New York Convention) on 10 April 2001.

Before joining the New York Convention, the Iranian courts and judges took different procedures with respect to the foreign and international awards or in the arbitration awards in cases when one party was a foreign company or a foreign legal entity. Some of the courts treated such awards as domestic and some as foreign awards that their enforcement were subject to the rules of CPCI (on enforcement of foreign awards). Finally, after ratification of the New York Convention, a more unified and homogenized procedure has been taken with respect to the enforcement of foreign and international awards.<sup>1</sup>

## **B. Nationality of Award**

### *1. Definition of Foreign Arbitration Award:*

For the purpose of enforcement of foreign arbitration awards, first a distinction should be made between domestic and foreign (international) awards. In other words, the nationality of the award should be determined<sup>2</sup>.

UNCITRAL Model Law, paragraph (3) of Article 1 mentions 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.

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1 Zahraie Morteza, Article on Security of International Arbitration Awards, 2012, p. 1

2 Some doctrines provide the theory of “stateless arbitration awards” in international commercial arbitration cases in order to release the arbitrations of national legal principles. But apparently this theory has not met with due success from different aspects and also from the perspective of states issuing or enforcing the award.

In Law on International Commercial Arbitration (LICA) para (b) Article 1, the 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. Therefore, it is noted that LICA, as the domestic law of Iran which is an adoption of the Model Law, has taken a different approach in comparison with the Model Law and has not enumerated the seat of arbitration or place of performance of the subject matter of agreement as relevant elements for recognition of the arbitration as “international” or “foreign”. Another criterion LICA has mentioned to regard the arbitration award as foreign is that the dispute should have been raised with respect to “international commercial relations” of parties. (Article 2 para 1).

Therefore, under LICA, the subject matter of arbitration and the parties play the main role for recognition of the award as “international”. Accordingly, if a dispute arises between two Iranians whose place of business is not in Iran or if one of the parties possesses double nationalities, their dispute does not qualify as “international” under LICA.<sup>3</sup>

## *2. Seat of Arbitration:*

From an international perspective, the main elements that are taken into account for an award to qualify as foreign and international; i.e. nomination of the nationality of the award, are the “place of issuance of the award” and the “applicable law”.<sup>4</sup>

According to Article 1 (1) of the New York Convention (NYC), the Convention is applicable in contracting states if according to the domestic laws; the award is not considered domestic. Hence, it is to be noted that under the Convention, the place of issuance of the award does not play a role in recognition of the award as foreign and international but it is important that the state in which the award is going to be enforced be a member state and that its domestic laws should qualify the award international.

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<sup>3</sup> Alireza Iranshahi, Challenge of Arbitral Award, 2014, p. 270

<sup>4</sup> Alireza Iranshahi, Challenge of Arbitral Award, 2014, p. 271

As to the awards that are issued in Iran, according to the “territoriality principle”<sup>5</sup> the awards are considered domestic and the law of the seat of arbitration is the applicable law<sup>6</sup> unless the parties have agreed otherwise. In spite of existence of this principle under the laws of Iran, it is noted that in Article 35 of UNCITRAL Model Law the arbitration award shall be recognized and be enforced if the conditions listed in Article 36 of the same law are met, irrespective of the country in which the award has been issued.

Considering the above and also Article 1(1) of NYC, it can be inferred that the arbitration cases seated in Iran which qualify as international and foreign according to LICA, could be requested to be enforced in Iran under the NYC.

### *3. Applicable Law:*

The other factor that should be noted is the applicable procedural law, which is normally determined by the parties in the arbitration agreement (unless the agreement is silent on this issue). The applicable procedural law might be of some relevance for the purpose of determining the nationality of the arbitration award.<sup>7</sup>

If we take into account the principle of “applicable law” for recognition of the nationality of the award, an arbitration award that has been issued in Iran subject to applicability of foreign law, would not be considered domestic. Likewise, in cases when the arbitration award is issued in a foreign country as seat of arbitration but has been made subject to the procedural laws of Iran, it is to be considered domestic<sup>8</sup>. This opinion is more justified in cases where the seat of arbitration is appointed by the parties as the “place” of arbitration”. This is normally a place where holding the arbitration proceeding and meetings is more convenient for the parties. Having said this, each arbitration award, based on its nationality, is finally subject to the governmental rules that have a right of supervision when it comes to recognition and enforcement. At the same time, it is likely that governing laws of the country whose procedural law has

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5Article 5 of the Civil Code of Iran

6 Laya Joneidi, *Enforcement of Foreign Commercial Arbitration Awards*, 2013, p. 322

7 Alireza Iranshahi, *Challenge of Arbitral Award*, 2014, p. 279

8 Laya Joneidi, *Enforcement of Foreign Commercial Arbitration Awards*, 2013, p. 325

been selected as the applicable law in the arbitration proceeding will also be taken into account for supervising the recognition and enforcement.

In Article 35 of the Law on International Commercial Arbitration (LICA), the awards that are issued in accordance with the regulations of this law are considered final and enforceable, upon notification. According to Article 6 of the same law, the request for enforcement of such awards should be given to the courts of the province where the seat of arbitration is located and if the seat of arbitration is not determined in the arbitration agreement, to the courts in Tehran<sup>9</sup>. From these provision, it can be understood that arbitrations that are subject to this law, are also enforceable in Iran if the seat of arbitration is in Iran or if the parties have not agreed on the seat of arbitration. However, this law provides no insight into arbitrations subject to these regulations whose seat of arbitration is not in Iran.

From another perspective, Article 33 of the LICA, which refers to request for cancellation of the awards, provides that the application for cancellation of arbitration should be submitted to the courts referred to in Article 6 of the same Code that are the courts of the seat of arbitration. Accordingly, the request for cancellation of the arbitration award is possible for the arbitrations whose seats are in Iran<sup>10</sup>. Considering this provision, according to LICA the seat of arbitration has a stronger effect than the rule of applicable law for determining the nationality of the award and the procedures to be taken for requests for cancellation, recognition and enforcement of awards.

Further, as the laws of seat of arbitration likely result in implication of the same procedural law, it is important to select the seat of arbitration in a country that is pro-arbitration<sup>11</sup>.

Considering the above and that the procedures that is taken by the Iranian courts for verifying the nationality of the arbitration award may differ based on the provision of LICA, there is less risk if, in the draft of the arbitration clause, the seat of arbitration and

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9 Laya Joneidi, *Enforcement of Foreign Commercial Arbitration Awards*, 2013, p. 326

10 Laya Joneidi, *Enforcement of Foreign Commercial Arbitration Awards*, 2013, p. 327

11 Alireza Iranshahri, *Objection to the arbitration award in international commercial arbitrations*, 2014, p. 283

applicable law would be agreed not in relation to the place of likely future enforcement i.e. Iran.

### **C. Enforcement of National Award**

One of the ways for objection to an arbitration award or prevention of its enforcement is request for cancellation of the award. Therefore, before we discuss the enforcement of the arbitration award, the procedures and legal basis for cancellation and objection to the award are outlined as these two subjects are intertwined.

#### *1. Enforcement of arbitration award under the Civil Procedure Code of Iran:*

Enforcement of arbitration awards under Civil Procedure Code of Iran (CPCI) mainly refers to domestic awards. The request for enforcement should be given to the courts that referred the dispute to arbitration in the first place or the one that had the capacity to consider the dispute subject to non-existence of arbitration (Articles 485 and 488).

In Article 493 of CPCI, it is mentioned that objection to the arbitration does not prevent enforcement of arbitration unless there is strong evidence. The law has not provided an interpretation on strong evidence and has left it to the discretion of the courts and judges, which makes it quite subjective.

In Article 498 of the CPCI, the conditions under which rejection of enforcement could be made are listed. These conditions are similar to the cancellation conditions including non-conformity to the lawful regulations, issuing the verdict on the non-subject matter, exceeding the scope of authority, issuance of the verdict after termination of the arbitration respite, contradiction between the award and the valid and lawful documents and issuance of the verdict by unqualified arbitrators.

The distinction here that can be made is that for the cases where request for enforcement of the award is made under Article 488, the courts, as the authority that have supervisory power for enforcement of award, would not enter into the merits of the case and upon conducting formalities, would issue its order on enforcement.

However, if one of the parties requests setting aside<sup>12</sup> of award, the courts of Iran would have this right to enter into further details of the case. Meanwhile, it should be noted that request for setting aside of the award is dedicated to the national awards (or the Iranian awards) that include the awards which have been issued in Iran as the seat of arbitration.<sup>13</sup>

## 2. *Enforcement of awards under the provision of the Law on International Commercial Arbitration:*

In Articles 33 and 34 of LICA, under section of “objection to the arbitration award”, the bases for rejection of the award are mentioned. Article 33 discusses the possibilities when the arbitration can be cancelled. Conditions listed in this Article are , to some extent, the same as the provision of Article 498 of CPCI. Subject to request of one party before the court, and existence of any of the listed conditions under Article 33 the court would issue its decision on cancellation of award. The listed conditions include incapacity of any of the parties, invalidity of the arbitration agreement, issuance of the verdict that is not in line with the authority, non-compliance with the regulations of this law for submission of the notices, disclosure of new or fraudulent documents after issuance of the awards and if the procedure and board of arbitrators have not complied with the nominated procedural law (and a few further items).

In Article 34 of Law on International Commercial Arbitration (LICA) three conditions are mentioned in the existence of which the arbitration award is essentially void. Firstly, in cases when the subject matter of arbitration is not referable to arbitration under the laws of Iran<sup>14</sup>, second, if the award is against the public policy, morality and imperative laws of Iran. Third, if the award is granted on the real estates in Iran which contradicts the provisions of imperative laws or official deeds.

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<sup>12</sup>In Article 34 of the UNCITRAL setting aside of the arbitration award is considered as the way for objection to the arbitration award. This also has been mentioned in the LICA Article No. 33.

<sup>13</sup>Laya Joneidi, *Enforcement of Foreign Commercial Arbitration Awards*, 2013, p. 330

<sup>14</sup> In accordance to Article 496 of CPCI issues of marriage, divorce, cancellation of marriage, parentage and bankruptcy are not referable to arbitration.

One of differences of this law with the CPCI is that the request for cancellation of the arbitration award suspends enforcement that is normally operative with payment of eventual damages.<sup>15</sup>

#### **D. Enforcement of Foreign Arbitration Awards**

With respect to the enforcement of foreign awards and as far as it relates to the rules of international law, the international conventions and treaties have superiority over the domestic law. Before Iran joined the New York Convention, there was no specific convention according to which enforcement of the arbitration could be sought<sup>16</sup>. The only applicable international instrument was the Bilateral Treaties that were concluded with few states while enforcement of the awards under such Treaties were also not straightforward.<sup>17</sup>

It is worth mentioning that there is a difference between “recognition” and “enforcement” of the arbitral award. Recognition is taking action to give the same value to the foreign award as the value of the national and domestic awards; and enforcement is pursuing and enforcing the judgment debtor to fulfill provisions of the award.<sup>18</sup> Hence, it can be understood that “recognition” is an action that can be taken only with respect to foreign awards while the national and domestic arbitration awards are subject to request for setting aside. As in domestic arbitration, the only way for objection to the arbitral award is request for setting aside of the award unless the parties have agreed otherwise.

According to Article V (2) paragraph a and b of the New York Convention, the request for recognition of the foreign arbitration award could be refused if the subject matter is not capable for arbitration in the country where enforcement is sought and if it is contrary to the public policy of that country. The provision of Article 5 of New York Convention, Article 496 of CPCI and Principle 139 of the Constitution of Iran are

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15 Laya Joneidi, *Enforcement of Foreign Commercial Arbitration Awards*, 2013, p. 329

16 Iran is not also member of ICSID that is referable in the arbitration dispute between the governments and investor of a foreign state.

17 Laya Joneidi, *Enforcement of Foreign Commercial Arbitration Awards*, 2013, p. 345

18 Laya Joneidi, *Enforcement of Foreign Commercial Arbitration Awards*, 2013, p. 90



considered as the provisions that provide limitation with respect to enforcement of foreign arbitral awards<sup>19</sup>.

According to Article 496 of CPCI the disputes relating to marriage, divorce, cancellation of marriage, parentage and bankruptcy are not by their nature referable to arbitration. Principle 139 of the Constitution is considered one of the controversial provisions for limitation of arbitration. According to this Principle, referral of the disputes on public or governmental properties to arbitration would be subject to ratification of the Board of Ministers and information of Parliament. In important cases, approval of Parliament is also required.

The reservation right mentioned in Article I (3) of New York Convention is also one of the other sources based on which Iran can exclude non-commercial disputes for enforcement under New York Convention.<sup>20</sup>

#### **E. Judicial Precedence of Enforcement of Foreign Arbitral Award in Iran**

As mentioned, enforcement of the foreign arbitral awards subject to New York Convention (NYC) is quite recent in Iran and before joining NYC, such awards were treated either as domestic arbitral awards or as enforcement of foreign awards in Iran. Nevertheless, in the few cases that have been decided before the courts of Iran, efforts have been made so that the courts do not enter into merits of the case and just consider the issued award from a procedural perspective.

Another measure that is taken in light of finalization of the order of the court on recognition of an award is that the courts do not consider the “recognition” as “judgment” but rather as a “decision”. As judgments that are issued by the court of first instance are appealable under the laws of Iran while decisions are not, so this procedure helps to make recognition of foreign awards final after judicial scanning by the court. However, the attached risk to this procedure is that there is no guaranty for its persistence since the judge may revoke his “decision” later.

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19 Laya Joneidi, *Enforcement of Foreign Commercial Arbitration Awards*, 2013, p. 356

20 Laya Joneidi, *Enforcement of Foreign Commercial Arbitration Awards*, 2013, p. 356

There are not many branches in the judiciary of Iran that are familiar with similar types of order, but the major elements that are checked for recognition of the award include: the dispute should come out of a commercial matter; no evidence should have been submitted on non-enforceability of the award; conformity of the award to public policy and that the subject-matter under the laws of Iran are would be arbitrarily.

## **F. Conclusion**

As mentioned above, request for recognition of award and request for setting aside of the award are two sides of the same coin. This has been referred to in some cases when the judgment-debtor requested for setting aside of the award against the decision of the court on recognition of the award. This also happened in one case further to which the court disregarded with the fact that it had no authority to enter into merits of the case and the only condition under which a foreign award cannot be recognized are the provision of Article 5 of New York Convention. In this case, the court revoked its decision on recognition of the arbitration award based on the case that judgment-debtor had brought before another branch for setting aside of the award.<sup>21</sup>

Therefore, in spite of join of Iran to New York Convention, enforcement of foreign awards in Iranian precedence come along with considerable instability and variety. This is because apparently the courts are still not sufficiently familiar with the scope of their authority with respect to foreign awards and oftentimes they confuse their authorities for the national and domestic awards with foreign ones.

In conclusion, promotion of the culture of referring to arbitration and informing the legal community of the advantages of using arbitration is what Iran must more seriously embark on. As long as a country does not have a stable position as to the enforcement of the arbitral awards, referral to that country's regulations and its nomination as seat of arbitration inevitably remains rare. Therefore, major actions, mainly in the precedence and judicial review in Iran should be taken so that international awards are

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<sup>21</sup> Two actual orders have been issued from two different branches of court though subject to confidentiality of the verdicts no reference is made to the order and issuing branch numbers.

provided with better protection for enforcement in Iran and also the awards that are issued in Iran have considerable enforceability position abroad.

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