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The Concept of Foreign Arbitration Award in the Light of New York Convention, 1958

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Abstract: The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958, is a comprehensive instrument which facilitates the enforcement of arbitral decisions. The New York Convention Compared to its predecessor, the Geneva Convention 1927, on the Enforcement of Foreign Arbitral Awards has gained more flexibility and acceptance among UN member states. In accordance with Article 1, this Convention is applicable in a State other than the State where the recognition and enforcement of such awards are sought, or to arbitral awards not considered to be domestic awards. Therefore, the scope of the application of this Convention depends on what the notions of "arbitrator's award" and "foreign arbitration award" are; because these two notions can determine which awards should be executed under the rules of the Convention and gain its benefits. However, the Convention gives no clear definition of foreign arbitral award. Under the New York Convention two types of foreign arbitral awards are recognized; arbitral awards that are not considered domestic and arbitral awards rendered in the territory of the state other than the state of the recognition and enforcement of award. In consequence it might be said the New York Convention is based on two criteria with different interpretations of which the territorial criterion is the most important one in comparison with functional criterion. So this paper aims to clarify the concept mentioned as one of Convention's requirements in terms of executive scope.

Keywords: New York Convention, Arbitral Award, Foreign Arbitral Award, Criteria, Scope

1. Introduction

Following the increase in international trade relations, there was general acceptance of arbitration as an effective and rapid method of resolving disputes. The reflection of this led to efforts to strengthen the efficiency and improve the implementation of the awards issued by arbitration institutions, which resulted in the conclusion of various treaties, including the 1958 New York Convention. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted on June 10, 1958, is designed to facilitate the enforcement of international commercial arbitral awards and is not subject to any specific domestic legal systems but has its provisions. Therefore, it is necessary for countries to apply the principles and rules set forth in the convention for the implementation of international commercial arbitration awards. The scope of the New York Convention is very broad because it applies to awards issued in any foreign countries, whether a Contracting State or not [1].[1]

The ratification and approval of the New York Convention has been a successful move that has been accepted by most countries. Its acceptance has been such that, according to Judge Michael Kerr, the entire structure of international arbitration is based on it, to the extent that without the Convention an efficient life pending arbitration could not be expected [3]. However, the Convention has cast doubt on the

1 The classification of arbitral awards in the New York Convention includes differences in the interpretation of the internal or external situation of arbitration in terms of approaches adopted by different countries. The prevailing theory is that arbitration is issued in the country where the arbitration takes place and it is located there [2]. The place of arbitration is usually the place where the arbitration award is issued.

nationality of the award issued. The New York Convention restricts the criteria of territory and the rules of non-domestic awards. According to this article, the New York Convention shall apply to 1) those arbitral awards which are issued outside the territory of a State in which recognition and enforcement are sought and also 2) arbitral awards which are not considered domestic in the territory of the State in which recognition and enforcement are sought. The first paragraph of the above article sets out a general rule and provides for an enforcement mechanism for foreign awards under which the Convention applies in a country other than the country where the recognition and enforcement are sought. However, in principle, it is not necessary for the country where the award is issued to be one of the Contracting States unless the requesting State exercises the right to restrict the reciprocal treatment referred to in paragraph 3 of Article 1. Section 2 of Article 1 of the Convention extends the authority of States to consider a local arbitral award as a foreign award if, for example, the arbitral proceeding is done under a foreign procedure. The mentioned article does not clarify what the purpose of the Convention is. By the way, it is deduced from of Article 1 that the country in which the award was issued and also the country whose law governed the arbitration process can consider the award to be domestic, but as the Convention is about the enforcement of foreign arbitral awards, it is important to find out the attributes for an award to be considered foreign[2]. In this case, it is said that a foreign arbitral award specifically means an award issued by an impartial arbitrator or foreign arbitration authority in compliance with the competent law or the law of the place of issuing the award and based on a valid arbitration agreement [5, 6].

Although the Convention defines its jurisdiction in two territorial and functional jurisdictions, it faces the challenge about not providing any criteria for explaining these two terms. For example, it is not clear what exactly the meaning of the territorial criterion is. Additionally, paragraph 2 of Article 1, declares about the possibility of enforcing the award which is not considered domestic in the applicant country. There is no definition of domestic award. In fact, it has somehow left this determination to the domestic law of the countries.

Not defining such a significant issue of the Convention may seem strange, but it never detracts from the unique position and role of the New York Convention in the field of international commercial arbitration. However, the ambiguity in the concept of foreign arbitration has effects on its enforcement. Such doubts may lead to the possibility of non-enforcement of the arbitral award which is in conflict with the purpose of the Convention to facilitate the enforcement of foreign arbitral awards and make the arbitral tribunal more efficient. Therefore, examining and revealing the scope of foreign arbitration is considered in the first part. The second part explains the domestic and foreign arbitral awards from the perspective of the Convention, and the last part discusses reservations provided for in the New York Convention in order to clarify the scope of the foreign arbitral awards in the New York Convention.

2. The Concept of Arbitration and Its Foreignness

The main issue in the New York Convention is the foreign arbitration award, which consists of two parts, “arbitration award” and “foreignness”, both of which need further consideration. In the first place, the question is what is an “arbitration award”? Are any decisions made by the arbitral tribunal subject to the title of award or is it necessary to consider the characteristics and elements in that decision and by measuring them, the chosen decision is entitled to such a title? On the other hand, the title and text of the 1958 New York Convention refer to foreign arbitral awards. The effects of recognizing foreign awards and providing a clear definition of them are reflected at the time of the enforcement of the award, as most countries have their own domestic rules governing the conduct of domestic arbitration and set different rules for it, which may be followed by procedure [7]. In addition, sometimes in international arbitrations, there are many factors such as the place of residence of the parties, the arbitration agreement, the seat of arbitration (which can sometimes take place in several countries), and finally, the place where award is issued can affect the geographical criteria and consequently change the implementation.

Another importance for defining foreign award refers to international documents when generally and even in some cases explicitly provide their rules only in relation to foreign arbitral awards. These include Article 1 of the 1927 Geneva Convention and Article 1 of the 1958 New York Convention [8]. Therefore, with regard to the above explanations, the necessity of finding out the definition of foreign arbitral award becomes clear.

2.1. The Concept of Arbitration Award

The arbitration agreement is the starting point of the arbitration and the arbitral award is the result of the arbitrator's consideration, with the issuance of which the arbitration process ends and the fate of the arbitrators’ review is crystallized in [9]. Given that an award includes both an order and an award, the question arises whether the awards rendered by arbitrators, is just like those issued by courts, include orders and awards? Besides, the arbitrators may have to make various decisions during their trial, not all of which necessarily require an award and include some formal instructions. Now, are any decisions made by the arbitrators entitled to be an award? Both domestic and international rules do not explicitly define the arbitral award, and even in

2 The Convention does not define arbitral awards. It is therefore up to the courts of the Member States to recognize and enforce the award to determine when a decision under the New York Convention is arbitral. The courts have generally accepted that the determination of whether an arbitral award is valid depends on the nature and content of the award, not on the label used by the arbitrators. Some courts have ruled that the subject matter and purpose of the Convention must be taken into account in determining what is meant by “arbitration” [4].

related laws, such as the International Commercial Arbitration Law of Iran (1997) and the UNCITRAL Model Law (2006), this deficiency is seen. The New York Convention is no exception, and only Article 1 (2), provides: "The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted". Hence, the responsibility of determining the criteria to specify the necessary components of the arbitral award falls on the domestic rules of States [10]. According to some, the award can be defined as a binding decision that, in addition to being decisive in the dispute, has the characteristic of being final and valid in the final issue [11].

In *Resort Condominiums International Inc. v. Bolwell (1993)* [12], the Supreme Court of Queensland had to consider whether the interim measure was enforceable in Australia. The petitioners had obtained an interim measure in the United States, instructing the defendant to enter into time-sharing agreement until a final decision was made. The plaintiffs requested for enforcing the preliminary order in Australia. The Supreme Court of Queensland refused to enforce the award, arguing that although the application of the Convention would restrict only final awards to the entire dispute, but a decision to be applied under the Convention, must finally resolve at least some matters of the disputes between the parties. A decision called an interim order does not lead to be an order and acquire this quality because it merely is so named. However, in practice, the dominant position is that finality is the determining factor [13].

Finality of award means to end the subject matter in the arbitration process, which the tribunal orders to end by issuing an award and the hearing is completed, in such a way that it passes all the means of protest or its period expires. The conclusion of the proceedings can include all awards, including partial awards and even interim orders, as they put an end to the matter [14].

Another characteristic mentioned in the definition of award is the rule res judicata [15]. Although, according to some jurists, the rule of the res judicata is not considered as a feature of the arbitrator award, [5]. it seems that the termination of the lawsuit and affecting the legal status of the parties will separate the arbitrator from a simple arbitration decision, because not every decision can be considered an award.

Therefore, if the arbitrator's decision does not resolve the dispute or only contains orders that do not assign a dispute, such decisions cannot be considered an award. Given the above explanations, it is obtained that the decision of the arbitrator is called an award when it has some qualifications:

1) have the effect of res judicata on the subject matter;
2) be final and end with the issuance of the jurisdiction of the judges to hear the issue;
3) the issued award is recognized and enforced; and
4) Objection to the award will be done in the courts where the arbitration takes place [16].

2.2. The Concept of Foreignness of the Award

Determining domestic and foreign arbitral awards and finding their distinction is one of the most significant issues in the implementation of awards. Because when the award is enforced, it faces different laws of countries. Most countries have enacted stricter enforcing laws on domestic awards, which may be difficult to enforce in foreign awards that consist of several non-domestic elements. While the plaintiff has gone through the arbitration process in order to enforcement of the award, and at this stage the arbitrator's actions is concluded.

The decision of the arbitrator consists of different elements. Various factors such as the subject matter of the dispute, the parties, each of whom may be a citizen of a different country, the law governing the trial and the place of arbitration. If all these elements belong to one government, the award is domestic. Also, if all the above factors lead to the issuance of an award in the arbitral tribunal, that award can be considered domestic.

According to the New York Convention, only conciliatory awards, non-objectionable awards due to the waiver of the right to appeal under the seat law, final award, partial award, and default award are enforceable. Since interim award does not involve any orders or judgment, it can merely be recognized but cannot be enforced. However, the following decisions are not subject to foreign arbitration:

1. Decisions dealing with procedural issues,
2. Preliminary, non-final decisions/ injunctions (as opposed to decisions that partially resolve the parties' mutual rights with final force and effect),
3. Decisions that depend on the agreement of the parties, such as *lodo irrtuale*
4. Court decisions on the recognition and enforcement of arbitral awards, and
5. Delocalized arbitral awards that are not subject to judicial control in any state [2].

In determining the foreign award, each government decides according to its own laws, and since the purpose of issuing an award is to enforce it and to exercise the claimant's right, the effects that are imposed on it in the country of implementation are important.

A study of the case of *Bergesen v. Müller (1983)* [17, 13]. shows this. In this case, the US Court of Appeals stated that although the arbitration process took place in New York and the law governing the proceedings is also New York law, the award issued in New York is foreign because both parties were foreign [17].

In *Brier v. Northstar Marine, Inc. (1992)* [18], in which a contractual dispute arose over the recycling of a ship between two Americans. Their contract provided term for arbitrating in the United Kingdom under British law. The U.S. District Court of New Jersey argued that while U.S. courts have the authority to enforce foreign agreements and awards on maritime disputes, referring to section 202 of Chapter 9 of U.S. Law in Context of the Convention, "When the case is only between US citizens, the matter is outside the scope of

the New York Convention until a reasonable relationship is established with the foreign country." In addition to the limited connection that the arbitrators had with the place of arbitration (UK), the court concluded that the contract was formed, enforced, and breached in the United States [18]. It, therefore, refused to comply with the rules of the Convention.

3. Foreign and Non-Domestic Arbitration Awards

Arbitral awards, in terms of nationality, are not out of two categories: foreign or non-domestic. However, what is a foreign and non-domestic award? What can be decisive in determining foreign and non-domestic arbitral award? And to what extent can each factor involved in creating such separation be effective? Another challenge is the extent to which governments play a role in determining a foreign award.

According to the New York Convention, it is necessary to distinguish between foreign and non-domestic awards and to examine each and to understand the concept presented in the Convention.

3.1. Foreign Arbitral Award

Foreign award is an award issued within a foreign country or following an arbitration hearing abroad or based on an arbitration referral agreement which is governed by foreign law shall be considered a foreign arbitral award [5] [3]. Recognition of the A foreign arbitral award is recognized by identifying the foreign elements contained in it. There may be several factors involved in an award that give it a foreign description. These include the seat of arbitration, the nationality of the parties, the place of domicile of the arbitrators, and the venue of the hearings If each of them is related to a different country, make it difficult to determine the nationality of the award.

Examining the above, it was found that Article 1 (1) of the New York Convention not only deals with the application of the Convention in the recognition and enforcement of an arbitral award issued by a foreign country but also in the continuation of the same article stipulates that: "This Convention …. shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." Therefore, in this article, the difference between domestic and foreign awards is obvious. However, no criterion for recognizing foreign awards has been mentioned. Accordingly, it is not clear, for example, to what extent the ruling law or other factors involved in the award play a decisive role in this matter.

Some countries determine the nationality of the award based on the arbitration seat and, consequently, the law that governs it. On the other hand, the law governing the arbitration may also be practical in determining nationality. For instance, if the law of the Belgian procedure governs arbitration, even if the arbitration held in Italy, the arbitration process and the award are under the rule of Belgium [7].

Although Article 1 does not provide a distinct criterion for determination, the mention of the word "also" indicates that the rule in the first part of the article is absolute. This means that if they want to enforce the award issued in Turkey in Iran, and this award is under the domestic laws of Iran, it can still be considered foreign and enforced in accordance with the Convention. The second criterion has no alternative role and is only expressed as an additional condition beside the first part. However, any award issued outside the country of the court where the recognition and enforcement are requested will be subject to the convention. In this case, the award is foreign. Therefore, criteria such as nationality or domicile of the parties do not affect whether the award is foreign or not. The perception of the legal systems of most member countries is that the place of award issuing is the seat of arbitration [19].

Finally, and considering the above, the clear criterion of foreign arbitral awards between different countries can be classified into two types: territorial (geographical) criterion and the criterion of the law governing the proceedings.

3.1.1. Territorial Criteria (Geographical)

Article 1 (1) of the New York Convention provides the basic rule for the territory concerning its scope. According to Article 1: "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." Although this article seeks to determine to some extent the scope of the New York Convention, the main questions that arise are that "what are the main and determining criteria of territorial jurisdiction?"/ "In what cases can an award be considered a foreign award based on its territorial jurisdiction?" "Basically, how correct and functional is this rule?" The direct and clear result derived from Article 1 indicates the non-enforcing of the Convention to the awards issued in the requested country. By the way, the second paragraph of this article applies an exception to this rule, which states the Convention: "shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought".

The reflection of the geographical criterion can be seen in international documents such as the Geneva Convention of 1927 [20], the New York Convention of 1958, and the UNCITRAL Model Law on International Commercial Arbitration (2006) [21].

3 The award is always due to the ruling power of the government. Therefore, the arbitral award is only related to the country where it was issued. The criteria of the country where the award is issued is quite clear and can always be easily dependent. However, it should not be forgotten that the reason for assigning a foreign court ruling to the sovereignty of a foreign country is not only territorial affiliation, but the issuing court itself is part of the foreign facility and the verdict is considered to be a foreign credit. In other words, authority comes from power, not power from authority [5].

In applying the geographical criterion, some jurists consider the seat of arbitration as the most significant element in determining the nationality of the award [5]. This criterion has also had specific acceptance worldwide [22]. This rule means that an arbitral award issued outside the geographical area of a country is foreign and is not different from a foreign award. Even if the award issued under the laws of that country. In this case, according to the principle of territorial affiliation, the place of issuance of the arbitration award is the criterion for determining the affiliation of the award [5]. The place of arbitration is the predominant criterion. Basically, an award issued in a state other than the state where the enforcement is made is usually easily identifiable. In international arbitration, it is accepted that the award is issued in the country of the legal seat of arbitration, not at the hearing place or the place of signing the arbitral award [13].

Therefore, the authors believe that the courts of the arbitral tribunal are, in principle, competent to monitor the award and hear the objections to the arbitral tribunal within the conditions prescribed by the laws of the country where the arbitral tribunal is situated [23]. The geographical criterion should be considered a legal criterion and not a material criterion [24]. Therefore, it is different from the objective facts of arbitration, such as appointment of an arbitrator, and means the legal basis of arbitration, which is not necessarily the place of the signing of awards. Therefore, the parties may designate the United Kingdom as the seat of arbitration while the hearings are being held in Sweden.

The place of arbitration may be determined by the parties or third party (arbitration organizations) or, if not determined by them, by the arbitrators. The place mentioned in the arbitrators' award is the place of award issuing [25].

The New York Convention on Award issuing also seems to refer to the concept of the seat of arbitration and not the place of arbitration [26]. In addition, the determining factor in the said convention is the factor of the relation of the place of issue. However, if the determination of the seat of arbitration and, consequently, the place of award issuing is only to evade the mandatory rules of public law of your country (such as tax laws, etc.), it seems that the courts of the country can refuse to enforce it under the title of public order or fraud against the law [27].

3.1.2. Functional Criteria

The paragraph 2 of the first article of the New York Convention adds another criterion to the main rule in that article, which is called the functional criterion or the judicial criterion. This considers the awards to be covered by the convention, which are considered non-domestic in the country of application. This section of Article 1 extends the scope of the Convention, as member states can specify instances of non-domestic awards. The last sentence of paragraph 1 of Article 1, which adheres to the territorial criterion, provides: "... arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." The phrase gives the Contracting States great autonomy to extend the scope of the Convention. This criterion has the advantage of giving ratifying states the power to decide which arbitrations issued outside their territory or their jurisdiction are enforceable under the Convention. For instance, according to the functional criterion, state courts can enforce non-national arbitral awards or those issued in their territorial jurisdiction while considered foreign. Since the New York Convention does not provide any definitions of non-domestic awards, it is the state courts that will rule on the matter [13]. Although the functional criterion extends the application of the New York Convention, the main criterion is still the territorial criterion. The functional criterion allows the application of the New York Convention even when an arbitral award is issued in the country of enforcement, provided that the award is not considered a domestic award in that country [2].

The subject matter of this section of Article 1 is taken from the US Court of Appeal in *Bergesen v. Müller (1983)* [13]. The court expressed that the issued award between foreign parties in New York under New York law could not be considered domestic under the New York Convention and Chapter 2 of US Federal Arbitration Law. In this regard, the American Appellate Court declared:

Under the New York Convention, non-domestic awards do not mean awards cast only outside the geographical area. They may include awards cast under the legal framework of another country, for instance, issued under foreign law or between parties reside outside the territory of the issuing country or their fundamental place of business.

Some commentators confirmed the award in *Bergesen's* case and argued that it gave the national courts broad authority in interpreting the scope of the awards covered by the New York Convention, specifically in determining the criteria for foreign awards. Some others criticized the award because the court overreacted to the convention [28].

According to the functional criteria, the law on which the arbitration process takes place determines the award to be considered domestic or foreign. Thus, if the law of country A governs the proceedings and the arbitration is conducted in country B, the award issued in country B is considered foreign. The *Gotaverken (1980)* [29] case is a significant example of a Swedish shipbuilder and a Libyan company. The arbitration happened under the rules of the International Chamber of Commerce, and the venue was Paris. The Libyan party, which was convicted of receiving three ships built by Gotaverken and paying the last part of the transaction price, made a claim in the Paris Appellate Court. But it declared that the suit was not under the French arbitration law and did not consider itself competent to judicial oversight of the arbitrator's award. It subsequently rejected the plaintiff's claim.

From the jurists' point of view, the governing law on the proceedings is formal, not a substantive one. It means, for example, if the parties request the annulment of the arbitrator's award, they can take their application to the court of a country whose formal law governs the arbitration process. The recipient is in each of the choices of the above

criteria or a combination of both.

3.2. Non-Domestic Award

Another type of awards under by the New York Convention is non-domestic awards issuing in the country where the recognition and enforcement are applied. The non-domestic award is applied as an extension means of the territory of the New York Convention. Therefore, the second criterion of the Convention is practical to the award issued in another country in which the enforcement is sought. A non-domestic award means when, based on a valid agreement between the parties, the issued award is subject to the arbitration law of another country [30][4].

The Convention does not define non-domestic awards. Hence, each member state is free to determine the instances of non-domestic awards. In this regard, some countries consider all or some of the following awards as non-domestic awards:

1. Issued awards under the domestic arbitration law of another country. This category of awards is considerable when the arbitration seat is located in the same country where recognition and enforcement are requested. However, the arbitration process has been done according to foreign arbitration law. This assumption rarely happens because the national law of the recognition and enforcement state must allow the parties to select a law other than the law of arbitration place as the governing law.
2. Awards with a foreign element. These awards are related to disputes with a foreign component, such as the foreign nationality or accommodation of parties or the foreign place of execution of the contract in recognition and enforcement country.
3. Transnational or a-national or floating awards. These awards are independent of any national arbitration law, whether due to parties' explicit agreement on non-application of national arbitration law or compromising on transnational laws such as the general principles of international arbitration. It is debatable whether non-local arbitrations and transnational or stateless awards are legally valid, and if so, will the New York Convention apply to them [31]? The prevailing view is that the New York Convention applies to such awards [19] [5] . Countries such as France, Germany, and Switzerland also recognize transnational awards. These awards are extracted from the laws of arbitration seat and the scope of any national arbitration law by agreement of the parties. However, in practice, these awards are exceptions, and most arbitrations are under the law of the arbitration seat. For example, there is serious doubt about the awards of the Iran-US claims tribunals The Hague as to whether they are nationals of the Netherlands or another country. There is no consensus on whether such awards fall under the New York Convention and commentators disagree on applying the Convention on such awards. Countries such as France, Germany, and Switzerland also recognize transnational awards [1]. Such awards are similar to illegal contracts and also informal arbitration in Italy. This means that even if an award is revoked at issuing state and under the laws of that place and loses its validity, it can be executable elsewhere. Provided that it does not contradict to the jurisprudence and public policy of the enforcement state. Those who do not believe the enforcing of the transnational award is opposed to the provisions of the Convention, citing the words at the beginning of this paragraph, which emphasizes the issuing place, not the law under which the decision was made. Therefore, as long as an award is made in one member state, it will suffice for enforcement in another country. This argument seems weak because it talking about the issuing place is not a reason to withdraw from the local law, but it leads to the obligatory implication of paying attention to the local law. Especially since the following paragraph 1 of Article 1 relies not on the geographical territory but the legal scope. In other words, an award issued in the geographical territory of a country but not under its laws is a foreign award, not a domestic one. Therefore, it can be enforceable in the same state by using the provisions of the Convention [32][6].

The a-national award emphasizes the parties'

4 The Convention does not provide a definition of a domestic term. As a result, the Contracting States have the discretion under their domestic law to decide what constitutes a non-domestic award. See the following: [4]

5 On the question of whether there are non-national or transnational awards, recent developments confirm the possibility of non-national or completely stateless arbitration awards, i.e. awards whose procedure depends entirely on the agreement of the parties and there is no reference to national law. Piere Lalive, "Enforcement of International Arbitration Awards (1993)(Translated in Persian by Susan Khattatan), op.cit, p. 348. Non-national or transnational arbitral awards can be found in sports arbitration awards, for example Lausanne, which is always the arbitration seat for the Olympic Games, as well as online arbitration, where the arbitration seat can be formal. Although rare, these views exist both theoretically and practically. For example, the Swiss Federal Court ruled in 1992 that arbitration between international organizations and individuals could be separated from Swiss law even if the arbitration is based in Switzerland [13].

6. The question that arises is whether the parties to the lawsuit are fundamentally right and can decide and agree on a type of arbitration regardless of any national law? In response, it should be said that agreement is never separate and independent of the law, and the statement that the law accompanies the agreement to a certain point and then leaves it to do whatever it wants is not compatible with the logic of law. In addition, the ruling law is responsible for the Interpretation and completing the agreements of the parties, and the expectation that the agreement always be comprehensive is an unrealistic and illusory expectation that ignores the facts, especially when it comes to resolving disputes. Constant attention is paid to the idea of justice and there can be no way in this field that leads to the deprivation of the right of one party and the annulment of the other party. [32]. The attractiveness of an arbitration and the verdict is taken from the realm of national arbitration law. The effective features of the national arbitration law should be eliminated in this type of arbitration. The legal status of non-local arbitration is uncertain. Arbitration internationally requires a judicial authority to injure the arbitrator, the validity of the arbitration agreement and the basic rules of procedure. Such oversight is usually done for the annulment of awards. It is a generally accepted principle that the courts of the country where the arbitration takes place have competent judicial authority in these cases. Therefore, there are few international arbitrators who agree on non-local arbitration [30].

independence, the satisfactory and contractual nature of the arbitration contract, and the reality which the arbitrators are not only state judges, but they also enjoy greater flexibility and freedom. An important reason for this is that the arbitration seat is insignificant. Its reason is parties have chosen arbitration since it was either geographically appropriate or for impartiality, not its law was suitable for the governance of arbitration. Undoubtedly, the said view is not acceptable because the principle of sovereignty of will and its derived executive power have roots in the exclusive and specific law of a country. No obligation is conceivable out of a country's law. Agreements and commitments of the parties are binding when the law, beyond the rule of will, recognizes the legal effects on such agreements and obligations. As a result, the validity of any contract is derived from the appropriate legal system from which it exists. The existence of a contract outside a legal system will inevitably face it with vacuity, and it will not have a specific enforcement guarantee [16]. Concerning the question of whether the New York Convention is applicable to transnational arbitrations, this document is executed merely to the awards which are subject to a domestic arbitration. This is applied to both criteria outlined in Article 1. Therefore, the Convention is not the basis for the implementation of a-national awards. The only real approach to adequate legal protection of these views is to formulate an appropriate international convention [30].

4. The Applicable Reservations

It seems article 1 of the New York Convention applies to the awards of all States, whether or not they are member states. This is in line with the purpose of the Convention, to facilitate and establish a single international procedure for the enforcement of arbitral awards. At the same time, the anticipation that countries would not welcome it to secure their domestic interests led to a restriction in Article 1 (3) of the Convention, which states: "When signing, ratifying, or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration." As can be seen, the above article expresses two types of restrictions: 1) retaliation and 2) commercial issues.

4.1. Reciprocity

According to Article 1, this Convention shall apply to the enforcement of arbitral awards issued in another country. A State may restrict the applicability of the provisions of the Convention to arbitral awards issued by other Contracting States (paragraph 3 of Article 1), that is, to enforce only the decisions made in the territory of a Contracting State. This is called the reciprocity reservation and has been admitted and applied by many countries (107 out of 143 contracting countries accepted the condition of reciprocity by 2008) [28]. The court of a country that uses this right will apply the convention only if either the award was issued in a country that is a party to the New York Convention or the award is non-domestic and in some way related to another member state [19]. The reciprocity reservation is provided in Convention because contracting states did not accept the universality principle, i.e., they did not want the Convention to be applied to all awards, regardless of their issuing place, while they desired to identify judgments made within the jurisdiction of another state party [13]. About 70 contracting states, have made reciprocal reservation [33]. The U.S. tribunal ruled that the reciprocity reservation relates to the country in which the arbitration takes place and that State is a signatory to the Convention, not to the fact that the arbitrating parties are nationals of the signatory states [34].

Mentioning an example can shed light on the implementation of the convention. In *Minister of Public Works of the Government of the State of the Kuwait v. Sir Frederick Snow & Partners. (1984)* [35], regarding the construction of an international airport in Kuwait, they ascertained to refer all disputes to arbitration in Kuwait. Following a dispute, an arbitration hearing was held in Kuwait in which an award equivalent to £3.5 million was issued in favor of the Kuwaiti government in 1973. Kuwait Sir Frederick Company did not want to pay the amount to the Kuwaiti government. Neither Kuwait nor Britain had acceded to the New York Convention at the time. In 1975, the British government acceded to the Convention Kuwaiti government wanted to enforce the award following provisions of the Convention, but the British government did not accept. However, Kuwait acceded to the New York Convention in 1978, and since tried to enforce mentioned award in the United Kingdom. As a result, the Convention became enforceable in the United Kingdom (Seyadi, 2017: 61) [36].

The concept of reciprocity reservation can be better understood in the case *of Hilton v. Guyot* (1985) [37]. Hilton and Libbey, U.S. citizens conducting business in Paris, France, were sued in French court by Guyot, administrator of a French firm, for sums allegedly owed to that firm. Hilton and Libbey complained about the jurisdiction of the French court. In a French court, the plaintiffs were sentenced and eventually upheld by French Supreme Court. The defendant then went to the New York Federal District Court to enforce the sentence. The referring court declared the sentence enforceable without any reviews or objections to jurisdiction. They, therefore, appealed to the US Supreme Court. However, the Supreme Court, citing traditional reciprocity reservation, declared that decision was enforceable and argued:

No law has any effects beyond the limits of the sovereignty from which it has taken its authority. No government or power is bound to enforce a judgment in courts of another state except by a specific agreement. If an award will be enforced in a trial or otherwise, a court where the case is put into or enforcement is requested from has

complete discretion in determining the jurisdiction of such an award. It can also consider it effective and enforce it or not. They have the same authority in examining fairness and legality principles. Still, reciprocity reservation caused a function among most civilized states by which final awards of competent foreign courts are accomplished mutually and under specific laws and restrictions, which are different in diverse countries. Also, rendered awards in France or any other foreign countries, under the laws which have jurisdiction to revise or judgments, will not have absolute validity and definite effect when they are put into trial in that state. They only include pieces of evidence for the entitlement of complainants.

The court's decision, in this case, reflects the traditional rule of reciprocity, according to which foreign awards will have the same effect as American arbitral awards in that country and will be treated equally.

It should be noted that provisions of this Convention apply only to arbitral awards rendered in another country. This document basically cannot be applicable for enforcing awards issued in a place where the enforcement is requested.

4.2. Commercial Affairs

Second reservaion in Article 1 (3) gives `the authority to member state to limit the scope of Convention and apply it only in respect of commercial awards.

In other words, as governments' domestic legal actions may be commercial or non-commercial, and on the other hand, international arbitration is mostly welcomed and applied in commercial matters, some countries refer to it only in these matters. Belgium, for example, is an example of such countries, whose representative at the New York Conference (1958), declared the impossibility of acceding of his country if it were not possible to limit the convention to commercial affairs [27]. Providing such a reservation was for allowing governments who only accepted arbitrating of commercial matters to ratify the Convention, albeit with a limited scope [13].

According to the fact that the Convention is a global document and each country acts follow its domestic laws, domestic laws play a significant role in determining the concept of trade. It is even possible that different interpretations offered by two courts in a country differ in their concept of business issues.

It was ordained in the case of *Jaranilla v. Megasea Maritime (2001)* [38] in US courts that maritime employment contracts are outside the scope of the commercial dispute under the New York Convention. Conversely, in another claim, the dispute between the company's shareholders regarding the formalities of the transaction of shares was considered a business relationship under the New York Convention [36].

In another recent ruling by the Mumbai Supreme Court in *Indian Organic Chemicals Ltd. v. Chemtex Fiber Inc. (1978)* [39] an even narrower interpretation is provided. Chemtex Fiber Company, together with its two subsidiaries - the second and third defendants in the case - signed a contract with the Indian Organic Chemicals Company, the content of which guaranteed the implementation of two other contracts concluded by the second and third defendants. The contract between the Chemical Company of India and the second defendant was for the supply of machinery, equipment, and technical information for the polyester plant facilities, which also included an arbitration clause under ICC London rules, and a contract with the third defendant was about supplying of machinery, equipment, and required technical information to carry out the project, with an arbitrating clause in India. Following the dispute, the Indian Chemical Company brought a lawsuit against Chemtex and two other defendants to Mumbai Supreme Court. The defendant requested to terminate the proceedings initiated by the plaintiff (Organic Chemical Products Limited Liability Company) and to seek redress through the arbitration process under Section III of the Foreign Award Law. However, the Mumbai Supreme Court rejected the defendants' request. Under Indian law (related to the New York Convention), the court was compelled to continue the proceedings to the extent that the arbitration clause fell within the scope of the New York Convention and adduced the commercial reservation to comply with the New York Convention. The Court argued that although the contract as the source of the claim is commercial, it should also be considered commercial under Indian law. In addition, the mere commercial essence of the agreement does not imply the commercial nature of the proceeding's matter because the accused cannot include his transaction as commercial by referring to the relevant laws or domestic practical legal systems.

The Supreme Court also noted that the 1961 Act was implemented to make the New York Convention more effective. In addition, he acknowledged that the second part of the 1961 Act was compatible with Articles 1 and 2 of the New York Convention. According to the court, the second part of the law applies in cases where there are four conditions: (1) the dispute is outside the relationship that is considered commercial under the current laws of India, (2) foreign arbitral award has been issued after October 11, 1960 (3) the award was issued following a contract to which the New York Convention applies, and (4) the decision was made in an area where the Government of India has declared the rules of the New York Convention are applicable. Whereas the third part of Article 1961 applies when: (1) there is an agreement to which Article 2 of the New York Convention is applicable, (2) the Contracting Party to such an agreement or his representative, to initiate legal proceedings before the court against the other party to this agreement, (3) the dispute is legal, (4) the other party "has not submitted any written statements or taken any other actions in this regard" before submitting the request. The court noted that once these conditions were met, a court would have to deal with a dispute under the law unless the agreement was void or unenforceable. The Supreme Court considered all three contracts to be "separated" and "commercial". Finally, the court stipulated that the so-called "commercial" structure should be liberal and free. However, the court emphasized

that the existing relationship must be considered commercial under current law in India to deem a contract as commercial.

Although the Convention on Commercial Determination refers disputes to the national law of the courts' seat, in practice, the courts also pay attention to specific circumstances of each case and international procedure. Anyhow, according to the purpose of the Convention, the courts must interpret the concept of commerciality in a broad way (ICCA, 2015: 30) [19].

In the United States, one can see a broad interpretation of commercial affairs, with a great diversity from the above. For example, in *Island Territory v. Solitron Devices (1973)* [40], The District Court for the Southern District of New York rejected an argument according to which it did not consider an award relating to a contract about launching an electronics industry as commercial. The court reasoned that the trade restriction included only awards related to marriage and other domestic relations, as well as political awards, and not matters related to production (Evans, 1974: 537-539)[7].

Considering Article 1 (3), as well as mentioned above, it is observed that different countries offer different definitions of commercial matters, which interpreting is the responsibility of the court. The variety of interpretations that arises from the diversity of legal systems leads to differences in practice, which may cause problems.

5. Conclusion

Examining the issues raised in the present study, it was found that the New York Convention is a document that, although it has considered different measures concerning the arbitration agreement, its principal purpose is to facilitate the enforcement of foreign arbitral awards. The inclusion of the Convention applies to any arbitral award rendered between the parties. The first rule proposed in the New York Convention is a general rule that has no reference to the domestic rules of states and, therefore, does not define foreign awards. In addition, to expand the scope of the Convention, applying of its rules has been extended to awards not considered domestic under the laws of the recognition and enforcement country. Thus have included the domestic provisions of countries in recognizing and defining foreign arbitrators. In this regard, countries have adopted different procedures. Some systems point to the importance of the rules governing the trial court, while studies indicate that other countries pay attention to another norm called the functional criterion in recognizing foreign awards, according to which the law governing the trial process recognizes what foreign awards are included.

In addition to these two rules, the Convention expresses two reservations, reciprocity and commercial reservation, which give States the authority to limit enforcing the Convention's included awards. Therefore, in defining foreign awards under the New York Convention, countries' domestic laws are relevant. By referring to those laws also performing or not performing mentioned reservations, the examples of awards subject to the Convention become evident to some extent. To avoid ambiguity in the concept of foreign arbitral award in the New York Convention in different countries, it is suggested that the text of Article 1 be amended and that the territorial criterion be accepted as the only basic criterion applicable within the Convention.

7 Ibid.

References

[1] Javier Rubinstein & Fabian Georgina, The Territorial Scope of the New York Convention and its Implementation in Common and Civil Law Countries, in Enforcement of Arbitration Agreements and International Arbitral Awards. The New York Convention in Practice (Emanuel Gaillard & Domenico Di Pietro, ed, 2008), p. 95.

[2] Alexander J. Belohlavek, "Concept of Foreign Award in Connection with Recognition and Enforcement and Conflicts of Sources", (2013), Revisita Romana De Arbitraj, Anul 7/Nr2. Aprilie-Junie, pp. 37, 43-44.

[3] Michael Kerr, "Concord and Conflict in International Arbitration", (1997), *Arbitration International*, Vol. 13 (2), p. 127.

[4] UNCITRAL Secretariat, Guide on the Convention on the Recognition and Enforcement of Foreign Awards (New York 1958), (2016 ed.), No. 11-12.

[5] Morteza Nasiri, "Enforcement of Foreign Arbitral Awards", (*Mousavi Publicaton 1967)*, Tehran (in Persian), p. 251, 74, 171, 118, 119, 245, 246, 247.

[6] Pierre Lalive, "Enforcement of International Arbitration Awards", (1993), *Legal Journal*, Vol. 12, p. 346 (Translated in Persian by Susan Khattatan).

[7] Laya Joneydi, "Enforcement of Foreign Commercial Arbitral Awards", (*Institute of Legal Studies and Research*, 2016, Tehran, (in Persian), p. 38, 44.

[8] Chia- Jui Cheng, "Basic Documents on International Trade Law", (2nd ed., 1990), *Kluwer*, p. 754.

[9] Mauro Rubino Sammartano, International Arbitration Law and Practice, Juris Net, LLC, (3rd ed., 2014) p. 1122.

[10] Claudia Alfons, "Recognition and Enforcement of Annulled Foreign Arbitral Awards-An Analysis of the Legal Framework and its Interpretation in Case Law and Literature", (2010), Peter Lang Internationaler Verlag der Wissenschaften, p. 29.

[11] Hamidreza Nikbakht, "Recognition and Enforcement of Arbitral Awards in Iran", *Institute of Business Studies and Research 2014*, p. 4 (in Persian).

[12] Michael Pryles, "Interlocutory Orders and Convention Awards: The Case of Resort Condominiums v. Bolwell", (1994), *Arbitration International*, Vol. 10 (4), pp. 385-394.

[13] Lew, Julian D. M., Mistelis, Loukas A., Kroll, Stefan M., "Comparative International Commercial Arbitration", (2012), *Mofid University Press*, pp. 670, 698, 699, 700, 701, 702 (Translated in Persian by Mohammad Habibi Mojandeh).

[14] Chan Leng Sun SC, "Singapore Law on Arbitral Award", Academy *Publishing 2010*, p. 66.

[15] Homayoun Mafi & Hossein Tari, "The Enforcement Validity of the Res Judicata of Arbitral Awards in Iranian and American Law", (2016), *Comparative Law Research*, Year 19th (4), (in Persian) p. 150.

[16] Homayoun Mafi, "A Commentary on the International Commercial Arbitration Law of Iran", *University of Judicial Sciences and Administrative Services 2018*, (in Perasian), pp. 347–348, 402.

[17] Bergesen v. Joseph Muller Corporation, 1983. Available at: https://www.casemine.com/judgement/us/59149010add7b04934570382. last visited: December 24, 2020.

[18] Steven Winters, "Salvaging Recreational Boating: Reforming an Antiquated Maritime Practice", (2018), Connecticut Law Review, No. 50 (4), p. 1032.

[19] "ICCA'S Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges, International Council of Commercial Arbitration", (Shahr-e-Danesh Institute for Legal Studies and Research 2015), (Translated in Persian by Mir Hossein Abedian, Reza Eftekhar) pp. 25- 28, 30, 39.

[20] Article 1, Geneva Convention of 1927.

[21] Article 31 (3) of UNCITRAL Model Law (2006).

[22] Peter K. Berger, "The Modern Trend Exclusion of Recourse against Transnational Arbitral Awards: A European Perspective", (1989), *Fordham International Law Journal*, Vol. 12, p. 646.

[23] Peter B. Rutledge, "On Importance of Institutions: Review of Arbitral Awards for Legal Errors", (2002), *Journal of International Arbitration. Kluwer Law International*, Vol. 19 (2), p. 74.

[24] Gabrielle Kaufmann-Kohler, "Globalization of Arbitral Procedure", (2003), *Vanderbilt Journal of Transnational Law*, Vol. 36, p. 1318.

[25] Albert J. Van Den Berg, Non- Domestic Arbitral Awards under the New York Convention, Arbitration International, 200-201 (1986).

[26] Lu May, "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", (2006), *Int'l & Comp. L*, 23 Ariz. J, p. 754.

[27] Laya Joneydi, "The New York Convention and its Enforcement Regime", (*Journal of Comparative Law 2011)*, Vol. 2 (1), (in Persian), p. 55, 58.

[28] Herbert Kronke, Patricia Nacimiento, Dirk Otto & Nicola C. Port, "Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention", (2010), *Kluwer Law International*, p. 25, 32.

[29] General National Maritime Transport Company v. Société Gotaverken Arendal A. B., available at: https://newyorkconvention1958.org/index.php?lvl=notice_display&id=1550, last visited: December 24, 2020.

[30] Albert J. Van Den Berg, "When is an Arbitral Award Nondomestic under the New York Convention", (1985), *Pace Law Review*, Vol. 7 (1), pp. 6, 39-43, 62, 63.

[31] Albert J. Van den Berg, "The New York Convention of 1958: An Overview in Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice", (2008), (Emanuel Gaillard & Domenico Di Pietro ed.), p. 41.

[32] Mohammad A. Movahhed, "Lessons from Oil Arbitrations", (Publications of the International Legal Services Office of the Islamic Republic of Iran 1995), (in Persian), pp. 231-223, 236.

[33] Michael Pryles, "Enforcement of Arbitration Agreements and International Arbitral Awards, The New York Convention in Practice", (2008), (Emanuel Gaillard, and Domenico Di Pietro), p. 161.

[34] Peter Gillies, "Enforcement of International Arbitration Awards- The New York Convention", (2005), The New York Convention International Trade Law Review 19, 21 (2005), *International Trade Law Review*, Vol. 19, p. 21.

[35] Minister of Public Works of the Government of the State of Kuwait v. Sir Frederick Snow & Partners, Available at: https://newyorkconvention1958.org/index.php?lvl=notice_display&id=890, last visited: December 24, 2020.

[36] Reyadh Mohamed Seyadi, "The Effect of the 1958 New York Convention on Foreign Arbitral Awards in the Arab Gulf States", (*Cambridge Scholars 2017)*, p. 61.

[37] Hilton v. Guyot. 1985. Available at: https://en.wikipedia.org/wiki/Hilton_v._Guyot, last visited: December 24, 2020.

[38] Jaranilla v. Megasea Maritime (2001), Available at: https://law.justia.com/cases/federal/district-courts/FSupp2/171/644/2488481/, last visited: December 24, 2020.

[39] Indian Organic Chemicals Ltd v. Chemtex Fibers Inc. (1978), Available at: https://indiankanoon.org/doc/250191/, last visited: December 24, 2020.

[40] Island Territory of Curacao v. Solitron Devices, Inc. (1973), Available at: https://law.justia.com/cases/federal/district-courts/FSupp/356/1/1892045/, last visited: December 24, 2020.