International Arbitration

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Unchallenged grounds during arbitration proceedings

Certainly, the New York convention[1] provides for grounds that can be objected during the arbitration process.[2] Firstly, an obvious ground that could lead to an objection is when an arbitration agreement is described as legally invalid.[3] Secondly, contravening the due process could render the agreement null and void.[4] Thirdly, the ability of the arbitration process to correspond to the agreement entered into by the participating parties.[5] Fourthly, if the tribunal tasked with arbitration is wrongly constituted, it could provide a fertile ground to raise objections.[6] While taking these objections into consideration, the courts have always pre-empted the notion that parties who had not raised objections on the above-mentioned grounds during the arbitration process should desist from doing so during the arbitral enforcement proceedings. Therefore, this doctrine of prohibiting arbitrating parties from raising these remonstrations is called the doctrine of estoppel.[7]

The doctrine of estoppel was applied against a party in the case of *China Nanhai Oil Joint Service Corporation Shenzlien Branch v Gee Tai Holdings Co Ltd*[8] who had attempted to invoke the ground of invalidity as a conduit to challenge the enforceability of an a arbitration award. Uniquely the party to the dispute had not attempted to challenge the jurisdiction of the arbitral tribunal, when the arbitration process was ongoing. The court in rejecting the ground of invalidity as raised by the party of arbitration noted that that party was fully aware that the tribunal was acting beyond its jurisdiction but opted not to raise the ground during arbitration. Identically, The Higher Court of Appeal of Bavaria also arrived at a similar decision in the

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958 effective on 7 June 1959
[2] Sec 207 Federal Arbitration Act,9 U.S.C. § 201-208 (1980)
[3] Matthias Scherer and Sam Moss, 'Resisting Enforcement of aForeign Arbitral Award under the New York Convention' (2008) 51 *INTER-PACIFIC BAR ASSOCIATION JOURNAL* 17, 21
[4] Ibid
[5] Ibid
[6] Ibid
[7] Ibid
[8] [1995] HKLR 215 (Supreme Court of Hong Kong, 1994), YBCA, vol XX (1995), p 671

dispute involving *K Trading Company v Bayerische Motoren Werke AG*[9] where BMW contended that whoever signed the agreement containing the arbitral clauses did not possess the requisite powers needed to sign the arbitration agreement. Despite being fully aware of this fact, BMW did not raise or object this fact during the arbitral process. In affirming the doctrine of estoppel, the court stated that this doctrine is necessary to forestall incidences of *mala fides* by rejecting any presented objection that had not been raised during the arbitration process. It is important to note that the doctrine of estoppel has not been denotatively outlined within the New York Convention and thus its application has to be impliedly derived especially from the interpretation of Article II which as a legal principle interdicts application of a contrasting conduct. Notably, this principle is only applicable to all mentioned objections grounds raised under Article V of the New York Convention and party raising it must have taken such opportunity during the arbitral proceedings as further depicted in the case of *Hainan Machinery Import and Export Corporation v Donald & McArthy Pte Ltd*.[10]

Therefore, a well-timed objection during the arbitration process is regarded as *sine qua non* condition necessary for articulating objections as outlined in the New York Convention necessary for dissenting enforcement. Additionally, courts tasked with enforcement jurisdiction often consider raising objections as against the doctrine of *uberrimae fidei* and thus obliged to reject such claims.

Legal invalidity

As noted above, only grounds that are sufficiently raised and objected during the arbitration process are the ones that would be entertained during the enforcement proceedings. One of the commonly raised objections during the arbitral proceedings is the invalidity in the applicability of the legal parameters as anticipated by the disputing parties. Under article

[9] [2005] 1⁄4 YCA XXX, 568 (at 571)
[10] [1996] 1 Singapore Law Reports 34 (High Court, 1995), YBCA, Vol XXII (1997), P 771

V(1)(a) of the New York Convention the court is under the obligation to refuse enforcement if the agreement subjected to the arbitration process is found to be contravening the law.[11] This ground is based on the doctrine of due process as illustrated in the *Paklito Investment Ltd v Klöckner East Asia Ltd*[12]case where an award delivered in China based on China International Economic and Trade Arbitration Commission (CIETAC) was denied because one of the parties disputing the award was denied an opportunity to point out to the reports concerning the expert appointed by the tribunal.

Similarly, enforcement was denied in a German case because the respondent who was participating in the proceedings felt that his role was limited to submitting documentations related to the contract in dispute and nominating an arbitrator. Conversely, the respondent was kept in the dark concerning the arguments articulated by the plaintiff. Certainly, the court decided that denial of such an opportunity to further one's claims without being furnished the arguments of your opponents' amounts to a contravention of the doctrine of due process.

Further, the ground of excess of jurisdiction though limitedly applied can also be relied upon as put forward by article V (1) (c) of New York Convention.[13] Expressively, in *Tiong Huat Rubber Factory v Wah-Chang International Company Ltd* ,[14] where the court overturned an enforcement ruling citing that the award rendered by the arbitrators due to the fact that they acted beyond their jurisdiction and thus the award could not be enforced.

Likewise, as preponderated by article V (1) (d) of New York Convention, provides that enforcement can be turned down on the basis that the composition of the arbitral tribunal was improperly constituted. For instance, a court in Germany declined to enforce an arbitral

[11] Gerold Herrmann, The Role of the Courts under the UNICITERAL model law script in Julian Lew (ed.), *Contemporary Problems in International Arbitration* (Springer Science & Business Media, 2013) 173
[12] [1993] (High Court of Hong Kong) YBCA, Voi XiX (1994), P 664
[13] Herbert Kronke, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010) 259
[14] [1990] (Hong Kong Court of Appeal), YBCA,Voi XVII (1992), P 516, at para 19.

award because the award was delivered by an inadequate number of arbiters. The law provided for three but it was delivered by two arbiters. Although the outcome seemed similar, that award had been set aside for annulment by another arbitral tribunal in another jurisdiction namely, Belarus.[15]

Correspondingly, as provided for under article V (1) (e) of New York Convention, the award will be un-enforceable if it has been set aside.[16] As enunciated in the case of *Termorio v Electranta,*[17]where the US Court of Appeals for the District of Columbia, rejected to enforce such an arbitration award because it had been set aside in another forum. Furthermore, the court stated that the appellants had no cause of action because the award had been rightfully annulled.

Public policy

Identically, the public policy ground as cited by Article V (2) of the New York Convention sets up the basis where an arbitration award can remain un-enforcement if the award contravenes the public policy doctrine.[18] Markedly, this doctrine is intertwined with the jurisdiction in which the arbitral award could be legally enforced. As instanced in *Cour d' appel de Paris*[19] case and *SNF SAS v. Cytec Industries B.V,*[20] where the courts reasoned that enforcement of an arbitral award could only be turned down if such a contravention cited is real, blatant and tangible. Equally as represented in *Hebei Import and Export Corporation v Polytek Engineering Co Ltd*[21] denial to enforce an arbitration award due to the fact that it

[15] *PT Putrabali v Rena Holding* [2007] 25 ASA Bull4/2007, P 826
[16] Joseph McLaughlin and Laurie Genevro, 'Enforcement of Arbitral Awards under the New York Convention - Practice in U.S. Courts' (1986), 3:249 *INTERNATIONAL TAX & BUSINESS LAWYER* 249, 267
[17] [2007] 487 F2d 928 (US Court of Appeals for the District of Columbia Circuit), note Goldstein, 25 ASA BulL. 3/2007, p 643
[18] Georgios Zekos, *International Commercial and Marine Arbitration* (Routledge, 2008) 44
[19] [2006] (Paris Court of Appeal) (Ire Ch C), Rev Arb 2007,p 100, note S Bollée.
[20] [2006] Court of Appeal of Paris, XXXII Y.B. COM ARB 282
[21][2000] 3 Intl Arb LR 185 at187

violates public policy must be restrictively applied and whatever is relied upon must be significantly offensive to warrant such a decision.

Despite the proposition set forth by *Hebei Import and Export Corporation v Polytek Engineering Co Ltd* case, it should be noted that public policy is an effective argument to deny enforcing an arbitration award. As exemplified in *COSID Inc v Steel Authority of India Ltd*[22]enforcement of an arbitral award was declined after one party cited *force majeure* that limited its powers to satisfy its contractual obligations which was paramount to the dispute.

Uniquely, public policy although limited in its use it is such an effective conduit to limit enforcement of an arbitral award. In recognition of its repercussions during enforcement of the arbitration award, enforcement courts have adopted the concept of extraordinary circumstances in deploying of the doctrine of public policy. Notably, a fraudulent conduct is considered an extraordinary circumstance. As deliberated by the French court in *European Gas Turbines SA v Westman International Ltd*,[23] where a decision was arrived at stating that fraudulent financial submission constituted an extraordinary circumstance and thus against public policy. In addition, in arbitral award enforcement where there are claims and counterclaims, the disputing parties can elect to invoke the concept of set off as illustrated in the case of *Mangistaumunaigaz Oil Producton Association v United World Trade Inc*.[24] Consequently, set-offs are equally considered an extraordinary circumstance under a public policy that affects the enforceability of arbitral awards.

[22] [1986] (High Court of New Delhi), YBCA,Voi XI, P 502, at 506-07
[23] [1995] YBCA, Voi XX, P 198 at 206
[24] [1997] Civil Action No 96-WY-1290-WD (US District Court, District of Colorado) at para 1-2, YBCA, Voi XXIVa (1999), p808

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