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Judicial Review of Arbitral Award

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Abstract

Arbitration is the process to settle dispute between the parties speedily and with confidentiality. The arbitration rules provide mechanism for judicial review of arbitral award as a supervision over arbitral process by the state at the seat of arbitration. An award reached by an arbitrator pursuant to a contractual agreement to arbitrate is not subject to judicial review except on the grounds set forth in law. According to article UNCITRAL Model Law recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of Article 34 (1). The object of research is to examine the ground of annulment of an arbitral award by the courts in the process of judicial review. If an award is set aside, it has no effects in the country where it was vacated. If setting aside occurs in a country in which, or under the law of which the award was made, such setting aside may become a reason under the New York Convention for other contracting states to refuse to recognize and enforce the set aside award. A brief review of legal provisions and judicial decisions demonstrate that courts in different jurisdictions interfered with arbitral awards only in limited circumstances. The study recommends that the judicial review of arbitral award should be done only on the grounds set forth in the law.

Keywords: *Arbitral Award, Annulment, Judicial Review, Recourse, Set Aside, New York Convention, Recognition and Enforcement.*

INTRODUCTION

Arbitration mechanism provides autonomy to the parties to decide the seat of arbitration, choice of substantive and procedural law for the settlement of disputes between the parties and it ensures confidentiality of the arbitration process. Hence, parties to the contracts prefer arbitration as a preferable method for settlement of their disputes. By submitting the dispute to arbitration under the arbitration rules, the parties undertake to carry out any award without delay, however, in some cases parties may resort to judicial review or challenge of the award at the place of arbitration.

The rationale of contesting an award before a national court at the arbitration's seat is to request that the relevant court alter it in some way or more usually to have that court declare that the award is to be ignored (i.e. "annulled" or "set aside") in whole or in part (Allan Redfern & Martin Hunter, 2004).

An award that is set aside or annulled by the appropriate court is typically regarded as invalid and, as a result, unenforceable before the national courts at the seat of arbitration as well as internationally. In common law jurisdictions remedy against the award to the courts is known as "appeal" and in civil law countries it is known as "recourse" to court of law against an award. If the challenge is successful, the award will usually be set aside, in total or in part (Allan Redfern & Martin Hunter, 2004). This process is also known as judicial review of arbitral award.

Under the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 2006 (herein after referred as Model Law) an measure for setting aside may only be brought in respect of an award made within the territory of the state concerned. It must be brought before the appropriate court in the state, and it may only be brought on the grounds stated in the Model Law (Allan Redfern & Martin Hunter, 2004). According to Article 6 of the Model Law every State adopting this law must designate the court or courts, or other entity as mentioned therein that is authorized to carry out specific tasks related to supervision and aid in arbitration.

Article 34 of the Model Law recognizes certain causes on which an arbitral award may be subject to judicial review before a national court at the place of arbitration. If the award is foreign, the courts in contracting state

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to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (herein after referred as New York Convention) cannot set aside award, however, may deny to recognize and enforce the award (Article V).

Article V (1)(e) of the New York Convention permits a court in one contracting state to deny recognition to an award that has been annulled in either: (a) the country in which the award was "made" (i.e. a country where the award is not "foreign"), or (b) the country "under the law of which" the award was "made" (Gary B. Born, 2016).

In respect of arbitral awards, there is a clear distinction between an award made within the state and outside the state. If an award is "made" outside a specific state, then it will be "foreign" in that state and protected by the Convention in that nation; where an award is "foreign" it will -not be subject to annulment and will be subject to non-recognition only in one of Article V's exceptions is applicable (Gary B. Born, 2016).

RESEARCH METHODS

The present research adopted normative legal approach, frequently referred to applicable legislative provisions and judicial decisions rendered by the court in different jurisdictions while exercising the power of judicial review. The statutory approach involves careful reference to legal rules applicable to the arbitral award annulment process as a judicial review.

The study also adopted comparative approach to make reference to certain judicial decisions from the different courts and their approach in interpreting the scope of legal process relating to set aside of an arbitral award rendered within the state and a foreign state.

RESULTS

Although arbitration awards are meant to be final, the arbitration rules allow challenging the award at the seat of arbitration. However, an award concluded by an arbitrator as per a contractual agreement to arbitrate is not subject to judicial review except on the grounds set forth in the applicable arbitration rules. According to the Uncitral Model Law recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of Article 34 (Article 34 (1)).

The recourse against foreign arbitral awards is administered by the New York Convention, accordingly, if the award is a 'foreign' award the courts in enforcement state may refuse to recognize and impose such award under Article V of New York Convention.

Recourse Against Arbitral Award Under National Arbitration Rules

Setting aside an arbitral award implies a limited judicial review. In most national arbitration laws, the award is subject to a scrutiny limited essentially to a listed number of procedural issues (Tibor Varady et al., 2009).

Setting aside procedures under article 34 of the Model Law is acceptable against all types of arbitral awards, regardless of whether they completely terminate the proceedings or are awards finally ascertained certain claims only. The mere fact that a party consented to an award on agreed terms following to article 30 does not prohibit it from applying for the setting aside of the award under article 34 of the Model Law (Uncitral Digest, 2012).

Grounds For Judicial Review Under the Uncitral Model Law

Article 34 (2) of the Model Law furnishes that an arbitral award may be set aside by the court only if: *(a)* the party submitting the application furnishes proof that: (i) there was no valid agreement or parties are lacking capacity to sign binding arbitration agreement; (ii) the party was not provided the notice of arbitration or denied sufficient opportunity to present its case; (iii) the arbitration was not happened in accordance with the parties' agreed arbitral procedures or, failing such agreement, was not in accordance with this law; (iv) the configuration of the arbitral tribunal or the arbitral procedure was not in accordance with the understanding of the parties, or (b) if the court finds that: (i) the subject-matter of the conflict is not possible to be solved by arbitration under the law of the State; or (ii) the award is in conflict with the public policy of the State.

A request for setting aside may not be made after three months have passed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that desire had been disposed of by the arbitral tribunal (Article 34 (2)).

The court, when requested to set aside an award, may, where pertinent and so requested by a party, suspend the setting aside proceedings for a period of time fixed by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will remove the grounds for setting aside (Article 34 (4)).

It Is Not Mandatory to Annul The Award

It is established from the rule stated in Article 34 (2) of the Model Law that the courts have the discretionary authority in respect of the annulment of award and it not mandatory for the courts to put aside the award. The arbitral award 'may be' set aside by the court on the reasons specified in Article 34 (2) (a) & (b) of the Model Law. That is, an adjudicating authority may annul an award if one or more of the Article 34 (2) grounds are satisfied, but the court is not mandatorily needed to annul the award, even where one of these grounds applies (Gary B. Born, 2009). Article 34 of the Model Law furnishes that the court may set aside the award on the proof of one or more reasons stated in Article 34 (2).

Inability of an arbitral tribunal to comply with procedural requirements determined by the laws of the arbitral place may, in the absence of contrary understanding by the parties, provide reasons for annulment of the arbitral award (Gary B. Born, 2009).

According to the Model Law resort to a court against an arbitral award may be made only by an application for setting aside in line with paragraphs (2) and (3) of Article 34 (Article 34 (1)). Article 34 (2) provides the reasons for set aside the award and Article 34 (3) deals with time limitation for application to set aside the award. The Model Law has been embraced in 88 States in a total of 121 jurisdictions (Uncitral, 2023).

With regards to award made within the state, recourse to a court against such arbitral award may be made only by an application for setting aside in accordance with Article 34 (2) of the Model Law. Similar rule is found in the London Court of International Arbitration (LCIA) Rules 2014 (Article 26.8) and International Chamber of Commerce (ICC) Arbitration Rules (Article 35 (6)). However, recourse to an arbitral award is available to the parties under certain circumstances provided under the national arbitral rules. If the award is a 'foreign award', irrespective of the country in which it was made, shall be recognized as binding on the parties to the arbitration and the court shall enforce subject to the provisions of Article 36 of the Model Law (Article 35) or Article V of the New York Convention.

The following paragraphs refer to provisions provided under different national arbitration rules with regard to annulment or setting aside of an arbitral award in process of judicial review.

France

In France the grounds for annulment of award are similar to grounds provided for non-recognition under the New York Convention. The action for setting aside of an arbitral award is viable on the grounds stated in Article 1484 of the French Code of Civil Procedure 1981: (1) if the arbitrator has provided his decision in the absence of an arbitration agreement or on the basis of an arbitration agreement that is not valid or that has expired; (2) if the arbitral tribunal was incorrectly constituted or the sole arbitrator incorrectly appointed; (3) if the arbitrator has not provided his decision in accordance with the assignment conferred upon him; (4) if due process has not been respected; (5) in all cases of nullity provided in Art. 1480; (a) if the award is not provided the summary of claims, arguments and reasons (Art. 1471); (b) award not contained the details of the arbitrators, seat of arbitration, the place and date of award (Art. 1472); (c) if the award was not signed by all the arbitrators (Art. 1473); (6) if the arbitrator has violated a public policy rule.

According to the New Code of Civil Procedure (France), Article 1502 (Inserted by Decree No.81-500 of 12 May 1981) provides that, an plead against the decision which shall confer recognition or enforcement shall be open only in the following cases: (1) where the arbitrator has resolved upon the matter without an arbitration

agreement or where this agreement is null or has lapsed; (2) where the arbitration tribunal has been unlawfully established or a sole arbitrator unlawfully assigned; (3) where the arbitrator has decided upon the matter contrary to the assignment given to him; (4) where the adversarial principle has not been followed; (5) where the recognition or enforcement shall be against to public international order.

Arbitral awards must be recognized in France where their presence has been established by the one claiming a right under it and where recognition of the same would not manifestly be against to public international order (Article 1498).

Swiss

According to the Switzerland's Federal Code on Private International Law (CPIL), 1987 the award shall be ultimate when communicated. It can be challenged only: (a). If a sole arbitrator was appointed irregularly or the arbitral tribunal was established irregularly; (b). If the arbitral tribunal wrongly held that it had or did not have jurisdiction; (c). If the arbitral tribunal ruled on issues beyond the claims submitted to it or if it failed to rule on one of the claims; (d). If the impartiality of the parties or their right to be heard in an adversarial proceeding was not honored; (e). If the award is conflict with Swiss public policy (ordre public) (Article 190).

The recognition and enforcement of foreign arbitral awards must be governed by the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (Article 194).

United Kingdom

According to the UK Arbitration Act 1996, a party to arbitral proceedings may apply to the court challenging an award in the proceedings on the reasons of significant irregularity affecting the tribunal, the proceedings or the award (Art. 68). The English law provides an approach to judicial review of the merits of an award which is broadly similar to the "manifest disregard" standard in the United States, Section 69 of the English Arbitration Act states that in a finite category of cases, an award may be subject to appellate review by the English courts for concrete errors of law (Gary B. Born, 2016)

Belgium

The Belgian Judicial Code on Arbitration in Part VII contains the similar grounds as provided in Article 34 of the Model Law for legal action against the arbitral award. The Code provides an additional ground that the award may be set aside if it was acquired by fraud (Art. 1717 § 3.).

Swiss Law

According to the Swiss Federal Act on Private International Law, 1987 an arbitral award may be set aside only: (a). where the sole member of the arbitral tribunal was inappropriately appointed or the arbitral tribunal inappropriately established;(b). where the arbitral tribunal incorrectly accepted or declined jurisdiction; (c). where the arbitral tribunal determined beyond the claims submitted to it, or failed to decide one of the claims;(d) where the rule of equal treatment of the parties or their right to be heard in an adversary procedure were breached;(e). where the award is inconsistent with public policy (Article 190).

European Union

According to the European Convention on Uniform Law on Arbitration, 1966 an arbitral award may be annulled: (a) if it is contrary to public order; (b) non-arbitrability; (c) if there is no legal arbitration agreement; (d) if the arbitral tribunal has exceeded its jurisdiction or its powers; (e) if the arbitral tribunal has omitted or exercised power beyond the jurisdiction; (f) if the tribunal incorrectly constituted; (g) if the due process of law was not followed or if the tribunal disregarded the arbitral procedure; (h)if the award was not signed by all the arbitrators; (i) if the conclusions for the award have not been stated; (j) if the award contains opposing provisions. An award may also be set aside: (a) if it was obtained by fraud; (b) if the award is based on false evidence; (c) if, after it was made, there has been discovery of a relevant document or other piece of evidence (Art. 25).

The Belgian Judicial Code, Article 1704(2)(j) provides that an award may be annulled if it "contains conflicting provisions. The Finnish Arbitration Act §40(3) states that an award shall be null and void… if the arbitral award is so unclear or incomplete if it does not appear in it how the dispute has been determined. Similarly, the Argentinean National Code of Civil and Commercial Procedures, Article 761 (1) states that an award that contains conflicting decisions shall be null and void.

Accordingly, many national arbitration statutes provide for the set aside of arbitral awards similar to the grounds stated in Article 34 (2) and some national arbitration rules provided more wide grounds than those available under the Model Law (Gary B. Born, 2016).

US Federal Arbitration Act, 1926

According to Section 10 of the Federal Arbitration Act (FAA), in any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the request of any party to the arbitration: (1) Where the award was obtained by corruption, fraud, or undue means; (2) Where there was evident partiality or corruption in the arbitrators, or either of them; (3) Where the arbitrators were at fault of misconduct in denying to postpone the hearing, upon reasonable cause shown, or in refusing to hear evidence relating and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; (4) Where the arbitrators surpassed their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter.

Judicial Intervention in Arbitral Awards Should Only Be Allowed in Limited Circumstance

Thus, reviews of set aside proceedings in Switzerland, the United States, France and England have come to the conclusion that annulment of international awards is an exceptional occurrence, with the overwhelming majority of all awards being upheld in the fact of set aside challenges (Gary B. Born, 2009).

The court in United Kingdom in *Zermalt Holdings SA v. Nu-Life Upholstery Repairs Ltd* (1985) (a decision under the 1950 Act) held that "... as a matter of general approach the courts seek to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavoring to pick holes, inconsistencies and mistakes in awards and with the objective of upsetting or frustrating the course of arbitration. The approach must be to read an arbitration award in a reasonable and commercial way expecting, as is usually the case, that there will be no substantial mistake that can be found with it. "

The courts in the United States indicated the similar view that review of arbitral award must be in limited circumstances. The following case law demonstrate the reasons on which courts entertained the request of setting aside the arbitral award:

In *Diapulse Corp. of Am.v. Carba, Ltd.*, (1980), the court held that the purpose of arbitration is to permit a relatively quick and inexpensive resolution of contractual issues by avoiding the cost and delay of extended court proceedings. Accordingly, it is a well-settled proposition that judicial review of an arbitration award must be, and is, very narrowly limited.

In *National Wrecking Co. v. International Brotherhood of Teamsters, Local* (1993) held that Judicial review of arbitration awards is with a limited scope because arbitration is intended to be the final resolution of disputes. Arbitrators are not support to act as junior varsity trial courts where subsequent appellate review is readily available to the losing party. Rather, reviewing courts ask only if the arbitrator's award "draws its essence from the agreement of the parties or will of the parties."

In *Forsythe International S.A. v. Gibbs Oil Company of Texas* (1990) it was held that judicial review of a commercial arbitration award is confined to Sections 10 and 11 of the Federal Arbitration Act. Accordingly, a district court has no authority to vacate an arbitration award except: (1) the award was obtained by corruption, fraud, or undue means; (2) there is a proof of partiality or corruption among the arbitrators; (3) the arbitrators were guilty of misconduct which prejudiced the rights of one of the parties; or (4) the arbitrators exercised their powers beyond their jurisdiction.

In *Harold and Joeanne Antwine v. Prudential Bache Securities, Inc.,*(1990) it was held that judicial review of an arbitration award is extraordinarily with a limited scope. The judicial review of an arbitration award is even narrower than judicial review of trial proceedings.

Can Parties by Contract Expand the Review of The Arbitral Award?

In the case of *Gateway Technology v. MCI Telecommunications Corporation* (1995) the parties by contract agreed to permit expanded review of the arbitration award by the federal courts. The contract contains that "the arbitration decision shall be final and binding on both parties, except those errors of law shall be subject to appeal." The U.S. Court of Appeals, Firth Circuit held that such a contractual change is acceptable because, as the Supreme Court has emphasized, arbitration is a creature of contract and the FAA's pro-arbitration policy does not operate without respecting to the wishes of the contracting parties. Hence, parties by contract may agree to enalrge the scope of judicial review.

In *Mastrobuono v. Shearson Lehman Hutton, Inc.,* (1995), the Supreme Court of United States held that just as they may confine by contract the issues which they will arbitrate, as held in Mitsubishi (*Mitsubishi Motors Corp.* v. *Soler Chrysler* (1985), so too, may they specify by contract the regulations under which that arbitration will be performed"(*Volt Information Sceince v. Stanford University*, 1989).

India

The Indian Arbitration and Conciliation Act, 1996 under Article 34 recognized the grounds for setting aside of an award similar to the grounds provided in the Model Law (Article 34).

The following case law demonstrates that the courts resorted annulment of award under limited circumstances.

In *ONGC Ltd. v. Western Geco International (GECO) Ltd.*, (2014), the Supreme Court of India considered the ambit of "public policy" under section 34 of the Arbitration and Conciliation Act, 1996. The Court held that if the arbitrators failed to make an inference which should have been made, or have made a *prima facie* wrong inference, then the court may interfere with such award. Applying this principle, the court rejected GECOs contention of non-interference of the Court with the award and allowed for ONGC to deduct liquidated damages (Arthad Kurlekar, 2015).

In *Bhatia International v. Bulk Trading S.A & Another,* (2002) the appellant argued that Part I of the Act (judicial intervention) would not apply to arbitrations where the seat of arbitration was not in India. The application was denied by the 3rd Additional District Judge. The appellant filed a writ petition before the High Court of Madhya Pradesh, Indore Bench and the same was denied by the impugned judgment dated. On Appeal the Supreme Court of India held that that if Part I was not made applicable to arbitrations held outside India would render "party remediless" is wholly correct. The court held that Part I of the Arbitration and Conciliation Act, 1996, which gives effect to the Model Law and which confers power on court to grant interim measures applied even to arbitration being held outside India.

The above decision was approved by the Supreme Court of India *In Venture Global Engineering v Satyam Computer Services* (2008), the question before the court was whether the aggrieved party is entitled to challenge the foreign award which was passed outside India in terms of sections 9 and 34 of the Indian Arbitration and Conciliation Act, 1996. The High Court of Andhra Pradesh dismissed the appeal stating that the award cannot be challenged even if it is against the public policy and in contravention of statutory provisions. Against the said order appealed before the Supreme Court of India. The Supreme Court of India held that a foreign award could be challenged under Section 34 of the Indian Arbitration and Conciliation Act, 1996. The court also held that in terms of the decision in Bhatia International (*Bhatia International v. Bulk Trading S.A & Anr.*, (2002), we hold that Part I of the Act is applicable to the Award in question even though it is a foreign Award. The court further held that article 34 could be invoked for the arbitration even it is outside of India, unless the parties by contract, express or implied, exclude all or any of its provisions.

In *Bharat Aluminium Co. Ltd. vs. Kaiser Aluminium Technical Services,* (2012) concluded that the Indian Arbitration Act, 1996 has accepted the territoriality principle which has been adopted in the Model Law. Section 2(2) provides that Part I of the Arbitration Act, 1996 shall apply to all arbitrations which happened within India.

We are of the considered opinion that Part I of the Arbitration Act, 1996 would have no application to International Commercial Arbitration held outside India. The court further held that with a great respect, we are unable to agree with the conclusions recorded in the judgments of this Court in Bhatia International (*Bhatia International Vs. Bulk Trading S.A. & Anr.,* (2002) & *Venture Global Engineering* ((2008). We conclude that Part I of the Arbitration Act, 1996 is applicable only to all the arbitrations which occurred within the territory of India.

Judicial Recourse to Foreign Arbitral Awards

An award is 'foreign' if it is made by the arbitral tribunal constituted outside of particular state. As such an arbitral award is enforceable internationally, a judgment creditor may sought to enforce the award in state which is a contract state for the New York Convention.

Judicial review of international arbitral award should be done only in limited circumstances, such as lack of or excess of jurisdiction, violation of due process of law and on the grounds recognized under the New York Convention.

Article V (1) of the New York Convention provides that the recognition and enforcement of the award may be refused if the party furnishes the proof that (a) the parties to the agreement were suffering with some incapacity to enter the contract or the said arbitration agreement is invalid; (b) the parties are not provided proper notice of appointment of arbitrators or arbitration proceedings or unable to present the case; (c) the award deals with different terms not contemplated by the arbitration agreement; (d) the composition of the tribunal is not according to agreement of the parties or not accordance with the law of the State where the arbitration is held; (e) the award has not become binding on the parties, or has been set aside or suspended by the competent authority of the country in which, or under the law of which that award was determined.

The recognition and enforcement of an arbitral award may also be refused if the competent court finds that the subject matter of the difference is not arbitrable under the law of that country or the recognition or enforcement of the award would be contrary to the public policy of the country where the enforcement was sought (Art. V (2)).

In most countries today, judicial control over the award occurs in just two settings: (i) opposition to recognition and enforcement, and (ii) the claim for setting aside of arbitral award rendered within the country (Tibor Varady et al., 2009).

United States

In *International Standard Electric Corp., (ISEC) v. Bridas Sociedad Anonima Petrolera* (1990) the place of arbitration was Mexico City. The ICC tribunal rendered the award against ISEC and the ISEC filed a petition before the US District Court to vacate and refuse recognition and enforcement of the award. The Respondent argued that only the Mexico City courts have the jurisdiction to vacate or set aside the arbitral award. The US District Court held that since the *situs*, or forum of the arbitration is Mexico, and the governing procedural law is that of Mexico, only the courts of Mexico have jurisdiction to vacate the award.

In *International Standard Electric Corporation (ISEC) v. Bridas Sociedad Anonima Petrolera* (1990) the plaintiff argued for annulment of award under Article V (1)(e) of the New York Convention, an award could be set aside in the country whose law had been applied to the substance of the dispute. In this case the award rendered by the application of Mexican law to the procedure and New York law to the substance. The District Court rejected this argument and held that the words in question referred not to the substantive governing law, such as the law of contract, but to the law governing the arbitral procedure.

In *Yousuf Ahmed Alghanim & Sons W.L.L., v. Toys "R" US.,* (1997) the court held that we read Article V(1)(e) of the Convention to allow a court in the country under whose law the arbitration was conducted to apply domestic arbitral law, in this case the FAA, to a motion to set aside or vacate that arbitral award. The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief.

In sum, the court conclude that the Convention endorses very different regimes for the review of arbitral awards (1) in the State in which, or under the law of which, the award was made, and (2) in other States where recognition and enforcement are requested. The Convention specifically contemplates that the State in which, or under the law of which, the award is made, will be free to annul or modify an award in accordance with its national arbitral law and its full panoply of express and implied grounds for relief (Article V(1)(e) of the New York Convention). However, the Convention is equally clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the reasons explicitly set forth in Article V of the New York Convention.

In *M & C Corp. v. Erwin Behr* (1996) the court held that the contested language in Article V(1)(e) of the Convention, "... the competent authority of the nation under the law of which, [the] award was made" refers exclusively to procedural and not substantive law, and more exactly, to the regimen or scheme of arbitral procedural law under which the arbitration was held, and not the substantive law of contract which was applied in the case. The court also held that under the terms of the New York Convention the judicial review of such an award is extremely limited and extends only to procedural aspects of the determination.

The English Arbitration Act also adopts an indispensable territorial approach to annulment actions similar to that of the Model Law, providing that an award may be set aside only if the arbitral seat was in England (Gary B. Born, 2016).

Difference between Article 34 of the Model Law and Article V of the New York Convention

Annulment or set aside of arbitral award is possible only in a country where the award is rendered or under the law which the award was made (Art. 34 of Model Law), whereas under the New York Convention the court only may refuse to recognize and enforce the foreign arbitral award (Article V). In other words, the Foreign arbitral awards courts may refuse to recognize under the grounds stated in the New York Convention or under the similar grounds provided under the domestic law.

No Review of The Merits of An Arbitral Award

A large number of cases underline that the Model Law does not permit review of the merits of an arbitral award (Uncitral Digest, 2012). The recourse to court against an arbitral award may be made only on the grounds stated under Article 34 of the Model Law or similar rule recognized under the domestic law.

One of the most commonly encountered bases for annulling awards which does not exist under the Model Law involves substantive review of the merits of the arbitrator's decision. Although not available under the Model Law, this type of review is available in a number of states (Gary B. Born, 2016).

Non-Statutory Grounds for Annulment of Award

Fraud

There are some states in their arbitration legislations provided provision for annulment of award on the grounds of fraud, such as the English Arbitration Act, 1966, Section 68 (2)(g) and the Belgian Judicial Code, Section 1717 (3)(b)(iii).

Lack of Impartiality

Many legal regimes provide for annulment of awards if an arbitrator did not satisfy applicable standards of independence and impartiality. This basis for set aside is not provided in the literal terms of Article 34 (2) of the Model Law, or Article V of the Convention, and few arbitration statutes include it as an express basis for annulment (Gary B. Born, 2016).

Waiving of Right to Judicial Recourse

In practice, parties sometimes seek to agree on the available legal remedy against an award, either by excluding or modifying the right to recourse against an award. (Uncitral Digest, 2012). However, the parties may decide to exclude any right they would otherwise have to apply to set aside an award under article 34, as long as their

agreement does not contradicting with any mandatory provision of the legislation enacting the Model Law, and does not confer powers on the arbitral tribunal contrary to public policy (Uncitral Digest, 2012).

Consequences of Setting Aside of The Award

If an award is set aside, it has no results in the country where it was vacated. If setting aside happens in a country in which, or under the law of which the award was made, such setting aside may become a reason under the New York Convention for other countries refusing to recognize and enforce the award; however, the New York Convention does not require this result (Tibor Varady et al., 2009).

Burden Of Proof

The burden of proving that one of the exceptions under Article 34 of the Model Law applies is on the party seeking to set an award aside (Gary B. Born, 2009). Similarly, according to the New York Convention the party seeking the refusal to recognize and enforce the foreign arbitral award must submit the proof of the existence of one of the grounds stated in Article V.

DISCUSSION

Even though an arbitral award is final and binding some judicial review remains a vital part of the arbitration process (Katherine A. Helm, 2007). The analysis of article 34 of the Model Law and Article V ((1)(e) of the New York Convention provides that the actions to annul may be pursued in either: (a) the country in which the award was "made," or (b) the country "under the law of which" the award was made under Article 34 of the Model Law. Accordingly, the most national arbitration statutes permit actions in local courts to annul awards "made" within the forum state, and do not permit local courts to entertain actions to annul other awards made elsewhere i.e. in foreign country (Gary B. Born, 2016). Article 36 of the Model Law provides only for recognition or non-recognition of the (foreign) award.

CONCLUSION

Annulment or set aside of arbitral award as a remedy of judicial review is possible under limited circumstances only in a country where the award is rendered and on establishment of the ground/s stated in Article 34 of the Model Law. If the award is a foreign, the court may only refuse to recognize and enforce the arbitral award under Article V of the New York Convention. The brief review of legal provisions and judicial decisions demonstrates that the courts in different jurisdictions interfered with arbitral awards only under limited circumstances. Accordingly judicial review is available against arbitral award; however, it is limited to the grounds provided under Article 34 of the Model Law or similar rule under the national arbitral legislation. If the parties intend to avoid any litigation after passing of the final award, the parties to the arbitration agreement may accept that the award as final and binding between the parties and not subjected to any recourse to judicial review.

An arbitral award, regardless of the country in which it was made, shall be recognized as binding and, upon application in writing to the appropriate court, and shall be enforced subject to the grounds stated in Article 36 of Model Law (Article 35 (1) of Model Law) and Article V (1) & (2) of the New York Convention, 1958.

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