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What Constitutes Non-Domestic Award under the New York Convention 1958

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ABSTRACT

The New York Convention on Recognition and Enforcement of Foreign Award 1958 (NYC 1958 or the Convention) became the principal vehicle for the resolution of international commercial disputes through arbitration. The signatories to the convention committed to incorporating its provisions into their domestic legislation to streamline the recognition and enforcement of foreign arbitral awards within their jurisdictions. The Convention has XVI Articles. Article I of the Convention has two provisos. First proviso mandates enforcement of foreign award by countries signatories to the Convention. Second proviso says that awards not considered as domestic will also be enforced by the member countries to the Convention. Thus, in the context of the New York Convention, a "non-domestic award" denotes an arbitral decision issued in a nation distinct from the one where the proceedings for recognition and enforcement are being conducted. In other words, enforcement of an award, incorporating some foreign elements, is neither domestic nor purely foreign award. This category will be covered under non-domestic award. The text of the Convention thus incorporates both internationality and nationality principles. This was due to difference of opinion between the member nations. This paper explores the journey of the signing of the Convention and also deliberates the theme of what constitutes a non-domestic award under the Convention.

Keywords: *New York Convention, foreign Award, Non-domestic Award, Bergesen case.*

I. INTRODUCTION

International commercial arbitration is a process of dispute settlement between two parties on matters that are commercial and international in character. A private tribunal conducts the proceedings as per the procedure established by the parties or under the rules agreed by the parties and recorded as such in their arbitration agreement. Award delivered by tribunal is legally binding and enforceable under the arbitration laws of the enforcing jurisdiction. It is worthwhile to state that the countries of the parties must be a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10

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June 1958). Key attributes of international commercial arbitration include consent of parties, neutral forum and independent arbitrators, binding nature of award and party autonomy.

International business entities prefer arbitration as a mode of dispute settlement rather than approaching judicial system of a foreign country about which they may not be well-versed. Therefore, arbitration starting as a private initiative in a private forum leads to award which is recognized and enforced in law courts under legal frameworks available in member states that are signatory to the convention. For example, if an Indian company sues a French company, it will be in a disadvantageous position dealing with the French laws and court system. However, if an Indian company wins judgment against a French party in an Indian court it may still be facing problem in enforcing the judgment or accessing the French company's assets in a French court. This problem could be obviated by approaching the mechanism of international commercial arbitration which is based on a system built by the parties themselves following party autonomy. In nutshell, both Indian and French litigating parties can approach courts of either jurisdictions or even choose a neutral forum with support from private arbitrators in a dispute which involved parties from multiple nationalities.

In the entire history of international commercial law, the New York Convention, 1958 is the most successful. "As of January 2023, the convention has 172 state parties², which includes 169 of the 193 United Nations member states plus the Cook Islands, the Holy See, and the State of Palestine. Twenty-four UN member states have not yet adopted the convention". If one compares dispute settlement through arbitration with adjudication by courts, then a difficult point emerges regarding enforcement of foreign judgments. There is no international treaty which facilitates every member state to honour foreign judgments in the similar manner as if they were judgments of their own domestic courts. "Given the broad scope of the New York Convention, the odds are in favor of an international commercial arbitration bringing final resolution to a dispute"³. The New York Convention 1958 has XVI articles and out of which "Article III envisages that signatory countries must recognize and enforce arbitral awards as binding"⁴. A signatory party may raise a challenge to a foreign award in some limited

² United Nations, *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention")*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (April 15, 2024, 10:15 AM), https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2

³ Kristina. L. Morrison, *A Misstep in U.S. Arbitral Law: A Call for Change in the Enforcement of Nondomestic Arbitral Awards*. *Tort Trial & Insurance Practice Law Journal*, 46, 3/4, 806 (2011).

⁴ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958). <https://www.newyorkconvention.org/english>

circumstances as provided under Article V of the convention. The Article V lists seven narrow grounds under which an enforcing court may refuse recognition and enforcement of a foreign award.

The New York Convention 1958 is a distinct improvement over its predecessor -the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. In essence, this treaty facilitated the acknowledgment and execution of awards rendered in other countries. In the context of the New York Convention, a "non-domestic award" denotes an arbitral decision issued in a nation distinct from the one where the proceedings for recognition and enforcement are being conducted.

The New York Convention mandates signatory countries to uphold and enforce arbitral awards from other member states, with few exemptions. At its core, the Convention operates on the principle of reciprocity, ensuring that countries party to the agreement recognize and enforce foreign arbitral awards on par with their domestic counterparts.

However, it's important to note that not all awards are automatically recognized and enforced under the New York Convention. There are specific criteria and procedural requirements that must be met for an award to be enforceable, such as ensuring that the arbitration agreement is valid and that the parties were given proper notice and opportunity to present their case.

In essence, within the New York Convention, a "non-domestic award" pertains to an arbitral decision rendered in a country distinct from where recognition and enforcement procedures are pursued. The Convention establishes a structured mechanism for acknowledging and executing such awards among its member states.

(A) Problem Statement

The New York Convention 1958 contains XVI Articles. Article I of the NYC can be said to be its extent clause that sets out the categories of awards which it envisages to enforce. The primary criterion outlined in Article I of the Convention pertains to the recognition and enforcement of arbitral awards rendered within a jurisdiction distinct from where recognition and enforcement are being sought, and arising from disputes involving individuals or entities, whether natural or legal⁵. Furthermore, the secondary criterion outlined in Article I extends its applicability to

⁵ Albert Jan van den Berg, *When Is an Arbitral Award Nondomestic Under the New York Convention of 1958?*, 6 Pace L. Rev. 25 (1985) DOI: <https://doi.org/10.58948/2331-3528.1553> Available at: <https://digitalcommons.pace.edu/plr/vol6/iss1/2>

arbitral awards that are not considered domestic within the jurisdiction where their recognition and enforcement are being sought.

II. BERGESEN V. JOSEPH MULLER CORP. CASE

Determining what constitutes a non-domestic award under the framework of the Convention poses one of its most intricate challenges. This complexity was underscored in the landmark case of *Bergesen v. Joseph Muller Corp*⁶.

In this case, Bergesen, a Norwegian ship owner, and Muller, a Swiss company, entered three charter parties in 1969, 1970, and 1971. The 1969 and 1970 agreements involved chemical transportation from the United States to Europe. Each charter party included a meticulously crafted arbitration clause stipulating arbitration in New York and governed by New York State laws.

Following disputes arising during the execution of the 1970 and 1971 charter parties, Bergesen initiated arbitration proceedings in 1972, claiming demurrage, shipping, and port expenses. Muller contested liability and presented counterclaims.

The arbitral tribunal, convened in New York City, rendered its decision on December 14, 1978, ruling in favor of Bergesen and mostly dismissing Muller's counterclaims. The final award totalled \$61,406.09, inclusive of costs and accrued interest, in favor of Bergesen.

In 1972, Bergesen initiated arbitration proceedings against Muller, seeking compensation for demurrage, shipping, and port expenses arising from disputes in their charter agreements. In 1978, the arbitral tribunal in New York City ruled in favor of Bergesen, awarding them \$61,406.09 plus costs and interest.

Bergesen pursued enforcement of the award in Switzerland under the New York Convention. The Judge of the Court of First Instance of Zurich ruled the award enforceable in summary proceedings in 1980, a decision upheld by the Court of Appeal of the Canton of Zurich. However, Muller challenged the enforcement, contending that according to New York law, the award required confirmation by a New York court to be binding.

The New York Convention abolished the requirement for leave for enforcement in the country where the award was made, unlike its predecessor, the Geneva Convention. The New York Convention stipulates that an award is enforceable when it is "binding," without the need for

⁶ *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928 (2d Cir. 1983).

confirmation by the court where the award was made. Despite this, Bergesen's lawyers filed a petition for confirmation of the award in a New York district court in December 1981, citing different time limits under New York state law and the implementing legislation of the New York Convention.

The key question before the courts was whether the award fell under the New York Convention and its implementing legislation. While the award was made in New York and didn't meet the territorial criterion of the Convention, it could potentially be considered nondomestic, fulfilling the second criterion for the Convention's application.

(A) Enforcement Proceeding in Switzerland

Bergesen started enforcement proceedings in Switzerland under the Convention. The Judge of the Court of First Instance, Zurich, and the Court of Appeal at Zurich supported the enforcement petition of Bergesen. Muller approached the Swiss Federal Supreme Court with the argument that the award delivered in New York had not become binding (enforceable). Muller quoted provisions from the New York Practice Law and Rules (CPLR) which provided for confirmation of award by a court within one year of its delivery. Therefore, this called for a confirmation/declaration from the New York Court that the award is valid and binding. Then only the award can be enforced in any country under the Convention.

(B) Confirmation of Award in New York

It is worthwhile to state that such a requirement of confirmation of the award was there under the Geneva Convention 1927, as it used the term 'final'- giving a connotation that the award is still not enforceable and required a declaration from the delivering court to this effect. The New York Convention 1958 has dropped the word 'final' and used 'binding'. Concerned about potential uncertainties, Bergesen took proactive measures and filed a petition in the District Court of New York seeking confirmation of the award under the implementing legislation of the United States.

The district court was tasked with assessing whether the award fell under the jurisdiction of the Convention and the applicable law of New York. It was determined that the award did not fulfil the territoriality requirement of the Convention since it was not issued outside the United States. However, the question remained if the award could be called non-domestic pursuant to the second criterion of Article I. The district court held the view that the award was non-domestic under the second criterion of Article I. This was also confirmed by the court of appeals in New

York.

A pivotal aspect of the Court of Appeal's reasoning was its observation that the drafters of the New York Convention intentionally omitted the term 'non-domestic' to ensure the broadest possible scope for eligible awards, empowering enforcing authorities to establish their own criteria for what qualifies as 'non-domestic' in accordance with their respective national laws. The omission of the term non-domestic made it easy for states to support the territorial concept and ratify the Convention. On the other hand, it was also acceptable to those countries that supported the view that the nationality of the award was to be determined by the law governing the arbitral procedure.

The Court of Appeal further said that it holds the award non-domestic not because they are made abroad, but because they are made within the legal framework of another country that is pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction. In the instant case, the parties were domiciled outside the enforcing jurisdiction. Thus, the award becomes enforceable in the US due to the fact that both parties were from outside its territory. It could not be called a foreign award as the award was delivered in the US, and it could also not be called a domestic award either as the parties were foreigners. Thus, the award fell under the nomenclature of an award that is neither domestic nor non-domestic. If, however, the award was enforced in Zurich, Switzerland, it will be treated as a foreign award under criterion 1 of Article I of the Convention.

(C) Compromise Text of the Convention

The Congress of the US while enacting the implementing legislation (under the Convention) mentioned that award delivered in the US between two US citizens cannot be enforced under the Convention unless the award has some foreign elements or connection with a foreign country. Had the US Congress desired to exclude the latter category of award which can be enforced in its territory (meeting the second criterion of territoriality), it could have clarified so in the legislation. However, it was not done. Thus, in some and substance, the New York Convention 1958 text is a compromised text due to differences among countries during its formulation on the necessity of including territoriality and nationality principle. This was the reason that the first criterion of Article I upholds the territoriality (internationality) principle while the second criterion of the same Article is about the nationality principle. Therefore, the concept of non-domestic awards was alluded to in the second criterion of Article I of the New

York Convention: ‘It shall also apply to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought.’”

(D) Illustration of Non-Domestic Award

An award is classified as non-domestic when it is subject to the arbitration laws of a foreign jurisdiction. For instance, if parties opt for arbitration in France under the framework of West German Arbitration Law, French courts will regard such awards as non-domestic. Consequently, they will enforce the award under the convention, even if the arbitration took place within their own territory. Therefore, a non-domestic award means that a foreign law has been used by a country where its enforcement is sought. In other words, delivery and enforcement of the award occur in the same country but under a foreign law of arbitration. Therefore, the requirement of the second criterion of Article I of the Convention would be met and thus it will fall under the Convention.

(E) The Supreme Court of India on Non-Domestic Award

In the case of *PASL Wind Solutions Pvt. Ltd. v GE Power Conversion Pvt. Ltd.*⁷¹, Justice R.F. Nariman elucidated what constitutes a non-domestic award under the Convention, offering an illustrative example. According to this explanation, Germany distinguishes an arbitral award rendered in France but guided by German procedural law as a domestic German arbitral award. Conversely, an arbitral award made in Germany but operating under French procedural law is categorized as a non-domestic. In determining the nature of the award, Germany relies on the criterion of the procedural law applied. Hence, if seeking enforcement in Germany of an award issued in Germany under French procedural law, Germany also applies the Convention.

The dispute in the above case stemmed from a Settlement Agreement dated 23 December 2014 ("Agreement"), which resolved prior conflicts between PASL Wind Solutions Pvt. Ltd. ("Appellant") and GE Power Conversion India Pvt. Ltd. ("Respondent"). Notably, the Agreement included an arbitration clause stipulating arbitration in accordance with the Rules of the International Chamber of Commerce ("ICC Rules"), with the seat in Zurich, Switzerland. However, the substantive law governing the Agreement was Indian law.

The Appellant initiated arbitration under ICC Rules while the Respondent opposed the jurisdiction of arbitrator. It was his contention that two Indian parties cannot select a foreign

⁷¹ *PASL Wind Solutions Private Limited v. GE Power Conversion India Private Limited*, (2021) MANU/SC/0295/2021.

seat. This was overruled by the arbitrator who decided that all proceedings will be held in Mumbai and issued final award in favour of the respondent and also awarded costs to be paid by the Appellant. The Appellant did not comply with the award and thus the respondent started commencement proceedings in Gujarat High Court under Section 47 and 49 of the Act because Respondent's assets were located there. The Respondent also filed application in court for interim directions under Section 9 of the Act for directions to the Appellant for not removing the assets located in Gujarat. The Gujarat High Court decided that two Indian parties can have foreign seat. However, they will forfeit advantage of receiving interim measure if the seat of the arbitration was outside India. Dissatisfied with this ruling, the Appellant appealed to the Supreme Court of India.

The issue before the Supreme Court was whether an award made at a seat outside India can be considered a foreign award under Part II of the Act and be enforceable in India and whether an application under Section 9 of the Act for interim relief by Indian parties with a foreign seat is maintainable.

The Supreme Court said that the Part I and Part II of the Act are mutually exclusive. Part I applies to domestic arbitration while Part II applies to New York Convention awards. Therefore, irrespective of the nationalities of the parties, if an arbitration is seated outside India, awards passed in such kinds of arbitration will be treated a foreign award and will be enforced under the New York Convention. Going by the judgment of the Supreme Court in PASL Wind Solution case, it emerges that the award passed by ICC tribunal in Zurich will be a foreign award because the award was regulated under the arbitrational laws of Zurich (Switzerland). This brings an international element in the foreign award that is proposed to be enforced in India and therefore, have to be treated a foreign award and enforced under Part II of the Act. The award passed by ICC tribunal in PASL Wind Solution case meets the second criterion of the Article I of New York Convention. In other words, this category of award will be broadly treated as a foreign award by an enforcing country and more specifically a non-domestic award for an Indian court. This will be in conformity with second proviso of the Article I of the New York Convention which says that the signatory countries will also enforce awards not considered as domestic awards in the state where their recognition and enforcement are sought.

(F) Foreign, Domestic and Non-domestic Arbitral Awards

Seat of arbitration is of crucial importance for the entire exercise of arbitration. Seat means

juridical seat. Therefore, it is about applicability of procedural law that will govern arbitration. It is not essential that the parties conclude their arbitration agreement or tribunal delivers award on the designated seat. This is because arbitration is a neutral process which can be held in any country with which the parties may not be connected. However, the juridical seat and the applicable law will apply. When a party plans to enforce an award, the nationality of the award will determine whether the enforcement country's domestic law or the New York Convention will apply in the enforcement. In case of domestic awards, both the parties belong the same country. Therefore, the enforcement of the award will be in that country itself there will be no international influence as far as enforcement of award is concern. In other words, Indian courts will enforce the award delivered in a dispute between two Indian citizens or two Indian companies. As such the award will be enforced under Section 36 of the Arbitration and Conciliation Act, 1996. In this situation, the New York Convention will not apply to this category of award because the convention envisages that its scope extends to those awards not considered domestic in the state where their recognition and enforcement are sort.

The New York Convention however applies to foreign arbitral awards made in the territory of a state other than the state in which recognition and enforcement are sought. For example, two Indian companies start arbitration proceedings in India under Indian laws. The award will be Indian domestic award. If, however, one Indian party proposes to enforce the award in France as the losing party has assets there then the award will be treated as foreign award by a French court. In addition, the above two categories of the awards, there is a third category known as non-domestic award and it is also enforced under the convention. The New York convention has not defined a non-domestic award and has left it to signatory states to define it under their domestic laws. However, in some cases few states have defined a non-domestic award as those issued under the laws of another state but physically held within the enforcement state. In this situation, the enforcement state may treat a non-domestic award in a similar manner as if it was an instance of a foreign award. Therefore, non-domestic awards are a hybrid category of both foreign and domestic awards. In other words, they are awards issued under the laws of the enforcement state but having some foreign characteristics. The foreign characteristics may be presence of a foreign national, or use of an element of foreign law in arbitration done in the enforcing territory.

III. CONCLUSION

The United Nations Convention on the Recognition and Enforcement of Foreign Awards (New York Convention) 1958 facilitated enforcement of foreign awards in a jurisdiction different from where award was made. The New York Convention 1958 established a robust framework for dispute resolution which made expected impact on expansion of businesses globally. Business entities started making greater use of the facility of dispute resolution through the convention in their international commercial transactions. International commercial arbitration is primarily a dispute resolution mechanism in which non-government decision maker delivers a legally binding and enforceable awards. The characteristic elements of international commercial arbitration include consent of the parties, arbitrators presiding over proceedings at a neutral forum, decision of arbitrator being binding, parties having autonomy and parties can decide modalities of arbitral proceedings and include them in their agreement. It is to emphasize that agreement provides legitimacy to dispute resolution through the process and practice of international commercial arbitration. In nutshell, arbitration begins as a private process to resolve disputes but ends in publicly recognised instrument call as award.

The New York Convention primarily applies to arbitral awards that originate from the territory of another Contracting State. However, it also extends to the enforcement of awards that do not fall under the category of domestic awards.

According to a conventional interpretation, which draws from the legislative history and text of the Convention, non-domestic awards are those made within the enforcing State's territory but are subject, by mutual agreement of the parties, to the arbitration law of another State. This addition was prompted by certain civil law countries during the Convention's drafting in 1958. However, this criterion is rarely utilized in practice. Typically, parties designate the place of arbitration, thereby selecting the applicable arbitration law. Opting for a different arbitration law than that of the place of arbitration can lead to complex legal issues. Consequently, in practice, the first criterion of the Convention's scope holds more relevance.

It's worth noting that neither the first nor the second criterion applies to stateless awards, which are not based on any specific arbitration law. Thus, they fall outside the scope of the Convention.

Therefore, it can be concluded that the New York Convention 1958 contains both the territoriality and nationality principles as enshrined in two criteria under Article I. This was a compromise text that emanated from the working group and the plenary meeting to finalize the text of the convention. The purpose of the Convention was to facilitate the enforcement of

arbitral awards in a wide variety of situations to facilitate dispute resolution through international arbitration. The text of the Convention did not define what constitutes an award that is not domestic or non-domestic in nature. The Convention left the signatory states to the Convention to define the term non-domestic under their own national legislations.
