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A REFUSAL REASON OF RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: PUBLIC POLICY

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Review article

Public policy is one of the most debated concepts in enforcement cases of foreign arbitral award as a sensitive term. It is the most frequent challenging reason of foreign arbitral awards in New York Convention, and therefore it may be used as a defense tool against foreign arbitral awards in enforcement cases before courts. Although public policy is not only refusal reason in New York Convention, other refusal reasons covered by New York Convention may be interpreted as public policy violations before courts. Therefore, relationship between public order and other refusal reasons is key point of this research. Secondly, one important well-known fact should be emphasized regarding public policy. Each country has its own public policy concept and criteria differently from other countries. Although one foreign arbitral award may be enforced in a country as it is in accordance with the public order of country of enforcement, it may be refused in a different country because of public policy reason. Therefore, public policy concept shall be discussed in different aspects in this study.

Key words: *Public Policy, New York Convention, Enforcement Cases, Foreign Arbitral Awards*

I. INTRODUCTION

Arbitration is a popular alternative dispute resolution. An arbitrator is a decision-maker like judge but private person who resolves conflict between parties. Even, evidence rules are flexible and there is no strict formality, but it is an adversarial process.[1] One important flexible practice in arbitration is the reality that arbitrators are chosen by parties and number of arbitrators are determined by parties, differently from courts. Arbitration is generally used to resolve commercial matters, but it may also be used in sport, intellectual property, banking, consumer, labour and investment disputes. Arbitration process is privately conducted in confidential rather than public unlike traditional court trial. By this way, it keeps important informations

[1] M. Deleney&T. Wright, Plaintiff Satisfaction with Dispute Resolution Processes (New South Wales: Law Foundation of New South Wales, 1997), 12. , REINHARDT Gregory J., Australian Civil Procedural Law, Wolters Kluwer, Law&Business, Australia, 2013, p. 91

confidential such as commercial secret, banking secret or business secret. International arbitration carries also same purpose and similar features. It offers solution to conflicts which at least one party has different nationality or arbitration place is different state from parties' country. International Chamber of Commerce (ICC), The Arbitration Institute of the Stockholm Chamber of Commerce (SCC), London Court of International Arbitration (LCIA) and Hong Kong International Arbitration Center (HKIAC) are popular international commercial arbitrations.

II. RELEVANT LEGISLATION IN INTERNATIONAL LAW

In international arbitration law, the most important problem is recognition and enforcement of foreign arbitral awards to set up efficient international arbitration system. Therefore, different relevant conventions exist at regional and international level. For example, while Panama Convention, Buenos Aires Convention or Riyadh Convention are treaties at regional level, New York Convention is a convention at international level.

First of all, Geneva Convention entered into effect in 1929. It sets uniform criteria regarding enforcement of foreign arbitral awards. However, these criteria are vague and restrictive. Assessment of the validity of the different stages of the arbitration contains reference to a set of domestic law systems, and the courts in the host state can only accept enforcement where the arbitral award is final in its country of origin. This situation requires "*double exequatur*".[2] It was not ratified by neither the United States not the Soviet Union which were super powers of that times. After World War II.(1938-1942), international trade increased. Insufficiency of Geneva Convention appeared in more globalized world order.[3] Therefore, New York Convention was done in 1958. Unlike Geneva Convention, New York Convention started to gradually be ratified by countries. The U.S. and Russia are signatory parties of New York Convention. Over 150 countries ratified it. New York Convention provides possibility to recognition and enforcement of foreign arbitral awards issued in a signatory state in a different signatory state unless refusal conditions set by convention are met. New York Convention set refusal reasons of recognition and enforcement of foreign arbitral awards. These refusal reasons are below;

- Invalid arbitration agreement or parties' incapacity to make an arbitration agreement under the law of the place where the award was issued,
- Improper notice of appointment of arbitrators by parties,
- The arbitral awards falling outside the scope of arbitration terms,

[2] FOUCHARD Gerard, International Commercial Arbitration, Edited by Emmanuel Gaillard and John Savage, Kluwer Law International, Hague, Netherlands, 1999, p. 121, 122

[3] İbid 122

- Improper composition of arbitral tribunal,

- Non-final or non-binding arbitral awards on the parties or arbitral awards has been suspended or set aside by the competent authority,

- Nonarbitrable disputes for the country where recognition and enforcement is sought,

- The recognition or enforcement of the arbitral award is contrary to the public policy of the country where recognition and enforcement is sought.[4]

Public policy is accepted as a refusal in New York Convention for recognition and enforcement of foreign arbitral awards.

III. PUBLIC POLICY

A. Public Policy in International Commercial Arbitration

Public policy occupies significant discussing debate in international commercial arbitration since public policy is a refusal reason of recognition and enforcement of not only foreign court awards but also foreign arbitral awards. Public policy is a refusal reason of recognition and enforcement of foreign awards in New York Convention. In such cases, public policy includes all that is required to be protected by the state and it's legal order. Each state has its own public policy concepts, objects, values and rules which shall provide protection against the negative effects of foreign law.[5] Therefore, public policy is safety valve for any state which rules in enforcement cases.[6] Turkish High Court annulled an ICC award in a case for the protection of Turkish public policy in following words;

> "*… the complete set of rules that protect the fundamental interests of society and designate the fundamental structure of the society, within the specific period of time, from political, social, economic, moral and legal perspectives.… For instance, since customs and tax laws concern public policy, an award that orders the payment of a receivable that contravenes tax laws will cause public policy intervention for conflicting with fundamental principles that are deemed indispensable by Turkish law*."[7]

Therefore, public policy is used as a defense tool against winning party for losing party in enforcement cases before national courts.

[4] New York Convention Article 5.

[5] STEFENKOVA Natalia, Introduction to Private International Law. Plzen: Ales Cenek, 2011 p. 28

[6] Ibrahim Idris, supra note 23, p. 30. BAHTA Tecle Hagos, Recognition and Enforcement of Foreign Arbitral Awards in Civil and Commercial Matters in Ethiopia, 5 Mizan L. Rev. 105, 2011, p. 133

[7] Turkish High Court 13th Civil Division, File No. 2012/8426, Decision No. 2012/10349, ESİN İsmail, DEMİREL Ali Selim, GULTUTAN Doğan, BARLAS Arda, BOZOĞLU Yiğitcan, The Baker McKenzie International Arbitration Yearbook in Turkey (Turkish National Report) 2017 p. 459

Public policy is classified two groups in international commercial arbitration: Substantive public policy and procedural public policy.

1. Substantive Public Policy

Substantive public policy consists of fundamental values of society, basic principles of law, mandatory rules of the state and public moral. Components of substantive public policy depends on place, time, society and country but, it must be "… *unconditionally* …" abided by in each country.[8]

a. Mandatory Public Law Rules

An arbitral award which bases on contract which content is subject to historical artifact smuggling, woman trafficking, drug trafficking or trading of organs and tissues is contrary to substantive public policy since such activities are crimes and their prohibition is mandatory rule, public moral and fundamental values of society. In *Soleimany v Soleimany* case, the English Court of Appeal refused enforcement of foreign award since the arbitral award contains provisions which are contrary to British mandatory rules. In this case, a conflict arose out of a contract between a father and a son concerning the sharing of profits from the Iranian smuggled carpets sales.[9] The English Court of Appeal delivered following judgment;

> "*An English court will not enforce a contract governed by English law, or to be performed in England, which is illegal by English domestic law. Nor will it enforce a contract governed by the law of a foreign and friendly state, or which requires performance in such a country, if performance is illegal by the law of that country.... The rule applies as much to the enforcement of an arbitration award as to the direct enforcement of a contract in legal proceedings*."[10]

b. Punitive Damage

Punitive damage is an award delivered for not only compensation of claimants but also punishment and deterrence of defendants in common law countries. It's purpose is to deter defendant from making same or similar mistake for the second time. Naturally, it's amount is much more higher than damage of victim which

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[8] BELOHLAVEK, Alexander J., Recognition and Enforcement of Foreign Arbitral Awards: The Application of the New York Convention by National Courts – Czech Republic, International Journal for Legal Research The Lawyer Quarterly, Issue:2 Year:2014 p. 104

[9] Soleimany v Soleimany [1999] 3 All ER 847. DESAİ Vyapak, KHAN Moazzam, CHATTERJEE Payel, Public Policy and Arbitrability Challenges to the Enforcement of Foreign Awards in India, Chapter 9 Enforcing Arbitral Awards in India, p. 208

[10] Id. At 803-04. GIBSON Christopher S., Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law, Penn State Law Review, Vol. 113:4 2009 pp. 128-129

equals compensatory damage. It may be awarded in negligence cases where negligence is flagrant.[11] However, civil law countries apply only compensatory damage which covers only damages of victim, not punitive damage while common law countries applies both.

Arbitrator's power to issue punitive damage is discussed in arbitration law. In the U.S., the New York Court of Appeals disapproved an arbitrator's punitive award and ruled that such an award is contrary to American public policy in a *Garrity v. Lyle Stuart, Inc* case.[12] Power to rule punitive damage belongs to just courts. As one ICC Arbitral Tribunal stated:

> "*Damages that go beyond compensatory damages to constitute a punishment of the wrongdoer(punitive or exemplary damages) are considered contrary to [the] public policy [of the situs (in that case Switzerland)], which must be respected by an arbitral tribunal… even if the arbitral tribunal must decide a dispute according to a law that may allow punitive or exemplary damages… !*"[13]

In civil law jurisdictions, punitive damages are not countenanced in private law disputes unlike common law states since recovery is only possible with compensatory damages to restore victim party to its previous situation. Punitive awards are assessed as an appropriate sanction in only criminal proceedings in civil law perspective.[14] Punitive damage is accepted against public order in civil law countries. Therefore, an arbitral award including punitive damage contravenes substantive public policy in not only common law countries but also civil law countries.

c. Excessive Interest

Interest is an amount of money payable or paid for compensation since debtor withholds money temporarily and does not make payment on time.[15] First function of interest is that its payment provides full compensation as it restores situation of claimant who would have enjoyed on-time payment if the infringement had not

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[11] KLAR Lewis, Punitive Damages in Canada: Smith v. MegaFood, 17 Loy. L.A. Int'l & Comp. L. Rev. 809 (1995) p. 826 Available at: http://digitalcommons.lmu.edu/ilr/vol17/iss4/4

[12] KOSLOW Andrew B., The Arbitrator's Power to Award Punitive Damages in International Contract Actions, N.Y.U. J. Int'l L.&Pol. Volume: 19 Year: 1986 pp. 217,218

[13] ICC Case No. 5946 (1991), reprinted in 16 Y. B. Com. Arb. 97, 113(1991), GOTANDA Y. John, The Unpredictability Paradox: Punitive Damages and Interest in International Arbitration, J. World Investment & Trade Volume:10 Year:2009 p. 556

[14] Gotanda, supra note 32, at 66. WOOD Darlane S., International Arbitration and Punitive Damages: Delocalization and Mandatory Rules, Defense Counsel Journal, October 2004 p. 410

[15] See McCollough&Co. v. Ministry of Post, Tel. & Tel., 11 Iran-U.S. Cl. Trib. Rep. 3, 29 (1986); G. Hackworth, 5 Digest of International Law 735(1943) (citing Illinois Central Railroad Co. (United States v. Mexico), Opinions of the Commisioners, 187, 189(1927)); D. Dobbs, 1 Dobbs Law of Remedies & 3.6(1) (2d ed. 1993), GOTANDA John Y., The Unpredictability Paradox: Punitive Damages and Interest in International Arbitration, The Journal of World Investment&Trade 2009 p. 560

occurred on payment time.[16] Second distinctive feature of interest is that its payment supports efficient payment on time. Interest is a deterrence reason on respondent for his on-time payment.[17] Therefore, interest is not contrary to substantive public policy in modern legal systems. However, excessive interest (also excessive cost) contradicts proportionality principle of awarded damages which constitute violation of substantive public policy.[18] For example, Swiss Supreme Court ruled that compounded interest rate were considered excessive, and therefore it is contrary to Swiss public policy.[19]

d. European Public Policy

Public policy is a refusal reason against foreign arbitral award at not only domestic level but also European level in the E.U. states. Benetton, Dutch commercial corporation, made 8 year duration trademark license agreement with Bulova and Eco Swiss, set up in New York and Hong Kong respectively.[20] Eco Swiss case originated from a trademark license agreement in which Bulova granted Eco Swiss company the Benetton name as a brand in Europe. Benetton noticed termination of the trademark license agreement 3 years before it's duration. Benetton faced arbitration proceedings commenced by Eco Swiss and Bulova based on relevant arbitration clause under the Netherlands Arbitration Institute Rules. Then, Benetton was held liable for the damages because of its early termination in the partial award. Also, it was ruled that Benetton must pay damages to Eco Swiss and Bulova in final award.[21] After final arbitral award, Benetton objected arbitral award, claiming that anti-competitive agreement was upheld; it contained European States and therefore it contravened Article 81 of EC Treaty. In the course of arbitral proceedings, none of the parties and arbitrators had taken into account of the situation that the anti-competitive agreement might have contravened to European Competition law.[22] The most important emphasized issues of the ECJ in Eco Swiss case is the point that Article 81 of EC may be considered as a public policy set by New York Convention

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[16] See generally J. Keir & R. Keir, "Opportunity Cost: A Measure of Prejudgment Interest," 39 Bus. Law. 129 (Nov. 1983); R. Haig, 3 Bus. & Com. Litig. Fed. Cts. & Restatement (Second) of Contracts & 344(a) (1981), İbid 560

[17] İbid 560

[18] See Jan Paulsson, The New York Convention in International Practice – Problems of Assimilation, in THE NEW YORK CONVENTION OF 1958, ASA SPECIAL SERIES NO. 9 100, 113 (Marc Blessing ed., 1996). See also Pierre Mayer&Audley Sheppard, Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, 19 ARB. INT'L 249, 254 (2003), YANG Inae, A Comparative Review on Substantive Public Policy in International Commercial Arbitration, Dispute Resolution Journal Vol. 70 No.2 p. 51

[19] Inter Maritime Management SA v. Russin & Vecchi, ibid 52

[20] VAN DER HAEGEN Oliver, European Public Policy in Commercial Arbitration: Bridge over Troubled Water?, 16 Maastricht J. Eur. & Comp. L. p. 451

[21] YANG Inae, A Comparative Review on Substantive Public Policy in International Commercial Arbitration, Dispute Resolution Journal Vol:70 No:2 p. 57

[22] VAN DER HAEGEN Oliver, European Public Policy in Commercial Arbitration: Bridge over Troubled Water?, 16 Maastricht J. Eur. & Comp. L. p. 451

Article V(2)(b).[23] Therefore, European Union law sources may be refusal reason as a substantive public policy in enforcement cases. Additionally, this case shows that competition law rules constitute substantive public policy.

e. Basic Principles of Sharia Law

In some Islamic countries, Sharia law is practiced as a religious law. In such countries, public policy arises out of main sources of Islamic law which are the *Holy Qor'an*, the *Sunna*, the *Icma* and the *Qiyas*.[24] Each Islamic state interprets public policy in accordance with its approach. For example, Saudi Arabia has also its own public policy interpretation. According to Saudi Arabian approach, Saudi Arabian courts have propensity to refuse arbitral awards rather than recognizing since foreign arbitral awards are perceived as a threat against national sovereignty for the protection of Western corporation's economic interest after *Aramco* case in 1958.[25] This is arbitration unfriendly perception. Whereas, *the Holy Qur'an* allows arbitration as a dispute resolution. For instance, the Almighty said: "*O ye who believe? Kill not game while in the sacred Precincts or in the state of pilgrimage. If any of you doeth so intentionally, the compensation is an offering, brought to the Ka'ba, of a domestic animal equivalent to the one killed as adjudged by two just men among you, or by way of atonement, the feeling of the indigent…'*(AlMa'ida, Verse 97, *the Holy Qur'an*, 1987). This verse lays down hunting prohibition for Muslims in the course of pilgrimage process. It contains two arbitrators by the one of them who killed any animal while practicing the pilgrimage so as to atone the other. Therefore, it is clearly fact that arbitration is allowed.[26] Also, Arbitration was used and advised to resolve conflicts by Prophet Muhammad. He played role as an arbitrator in conflicts of the clans of the Quraysh tribe in the course of the renovation of the *Ka'ba* which occupies crucial place in Islamic history and *Shari'ah*. Quraysh tribes could had not reached consensus about reinserting the Black Stone in the *Ka'ba* after it was renovated. All clan chiefs wanted to reinsert the Black Stone in the *Ka'ba* without other clan chiefs. By way of Prophet Muhammad's successful arbitration, he prevented the Quraysh tribes from declaring war one another. Later, the Treaty of Medina which was the first treaty of Muslim community in AD 622 offered arbitration to solve conflicts.[27] Therefore, Saudi Arabia enacted a New

[23] İbid Page 460

[24] El-Ahdab (n 1) 49, ALMUTAWA Ahmed Mohd Khurshid, Doctoral Dissertation:Challenges to The Enforcement of Foreign Arbitral Awards in the States of the Gulf Cooperation Council, University of Portsmouth School of Law, Portsmouth, United Kingdom, March 2014 p. 95

[25] Y. AJ-Samaan, The Settlement of Foreign Investment Disputes by Means of Domestic Arbitration in Saudi Arabia, 9 ARAB L.Q. 217,231 (1994)., ANUSORNSENA, Veena, "Arbitrability and Public Policy in Regard to the Recognition and Enforcement of Arbitral Award in International Arbitration : the United States, Europe, Africa, Middle East and Asia" (2012). Theses and Dissertations., Golden Gate University School of Law p. 135

[26] AL-OBAIDLI, J.M.A.A., Arbitration law in Qatar: the way forward. Robert Gordon University PhD thesis, 2016 pp. 67, 68 Held on OpenAIR(online). Available from: https://openair.rgu.ac.uk

[27] AL-AMMARI Saud & MARTIN A. Timothy, Arbitration in the Kingdom of Saudi Arabia, Arbitration International, Volume 30 Issue 2 2014 p. 388

Arbitration Law which bases on the UNCITRAL Model Law to change arbitration unfriendly perception and to keep foreign direct investments.[28]

The most well-known example of Saudi Arabian public policy violation is *riba* which may take a form of legal or contractual interest. Generally, arbitral tribunals deliver arbitral award including contractual or legal interest arising out of primary damages to be awarded for distressed party. However, it is clearly fact that Saudi Arabian courts disallow execution of interest included by foreign arbitral awards since it is considered that interest is a usury(*riba*) under Sharia rules.[29] *Riba* is accepted as any type of interest. It is prohibited by a number of Quranic verses.[30] Pursuant to Kuwaiti Civil Code Article 305(1), interest is forbidden in following words;

> " *… any agreement for interest in consideration of utilizing a sum of money or against delay in settlement thereof shall be void.*"[31]

Civil Codes of Bahrain and Qatar also include same rule.[32] Interest is also forbidden in Qatar and Bahrain.

In Islamic law, *Gharar* is the second most important public policy violation. Gharar is defined as " *… the sale of a thing which is not present at hand or whose consequence is not known or a sale involving hazard in which one does not know whether it will come to be or not, as in the sale of a fish in water or a bird in the air.*" This is unclear obligation in a commercial transaction. A Risk, gambling, chance and hazard are types of *Gharar*. These things shall not be contained in arbitral awards or contracts to be enforced before Saudi Arabian courts.[33] Due to the ban on *gharar*, various agreement types including risk or uncertainty as an element will be considered null and void under Sharia law, involving insurance and gambling.[34] Therefore, religion is important factor effecting public order.

[28] ibid 390

[29] S Al-Fawzan, A Summary of Islamic Jurisprudence (Al-Maiman Publishing House, Riyadh 2005 'in Arabic') vol 2 p 38, ALMUHAİDH Yasser, The Recognition and Enforcement of Foreign Arbitral Awards in Saudi Arabia: An Examination of the Function of Article (V) of the 1958 New York Convention in the Saudi Legal Order, PhD Thesis, University of Hull, October 2013, p. 190

[30] Surat al-Baqara, Part 3 Verse 275,(3:275), ALEİSA Mohammed I., A Critical Analysis of the Legal Problems associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arbitration Law(2012) Resolve the Main Legal Poblems? PhD Thesis, University of Essex School of Law May 2016 p. 184

[31] ALENEZAİ Abdullah Mubarek Aldelmany, An Analytical Study of Recognition and Enforcement of Foreign Arbitral Awards in the GCC States, PhD Thesis, University of Stirling, Scotland, September 2010 p. 308

[32] Bahrain Civil Code Article 228, Qatar Civil Code Article 568, ibid 308

[33] Ayub, Understanding Islamic Finance. at p. 143, ALEİSA Mohammed I., A Critical Analysis of the Legal Problems Associated with Recognition and Enforcement of Arbitral Awards in Saudi Arabia: Will the New Saudi Arabian Arbitration Law(2012) Resolve the Main Legal Problems?, PhD Thesis, University of Essex School of Law May 2016 p. 191

[34] Saleh (n 83) 28 (explaining that there are no insurance companies in the KSA, but Saudi nationals will arrange for insurance outside of the KSA), ALMUTAWA Ahmed Mohd Khurshid, Challenges to the Enforcement of Foreign Arbitral Awards in the States of the Gulf Cooperation Council, PhD Thesis, University of Portsmouth, Portsmouth, United Kingdom, March 2014, p. 206

2. Procedural Public Policy

Procedural public policy is related to properness of procedural action. It concerns legal faults in the arbitral rules governing arbitration process. First condition of procedural public policy is in conformity with due process.[35] Unlike courts trials, arbitrators are not firmly bound to procedural rules. However, sometimes improper procedural rules practice is contrary to (procedural) public policy if it reaches excessive level. Naturally, every procedural fault does not constitute procedural public policy. It must be at certain level. Refusal reasons in New York Convention are related to procedural public policy. These refusal reasons are procedural public policy violations at extreme level in signatory states.[36] For instance, lack of independence of arbitrators is a procedural public policy violation at high level. For instance, generally, an arbitrator's breach of his confidentiality duty is not a reason of challenging the arbitral award.[37] However, Turkish High Court issued a judgment which is open to criticism in 1976. In that case, parties chose applicable law as a Turkish law in their contract. When the dispute arose between parties, Swiss arbitral tribunal practiced Turkish law as a substantive law and Swiss law as a procedural law. After Finnish party won the case, it sought recognition and enforcement of foreign arbitral awards before Turkish courts but, Turkish High Court considered that application of Swiss procedural law is contrary to Turkish public policy instead of applying Turkish law as a procedural law. This decision was criticized by even foreign jurists since applying Swiss law does not have impact on the outcome of the case instead of applying Turkish Civil Procedural Code.[38] Therefore, there is no procedural public policy in that case.

a. Invalid Arbitration Agreement

Invalid arbitration agreement is a refusal reason against recognition and enforcement of foreign arbitral awards in New York Convention since an arbitral award cannot base on invalid arbitration agreement. Arbitration agreement may be invalid due to some reasons such as incapacities of parties, undue influence, coercion or duress. In such cases, Validity of arbitration agreement may be examined by national courts of the state which the recognition and enforcement are sought. Arbitral tribunal may also evaluate validity of arbitration agreement

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[35] FOUCHARD Gerard, International Commercial Arbitration Edited by Emmanuel Gaillard and John Savage Kluwer Law International, Netherlands, 1999, para. 1653 p. 957

[36] RUHİ Ahmet Cemal, KAPLAN Yavuz, Yabancı Mahkeme ve Hakem Kararlarının Tenfizi Açısından Kamu Düzeni(Ordre ublic) Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni, Cilt:22 Sayı:2 Yıl:2002 p. 661

[37] C. Müller, 233; P. Ritz, Die Geheimhaltung im Schiedsverfahren nach schweizerischem Recht, 188 et seq. JOLLES Alexander, STARK-TRABER Sonja, CANALS DE CEDİEL Maria, Chapter 7: Confidentiality, in:Geisinger/Voser/Petti(Eds), International Arbitration in Switzerland: A Handbook for Practitioners, 2nd ed. Kluwer Law International 2013 p. 142

[38] Decision of the 15th Civil Chamber, 10 March 1976, No 1617-1052, DESAİ Vyapak, KHAN Moazzam, CHATTERJEE Payel, Public Policy and Arbitrability Challenges to the Enforcement of Foreign Awards in India, Chapter 9 Enforcing Arbitral Awards in India, p. 208

but, it's decision is not binding regarding validity on courts since transference of authority to evaluate validity of arbitration agreements from court to arbitral tribunal is contrary to public policy.[39] Therefore, national courts may need to assess validity of arbitration agreements for the protection of their procedural public policies. Additionally, the English Court of Appeal ruled that an arbitral award which bases on arbitration agreement concluded under duress, coercion or undue influence is unenforceable as a result of public policy.[40]

b. Improper Notice of Appointment of Arbitrators to Parties

For smooth arbitration process, parties are properly informed concerning arbitrators' appointment process. Improper notice on the appointment of arbitrators does not cause infringement to parties' right to defense their allegations, if parties can submit their claims. Such improperness does not create procedural public policy.[41] Improperness must reach a certain level which may affect content of arbitral award. According to Spanish arbitration law, "*lack of notification of the nomination of the arbitrators to the party*" is an example of improper notice of appointment of arbitrators to parties and contrary to procedural public policy[42] since it affects result of the case.

c. The Arbitral Awards Falling outside the Scope of Arbitration Terms

An arbitral tribunal cannot make decision uncovering arbitration terms. Scope of arbitral awards must fall on the scope of arbitration terms. An arbitral award which falls outside the arbitration terms is not subject to recognition and enforcement of arbitral awards cases. Taiwan Supreme Court held that such a arbitral award is refused in recognition and enforcement cases when it is harmful to public policy.[43]

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[39] Krş. HUMK. M. 519; ALANGOYA: Yönetmelik, s. 19; ALANGOYA: Tahkim, s. 151; Ayrıca bkz. Avusturya Medeni Usul Kanunu & 596, II; FASCHING: Lehrbuch, s. 1074; Uncitral Tahkim Kuralları m. 21; TANRIVER Süha, Yabancı Hakem Kararlarının Türkiye'de Tenfizi ve Kamu Düzeni Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni Cilt:17 Sayı:1-2 Yıl:1997-1998 syf 485

[40] Israel Discount Bank of New York V. Hadjipateras, [1983] 3 ALLER 129., XİAO Hong, Refusing Recognition ad Enforcement of Foreign Arbitral Awards under Article V (2) of the New York Convention in China: From the Judicial Experience of Europe and USA, 2 US-China Law Review 51 (2005), p. 58

[41] ALONSO Jose Maria, GOMEZ-ACEBO Alfonso, CASADO Jose Ramon, MERCEDES Victor, DE LA MATA Fernando, The Baker McKenzie International Arbitration Yearbook in Spain (Spanish National Report) 2017 p. 409

[42] TOL 149505, Spanish Supreme Court Order of 13.03.2001; MOTA Carlos Esplugues, Recognition and Enforcement of Foreign Arbitration Awards in Spain and Public Policy, Recent Issues of International Business Litigation and Arbitration Conference University of Nagoya(Japan) 2009 p. 7

[43] CHEN Rong-Chwan, Interpretation and Application of the New York Convention in Taiwan, Editor: George A. Bermann, Recognition and Enforcement of Foreign Arbitral Awards The Interpretation and Application of the New York Convention by National Courts, Springer Publishing, 2017, page 957

d. Improper Composition of Arbitral Tribunal

Arbitral tribunal must be properly composed. Improper composition of arbitral tribunal is refusal reason in enforcement cases of foreign arbitral award. For example, An arbitral tribunal must be constituted by impartial and independent arbitrators for proper composition.

da. Independence of Arbitrators

Internal rules of institutional arbitrations lay down independence of arbitrators.[44] Where doubts regarding their independence exist, arbitrators may be challenged.[45] However, lack of independence of arbitrators is not listed as a refusal reason against enforcement of arbitral award cases in New York Convention. Whereas, an arbitral tribunal must absolutely consist of independent arbitrator(s) for proper composition of arbitral tribunal since lack of independence of arbitrators is contrary to procedural public policy. Even, if a judge does not consider that lack of independence of arbitrators is not improper composition of arbitrators in enforcement cases, it is probably assessed that it is contrary to substantive public policy pursuant to New York Convention Article V/2b.[46]

Lack of independence of arbitrators may occasionally arise out of institutional arbitration rules. 1998 ICC Arbitration Rules Article 21 (Scrutiny of the Award by the Court) includes following provisions;

> "*Before signing any Award, the Arbitral Tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal's liberty of decision, may also draw its attention to points of substance. No Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form.*"

In this provision, *The Court* means the International Court of Arbitration. It is not arbitral tribunal. This rule limits capacity of arbitral tribunal to render final arbitral award and therefore this provision is considered that it restricts independence of arbitrators and brings about public policy violation which is a refusal reason of foreign arbitral award in Turkey.[47]

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[44] 1998 ICC Rules of Arbitration Article 7, ISTAC(İstanbul Arbitration Centre) Arbitration Rules Article 12, WIPO Arbitration Rules 22

[45] 1998 ICC Rules of Arbitration Article 14, ISTAC(İstanbul Arbitration Centre) Arbitration Rules Article 16, WIPO Arbitration Rules 22

[46] KAPLAN Yavuz, Milletlerarası Tahkimde Hakemin ve Tenfizin Reddi Sebebi Olması Açısından Bağımsızlık ve Tarafsızlık İlkesi, Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni Cilt:21 Sayı:1-2 Yıl:2001 Sayfa 50

[47] Baki KURU, Hukuk Muhakemeleri Usulü, C. VI, 6. Bası, İstanbul 2001, s. 6203, EKŞİ Nuray, Yargıtay Kararları Işığında Icc Hakem Kararlarının Türkiye'de Tanınması ve Tenfizi, Ankara Barosu Dergisi, Yıl:67 Sayı:1 Kış 2009 p 61

db. Impartiality of Arbitrators

Internal rules of institutional arbitrations lay down impartiality of arbitrators.[48] Where doubts regarding their impartiality exist, arbitrators may be challenged.[49] In civil law jurisdictions, decision-makers (arbitrators or judges) cannot submit any evidence or proof material to issue award. Within this context, impartiality of arbitrators means that an arbitrator issue an award based on just documents or evidences submitted by the parties. Therefore, if the arbitral tribunal had seen any proof or evidence relevant to conflict, it should not base on that knowledge to issue an award to be impartial.[50] Spanish Supreme Court ruled that lack of partiality of arbitrators is contrary to procedural public policy.[51] Therefore, an arbitral tribunal must properly consist of impartial arbitrators.

e. An Arbitral Awards Suspended or Set Aside by Competent Authority

An arbitral award suspended or set aside by competent authority is subject to refusal reason in enforcement. Pursuant to New York Convention Article 1(e), an arbitral award aside by competent authority is laid down as a challenging reason in enforcement cases for foreign arbitral awards. However, this reason is still debated in doctrine. According to one doctrinal view, an arbitral award set aside by competent authority is enforceable in a different country. This idea came into existence in *Chromally* and *Pemex* cases in the U.S. In these cases, the U.S. courts accepted enforcing foreign arbitral awards set aside by competent authorities in their country of origin based on the statement that is " ... *may be refused* ..." in the New York Convention. According to opposite idea, " … *may be refused* …" statement does not grant discretion to the courts regarding whether such awards are enforced or not. Such awards are not binding on the parties and therefore it is an obligation to refuse arbitral awards suspended by competent authority in state which award was delivered in the country which enforcement is sought.[52] However, in *Radenska* case, Austrian Supreme Courts ruled that an arbitral award which was set aside in country origin(Slovenia) by competent authority since it contravenes public policy in Slovenia is enforceable in Austria.[53] According to this decision, an arbitral award annulled by competent authority is enforceable in the country which enforcement

[48] ISTAC(İstanbul Arbitration Centre) Rules Article 12, WIPO Arbitration Rules Article 22

[49] ISTAC(İstanbul Arbitration Centre) Rules Article 16, WIPO Arbitration Rules Article 24

[50] ALENEZİ Abdullah Mubarek Aldelmeny, An Analytical Study of Recognition and Enforcement of Foreign Arbitral Awards in The GCC States, PhD Thesis, University of Stirling, Stirling, Scotland the U.K., September 2010, p. 235

[51] JUR 2003/261577 ; MOTA Carlos Esplugues, Recognition and Enforcement of Foreign Arbitration Awards in Spain and Public Policy, Recent Issues of International Business Litigation and Arbitration Conference University of Nagoya(Japan) 2009 p. 7

[52] AKINCI Ziya, Verildiği Ülkede İptal Edilen Hakem Kararlarının Türkiye'de Tenfizi, İzmir Barosu Dergisi, Nisan 1994 Sayı:2 İzmir sayfalar 12,13

[53] Yearbook of Commercial Arbitration, Vol. XXIV (1999), s. 919 vd.. Karar hakkında Türkçe bilgi için bkz. EKŞİ New York, s. 111 vd., ATAMAN-FİGANMEŞE İnci, Milletlerarası Ticari Hakem Kararlarının İptal ve Tenfiz Davaları Yoluyla Mahkemelerce Mükerrer Kontrole Tabi Tutulmaları Sorunu ve Bu Sorunun Giderilmesine Yönelik İki Öneri, MHB Yıl 31, Sayı 2, 2011 pp. 62, 63

is sought unless it is not contrary to public policy in the country which enforcement is sought.

f. Nonarbitrable Disputes

Nonarbitrability is a challenging reason of foreign arbitral award. Although one type of dispute may be arbitrable in a country, same or similar dispute may not be arbitrable in a country which recognition and enforcement of arbitral award is sought. Under this condition, procedural public policy or nonarbitrability claim defense may be claimed in enforcement cases before courts of the country which prohibits arbitrability of same disputes since "*Arbitrability, in essence, is a matter of national public policy*."[54]

fa. Intellectual Property Disputes

Arbitration can be used to resolve intellectual property law disputes. WIPO arbitration was established for this reason. It means that intellectual property disputes are arbitrable. However, each intellectual property law conflict is not arbitration. In many countries, national courts have exclusive jurisdiction over validity claims of registered intellectual property rights. Namely, validity claims of patent, trademark or utility model is non-arbitrable in these countries.[55] As a rule, arbitral awards are *inter partes*, not *erga emnes* unlike court judgments. Therefore, if arbitral tribunal render decision regarding validity of registered intellectual property rights, it shall be *erga omnes* decision since patent and trademark registrations are open to public and have effect on 3. persons.[56] In Switzerland, arbitral awards can invalid patent rights under the condition that the arbitral award is approved by Swiss courts.[57] One more time, national courts "have the last word." As a result of this situation, only public authorities or courts make final decision as a result of public order and therefore such things are considered as non-arbitrable.[58] There is exclusive jurisdiction of national courts over validity disputes of intellectual property rights.

Arbitrability of intellectual property rights discussion is not limited with claims of validity. For instance, only commercial disputes may be arbitrated in South Korea. Intellectual property conflicts are not considered as a commercial disputes in general and therefore IP rights conflicts cannot be generally taken before arbitral

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[54] P&M Baron&S. Liniger, supra note 19, SÜMER Murat, Jurisdiction&Arbitration Jurisdiction of Sovereign States and International Commercial Arbitration: A Bound Relationship, Ankara Bar Review 2008/2 p. 60

[55] CELLİ Alessandro L. and BENZ Nicola, Arbitration and Intellectual Property, European Business Organization Law Review 3 2002 p. 597

[56] Smith ve diğerleri, s. 307, BOZKURT YÜKSEL Armağan Ebru, Fikri Mülkiyet Uyuşmazlıklarında Tahkim, Banka Hukuku Dergisi Cilt:XXV Sayı:2 Haziran 2009 Sayfalar 360, 361

[57] ÇALIŞKAN Yusuf, Uluslararası Fikri Mülkiyet Hukukunda Uyuşmazlık Çözüm Mekanizmaları: WIPO Tahkimi ve Dünya Ticaret Örgütü, Değişim Yayıncılık, 1. Basım, İstanbul, 2008, sayfa 31

[58] Lew/Mistelis/Kröll, s. 210; Blessing, s. 202; Gurry, s. 119, BOZKURT YÜKSEL Armağan Ebru, Fikri Mülkiyet Uyuşmazlıklarında Tahkim, syf 362.

tribunal in South Korea.[59] Whereas, Intellectual property rights conflicts may be considered as commercial disputes and therefore it is arbitrable in many countries. An Arbitral award which was issued in a country which allows intellectual property rights to be taken in arbitration is refused in enforcement case for the protection of South Korean procedural public policy before Korean national courts.

fb. Immovable Disputes

Arbitrability of land disputes is not possible in general. For example, real estate litigations are subject to mandatory provisions in Egypt. Courts have exclusive jurisdiction over immovable properties in Egypt. The Cairo Court of Appeal emphasized repeatedly that arbitration agreement provisions including immovable properties is void and null. Reason of this nullity bases on public policy. This approach has been justified for the protection of 3. parties and states' rights.[60]

Pursuant to Turkish International Arbitration Act Article 1, rights *in rem* on immovables falls outside the arbitrability of disputes since these rights are absolute and can be claimed against third parties. Rights *in rem* are recorded in land registries. As arbitrators have *inter partes* effect, not *erga omnes* effect, their decision cannot change land registries. From this point of view, personal rights on immovable are arbitrable unlike rights *in rem* which are absolute rights.[61] Taking into consideration of actio ex locato("*kira davası"*), Turkish Court of Appeal approaches these cases negatively for the protection of weaker party of lease contracts.[62] Therefore, leasing disputes on immovable are nonarbitrable under Turkish law.

fc. Labor Disputes

Arbitrability of labor disputes should be carefully analyzed because workers are weaker party in employment relationship. Under German law, courts have exclusive jurisdiction over individual labor disputes and therefore individual labor disputes are nonarbitrable in Germany but collective labor disputes are arbitrable.[63] In Turkey, parties may decide to resolve their individual labor disputes for their reemployment case(*işe iade davası*) after their employment relationship ends. Before or in the course of employment contract, it is prohibited to make arbitration agreement.[64]

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[59] CELLİ Alessandro L. and BENZ Nicola, Arbitration and Intellectual Property, European Business Organization Law Review 3 2002 p. 597

[60] See Cairo Court of Appeal, Commercial Section No. 91, Case No. 95/120(Apr. 27, 2005); Cairo Court of Appeal, Commercial Section No. 91, Case Nos. 13 and 14/121(Jan. 29, 2006); Cairo Court of Appeal, Economic Section No. 91, Case Nos. 43 and 89/122 (May 30, 2006); Cairo Court of Appeal, Economic Section No. 7, Case No. 68/123 (July 2, 2007); Court of Cassation, Commercial and Economic Section, Appeal No. 9882/80 (Oct. 8, 2013), SELİM İsmail, Egyptian Public Policy as a Ground for Annulment and Refusal of Enforcement of Arbitral Awards, BCDR International Arbitration Review 3, no.1, Kluwer Law International BV, The Netherlands 2016 p. 73

[61] Akıncı, (Milletlerarası Tahkim), s. 203. , HUYSAL Burak, Milletlerarası Ticari Tahkimde Tahkime Elverişlilik, Vedat Kitapçılık, İstanbul, 2010, sayfa 135

[62] İbid 132

[63] Yücel(2004) s. 1354, ŞİŞLİ Zeynep, Bireysel İş Uyuşmazlıkları ve Yargısal Çözüm, Ankara Barosu Dergisi Yıl:2012/ 2 Sayfa 60

[64] 4857 sayılı İş Kanunu madde 20

The reason for this is to maintain protection of worker principle.[65] As employer has economic and social effect on employee during or before employment contract, arbitration contract cannot be made in this situation for the protection of weaker party according to Turkish Court of Appeal decisions.[66] Therefore, protection of weaker party(protection of workers in this situation) is a result of public order.[67]

fd. Family Law Disputes

Arbitrability of family law disputes varies from country to country. While some countries allow arbitration in family law disputes, some of them does not apply arbitration in family law disputes based on public policy reasons. Pursuant to Morocco Arbitration Law Article 308 "*persons of the requisite capacity can conclude arbitration agreements pertaining to rights that are under their free disposal…*".[68] Same provision is also included in Turkish Civil Procedure Code. Family law disputes are also non-arbitrable since rights arising out of family law are not under free disposal of people in Turkey. Family law disputes are also non-arbitrable in Zambia and Botswana. Unlike these countries, some countries may admit arbitration to solve family law disputes. Family law disputes are arbitrable in Ethiopia.[69] Family law disputes may be solved in arbitration under Islamic law since one verse of Qur'an(al-Nisa:35) allows parties to solve their family law disputes in arbitration:

> "*If ye fear a breach between them twain, appoint (two) arbiters one from his family and the other from hers; if they wish for peace Allah will cause their reconciliation for Allah hath full knowledge and is acquainted with all things*."[70]

Therefore, an arbitral award may include family law disputes, but it cannot be enforced before the courts of the state which disallows family law disputes to be solved because of public policy reason.

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[65] Yücel (2004) s. 1356, ŞİŞLİ Zeynep, Bireysel İş Uyuşmazlıkları ve Yargısal Çözüm, Ankara Barosu Dergisi Yıl:2012/ 2 Sayfa 60

[66] Yargıtay 9. HD, E. 2008/44630, K. 2009/557, T. 20.1.2009 (Kazancı), İLHAN Hüseyin Afşın, Tahkim Sözleşmesinin Geçerliliği, Doktora Tezi, Yeditepe Üniversitesi Sosyal Bilimler Enstitüsü Özel Hukuk Anabilim Dalı, Tez Danışmanı: Ali Cem BUDAK, İstanbul, 2014, Sayfa 215

[67] Brekoulakis, (New Areas of Concern) s. 28, HUYSAL Burak, Milletlerarası Ticari Tahkimde Tahkime Elverişlilik, Vedat Kitapçılık, İstanbul, 2010, Sayfa 212

[68] MANTE, J., Arbitrability and Public Policy: an African Perspective, Presented as the Society of Legal Scholars Conference, University of York, the U.K. 2015 pp. 12-13

[69] ibid p. 13

[70] ZAHRAA Mahdi; NORA A. Hak, Tahkim(Arbitration) in Islamic Law within the Context of Family Disputes, 20 Arab L.Q. 2 (2006) p. 10

B. Enforcement of ICSID Awards and Public Policy

ICSID Awards have an exception regarding it's recognition and enforcement process. Under ICSID Convention, ICSID awards are binding on parties[71] and each contracting state must recognize ICSID awards in their territories " … *as if it were a final judgment of a court in that State*."[72] Unlike international commercial arbitral awards, Enforcement of ICSID awards is not subject to New York Convention. Moreover, ICSID awards are final and directly enforceable in ICSID Convention signatory states.[73] Therefore, public policy defense is not be claimed against ICSID awards before courts.

CONCLUSION

New York Convention sets a number of refusal reasons in enforcement cases. Although these reasons seems different from each other, all of them are actually interpreted as a public policy violation by different national courts. It can be deducted that public policy violation is key concept to challenge a foreign arbitral award. As other refusal reasons are also interpreted as public policy violation, there is only refusal reason that is public policy violation. Therefore, judge should examine public policy violation conditions in recognition and enforcement cases in every time.

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[71] ICSID Convention Article 53

[72] ICSID Convention Article 54

[73] ZENGİNKUCUZU Dikran M., Turkey: Ratification of the ICSID Convention and the Enforcement of ICSID Arbitral Awards, International Arbitration Law Review, 2012 p. 216

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RAZLOG ODBIJANJA PRIZNAVANJA I IZVRŠENJA STRANIH ARBITRAŽNIH ODLUKA: JAVNA POLITIKA

Javna politika je jedan od najčešćih pojmova u slučajevima ovrhe stranih arbitražnih odluka kao osjetljivog pojma. To je najčešći razlog izazova stranih arbitražnih odluka u njujorškoj konvenciji, te se stoga može koristiti kao sredstvo obrane od stranih arbitražnih odluka u ovršnim predmetima pred sudovima. Iako javna politika nije samo jedini razlog odbijanja u njujorškoj konvenciji, drugi razlozi odbijanja obuhvaćeni njujorškom konvencijom mogu se tumačiti kao kršenje javne politike pred sudovima. Stoga je veza između javnog poretka i drugih razloga odbijanja ključna točka ovog istraživanja. Drugo, važno je istaknuti jednu važnu činjenicu u vezi s javnom politikom. Svaka zemlja ima svoj vlastiti koncept javne politike i kriterije koji su različiti od onih u drugim zemljama. To znači da se jedna strana arbitražna odluka može izvršiti u zemlji ako je to u skladu s javnim

poretkom zemlje izvršenja, dok se u drugoj zemlji ista može odbiti zbog razloga javne politike. U studiji se raspravlja o različitim aspektima koncepta javne politike.

Ključne riječi: *javna politika, njujorška konvencija, slučajevi izvršenja, strane arbitražne odluke*