Kluwer Arbitration Blog

To NYC or Not: Dealing with Discrepancy in Enforcement Requirements between the New York Convention and the Domestic Arbitration Act

Junu Kim (Bae, Kim & Lee LLC) and Bhushan Satish (Willkie Farr & Gallagher) · Wednesday, August 9th, 2017 · Bae, Kim & Lee LLC

As arbitration gains prominence, legislative regimes governing domestic arbitration are fast liberalizing globally, and in some instances, like in South Korea, liberalizing faster than the regime governing international arbitration. The question we consider in this post is whether Contracting Parties to the New York Convention on the Enforcement of Foreign Arbitral Awards ("New York Convention") must mandate the enforcement of foreign awards under the New York Convention alone? With the convergence of legislative regimes governing domestic and international arbitration, which regimes also go by the moniker "monist regimes" (as opposed to "dualist regimes"), this question becomes increasingly material. In the context of monist regimes the answer to this question seems to be in the affirmative. However, when the evolution of the regime governing domestic arbitration outpaces international arbitration, then this response ceases to become obvious. The example presented by the 2016 Korean Arbitration Act, which offers a more liberalized enforcement regime for domestic awards than for foreign awards, offers an opportunity to probe this question further.

Article VII of the New York Convention

Article VII of the New York Convention states *"[t]he provisions of the present Convention shall not … deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law … of the country where such award is sought to be relied upon."* According to this provision, if the law of a Contracting State, where the enforcement is sought, makes enforcement of a domestic arbitration award more favorable than the New York Convention, then the award creditor has the right to apply for enforcement under the more favorable law.

It bears mention that there is some divergence in doctrine and case-law on whether Article VII applies to the exclusion of the more favorable national law in toto, or whether an award creditor applying for enforcement under the national law can additionally cherry pick those provisions of the New York Convention which it seeks the selective application of. However that is not the subject of this post and will not be explored further.

The Curious Case of the 2016 Korean Arbitration Act

Given the historic sovereign reluctance to accede judicial power, the public interest surrounding notions of access to municipal courts, and the accompanying strictures associated with domestic arbitration, the regulation of domestic arbitration was stricter than international arbitration. However as arbitration gains wider acceptance, this is no more the case. This, as a result, has upended certain assumptions underlying the traditional understanding of international arbitration. One such understanding is that international arbitration, compared with domestic arbitration, enjoys more favorable treatment under national laws. However this is increasingly not the case and the 2016 Korean Arbitration Act serves as a suitable case in point.

Article 39(1) of the Korean Arbitration Act expressly states that the recognition and enforcement of foreign awards is be governed by the New York Convention. However Article 39(1) raises the question whether this provision, by itself, excludes the application of the law on enforcement of domestic awards from application to foreign awards. This question arises because the requirements for the enforcement of domestic awards under the 2016 Korean Arbitration Act are more favorable than those prescribed under the New York Convention.

The Korean Arbitration Act, amended in 2016, makes the enforcement of domestic awards easier. For example, parties applying for enforcement do not need to submit a copy of the arbitration agreement to the enforcing court, nor do the copies of the award need to be certified. However the said dual requirements continue to exist under Article IV of the New York Convention. Hence the question arises, can an award creditor enforcing a foreign award now dispense with these requirements?

It is arguable that Korean Courts ought to apply the recently adopted and more favorable provisions concerning enforcement of domestic awards, to the enforcement of foreign awards. Although this issue has not reached the Courts yet, it is easily foreseeable that Courts might hold the opinion it has no legislative leeway on the application of Article 39(1) because the 2016 amendment expressly provides that the New York Convention applies to the enforcement of foreign awards. We believe the legislators ought to have considered this issue more carefully, and it might be better to delete Article 39 altogether and to extend the New York Convention-compliant domestic award enforcement regime to cover foreign awards too.

To conclude, whilst the South Korean example might be relatively rare in a world where arbitration continues to be viewed with some suspicion, it offers food for thought on the possibility of revisiting the traditional distinction drawn between domestic and international arbitration, and in recalibrating the future course for the arbitration community in general.

This entry was posted on Wednesday, August 9th, 2017 at 5:26 am and is filed under New York Convention, Recognition and enforcement of arbitral award, South Korea
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.