Kluwer Arbitration Blog

Public Policy: National, International and Transnational

Margaret Moses (Loyola University Chicago School of Law) · Monday, November 12th, 2018 · Institute for Transnational Arbitration (ITA), Academic Council

On the 60th anniversary of the New York Convention, we can generally conclude that the public policy basis for refusing to enforce an arbitration award has for the most part worked as the drafters intended. The drafters knew that by permitting courts to refuse to enforce foreign arbitral awards based on public policy, they were opening the possibility that courts might use idiosyncratic local rules to undermine the broad enforcement goals of the Convention. Nonetheless, they believed this exception to enforcement was a necessary safety valve that would prevent intrusion on state sovereignty if a foreign award was irreconcilable with the enforcing country's legal structure. Today, although there are some idiosyncratic decisions where foreign arbitral awards are not enforced because of local rules, the trend is toward a more international and even transnational understanding of the proper application of the public policy exception.

The language of Article V(2)(b) of the Convention, redrafted several times by the Working Group, ultimately provided that the enforcing court could refuse enforcement if it found that

> (b) The recognition or enforcement of the award would be contrary to the public policy of *that* country.[1)]

"That country" refers unequivocally to the country where recognition and enforcement is sought. The plain language of the clause and the drafters' intent indicate that public policy means national public policy, the public policy or *ordre public* of the state of the enforcing court. This interpretation is warranted because the purpose behind the exception was to permit a country to refuse to enforce an award that was contrary to its own system.

However, in practice, courts have varyingly used national, international and even transnational interpretations of the public policy exception. The Convention itself does not define public policy. So the public policy of one country will not be exactly same as that of another country. Different countries have different standards undergirding their national public policy, and these can result in quite different interpretations of the term. In addition, public policy is not necessarily static, and

over time may continue to evolve.

But there are some similar understandings and common principles that have, for the most part, prevented the public policy exception from creating a large loophole undermining Convention enforcement, and have encouraged courts **not** to refuse enforcement based on local, parochial standards.

There are two main reasons why, for the most part, courts do not often refuse enforcement of a foreign arbitral award. First, domestic public policy has traditionally been interpreted narrowly. Second, a number of countries have both a domestic public policy and an international public policy, and they have tended to apply their own states' international public policy with respect to foreign awards.

In a case in Colombia, *Tampico Beverages Inc. v. Productos Naturales*,[2)] for example, the Supreme Court of Colombia was asked to enforce an ICC award that had been challenged as a violation of public policy because of an arbitrator's conflicts of interest. Although the court acknowledged that enforcement under these particular circumstances might violate Colombia's domestic public policy, it concluded that the country's international public policy was different, and that the court should look to international authorities to determine if there was a violation. It then turned to the 2014 IBA Guidelines on Conflicts of Interest as representative of international practices. Thus, the court looked outwardly, toward international practices, relying on an international soft law instrument to help it determine that its country's international public policy was not violated.

A state's international public policy tends to be interpreted more narrowly than its domestic public policy, such that a foreign arbitral award is less likely than a domestic one to be refused enforcement. But a state's international public policy is not what commentators call a "truly international public policy," or a transnational public policy. Rather, it is a policy viewed through the lens of the state's own laws or standards for dealing with a foreign arbitral award. Thus, even though it is an international public policy, it is defined at the state level. It is still the public policy of *that* country, that is, the country of the enforcing court. But it is the international public policy of that country.

"Truly international" is how commentators view transnational as opposed to international public policy. Transnational public policy is not the public policy of any one state, but rather involves public policy that transcends state boundaries. Such public policy is defined as arising out of an international consensus regarding universal standards as to norms of conduct that are generally recognized and agreed upon as unacceptable in most civilized countries, such as slavery, bribery, piracy, murder, terrorism, and corruption. It is generally agreed that transnational public policy has an even more restrictive scope than international public policy.

Commentators note that support has been steadily growing for the development of a body of transnational public policy. Most nations these days find that an award fundamentally tainted by fraud or corruption should not be enforced. To the extent that there is a general, widely held perception among nations that this is the case, there are likely to be fewer outliers among courts who may proceed to enforce an award tainted by fraud or bribery.

Thus, it may be that transnational public policy, with its carefully defined terms representing "fundamental moral or legal principles recognized in all civilized countries," may have some influence on a court's perspective in enforcing arbitral awards. But probably more influential than transnational public policy is simply a transnational perspective that could influence a court's conception of what the scope of its state's international public policy should be.

A transnational perspective can substantially broaden a court's approach to its state's international public policy. Rather than simply viewing the policy through the lens of the state's own laws or standards for dealing with a foreign arbitral award, a transnational focus can encourage courts to adopt broader perspectives which, although not recognized in all civilized countries, tend to be accepted as best practices in the international arbitration community. By incorporating into their conception of international public policy this more transnational, best practices perspective, courts can help to unify the international framework for deciding on enforcement of foreign arbitral awards.

Incorporating a transnational perspective into this framework could encourage courts to become less parochial. For example, India has recently moved away from a position of refusing to enforce a foreign award that violated Indian law. At least part of India's reason for changing its approach was likely that its decisions were out of step with what other countries were doing. Thus, an incentive to incorporate a more transnational perspective may come from a pragmatic perception that when a country is an outlier with respect to what other countries are doing, there are economic costs. The Indian government has expressed a desire to make India a hub for international arbitration. It understands that to do this, it must change its reputation as a country unfriendly to arbitration.

Countries interested in change should understand that a transnational perspective is one that embraces the practices of the international community of nations. For the arbitration community, when courts treat enforcement of foreign arbitral awards with some consistency across borders, international awards can become more predictable and more likely to be enforced.

At this time of the 60th Anniversary of the New York Convention, the public policy exception appears to have worked well. However, it could be better. Although it is not realistic to expect

uniform cross-border application of the public policy exception, nonetheless, today better communication and technology make it possible to know both how courts in different countries are dealing with the public policy exception, and also what the international arbitration community views as best practices with respect to enforcement of foreign arbitral awards. Thus, courts in different jurisdictions are more able to understand and meet expectations in the arbitration community with respect to enforcement of foreign arbitral awards.

A transnational public policy, defined as "norms agreed upon by all civilized nations," was not envisioned by those who drafted the language of Article V(2)(b) of the Convention. Such a policy, however, can inform court decisions dealing with issues of bribery and corruption. A transnational perspective, on the other hand, is different. It is a perspective that encourages the application of public policy in a way that is reasonably congruent with the international public policy of a broad community of nations. A transnational perspective can thus strengthen both the pro-enforcement bias of the Convention, and the safety valve for ensuring that only meritorious awards are enforced.[3)]

References

?1 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), 330 United NationsTreaty Series 38, no. 4739, Art. V(2)(b) (*emphasis added*).

?2 *Tampico Beverages Inc. v. Productos Naturales de la Sabans S.Z. Alqueria*, SC9909-2017, Case N° 11001-02-03-000-2014-01927-00.

?3 An expanded version of this topic can be found in Fach Gómez K, Lopez Rodriguez AM (eds), *60 Years of the New York Convention: Key Issues and Future Challenges*, Wolters Kluwer, forthcoming, 2019.