
SCIENTIFIC ARTICLE ON THE TOPIC: CHALLENGES WITH RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS IN AFRICA

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Abstract

This article postulates the constitutional ideal of compliance with contracts concluded between the parties, based on the principle of good faith in practice. This is in line with the international principle of respect for the autonomy of the parties in court. A party cannot easily withdraw from a contract that stipulates that the dispute must be submitted to arbitration and, in addition that the arbitration award is binding on the parties and is not subject to appeal. This article is aimed at discussing the fact that there is judicial enforcement of arbitral awards in the courts of South Africa. There is no distinction between national and international enforcement of arbitral awards. The principle of party autonomy is the cornerstone of the enforcement of arbitral awards. From South Africa's perspective, both national and international legislation supports the recognition and enforcement of arbitral awards. This article reveals the subtleties of enforcement of arbitral awards and protection of the interests of the parties in the process. This article explores the consequences of an antithetical approach to arbitration agreements and proceedings. Judicial practice consists in observing the contractual principle of consensus between the parties, and not in allowing the parties to refuse to award decisions for unreasonable reasons and renouncing the terms of the contract.

Keywords: Arbitration agreement, the parties, the New York Convention, corruption, weak legal frameworks, judicial independence, Foreign Arbitral Awards.

Introduction

This article examines and analyzes court decisions. Case law shows that the judiciary supports contractual terms concluded between the parties, which are inviolable. Section 34 of the Constitution of the Republic of South Africa provides that a dispute may be resolved in an "independent or impartial court or forum". The importance of this article illustrates the nuances and technical consequences arising in the execution of foreign arbitral awards. The most important aspect of law enforcement is the achievement of consensus between the parties by concluding an arbitration agreement. In the absence of a written agreement

between the parties, the decision has no legal force. International law supports the idea that if there is no consensus on arbitration, then the decision is not valid to resolve the dispute. Because it has no binding force. The lack of consensus of one of the parties to the arbitration negates the effectiveness of the decision, and, consequently, the decision becomes invalid. Today, international commercial arbitration is a proven and a reliable system for resolving international disputes within the framework of the foreign trade of states around the world. The importance of resolving disputes complicated by a foreign element, as well as the support and development of arbitration courts are currently the main issues of the development of legislation in all existing legal systems. Special the recognition and application of international commercial arbitration decisions on the territory of a particular State is also important. In this article I would like to turn to a foreign the experience of recognition of foreign arbitral awards in the Republic of South Africa (hereinafter referred to as South Africa), since this is a new institution that requires constant study. In the era of globalization, business and trade and economic cooperation in South Africa and Russia as members of the BRICS countries it is developing rapidly, so South Africa is of particular interest to us¹. The growing interest in the South African Republic is due to the presence of rich raw materials in this region, which is an excellent incentive to increase demand for ready-made products of the manufacturing industry and the development of foreign trade. Over time, there is a high growth of concluded transactions, contracts and contracts, and disputes that require settlement and resolution arise from them. Recent trends in dispute resolution indicate that an indisputable prerequisite for the effective settlement of emerging conflicts is the inclusion of an arbitration clause in the terms of the transaction²

South Africa has a typical mixed legal system. In South Africa, African customary law and the norms of Romano-Dutch and English common law coexist side by side. In the XXI century, the question: "Which Romano-Germanic or Anglo-and Merican - legal family does modern South African law belong to?" cannot be answered unequivocally. If we talk about the conceptual and categorical apparatus and the structure of South African law, then the legal system of South Africa is based on Roman law. As for law enforcement equipment in judicial practice, procedural norms, methods of evidence, the use of precedents, judicial arrangements, tasks and provisions of judges and lawyers, then the patterns of the legal family of common law clearly prevail³

Arbitration is a popular and widely used method of resolving commercial disputes in South Africa. The main advantages of arbitration are: the possibility of choosing a suitable arbitration, a less expensive procedure (although not always) than a trial, the speed of the trial, and, as a rule, flexibility and informality arbitration⁴. To date, there are two international

¹ The trade turnover of South Africa and Russia has almost doubled [E-resource] –URL: <http://www.rg.ru/2013/02/04/tovarooborot-anons.htm>

² Komarov A. S. Three quarters of a century in step with the times: to the 75th anniversary of the ICAC. [E-resource] – URL: <http://www.tpprf-mkac.ru/>

³ Saidov A. H. Comparative jurisprudence (basic legal systems of modernity): Textbook // Edited by V. A. Tumanov. – M. : Lawyer", 2003. 220 p.

⁴ Sitkareva E. V. International commercial arbitration: challenging decisions : auto ref. dis. ... Candidate of Legal Sciences : 12.00.03 / Sitkareva Elena Vitalievna. – M. : Russian University

commercial arbitrations in South Africa: the Arbitration Fund South Africa (Arbitration Foundation of South Africa or AFSA) and the Association of Arbitrators (Southern Africa) or AOA)⁵. Arbitration Fund South Africa occupies a leading position and is the central national institution in relation to all existing types of permits disputes.

There are several challenges with the recognition and enforcement of arbitral awards in Africa, including:

1. Weak legal frameworks: Many African countries lack adequate legal frameworks for the recognition and enforcement of arbitral awards. This makes it difficult for parties to enforce their awards in these countries.
2. Corruption: Corruption is a significant challenge in many African countries, and it can affect the recognition and enforcement of arbitral awards. In some cases, parties may have to pay bribes to officials to enforce their awards.
3. Lack of judicial independence: In some African countries, there is a lack of judicial independence, which can make it difficult for parties to enforce their arbitral awards. Courts may be influenced by political interests or other factors, which can result in biased decisions.
4. Limited resources: Many African countries have limited resources, which can make it difficult for them to enforce arbitral awards effectively. This can lead to delays and other issues that can affect the parties' ability to enforce their awards.
5. Cultural differences: There may be cultural differences between parties from different countries that can affect the enforcement of arbitral awards. For example, some African countries may have different attitudes towards arbitration, which can make it difficult for parties to enforce their awards.

Overall, the challenges with the recognition and enforcement of arbitral awards in Africa are significant. However, there are steps that can be taken to address these challenges, such as strengthening legal frameworks, promoting judicial independence, and increasing resources for enforcement.

Comparative analysis. Legislation of foreign countries

Recently, arbitration becomes more popular kind of resolving disputes. In the Republic of Uzbekistan, the recognition and enforcement of arbitral awards is carried out in accordance with the Law "On Arbitration Courts", as well as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which entered into force on February 7, 1996⁶.

Nevertheless, in practice there are several challenges and problems in the process of recognition and enforcement of arbitral awards in Uzbekistan, include weak development of

Friendship of Peoples (RUDN), 2005. – 20 s

⁵ UNCITRAL Arbitration Rules // [E-resource] – URL: http://www.uncitral.org/uncitral/ru/uncitral_texts/arbitration/2010Arbitration_rules_status.html%C2%A0

⁶ URL: <https://lex.uz/docs/2009040>

the legal system: In Uzbekistan, the legal system governing the recognition and enforcement of arbitral awards is still under development. This can create uncertainty, ambiguity and inconsistency in the execution process. Moreover restrictions on foreign arbitral awards: In Uzbekistan, there are restrictions on the recognition and enforcement of foreign arbitral awards, especially if they relate to state interests. That is, if the decision made by the arbitration contradicts the interests of the state, it will not be enforced.

Insufficient protection of the rights of foreign investors: Foreign investors may face problems in recognizing and enforcing arbitral awards if they relate to state interests or violations by the Government of Uzbekistan. This problem concerns not only the enforcement of arbitral awards, but also, in general, the adoption of decisions in relation to the decrees and resolutions adopted by state bodies. Limited access to information: Access to information may be restricted in Uzbekistan, which may complicate the process of recognition and enforcement of arbitral awards. Possibility of interference by state bodies: In Uzbekistan, there may be a possibility of interference by state bodies in the process of recognition and enforcement of arbitral awards, especially if they relate to state interests.

Further reforms of the legal system and strengthening of civil justice institutions are needed to improve the recognition and enforcement of arbitral awards in Uzbekistan. This includes improving access to information, increasing the level of protection of the rights of foreign investors and adherence to the principles of independence and fairness in judicial processes. At the same time, it is worth comparing the same process with the experience of South Africa. In South Africa, the recognition and enforcement of arbitral awards is carried out in accordance with the International Commercial Arbitration Act and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

Despite existing laws and international conventions, South Africa may face some challenges and problems in the process of recognition and enforcement of arbitral awards, including:

1. Duration of the process: The process of recognition and enforcement of arbitral awards can be lengthy and costly in South Africa. This can lead to delays and additional costs for the parties.
2. Uncertainty in the legal system: South Africa has a complex legal system that can cause uncertainty in the recognition and enforcement of arbitral awards. This can create problems for the parties, especially for foreign companies.
3. Political instability: South Africa may be subject to political instability, which may affect the process of recognition and enforcement of arbitral awards. This can lead to unpredictable decisions and delays⁷.
4. Insufficient level of legal qualifications: In South Africa, there may be an insufficient level of legal qualifications in court sessions, which may lead to errors in decision-making.

⁷ Enforcement of local and foreign arbitral awards in South Africa // Article // URL: <https://www.pinsentmasons.com/out-law/guides/enforcement-of-local-foreign-arbitral-awards-south-africa>

5. Restrictions on foreign arbitral awards: In South Africa, there are restrictions on the recognition and enforcement of foreign arbitral awards, especially if they relate to state interests.

Further reforms of the legal system and strengthening of civil justice institutions are needed to improve the recognition and enforcement of arbitral awards in South Africa. This includes raising the level of legal qualifications, speeding up the process and increasing transparency in the recognition and enforcement of arbitral awards.

Cases

1. Case: Stremline Shipping (Pty) Ltd v Mediterranean Shipping Company S.A.

In this case, Stremline Shipping appealed to the South African court to challenge the arbitration court's decision in favor of Mediterranean Shipping Company. The decision of the arbitration court is related to the refusal to compensate for losses incurred by Stremline Shipping as a result of violation of the contract between them.

As a result of the case, the South African court rejected the arguments of Stremline Shipping and confirmed the arbitration decision in favor of Mediterranean Shipping Company. The court ruled based on the fact that Stremline Shipping failed to provide sufficient evidence of its losses.

2. Case: South African Airways (SAA) v Comair Limited

This case is related to a long-standing dispute between two airlines - South African Airways and Comair Limited. In 2002, Comair appealed to the arbitration court, accusing SAA of monopolizing the air transportation market and violating competition.

In 2007, the arbitration court ruled in favor of Comair, finding SAA guilty of violating competition and obliging it to pay compensation in the amount of 104 million South African RAND. SAA appealed to the South African court to challenge the decision of the arbitration court.

In 2014, the South African court rejected the appeal of the SAA and confirmed the decision of the arbitration court. The court found that SAA had indeed violated competition and set the amount of compensation in the amount of 1.16 billion South African RAND.

3. Case: Nkonjane Economic Prospecting and Investment (Pty) Ltd v Minister of Mineral Resources and Energy

In this case, Nkonjane Economic Prospecting and Investment appealed to the South African court to challenge the decision of the arbitration court related to the licensing of coal mining in one of the regions of South Africa. The Arbitration Court ruled in favor of Nkonjane Economic Prospecting and Investment, recognizing it as the rightful owner of the coal mining license. However, the Ministry of Mineral Resources and Energy of South Africa appealed this decision to the South African court.

In 2019, the South African court confirmed the decision of the arbitration court and rejected the arguments of the ministry. The court recognized that Nkonjane Economic Prospecting

and Investment has the right to mine coal in the relevant region and ordered the Ministry to pay compensation for the loss of profits during the period when the license was suspended⁸.

Offers and recommendations

With regard to solving problems in the sphere of application and enforcement of arbitral awards in Uzbekistan, first of all, it is necessary to eradicate corrupt actions of state bodies, the most striking example of the eradication of corruption is the example of Singapore.

Secondly, to review the domestic legislation governing the application and enforcement of arbitral awards.

Another important aspect is the fact that there are restrictions on arbitral awards in Uzbekistan, that is, there are restrictions on the recognition and enforcement of foreign arbitral awards, especially if they relate to state interests. This means that if the arbitration award is in any way contrary to the interests of the State, it is not applicable in the State. This fact concerns investors directly. Insufficient protection of the rights of foreign investors: Foreign investors may face problems in the recognition and enforcement of arbitral awards if they relate to State interests or violations by the Government of Uzbekistan. It is necessary to develop and adopt regulatory legal acts in the field of investor rights protection to strengthen the investment climate.

Regarding South Africa, there are several proposals to improve the application and enforcement of arbitral awards. First of all have to improve the process of selecting arbitrators - it is necessary to conduct training and certification of arbitrators to ensure a high level of their competence and independence. Improve legislation - South Africa should adopt laws that will ensure transparency and respect for arbitration decisions, as well as eliminate possible contradictions in their application. To reduce the time of consideration of cases - it is necessary to optimize the processes of litigation and arbitration in order to reduce the time spent on consideration of cases and making decisions. To ensure the effective implementation of arbitral awards - it is necessary to create mechanisms for the enforcement of arbitral awards in order to guarantee their effective application. Improve communication - Lawyers, arbitrators and other participants in legal processes need to improve communication and interaction in order to speed up the process of considering cases and improve the quality of decisions.

Conclusion

Obviously, when the parties conclude a valid agreement, the arbitration award is valid and binding on the parties. Obviously, in the absence of an agreement, consensus becomes a problem, and then an arbitration award cannot be binding on the parties. A party that disputes the validity of an agreement does not have to declare the invalidity at the place of arbitration, but it can also do so in the country that enforces the arbitration. In the absence of an arbitration agreement, the arbitration award is invalid. The time limit for consideration and

⁸ URL: <http://www.saflii.org/za/cases/ZASCA/2012/56.html>

appeal does not apply to circumstances where an arbitration agreement has not been concluded between the parties or a consensus has been reached. National legislation, such as the Law on International Arbitration, has been brought into line with the UNCITRAL Model Law and the New York Convention on the Enforcement of Foreign Arbitral Awards. In the practice of alternative dispute resolution, arbitration hearings and agreements are the cornerstone of the recognition of arbitral awards. An arbitration award cannot be valid without the parties reaching a consensus on the conduct of the arbitration and the premeditation of the hearing. When interpreting an arbitration agreement, the principles of the contract apply simultaneously with the agreement between the parties. The norms and standards of public policy also play a role in relation to the enforcement process at the place of arbitration. The law on enforcement must be brought into line with the norms of state policy. It is on this basis that it is claimed that judicial enforcement of arbitral awards is carried out in South African courts.

Based on the above, it is worth noting that it is necessary in both countries to make certain changes in the scope of application and enforcement of arbitral awards.

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