



INTERNATIONAL ARBITRATION AND THE NEW YORK CONVENTION- SETOFF WHILE ENFORCING AWARD

Asma Hameed Khan
Advocate High Court
Candidate SJD Program
University of Miami School of law (LLM)
Miami – United States
ahk84@miami.edu

Abstract

Can a respondent introduce a counterclaim or setoff request during proceedings to enforce an arbitral award under the New York Convention? The subject regarding set-off is constantly under arguments, amongst various jurisdictions having different views. This paper aims to analyze stances taken by different courts and discuss the pros and cons, disadvantages of allowing setoffs. Additionally, it will also delve into analyzing the relevant Articles of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the convention") to conclude the longstanding discussion on set off.

Introduction

Article III of the convention," outlines the requirement that enforcement should be according to the procedural rules of the jurisdiction where the award is being relied upon. further the process for recognizing or enforcing foreign awards should not be discriminatory, without containing significantly more burdensome conditions, higher fees, or charges, in contrast to domestic awards.

Articles III to VI of the New York Convention deals with the enforcement procedure. Article III defines the general obligation of each Contracting State to recognize and enforce arbitral awards, subject to the conditions outlined in the article. It is necessary to differentiate between the conditions for enforcement specified in the Convention itself and those described by the procedural rules of the applicable legal system *lex fori*. Additionally, national rules of the forum govern aspects of recognition and enforcement that fall outside the scope of the Convention.

Lex Fori

The procedural law of the country where enforcement is sought, known as *Lex Fori*, can set out rules allowing discovery of proof supporting refusal justifications under Article V of the Convention. In addition, *Lex Fori* could establish conditions permitting a party to dispute enforcement, even lacking objections during arbitration. Furthermore, it may enable respondents



to counterclaim against awards enforced provided the arbitration pact includes an “entry of judgment” term, since domestic courts potentially have no jurisdiction without said term.

Furthermore, domestic law could mandate awarding interest even if none was initially granted or if the interest rate diverges substantially from prevailing market levels. Legislation may also establish a timeline for commencing enforcement proceedings. The Convention expects Contracting States to potentially allow utilizing awards as defenses or supporting set-offs and counterclaims in certain situations. Numerous courts have deemed enforcement of arbitral awards as summary proceedings. For example, when a party tries to nullify an award due to perceived conflicts of interest between the opposing party and the arbitrator, they do not enjoy unconstrained access to any discovery demanded. This limitation is especially relevant in summary proceedings requiring parties to promptly furnish pertinent information.

National regulations can govern matters including evidencing rules, estoppel or waiver principles, set-off permissions or counter-petitions against the award, needing “entry of judgment” terms, enforcement timeframe limits under the Convention, and interest provision on the award. As per the Convention, once an award is presented for enforcement, parties may only dispute enforcement on the grounds stated in Article IV. The advocate seeking recognition or enforcement has two key requirements: providing the “original duly authenticated” or “duly certified copy” of the arbitral award and the original arbitration agreement or “duly certified copy.”

Obligation Under Article III of The Convention

The general duty to recognize Convention awards as binding under Article III serves as the basis for applying the forum's procedural legislation to enforcement aspects the Convention does not detail. Examples comprise evidencing rules, estoppel or waiver principles, set-off allowances or counter-petitions against the award, necessitation of “entry of judgment” terms, enforcement timeframe constraints, and interest provision on the award. Significantly, Article V refusal grounds do not expressly encompass awards lacking resolution of all (counter)claims filed, termed award *infra petita*. As key clarifications: set-off, whether substantive or procedural, is purely defensive, only applying up to the main claim's amount without further effects; whereas a counter-petition constitutes independent substantive relief sought after the original claim's initiation, with the primary claim still disputed.

There are documented instances of national procedural legislation being applied to recognize and enforce foreign arbitral awards. Several cases have involved courts addressing counterclaims during enforcement proceedings. Numerous academics argue that allowing counterclaims or set-offs contradicts Article III's fundamental essence within the New York Convention. Indian jurisprudence sets out specific conditions for evaluating a counterclaim in enforcement proceedings. Firstly, a party needs to submit its enforcement application within a three-year timeline. Secondly, the counterclaim must be deemed fitting for confirmation



proceedings. Similarly, a German court declined to identify a violation when a party protested not being promptly notified regarding the opponent's counterclaims during arbitration. An Indian court underlined that if a respondent, upon receiving an interim award, fails to contest it, the arbitrators should not bear responsibility for the defendant's inaction.

What is Counterclaim and Set off?

In one pertinent legal case, the court had to address whether it possessed the jurisdictional power within the CPR 62.18 enforcement mechanism framework to allow a counter-petition for a New York Convention Award. It turned down the Defendant's pleas seeking approval to bring a counter-pleading in an arbitration dispute and to delay the execution of an unopposed New York Convention arbitral decision. The justification was that the court either lacked the legal authority to permit counter-pleadings through the CPR 62.18 procedure meant solely for foreign arbitration award enforcement filings, or alternatively made the discretionary choice not to exercise such a right.

In the case of *De Agostini versus Milloil*, the court did not find any grounds for refusal under Article V(1)(c) of the New York Convention. However, it stated that making an adjudication based on fairness instead of legal tenets would violate the stipulated arbitration pact. When the defendants in Italy sought to enforce the ICC arbitral conclusion, the claimants objected, contending amongst other things that the arbitrators had exceeded their authority by issuing a fairness-based decision, conflicting with the arbitration clause requiring a legal methodology. The court differentiated rulings made "in equity" versus those awarding damages, deducing the latter aligns with legal standards. Finally, when distinguishing between set-offs and cross-pleadings, common law courts followed distinct principles.

In one noteworthy Scottish case, the court ruled that enabling a counter-pleading would impede the quick resolution of the challenge against the adjudicator's conclusion and prolong the enforcement of the claimants' payment entitlements. Nonetheless, the proceedings would tackle two distinct yet connected issues: (a) the claimants' right to uphold the adjudicator's determination, and (b) their entitlement to remuneration owing to the defendants' contract violation. Regarding counter-arguments, perspectives diverge across different courts. However, in several jurisdictions, the allowance for counter-pleadings seems minimal and restrictive. As for set-offs, academics in Switzerland argue that separate advances on costs are seldom appropriate when presenting a set-off defense, as such a defense typically results in the automatic nullification of the primary claim under Swiss law.

Approach of the Different Courts

The court reiterated its stance that set-off contentions can be pursued in proceedings intended to proclaim enforceability. This holds even if the set-off grounds predated the arbitration's



conclusion, assuming the set-off was originally presented during arbitration but not addressed by the arbitral tribunal. The court emphasized that the tribunal's conclusion regarding the pleas in question's arbitrability does not compel the enforcement court, which must independently evaluate the set-off claim.

However, certain substantive objections, such as a set-off, are typically unsuitable for enforceability declaration proceedings and must be followed separately to oppose execution. For example, in *Uganda Telecom Limited versus Hi-Tech Telecom Pty Ltd*, the court dismissed the respondent's set-off request. Conversely, in another case, the court ruled in favor of a defendant's right to set-off against the adjudication award, stating that a contractor could offset any amount it was permitted to withhold from the final payment under the sub-contract's covenants. Another case illuminated that when adjudication and arbitration co-occur, a party can set off a favorable adjudication result against an adverse arbitration conclusion.

In the *Stemcor UK Ltd versus Global Holdings Ltd and Pramod Mittal* case, the eminent English High Court analyzed the Claimant's petition regarding payments from two guarantees and the Defendant's motion to halt the court proceedings pending the related arbitration's resolution on the underlying debts. The Court favored the Defendant, pausing the proceedings until the arbitration's conclusion. Moreover, the Court ruled that the Claimant hadn't convincingly exhibited the potential viability of the Defendant's set-off defense.

Observations indicate English courts tend to endorse equitable setoffs, as emphasized in the *Workspace Management versus YJL London Limited* case. Here, the court stated that a counterpleading shouldn't undermine enforcing an unfavorable arbitral decision. However, this case's circumstances differed, as YJL didn't merely mention a counterpleading but contended an adjudicator's binding decision existed favoring it against Workspace. Furthermore, the case entailed straightforward mutual set-off of debts. Given the mutual nature of the debts arising from the same transaction, equitable set-off principles entitled YJL to counter-plead against Workspace.

In view of the above while provision of Art III of the convention deals with the reasons to oppose and challenge arbitral awards, there's a rationale behind limiting enforcement avenues. Further, it is assumed that arbitral tribunal have resolved all the issues and reached to final decision after

However, it may be noted that forum states have fashioned the exception by considering allowing set-off or counter claim during enforcement proceedings, so it may not be wrong to say that member states have exclusive authority and by applying local/procedural law, to deal with the question of bringing counterclaim or set-off in enforcement proceeding.



Conclusion

Having said that above, to sum up, bringing counterclaim or set-off during enforcement proceedings anticipate to start a new round of trial/proceedings for both the parties entailing lengthy actions such as discovery, evidence hearing and lengthy arguments etc. Should forum state court decide to admit all counterclaim set-off in enforcement proceedings of arbitral award, in that case real spirit and brevity of arbitration award will inevitably be affected which will end up modification of award. Unless, there's a solid reason for admitting the counterclaim or set-off courts may not allow the same. It will be more feasible for both the parties, if courts in forum state directs the parties to file a different suit/ case before the relevant court with regard to claim or set-off instead of bringing the matter before enforcement court.



References

- Anzilotti, D., *La demande reconventionnelle en procédure internationale*, *J.D.I (Clunet)*, 1930, pp.857-877.
- An Overview Albert Jan van den Berg. The New York Convention of 1958: An Overview Albert Jan van den Berg.
- Australia No. 36 Federal Court of Australia, New South Wales District Registry, General Division, 22 February 2011 in Albert Jan van den Berg (ed) Yearbook. Commercial Arbitration 2011- Vol. XXXVI, (Kluwer Law International 2011) pp. 252-255.
- Bjorklund, A., *Role of Counterclaims in Rebalancing Investment Law*, *The Business Law Forum: Balancing Investor Protections, the Environment, and Human Rights*, Lewis & Clark law Review, pp. 461-480.
- Corte di Appello di Milano, 24 March 1998, Virgilio De Agostini (Italy) and Loris and Enrico Germani (Italy) v. Milloil SpA (Italy), Pia and Gabriella Germani (Italy) and Andrea De Agostini (Italy), YCA, Vol. 25 (2000), pp. 739-750.
- Explanatory document on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Award. Retrieved from <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-commonwealth.pdf>.
- Federal Commerce & Navigation Co Ltd v Molena Alpha Inc.* (1978) 1 QB 927.
- Fertilizer Corp. of India v. IDI Management, Inc.*, [517 F. Supp. 948](#) (S.D.Ohio 1981).
- Gary Born, *International Commercial Arbitration*, Second Edition, §§25.01-25.
- Germany No. 138, Seller v. Buyer, Bundesgerichtshof, 30 September 2010.
- Georgia. Corporation v. Gavino Supplies* (UAE) Fze [2016] DIFC ARB 005
- Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, [535 F.2d 334, 335](#) (5th Cir. 1976).
- Margulies Bros Ltd v Dafnis Thomaidēs & Co (U.K.) Ltd* [1958] 1 Lloyd's Rep 250: Christopher Hill and Steve Abraham, Norton Rose, "Adjudication and Arbitration Set-Off- Lexology (2006).
- Maxi Scherer, Article III (Recognition and Enforcement of Arbitral Awards; General Rule), in New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards:



Commentary 193, 203-04 (R. Wolff ed., 2012), who considers that “permitting counter-claims or set-off defenses during recognition or enforcement proceedings is contrary to Articles III and V.”

Micha Bühler & Marco Stacher, Costs in International Arbitration, in *ARBITRATION IN SWITZERLAND, THE PRACTITIONER’S GUIDE* ¶ 32 (Arroyoed., 2013).

OLG Hamm, NJW RR 2001, 1362 et seq.; OLG Cologne, SchiedsVZ 2005, 163, 165; OLG Dresden, SchiedsVZ 2005, 210, 213;

OLG Düsseldorf, SchiedsVZ 2005, 214, 215 et seq

PASCAL PICHONNAZ & LOUISE GULLIFER, SET-OFF IN ARBITRATION AND COMMERCIAL TRANSACTIONS ¶ 3.01 (2014); Alexis Mourre, The Set-off Paradox in International Arbitration, 24 Arb.Int’l. 392 (2008); JEANFRANÇOIS POUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION ¶ 317 (2007); Michael Schöll, Set-off Defences in International Arbitration, Criteria for Best Practice.

*R & C Electrical Engineers Ltd v. Shaylor Construction Ltd*¹ (2012) EWHC 1254 TCC:

Selelevision Saudi Company v. Bein Media Group LLC (2021) EWHC 2802 Comm. Retrived form <https://jusmundi.com/en/document/pdf/decision/en-selevision-saudi-company-v-bein-media-group-llc-judgment-of-the-high-court-of-justice-of-england-and-wales-2021-ewhc-2802-friday-22nd-october-2021>.

United Nations Commission On International Trade Law retrieved from https://uncitral.un.org/sites/uncitral.un.org/files/mediadocuments/uncitral/en/2016_guide_on_the_convention.

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, Dispute settlement, International Arbitration, retrieved from [UNCTAD/EDM/MISC.232/ADD.37](https://unctad.org/Document/TradeAndDevelopment/UNCTAD/EDM/MISC.232/ADD.37)

VAN DEN BERG, Albert Jan, The New York Arbitration Convention of 1958 retrieved from. [New York Convention of 1958 Overview AJBRev01.doc\[5037\].pdf](https://www.ajbrev.com/rev01/5037.pdf).

VAN DEN BERG, “Court Decisions on the New York Convention”, supra at note 26, pp. 75-7. *Whyte and Mackay Ltd v. Blyth & Blyth Consulting Engineers Ltd* (2012) CSOH 79; 2012 G.W.D. 17-3433.



Workspace Management v. YJL London Limited. (2009) EWHC 2017 (TCC):