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What Happens when an Award is Set Aside?

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Introduction

If after encountering many obstacles, it becomes impossible to enforce the final award, the practicability of the arbitral awards and the practical value of arbitration as an alternative dispute resolution means come under question. When looking closely into the provisions of the Law on Commercial Arbitration of the Republic of Armenia (hereinafter the Arbitration Act) concerning regulations after the award has been set aside, we encounter lack of detail and ambiguity.

An arbitral award cannot be appealed on merits. The only option of challenge available to the losing party under Arbitration Act and the New York Convention[1] is to apply to court for setting the award aside. However, RA legislation does not provide for any regulations as to what happens after an award has been set aside. Is the arbitration agreement inoperative now leaving the parties with a dispute and without any resolution having spent so many resources or the parties can start a new arbitration process? In the latter option we come across some other points of concern, such as if there is an option to start the arbitration *anew*, should it be conducted by the same arbitrators or a new tribunal? While a clear answer to this and other ambiguities on what happens after the award is set aside cannot be found in the existing Republic of Armenia ("RA") legislation, it is obvious that having clear legal regulations by removing the existing ambiguities will greatly contribute to the development of extrajudicial dispute settlement practice in Armenia.

Setting Aside the Award: Grounds for Refusal of Enforcement and the *Right* of the Court to Refuse

In general, under RA legislation and international treaties no review on merits is available for an arbitral award by a superior institution which is one of the peculiarities of arbitration as it offers a final award while undergoing a single proceeding. The award can only be set aside by filing an application to the court for setting the award aside which will be possible only on limited

1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) adopted by ICCA. RA has ratified the convention in 1997.

number of grounds (Article 34 of RA Law on Commercial Arbitration). The party applying for setting the award aside shall present evidence in support of a claim that (a) either the other party was lacking legal capacity (անգործունակ) or the arbitration agreement was invalid under the applicable law, (b) the party has not been duly notified about the appointment of arbitrator or the arbitration, or was deprived of the opportunity to present his/her positions due to some other reason, (c) an award has been made regarding a dispute not within the scope of the arbitration agreement, (d) the composition of arbitrators or the procedure of the proceedings did not correspond to the arbitral agreement between the parties. The above listed grounds may be used as challenges to an award only by the losing party and cannot be raised by the court on its own initiative.

The court, however, has the right, on its own initiative, to set the award aside if (a) the dispute is not an arbitrable matter under RA legislation; and (b) the award is contrary to RA public policy. The latter is the ground that gives most discretion to the court as there is no clear definition as of what public policy means.

Vahe Hovhannisyan, PhD, discusses the RA Law on Commercial Arbitration in his study guide "*Commercial Arbitration in the Republic of Armenia*" (2011). In his research he touches upon the *right* of the court to refuse enforcement if there are the grounds stipulated by the law. This suggests that in one case the court can refuse enforcement, in another case, with similar factual circumstances, the court may uphold the application for enforcement. As the court has a right to refuse enforcement (or recognition and enforcement, in case of foreign arbitration awards) it can either make use of its right or choose not do so. Having the right, not the obligation, to apply the same standard every time a similar circumstance exists in a case, provides the court with a discretionary power. This contradicts the legal doctrine of *stare decisis*[2], which literally means to stand by that which is decided. The notion behind *stare decisis* is following already decided cases with similar or same circumstances. The right of the court to refuse enforcement hinders the uniform application of the law as by giving discretionary power to the court it enables the court to make different decisions in cases with same or similar circumstances. This is an issue that should be addressed to ensure uniformity in the application of the law.

[2] https://www.investopedia.com/terms/s/stare_decisis.asp

Public Policy

Of the grounds listed in the Arbitration Act for refusal of enforcement public policy is the only ground that gives most discretion of interpretation to the court because of not having a clear definition of the term *public policy,* and because the term can be interpreted differently in different jurisdictions.

Zheng Sophia Tang discusses recognition and enforcement of awards in her book "*Jurisdiction and Arbitration Agreements in International Commercial Law*" (2014)[3]. In her research Dr. Tang suggests that recognition and enforcement regulations are relatively certain in a region with proper judicial cooperation. By discussing the examples of the US, the UK and China Dr. Tang draws parallels between these jurisdictions highlighting the differences in the existing practices of recognition and enforcement of arbitral awards, in particular the recourse to public policy as a ground to refuse recognition and enforcement.

In countries like the US and the UK the public policy ground is used somewhat restrictively in order to prevent the public policy rule from being used too lightly, as Tang puts it. This includes using a narrow definition in regard to public policy by interpreting it only as 'international public policy' and by putting a procedural restriction not allowing a court to reopen a case on substantive grounds that have already been considered in arbitration. China, on the contrary, is more protective in this sense vastly using the public policy ground to refuse recognition and enforcement with a wider interpretation that can be given to the word. According to Tang the public policy defense is rephrased as 'public interest' in China and it may include "not only the adopted rules, expressed state commitments and social morality, but also less transparent state interests and unstable short-term policies".[4] In addition, when it comes to enforcement treaties China requires reciprocity from other member states: "foreign judgements [arbitral awards] can only be recognized and enforced in China if the judgement-rendering country and China have entered into bilateral/multilateral treaties, or if the reciprocal relationship exists".[5]

Similar to the case of enforcement regulations, in RA we are also faced with scarcity of judicial decisions on the use of public policy grounds for refusing enforcement of an award. In their research "*The Public Policy Exception to Recognition and Enforcement of Arbitral Awards under Armenian Law*" (2012) Koryun Tamrazyan and Stepan Khzrtian offer a brief analysis of RA public policy regulations based on legal practice of the US, RF and European countries as well as

[3] Tang, Zh. S. (2014). Routledge. Jurisdiction and Arbitration Agreements in International Commercial Law
[4] ibid 3, pg. 228
[5] ibid 3, pg. 233

considering *Travaux Préparatoires* for the New York Convention.[6] By trying to identify the underlying policy for public policy exception, Tamrazyan and Khzrtian mention (1) sovereignty and a jurisdiction's right and duty to regulate its own territory and citizens: and (2) anti forum shopping/equality before the law.[7] Mostly the public policy exception is applied to prevent violation of state sovereignty: not to allow an arbitral award directly conflicting with the laws of a state to be enforced because of the impossibility to review the case on merits. This implies the use public policy exception as means to indirectly comment on the merits of the case. In other words taking into account that there is no possibility to review the case on merits, public policy exception can be used to refuse enforcement of the awards which in some way contradict the legal system of a state where enforcement is sought.

The authors further suggest that "RA Civil Code definition of public order is to be read as a conflict of laws provision, calling for the application of Armenian law to disputes adjudicated in Armenia when foreign norms directly conflict with fundamental basis of Armenian law, rather than as a provision defining public order for the purpose of setting aside an otherwise properly adjudicated arbitral award".[8] Hence, despite the limitation on reviewing the case on merits, the court has the opportunity to protect state sovereignty and prevent the recognition and enforcement of arbitral awards that expressly conflict with domestic legal regulations. It is submitted that to avoid misuse of the public policy exception it would be more appropriate to adopt a more restrictive and clearly defined scope for application of this rule, similar to that in US and UK as discussed by Tang, Although there is a risk of misuse of this tool, not having it may entail serious consequences in terms of uniformity of the law.

In their research "*Establishment of lawfulness and justice through arbitration with the example of Financial Arbitration Institution of Union of Banks of Armenia*" (2014) Karine Poghosyan, Heghine Badalyan and Mariam Mkrtichyan, under supervision of expert Aida Avanessian, discuss several issues related to the enforcement of arbitral awards by examining RA legislation and foreign experience among other things[9]. Based on the examination of foreign experience of arbitration, the authors suggest that in countries where arbitration is more advanced as one of the means of alternative dispute resolution, generally there are no time limits for

[6] https://law.aua.am/files/2012/02/Legal-Memo-Public-Order.pdf
[7] Ibid 6, pg. 4
[8] Ibid 6, pg. 6
[9] Karine Poghosyan, et.al. "Establishment of lawfulness and justice through arbitration with the example of Financial Arbitration Institution of Union of Banks of Armenia" (2014). Open Societies foundation

enforcing an arbitral award and where there are such limitations, the timing restrictions are reasonable enough not, in practice, to gravely affect the right of a winning party to enforce the award made in his favor.[10]

The authors further discuss the RA legislation and in particular Article 23 of the Compulsory Execution Act, which stipulates time limitations for application for enforcement of awards. According to the said Article:

"The writ of enforcement may be presented for execution within one years starting from the day:

1. A judicial act has lawfully entered into force;
2. The arbitral tribunal made an award...".

Briefly discussing the issue the authors suggest making amendments to the abovementioned provision of the Law or to allow a broader interpretation of the said provision by cross-referencing to Article 19 of the same Law.

Under article 19 of the Compulsory Execution Act the writ of enforcement is issued by the decision of the court, which in its turn under article 13 of the RA Civil Procedure Code[11] is considered a judicial act. Hence the enforcement procedure can be initiated in accordance with the point two of the Article 23 of the Compulsory Execution Act which, in turn, will give the winning party a longer time period for enforcement.[12]

Although according to the amended Civil Procedure Code (2018) the commencement date of the one year period for local arbitral awards has been changed to the date of receipt of the award (presumably be the party seeking enforcement)[13] and the time limit for applying for recognition and enforcement of foreign arbitral awards has been increased to 3 years[14], the issue discussed by Poghosyan, et al may still become relevant, in practice, especially if the award has been challenged.

[10] ibid 9, pg 42
[11] Due to 2018 changes of the Civil Procedure Code the respective article is Article 5
[12] ibid 9, pg 45
[13] Article 321.4 of the Civil Procedure Code.
[14] Article 326.4 of the Civil Procedure Code.

The Next Step after the Award is Set Aside

An important question arises concerning the situation we face after the award has been set aside: what happens next? The result of setting the award aside is that the dispute still remains and the parties need to resolve it. RA legislation is not specific on this matter. Poghosyan, et. al. provide in their research analysis concerning Article 34.4 of the Arbitration Act, which states that the court presented with an application to set an award aside can, by its own initiative or at the request of one of the parties, suspend the examination of the case in order to allow the arbitral tribunal to restart the arbitration procedure or take measure that in the opinion of the tribunal can remove the grounds for setting the award aside. However, this specific provision concerns circumstances where the award is challenged but has not yet been set aside. The law remains silent on what happens after the award has been set aside. The authors of the research bring the example of Switzerland and Germany. In both countries after setting the award aside the court returns the dispute to the arbitral tribunal to make a new award. In German legislation specifically there is a regulation stating that the arbitration agreement is again operative for the purpose of settlement of the dispute.

Article 32.1 of the Arbitration Act states that the "arbitral proceedings are terminated by the final award…" and according to Article 32.3 of the same Act the "mandate of the arbitral tribunal terminates with the termination of arbitral proceedings subject to the provisions of Articles 33 and 34. 4" of the Act. Article 33 of the Arbitration Act sets the opportunity for one of the parties, to request correction of computation, clerical or typographical errors in the award (33.1) or, with the consent of the other party, give an interpretation of a specific point or part of the award (33.2) Further, the Article states that one of the parties with the consent of the other party may ask the tribunal to make an additional award regarding the claims presented during the arbitral proceedings but reflected in the award.

Article 34.4 states that the court with whom a claim to set an award aside is filed may, on its own initiative or by the request of one of the parties suspend the examination of the case for a certain time period in order to allow the arbitral tribunal to re-examine the case or take other measures it would consider necessary for eliminating the ground for challenging the award. Hence it is implied that the powers of arbitration tribunal in these cases are extended beyond the date of issuance of the award[15].

[15] ibid 9, pg 49

However, considering the arbitration agreement operative again after the arbitral award has been set aside may be subject to different interpretation and may, eventually prove to be another ground for setting the award aside again. As the Act does not provide for such circumstances, no specific course of actions may be implied because a contradicting argument may also be made. Similar to Swiss and German examples, the law should provide clear rules as to what logical steps should be there after the award has been set aside and the parties remain with an unresolved dispute. In addition, it should be mentioned that if the award has been set aside based on the invalidity of the arbitration agreement the further re-examination of the dispute would not be possible.

Conclusion

Arbitration is a means of alternative dispute resolution that offers an opportunity for parties at a dispute to have extrajudicial proceedings and settle their disputes in faster proceedings, which will save them money and provide the option of choice of several important aspects of the process, such as choosing the arbitrator(s), procedural law, the seat of arbitration, etc.

For the purpose of avoiding the ambiguities or lack of regulation, it is recommended to undertake amendments aiming at having more clear regulations regarding the dispute settlement procedure after an award made in accordance with an arbitration agreement has been set aside by a competent court (not on the ground of the invalidity of the arbitration agreement, of course), similar to the example of German legislation discussed above. In setting the award aside there should be no discretion in order to ensure uniformity of the law, especially considering the *public policy* ground for refusal to enforce.

BIBLIOGRAPHY

Legal Acts

1. RA Civil Code (1998)
2. RA Civil Procedure Code (1998)
3. RA Law on Commercial Arbitration (2006)
4. RA Law on Making Amendments to RA Law on Commercial Arbitration (2015)
5. RA Law on Mandatory Enforcement of Judicial Acts (1999)
6. New York Arbitration Convention of International Council for Commercial Arbitration (1958)

Electronic Resources

1. The Public Policy Exception to Recognition and Enforcement of Arbitral Awards under Armenian Law. Retrieved from: <https://law.aua.am/files/2012/02/Legal-Memo-Public-Order.pdf>
2. *Stare Decisis*. Reprieved from: <https://www.investopedia.com/terms/s/stare_decisis.asp>

Printed Materials

1. Karine Poghosyan, et.al. "Establishment of lawfulness and justice through arbitration with the example of Financial Arbitration Institution of Union of Banks of Armenia" (2014). Open Societies Foundation
2. Tang, Zh. S. (2014). Routledge. Jurisdiction and Arbitration Agreements in International Commercial Law
3. Հովհաննիսյան, Վ. Առևտրային Արբիտրաժը Հայաստանի Հանրապետությունում (2010). ԵՊՀ Հրատարակչություն