



Standards of Distinctions between National and Foreign Arbitral Awards: A Discussion in The Light of Libyan Current Legislation

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ABSTRACT

Arbitration is a legal process in which disputes between two or more parties are resolved by an impartial third party, known as an arbitrator, rather than by a court of law. In the context of this article, the legal approaches distinguishing between domestic and foreign arbitral award are very important and they differ from one arbitration law to another. By using doctrinal legal research methodology, this article aims to examine the legal approaches distinguishing between domestic and foreign arbitral awards in the context of Libya. Both primary and secondary sources are used and then analysed using critical and analytical approaches. In order to determine the legal nature and nationality of an arbitral award, the paper has found that there are several approaches in the study of this issue. The Libyan approach is quite outdated as it is not in line with recent developments in the field of arbitration and international trade. Therefore, it is recommended that Libyan lawmakers are encouraged to adopt a comprehensive approach such as the one followed by the Model Law on International Commercial Arbitration 2006. This is vital to cope with the developments adopted by modern arbitration laws.

Keywords: Libyan Law, arbitral award, arbitration, dispute resolution.

INTRODUCTION

Arbitration is a legal process in which disputes between two or more parties are resolved by an impartial third party, known as an arbitrator, rather than by a court of law. The arbitrator is selected by the parties involved in the dispute and he/she is usually an expert in the relevant field. Furthermore, arbitration is often used as an alternative to litigation because it can be faster, less formal, and more flexible than going to court (Labanieh, Hussain & Mahdzir, 2019). It is commonly used to resolve disputes in commercial and business relationships, employment contracts, construction projects, and international trade. The process of arbitration usually involves submitting evidence and arguments to the arbitrator, who then makes a final decision that is legally binding on the parties involved. The decision is called an arbitration award, and it can be enforced in court like a regular court judgment (Rajoo, 2017).

In fact, arbitration is governed by national and international laws as well as by the rules of the arbitration institution chosen by the parties. Some of the most well-known international arbitration institutions include the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the International Centre for Dispute Resolution (ICDR). In the context of this article, an arbitral award is used to refer to a final and binding decision issued by an arbitrator or a panel of arbitrators in an arbitration proceeding. The arbitral award is the outcome of the arbitration process and represents the resolution of the dispute between the parties involved (Wang, 2019). Arbitral awards are similar to judgments issued by courts in that they are legally binding and enforceable. They can be enforced in courts under the laws of the country where the award was made or in a different country where the losing party has assets by the guarantee of the international convention such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 if that state of issuing and enforcing the arbitral award is a member to the said convention.

Moreover, the legal approaches distinguishing between domestic and foreign arbitral award are very important (Al-Haddad, 2010), and they differ from one arbitration law to another. For example, some arbitration laws differentiate between national and foreign arbitral award, while others such as Malaysian Arbitration Act 2005 (Act 646) do not (Article 2(1) of Arbitration Act 2005 (Act 646)). In light of this, the current article aims to examine the legal approaches distinguishing between domestic and foreign arbitral awards, the legal consequences of distinguishing between the foreign arbitral award and domestic arbitral award, and finally recommend a new reform for determining the nature of the foreign arbitral award in Libya.

METHODOLOGY

Since the article aimed to examine standards of distinctions between national and foreign arbitral awards, the article adopted the doctrinal legal research methodology. The data were examined using analytical-critical approach.

DISCUSSION AND ANALYSIS

The legal approaches distinguishing between domestic and foreign arbitral awards.

Determining the nationality of the arbitral awards is one of the complicated issues that sparked a wide debate between jurists and the lawmakers (Al-Ahbani, 2012). The following section discusses the most important prevailing legal approaches that determine the legal nationality of the arbitral award, whether it is domestic or foreign arbitral award.

The Geographical Approach

This approach depends on the place where the arbitral award was issued as a main criterion that determines a foreign nature of an arbitral award (Mahmud, 2017). If the arbitral award is issued outside the place of enforcement, most arbitration laws would consider that arbitral award as a foreign arbitral award (Elhamaideh, Alsoelemin & Shanikat, 2012). It is worth noting that some jurists consider this approach simple and clear to determine (Masood, 2022). However, the geographical approach is criticised on the ground that one particular aspect is not enough for determining a foreign or domestic nature of an arbitral award (Apudah, 2012) because the arbitration tribunal could meet in a place by coincidence (Turkman, 2013), the place of arbitration procedures could differ from the place of issuing the arbitral award and the place where arbitral award is signed. Therefore, it is argued that the geographical approach ignores the nature of the dispute, which is considered one of the most important criteria in distinguishing between the foreign and domestic characters of an arbitration award. Therefore, the geographical approach could open a door to cheating thus running counter to the UNCITRAL Model Law of 1985 and as such it will not lead to an adequate settlement of an international trade dispute (Al-Rifai, 2015). This is a serious drawback of the geographical standard of determining nationality or internationality of the foreign arbitral award. To forestall an outcome of this type of the geographical standard needs to be complemented by other standards.

The Approach of the Law Applicable to the Procedures

This approach distinguishes between the foreign and domestic arbitral award from the procedural law applicable to arbitral procedures (Masood, 2022). Accordingly, the arbitral award is considered as a domestic arbitral award if the applicable procedural law is national even though the arbitral award was issued outside the jurisdiction of the State, while the arbitral award is considered as a foreign if it is subject to a foreign law (Ighniya, 2009). In this regard, it could be said that this approach offers some advantages. For example, it provides the disputing parties with an opportunity to determine the foreign or domestic nature of the arbitral award by choosing the procedural law applicable to the arbitral procedures (Al-Khuza'lh, 2017). With this option provided to the dispute parties this standard is seen as more flexible and less controversial than the geographical standard.

The Economic Approach

The economic standard can be considered as one of the relatively modern approaches that have been applied (al-Miqati, 1996) to determine whether the arbitration award is foreign or domestic (al-Miqati, 1996). This approach is based on the linkage of the dispute with the international trade as a means to determine the nature of arbitral award. In short, it considers the arbitral award as a foreign award if it has a link with international trade transactions without looking at the applicable law, place of the arbitral award and nationality of the parties (Al-Thalayaa, 2014). According to this approach, the arbitration is characterised as a foreign arbitral award when there is a movement of funds, services, payments and others across the borders of countries (Mustapha, 2017). It is worth noting that this approach is adopted by several arbitration laws, such as the French Procedure Code Decree No. 48 (Article 1504 of French Procedure Code Decree No. 48 of 2011) and by the Lebanese Code of Procedure No. 90 Article 809 of 1983. Therefore, as it names indicates, the economic standard is based on the purely financial concerns of the dispute as the principal element in determining the nature of the arbitral award as international or national when the transactions under dispute do not cross the borders of a state where the award was issued.

The Approach adopted by the Libyan Legislator

The Libyan Law of Civil and Commercial Procedures of 1953 in its Article 761 has been clearly adopted the geographical approach (Masood, 2022) as a criterion for distinguishing between the foreign or national nature of the arbitral award. Article 761 stated that “the award of arbitrators should be issued inside the territory of the Libyan land, otherwise the rules prescribed for judgments issued in a foreign country shall be followed in this regard” (The

Libyan Civil and Commercial Procedures Law of 1953, Art. 761). By virtue of this Article, the law of Libya has adopted the approach of the place of issuing the arbitral award (the geographical approach). In case of issuing the arbitral award in the Libyan territory, the arbitral award will be considered as a national arbitral award and vice versa. It is important to note that the previous approach was modernised by the Libyan legislator in the Bill of Libyan Arbitration Law of 2010 as mentioned in Article 53 of the Bill:

The arbitration is foreign if its subject is a dispute related to international trade, and results in the transfer of funds or services across borders in the following cases:

If the headquarters of the parties to the arbitration are located in two different countries at the time of the conclusion of the arbitration agreement.

First: In case where there are multiple centres of work belonging to one party, the centre that is related to the agreement of the arbitration shall be considered. If one of the parties does not have a business center, his usual place of residence shall be considered.

Second: If the case of the dispute of the arbitration agreement links to more than one country.

Third: If one of the following places are out of the state which the main centre of work of the two arbitration parties

- The place of conducting the arbitration as specified by the arbitration agreement or if it was determined according to it,
- The place of implementation of a substantial aspect of the obligations resulting from the commercial relationship between the two parties,
- The place with which the subject of the conflict is most relevant (The Bill of Libyan Arbitration Law of 2010, Art. 53).

From provisions of Article 53 of the Bill, it is obvious that the Libyan legislator considered the place of issuing the award as a criterion for distinguishing between the foreign or domestic arbitral awards, but it did completely abandon the economic approach. This can be understood from the reference to the place that the dispute is most relevant to. In the Bill, the Libyan legislator tried to combine between the two approaches with a focus on the geographical approach where the arbitral award was issued and thus, the Libyan legislator adopted the same rules of the UNCITRAL Model Law on International Commercial Arbitration 2006. It also adopted the approach of the Egyptian legislator in Law No. 27 of 1994 to determine the nature of international arbitration. Furthermore, it is discovered after analysing the Bill of Libyan Arbitration Law of 2010 that the Libyan legislator does not address the legal nature of the arbitral award that would be issued by arbitration centres inside or outside Libya. This may hinder the enforcement and recognition of the arbitral award issued by these centres and especially if such centres located in Libya and subject of the dispute related to an international trade. To overcome that legal gap, it is recommended that the Libyan lawmakers have to

address the gap in the Arbitration Bill by considering the legal nature of the arbitral award issued by arbitration centres, whether inside or outside Libya, as a foreign arbitral award.

Legal Consequences Of Distinguishing Between The Foreign Arbitral Award And Domestic Arbitral Award

From the perspective of the enforcing country (the country where the arbitral award is sought to be enforced), there are several consequences result from describing an arbitral award as a foreign arbitral award. The first legal consequence can be seen in the competent court which has the authority to recognise and enforce a foreign arbitral award which differs from a legal system to another and this court usually differs from the court enforcing the national arbitral award (al-Haddad, 2010). For example, while in the Libyan law, the competent court is the First Instance, under the Egyptian Law, it is the Cairo Court of Appeal. The second legal consequence related to the international guarantees given to a foreign arbitral award by virtue of international and regional agreements. The third legal consequence is the use of the principle of reciprocity against the foreign arbitral award as an opposed to the domestic arbitral award which does not subject to this principle (Ighniya, 2009). The fourth legal consequence of distinction between the foreign arbitral award and domestic arbitral award is that the foreign arbitral award should not be contradict with the principle of the public policy of the state where it sought to be recognised and enforced.

A Proposed Reform for Determining the Nature of the Foreign Arbitral Award in Libya

As mentioned before, the issue of determining the nature and legal nationality of an arbitral award is an important issue (al-Haddad, 2010) which should not be ignored. Regarding the Libyan law that governs this issue, it is discovered that the Libyan law is explicitly adopted the geographical standard, which is seen by some as insufficient (Apudah, 2012) and inconsistent with modern standards adopted by the International Model Law for International Commercial Arbitration 2006, which is adopted by different modern arbitration countries, such as England, Malaysia, and India. It is also discovered that the Egyptian legislator adopted double approaches in terms of determining the nature and legal nationality of the arbitral award. Article 3 of the Egyptian Arbitration Law of 1994 states that “the arbitration award shall be international within the provisions of this law if its subject is related to international trade”.

Moreover, the Libyan legislator in the Draft of the Libyan Arbitration Law of 2010 stated that “the arbitration shall be international if its subject is a dispute related to international trade, and it entails the movement of funds or services across borders” (Art. 53 of the Draft). In light of

this, it could be said that the Draft of the Libyan Arbitration Law of 2010 adopted the double approaches (Apudah, 2012), including legal and economic approaches and follows Article 3 of the Egyptian Arbitration Law 1994. However, Article 53 of the Draft of the Libyan Arbitration Law of 2010 differs from the previous laws by adding the phrase of movement of funds and other services across borders and the international commercial trade. For the rest of conditions, the Draft re-mentioned the same conditions found in the Model Law on International Commercial Arbitration 2006. By this way, Article 53 deals with inefficiency found in standard related to internationality of arbitration and takes that from Model Law on International Commercial Arbitration 2006. However, the Draft of the Libyan Arbitration Law of 2010 does not talk about the case of issuing an arbitral award from arbitration centres located inside or outside Libya. When parties agree to go to one of institutional centres whether in Libya or outside in order to resolve their dispute and then an arbitral award issued by the agreed centre based on the intention of the parties, the silence of the Draft on this issue could lead to obstacle in terms of enforcing and recognising the arbitral awards issued by these centres, especially in case of issuing an arbitral award from a centre inside Libya or if the subject of the dispute related to international trade. To overcome that legal gap, it is recommended that the Libyan lawmakers need to address the gap in the Libyan Arbitration Bill by considering the legal nature of the arbitral award issued by arbitration centres, whether inside or outside Libya, as a foreign arbitral award.

CONCLUSION

The current article examined the legal approaches distinguishing between domestic and foreign arbitral awards, the legal consequences of distinguishing between the foreign arbitral award and domestic arbitral award, and finally recommended a new reform for determining the nature of the foreign arbitral award in Libya. It is found that Libyan Law of Civil and Commercial Procedures of 1953 clearly adopted the geographical standard that is based on the place of issuing the arbitral award and it was the prevailing standard in the time of enacting that law. However, this approach is quite outdated as it is not in line with recent developments in the field of arbitration and international trade. Moreover, the geographical approach is not coinciding with the approach adopted by the Model Law on International Commercial Arbitration 2006. Therefore, it is recommended that the Libyan lawmakers have to adopt a comprehensive approach as followed by the Model Law on International Commercial Arbitration 2006. This is very vital to cope with developments adopted by modern arbitration laws.

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