

# A Case Study on the Reasons for Refusing to Recognize or Enforce a Foreign Arbitral Award

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Received: February 17, 2022

Accepted: March 15, 2022

Online Published: March 28, 2022

doi:10.20849/ajsss.v7i3.1034

URL: <https://doi.org/10.20849/ajsss.v7i3.1034>

## Abstract

Firstly, this paper discusses the legal basis for refusing or recognizing a foreign arbitral award or a judgment in our country, that is, the New York Convention. Our country is a signatory to the New York Convention. Paragraph 2 of Article 5 of the New York Convention exhaustively sets out the grounds on which a Contracting State refuses to recognize and enforce a foreign arbitral award. Secondly, this paper analyzes the reasons for rejecting the application for enforcement based on two cases tried in Taiyuan and Wuxi in recent years, and finds that the courts in our country did not strictly follow the provisions of Paragraph 2 of Article V of the New York Convention when they ruled to reject the application, and neither the applicant nor the respondent mentioned the New York Convention in their application or defense. In the process of our country's judicial assistance system being gradually improved, this problem is also gradually solved. We should adhere to the seven reasons for refusing to recognize and enforce a foreign arbitral award in Article V of the New York Convention as the only source to refuse to recognize and enforce a foreign arbitral award.

**Keywords:** New York Convention, refusal to recognize and enforce, international civil and commercial arbitration

## 1. Legal Basis for Refusing to Recognize or Enforce a Foreign Arbitral Award

### 1.1 The New York Convention

After our country joined the New York Convention, the Convention has become the most important legal basis for recognizing and enforcing foreign arbitral awards. Our country joined the New York Convention in 1987. The New York Convention should be regarded as one of the most famous and successful UN conventions. So far, it has been acceded to by 159 countries and regions in the world, and its ideas and rules have been widely accepted and applied (Note 1). The New York Convention encourages courts to recognize and enforce international arbitral awards. Of course, a foreign arbitral award may also be refused to recognize and enforce by a country's domestic law if the foreign arbitral award does not conform to certain mandatory provisions of domestic law.

According to the New York Convention, when a contracting state refuses to recognize and enforce a foreign arbitral award, it "can only" refuse recognition and enforcement of the award based on the conditions set out in Article V (2), Item 7. After systematically reviewing Article 5 of the New York Convention, we can see that the main points of the New York Convention for refusing to recognize and enforce foreign arbitral awards are as follows:

- 1) A party to the arbitration agreement has no capacity for civil conduct or the arbitration agreement is invalid;
- 2) A party to the arbitration agreement has not received proper notice from the arbitration tribunal, or the party has not been free to express or state its opinions freely in the course of the arbitration;
- 3) The arbitral Award Has Been Made Outside The Arbitration Agreement;
- 4) The composition Tribunal Does Not Conform To The Rules Or The arbitration Proceedings Are Not Due;
- 5) The arbitration Award Has No Been Binding Force or The Arbitration Award Has Been Cancelled;
- 6) The matters in arbitration are not arbitrable;
- 7) The arbitral award is contrary to public policy.

In judicial practice, a local court applied the provisions of article 4 of the New York Convention to prepare a ruling refusing to recognize and enforce a foreign arbitral award, which was corrected by the Supreme People's Court. Article 4 of the New York Convention provides: "I. A claim for recognition and enforcement shall, in order to obtain recognition and enforcement referred to in the preceding article, be made by: (a) the original or official copy thereof of the original award, and (b) the original or official copy thereof referred to in article 2." 2. If the language used in the foregoing award or agreement is not the official language of the State in which the award is invoked, the request for recognition and enforcement of the award shall be accompanied by a translation of the respective documents. Translations shall be certified by public or sworn translators or diplomatic or consular personnel. It can be seen that this article stipulates that materials should be submitted for application for recognition and enforcement of foreign arbitral awards. If a party does not submit the corresponding materials in accordance with the requirements of this article when applying to the court for recognition and enforcement of a foreign arbitral award, the court shall require it to submit or supplement the submission, and if the parties are truly unable to submit the relevant materials, for example, if the parties in a case are unable to submit the original or certified copies of the arbitral award, the court shall not accept it or rule to reject the application instead of ruling to refuse to recognize and enforce the arbitral award.

The Supreme People's Court emphasized that only if one of the circumstances provided for in Article 5 of the New York Convention exists, the people's court may rule on the refusal to recognize and enforce a foreign arbitral award, and strictly interpret each ground in order to raise the threshold for refusal to recognize and enforce a foreign arbitral award.

## **2. Case Study on the Grounds: A Case Study why a Chinese Court Based on a Foreign Case**

### *2.1 FairdealFairdealSupplies and Shanxi Coal Import & Export Group Co., Ltd. for the Recognition and Enforcement of Foreign Arbitral Awards (Note 2)*

The trial of this case was concluded in November 2019. Taiyuan Intermediate People's Court's reasons for rejecting the application included: 1) The evidence provided by the applicant, according to Article 11 of the Several Provisions of the Supreme People's Court on Evidence in Civil Procedures (Note 3), has not undergone the relevant notarization and authentication procedures, and therefore is inadmissible; 2). The mailing address for an arbitral award mailed by the International Court of Arbitration of the ICC (the address of the law firm of the respondent's agent) does not conform to the mailing address of the respondent expressly recorded in the arbitral award; therefore, there is no evidence to prove that the arbitral award has been delivered to the respondent; and, according to Article 548 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China, such arbitral award cannot be ascertained as having been legally effective overseas.

According to the court's ruling, the main reason for refusing recognition and enforcement is not a substantive issue, but a procedural one. As far as I'm concerned, firstly, as to the substantive issue of the validity of arbitration, this ruling does not address it directly, and it may be because the procedure does not comply with PRC law, thus there is no need to further discuss the substantive issue. It may also be because domestic courts have difficulty in clarifying the substantive issue of international arbitration. Secondly, as to the second argument of the court's refusal to recognize and enforce an award for extraterritorial arbitration, after the agent of the respondent receives the arbitration agreement, he will certainly inform his client of relevant information, so the respondent must have received the final award in essence. However, the respondent deliberately excuses itself, and evades the award of the award by circumventing the procedures. It can be seen that delivery, an issue which can easily be overlooked, seems basic, but in fact has a significant impact. In my opinion, it is biased for the people's court to reject the application for recognition and enforcement for this reason.

## **3. Thoughts on the Outcome of the Above Case**

Although China acceded to the New York Convention a long time ago, participates in the international judicial assistance system, and has a basically established domestic legal system for the recognition and enforcement of foreign arbitral awards, it is clear that the maturity of China's legal system for the recognition and enforcement of foreign arbitral awards still needs to be further improved, and that China's participation in international judicial practice shall deepen and broaden.

The Supreme People's Court in the People's Republic of China has adopted an "internal reporting system", which means that only the Supreme People's Court has the ultimate authority to refuse recognition and enforcement of a foreign arbitral award. The Intermediate People's Court or a Higher People's Court that intends to refuse recognition and enforcement of a foreign arbitral award must report the case level by level to the Supreme People's Court, which shall make the final decision (Xu, X., 2019). In sorting out and analyzing cases where recognition

and enforcement has been refused by the Supreme People's Court in recent years in China, and in summarizing and classifying the grounds for refusing recognition and enforcement, I assumed that although some local courts were somewhat arbitrary in their refusal of recognition and enforcement of foreign arbitral awards in the early stage, resulting in circumstances in violation of the spirit of the New York Convention, which had a negative impact on the international community, after the implementation of the "level-by-level reporting" system through a document issued by the Supreme People's Court at a later stage, however, the Supreme People's Court standardized the application of the grounds for refusing recognition and enforcement of foreign arbitral awards, and rectified any previous chaos in this area. Of course, what is still not sufficient is that the choice of grounds for refusing recognition and enforcement of foreign arbitral awards are not fully consistent with those under Article 5.7 of the New York Convention. I personally believe that, since the Convention provides that the only seven grounds for refusing to recognize and enforce foreign arbitral awards are the seven grounds as specified in Article 5.2 of the Convention, the grounds for refusing to recognize and enforce foreign arbitral awards shall be consistent with those stated in the Convention, with regard to the statements of the grounds for refusing, the reply of the Supreme Court shall be consistent with those stated in the Convention.

Both extraterritorial experience and the practices in China show that major countries have gone through a process from being relatively conservative to relatively supportive of the enforcement of foreign arbitral awards when refusing recognition and enforcement of foreign arbitral awards. In the early days, when refusing to recognize and enforce foreign arbitral awards, all major countries in the world (including China) unexceptionally applied the grounds other than the seven grounds set forth in Article V of the New York Convention. According to the Convention (Yang, H.-L., 2006), the seven grounds set forth in the New York Convention are the only grounds applicable to the Contracting States when refusing to recognize and enforce foreign arbitral awards. With the development of times, with the concept of "supporting arbitration" and "facilitating arbitration" becoming widespread among people, countries are increasingly inclined to recognize and enforce foreign arbitral awards in the field of recognition and enforcement of foreign arbitral awards. The New York Convention, which opened the way for international commercial arbitral awards to circulate internationally, attracted a large number of member states and was universally respected, setting an example of international treaties around the world. The Supreme People's Court has always maintained a supportive attitude toward international commercial arbitration, actively created an arbitration-friendly rule of law environment, attached special importance to the unified interpretation and reasonable interpretation of the New York Convention in China's judicial practice, and made its greatest efforts to recognize and enforce foreign arbitral awards. China has a vast territory, with more than 400 intermediate people's courts in more than 30 provinces, which is of greater significance for the unified understanding and application of the New York Convention. Therefore, we should adhere and stick to the seven grounds for refusing to recognize and enforce foreign arbitral awards under Article 5 of the "New York Convention" as the sole source for refusing to recognize and enforce a foreign arbitral award, in which case that the law and order can be promoted.

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## Notes

Note 1. Anna Joubin-Bret, Secretary-General, United Nations Commission on Trade Law: The Past and the Future of the New York Convention - The Sixtieth Anniversary of the New York Convention and the Belt and Road to the Future Symposium (II). <http://www.sccietac.org/web/news/detail/1762.html>, accessed on 20 September 2018.

Note 2. Jin 01 Min Chu [2018] No. 921

Note 3. Article 11 of the Several Provisions of the Supreme People's Court on Evidence in Civil Procedures provides that "where the evidence submitted by a party to the people's court is sourced from outside the People's

Republic of China, such evidence shall be certified by a notary organ in the country where it is sourced, and authenticated by the Embassy and Consulate of the People's Republic of China in that country, or the procedures stipulated in the relevant treaties between the People's Republic of China and the country shall be completed ..."

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