Article V(1)(e) of the 1958 New York Convention in Light of a Decision of the Turkish Court of Cassation

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Article V of the 1958 New York Convention ("NYC") lists the grounds of non-enforcement of a foreign arbitral award. Accordingly, Article V(1)(e) provides that when "[t]*he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made*" the award's enforcement may be refused.

In 2024, the Turkish Court of Cassation quashed the lower courts' decision that declared an International Centre for Dispute Resolution of the American Arbitration Association ("ICDR") award as enforceable, stating that the courts should have further investigated whether the award is final, enforceable and binding (Court of Cassation, 11th Civil Chamber, Docket No: E. 2022/5986, Decision No: K. 2024/2257, Date: 20.03.2024). This article explains the decision of the Turkish Court of Cassation and comments on the final, enforceable and binding character of an arbitral award in relation to Article V(1)(e) of the NYC.

Decisions of the Lower Courts and the Court of Cassation

The underlying dispute relates to the enforcement of an ICDR award with the seat located in the United States. In the arbitral award, the three respondents were ordered to pay a certain amount to the claimant. The claimant sought the enforcement of this arbitral award in Türkiye.

In the First Instance Court proceedings, the respondents did not submit an answer to the statement of claim. The court noted, amongst others, that (i) all documents in the arbitration, including the award, were validly notified to respondents, (ii) the award is final as per Article 30 of the ICDR Arbitration Rules ("Rules"), (iii) there is no means of appeal against the award, (iv) the respondents did not argue for the denial of the enforcement request. Thus, the court granted the enforcement of the award.

The respondents appealed this decision by claiming that they did not duly receive notification on the arbitration proceedings. However, the Regional Court of Appeal, as the second instance court, agreed with the first instance court that the respondents were duly notified on the proceedings and the award. The Regional Court of Appeal also held that it is the respondent who bears the burden of proof to establish that the award is not final or non-binding. It further incorporated the findings of the first instance court and stated that the award is final and binding according to the Article 30 of the Rules. The Regional Court of Appeal thereby dismissed the appeal on the first instance court decision.

Following the final appeal by the respondents, the was is brought before the Turkish Court of Cassation ("Court"). The Court initially referred to Articles 60-61 of the Turkish Private International Law Act numbered 5718 ("TPILA") and noted that to enforce a foreign arbitral award, the latter should be final and this requirement shall be considered by the court *ex officio*. The Court concluded that the finality of the award was not clearly established, based on the information available in the case file. Thus, the Court revoked the lower courts' decision, holding that the lower court shall render a decision following a further investigation as to whether the award is final, enforceable and binding.

Comments

Article V(1)(e) of the NYC provides that:

"*Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that* […] [t]*he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made*".

Accordingly, this provision lists three grounds for the refusal of the enforcement of a foreign arbitral award, which are (i) the non-binding character of the award, (ii) the setting aside of the award and (iii) the suspension of the enforcement of the award. NYC provides that these should be established by the party against whom the enforcement is sought.

In relation to the first of the said grounds, an award shall be deemed to be binding if there is no possibility of appeal on merits. Parties can freely characterize an arbitral award as binding between them. This can be made through an explicit agreement in the arbitration clause. The parties can also refer to arbitration rules or laws, which govern that the arbitral award shall be binding. If the parties have such an agreement, the award shall gain binding character in the sense of Article V(1)(e) of the NYC.

In relation to the "*enforceable character*" of the award, an arbitral award shall be deemed as enforceable, once it is rendered unless the arbitration agreement/rules/laws provide otherwise,. Some jurisdictions provide remedies against the award, in which case the competent authority may decide to suspend an award's enforcement.

In terms of the *final character*, an award shall be deemed as final if, (i) there are no possible remedies foreseen against the award or parties waived to resort to such remedies, or (ii) parties initiated these remedies and these are rejected. Notably, for this ground, the NYC considers whether the award is set aside or not.

In the underlying dispute, the principle question discussed is whether the award was final, enforceable and binding on the parties. Before, analysing the binding, enforceable and final character of an award it should be noted that in the present case the Court's application of TPILA to revoke the lower courts' decision was systematically wrongful. Türkiye and the USA (i.e., the seat of arbitration) are parties to the NYC. As per Article 90(5) of the Constitution of the Republic of Türkiye and Article 1(2) of the TPILA, the provisions of the NYC prevail over the TPILA. Thus, the author considers that the Court should have applied the provisions of the NYC, instead of the TPILA.

Regarding the determination of the binding, enforceable and final character of an award, the lower courts relied on Article 30 of the Rules (2014 version), which provides under its paragraph 1 that:

"*Awards shall be made in writing by the arbitral tribunal and shall be final and binding on the parties.* […] *The parties shall carry out any such award without delay and, absent agreement otherwise, waive irrevocably their right to any form* *of appeal, review, or recourse to any court or other judicial authority, insofar as such waiver can validly be made.* […]".

Starting with the *binding character*, in the present case, the parties had agreed in the arbitration agreement that the Rules shall be applicable in the arbitration proceedings. As stated above, Article 30 of the Rules provide that the award shall be binding on the parties. Consequently, in the author's view, unlike the Court's findings, this gives the award the binding character and the respondents did not establish the contrary.

In terms of the *enforceable character*, the respondents did not seem to argue that the award's enforcement is suspended. Thus, the author considers that the award is enforceable as well.

For the *final character*, Article 30 of the Rules, as agreed between the parties, provide that the award shall be final and the parties waive any form of appeal against the award. The validity of such waiver can be further discussed in light of the applicable law. Notwithstanding this, as explained above, the NYC places emphasis on whether the award is set aside, and it is the respondent who carries such burden of proof. In the case at hand, respondents neither argued that they brought a setting aside action against the award nor that the latter was set aside. Thus, the author is of the view that the final character of the award was also established in the case at hand, unlike the ruling of the Court.

To summarize, the author initially finds that the Court's application of the TPILA, instead of the NYC, was systematically wrongful in light of the Turkish Constitution Article 90. Additionally, the lower courts' decision on the award's binding and enforceable character was rightful, which, in the author's view, did not require any further investigation. In terms of the finality of the award, the lower courts' reliance to the arbitration rules may be debated; however, since the respondents did not prove that the award was set aside, the author argues that the award should have been regarded as final and binding on this final ground as well.

For further discussions on the topic, see also: Erdem Küçüker, '*Binding and Final Character of Arbitral Awards in the Enforcement of Foreign Arbitral Awards in Türkiye – Recurring Need for Clarity*', Daily Jus Blog, 4 November 2025 (available at:

https://dailyjus.com/world/2025/11/binding-and-final-character-of-arbitral-awards-in-the-enforcement-of-foreign-arbitral-awards-in-turkiye-recurring-need-for-clarity).