

The Republic of Malta & the 1958 New York Convention: the Recognition & Enforcement of Foreign Arbitral Awards

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Upon ratification of the 1958 New York Convention, on the 22nd of June 2000, Malta has several international prerogatives it must consider in the recognition and enforcement of foreign arbitral awards. Indeed, Mr Portelli sheds light on this concept.

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Introduction

The Republic of Malta ratified the 1958 New York Convention, (herein referred to as ‘the Convention’), on the 22nd of June 2000, stipulating the Convention’s entry into force from the 20th of September 2000.

In regard to the Convention’s applicability and enforcement, Malta would only adopt the Convention in regard to the recognition and enforcement of awards made in the territory of another State which is a party to the Convention. Furthermore, the Convention would only apply, in regard to Malta with respect to arbitration agreements concluded after the date of Malta’s accession to the Convention.

The provisions of the Convention have been promulgated into Maltese Law into Part III of the Second Schedule of the Arbitration Act, Chapter 387 of the Laws of Malta.

The Convention

International arbitration is an efficient and important method for the settling of international commercial disputes. In fact, the Convention’s main scope is to create commonplace standards for the global recognition of arbitration agreements, as well as to provide court recognition and for the enforcement of foreign and non-domestic¹ arbitral awards.

The main aim of the Convention is to allow for the recognition of foreign and non-domestic arbitral awards, in Maltese ‘*lodo arbitrali*’, to not be prejudiced, whilst allowing for the relevant Parties the ability to ensure recognition and enforcement of the aforementioned awards within their jurisdiction.

Furthermore, the Convention is to bind courts within the jurisdiction of the respective Parties to give full effect to arbitration agreements. This process requires the courts to deny a party access to the court if in defiance of an arbitration agreement. As well as binding the court to refer the matter to an arbitral tribunal.

¹ They are treated as foreign under the law of the State who made the enforcement, due to the presence of foreign elements in the proceedings; it may be the case that the foreign laws of procedure of a foreign State are applied.

Recognition and Enforcement

The New York Convention does not attempt to define the terms ‘recognition’ and ‘enforcement’. However Commentators generally hold that ‘recognition’ refers to the entirety of the process of considering an arbitral award as binding although not necessarily enforceable, whilst ‘enforcement’ refers to the process of giving effect to an award.²

A frequent question that may arise is whether a party must seek recognition and enforcement together or whether a party can independently seek the recognition of an award. In a 1981 decision, the German Supreme Court, in *Compagnia Italiana di Assicurazioni S.p.A., Società di Assicurazioni Gia Mutua Marittima Nazionale S.p.A. and others v. Schwartzmeer und Ostsee Versicherungsaktiengesellschaft, Bundesgerichtshof* construed both recognition and enforcement to mean that the two actions were interrelated and could not be brought forward separately.³

On the other hand, Courts from other jurisdictions have considered that recognition can be requested on its own, without the need to request enforcement. For example, courts from other jurisdictions, such as Portugal and the United States, have held that recognition can be sought separately from enforcement.⁴

Local Enforcement Proceedings

In order to enforce an arbitral award, the party must apply, using the procedures set out in the law. There are two separate instances when a person may apply to enforce an arbitral award, meaning that there are separate procedures for both Domestic and Foreign Awards.

1. Domestic Awards

In the case of Domestic Awards, reference should be made to Article 72 of the Arbitration Act, which holds that in the case that the registration of any final award or document under the Arbitration Act is required to be made

2 UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards http://newyorkconvention1958.org/pdf/guide/2016_Guide_on_the_NY_Convention.pdf.

3 Ibid.

4 Ibid.

with the Centre. The article continues by stating that the award or document, or an authentic copy thereof, shall be deposited with the registrar together with any relevant fees as may be prescribed from time to time for such registration.

Furthermore, the registrar shall refuse to register an award or a document if that award or document does not comply with any of the provisions of this Act or with any of the rules made by the Centre relative to such Act.

The Registrar shall not register an award prior to the lapse of thirty days from the date on which the award has been notified to the parties to an arbitration or if the Centre is notified of any recourse against an award taken by any party to the arbitration proceedings in terms of this part of this Act.

In the case that the Court does not uphold the application, the judgement of the Court of Appeal shall be registered with the Centre together with the award being registered on the request of the party seeking registration. Upon its registration with the Centre the award shall be final, binding and may not be challenged.

If any application which the Court of Appeal determines to be frivolous or vexatious shall render the party making such challenge or appeal liable to pay the party requesting it. In turn a penalty of not less than two hundred and thirty-two euro and ninety-four cents (232.94) and not more than eleven thousand and six hundred and forty-six euro and eighty-seven cents (11,646.87) to be determined by the Court of Appeal.

The award is made under an arbitration agreement, which is registered by the Malta Arbitration Centre. The awards may be enforced through an executive warrant within 24 hours as held by Article 69A sub-article 1 of the Arbitration Act.

A Registration may be refused on grounds of lack of proper notice or if Article V of the Convention is being infringed.⁵

2. Foreign Awards

The foreign arbitration award is first registered by the Malta Arbitration Centre, and then it is enforced by the Maltese Court, in the same way

⁵ Arbitration Act, Chapter 387 of the Laws of Malta.

that domestic arbitration awards are enforced. The recognition of a foreign award may only be refused on the grounds found in Article V of the Convention.

The Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked. This only applies if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

“The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.”

The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration. It may also contain decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted. That part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or the 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.

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the subject matter of the difference is not capable of settlement by arbitration under the law of that country. The award may also be refused if the recognition or enforcement of the award would be contrary to the public policy of that country.⁶

⁶ The 1958 New York Convention on the Recognition and Enforcement of Foreign Judgements..

References

Primary Sources

Statutes and statutory instruments

- I. Arbitration Act, Chapter 387 of the Laws of Malta.
- II. UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. <http://newyorkconvention1958.org/pdf/guide/2016_Guide_on_the_NY_Convention.pdf>
- III. New York Convention Guide. <http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=11&menu=815&opac_view=-1>
- IV. The 1958 New York Convention on the Recognition and Enforcement of Foreign Judgements.