The Province of New York Convention Determined

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Abstract. The New York Convention of 1958 governs the worldwide recognition and execution of foreign arbitral decisions. The Convention prescribes several quintessential rules which leave the contracting States to construe its meaning according to their municipal law respectively. The rules of the convention which specifically contain the words "commercial", "public policy", or "reciprocity", the convention vested national States the discretion to construe the above rules. In many cases, the discretion of national states to construe those rules based on their municipal law has been made the enforcement of foreign arbitral awards carried out inconsistent with the purpose of the Convention. This study discovered that theories of the link between national and international law, such as dualistic or pluralistic theories, had a significant impact on the content of the aforementioned Convention provisions. The issue of epistemological postulates relates to how to define the link between domestic and international law. Depart from intrinsic conditions of jurisprudence, this discussion rejects dualist or pluralist approach to the above rules of the Convention. Hence, the purpose of this discussion is to argue that interpretation to the above rules of the convention should be exercise monistic theory on the relationship between national and international law.

Keywords: Arbitration, New York Convention, Foreign Arbitral Awards.

1 Introduction

The establishment of the New York Convention 1958 began with ICC's identification to the weaknesses of the recognition and enforcement of foreign arbitral awards as priorly governed in Protocol on Arbitration Clauses 1923 and Geneva Convention 1927 on Execution of Foreign Arbitral Award [1]. The result was preliminary draft of the New York Convention 1953 (ICC Draft). This ICC draft was taken over by the ECOSOC, and after revisions carried out, the result was. ECOSOC Draft of the New York Convention 1955 (ECOSOC Draft). It was both of these drafts discussed in a Conference held in New York on May to June 1958 and adopted as the New York Convention 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention 1958) [2].

ICC rejects the notions of conflict of laws, remind to respect autonomy of the will of the parties, restrict the conventional notions of the States sovereignty, and suggest simultaneously establish international forms of procedure along similar lines [3]. In a

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nutshell, ICC tried to make the States consider that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes [4]. The basic notion is then uniformity of law under international law; "a universal law which governs transnational or cross-border business transactions apart from municipal laws."

Unfortunately, the influence of empirical approaches toward a legal existence called international law was deliver technical experts of the New York convention 1958 had been arrived to the following Article I (1), Article I (3), Article II (1), and Article V (2) of the Convention. These rules are basically stipulate that notwithstanding the convention is formally international law, it has also vested to national States the discretion to determine "foreign arbitral awards", "commercial", and "public policy", according to municipal laws. The terms above mentioned, however, are too general. It can be construed into a dozen of haphazard situations and its application therefore is the matter of interpretation.

Within the matter of interpretation, those circumstances will eventually compel us construing those rules based upon our standing on the relationship between national and international law. Interpretation to such a norm depends on our theory of the relationship between national and international law." [5] To that extent, we have two basic theories those are pluralistic and monistic legal theory. While monistic theory perceives both national and international law as one united legal system—that international law is hierarchically the prime—pluralistic theory rigorously separates between national and international law, the reason why Kofi Annan, the former of Secretary-General of United Nations, said that: "...While we proudly recall the Convention and reaffirm our dedication to its principles, we must equally admit that the Convention's ultimate purpose has not yet been accomplished." [6]

1.1 The Nature of Interpretation

Historical hermeneutics' point of views generally initiate certain legal discourses with their prime common opening statements: "Since Plato, Aristotle, and Thomas Aquinas put forwarded almost the same idea—that a good state is a state based on law (rule of law)—and that the doctrine of the rule of law is government by law or government through rules (rule governance), not by people (rule of man)—its transformation into civil society is primarily manifested through the enactment of positive laws strengthened by legal officers."

The above consideration is obviously derived from legal positivism [7]. Identifying what is law according to Austin's point of view, at the end of analysis will be arrived to the propositions that the empirical shape of positive law is every written law created by those who have the power or authority to make law, now it is the statutory law so called—from written constitution to the most technical rules of the state which backed by sanction, strengthened by the state organs. In other words; "theres no any law without the only existence—the state".

Disagree to "originalism" which is considered compatible to traditional thought of the rule of law, constructivist such as Richard Rorty makes a sharp distinction between normal discourse and abnormal discourse [8], while Fred Dallmayr goes on the

discussion between the context of regular and irregular practice or between what is normal and what is abnormal [9]. But the problem of constructivism was not essentially different with the problem of the legism. Vested to the judges excessive freedom to find law has tend to—if not always—bring the same risks. For that reason, Dworkin emphasizes that judges should decide a case based on principle as standard, even though not all standards are principle. If the standard is justice, fairness, or morality, the question is what the standard is?

When Savigny put forwarded that the interpretation is a reconstruction of the hidden ideals of law, and if the ideal of law is morality, thus, following Fuller, morality as duty should be distinguished from morality of aspiration. Because law is not only the system of values, but also social norm, the way to understand law should be derived from the notion that the existence of law is closely related to its main function; to maintain social life as survival mode. The world ideal should then considered as the "ideal of social order." [10] Hence according to the above considerations, which one epistemologically prefer within relationship between national and international law; pluralistic or monistic legal theory?

1.2 Relation Between National and International Law

The New York Convention 1958, because factually or historically created by the States—the subject of international law, it then make one possible to convey the following propositions: First, the Convention is basically national law, or part of national law, or at least international part of national law, because it was created by the States. It basic tenet is that national and international law are two separated legal orders. Second, the Convention is international law because logically, the relationship among the States is only possible to be governed through international law—a universal law. It basic tenet is that national and international law are one united legal order. The first proposition belong to pluralist standing, while the second proposition belong to monistic standing.

Pluralist's point of view relied upon several basic empirical postulates: (1) the States are priorly exists rather than international law, (2) the States are sovereign, (3) the customs by which international law is created or the creation of international treaties created by international organs—consists in acts of States, (4)both national and international law are two separate legal systems or not parts of one normative system, (6) States should priorly recognize international law before its transformation into national law, (7) national law is hierarchically supreme rather than international law, (8) when national and international law conflicts, national law prevail. The above postulates are strongly influenced by Austin's legal positivism. According to Austin, "international law is not positive law." Since law has no effective instruments of its enforcement, such as international law, he asserted that that law was not "law properly so-called." [12]

Kelsen rejects those pluralist point of views based upon several logical reasons as follows [11]: (1) Law is normative system, not the system of facts. The matter of normative system is the matter of validity of norm. If there are more than one or two normative systems, such as national and international law, they cannot both be re-

garded as legitimate at the same time unless they are viewed as components of a single system. (2) Positive law and morality sometimes contradict. Only if one order is viewed of as delegating the other is it conceivable to regard law and morality from the same angle as concurrently legitimate commands. (3) If two norms are conflict, both cannot be simultaneously valid. (4) The fact that the State is a subject of both international and domestic law means that there is a single, universal legal system that is made up of the persons who serve as the State's organs and carry out its international obligations and international rights. (5) The State's constitution, for example, may require that the courts and authorities apply only and exclusively statutes (or standards of customary international law) and ordinances, making the transformation of international into national law unnecessary. (6) The numerous national legal orders must thus also be detached if national and national law are. Thus, a theorist who holds to the pluralistic viewpoint would have to declare one national legal system—for example, his own State's legal system—as the alone legitimate system. Only when they are viewed as constituting a single system can two national legal orders be concurrently based on their validity. (7) A rule of international law whose applicability to a State depends on that State's acknowledgment of it is illogical since it assumes that international law itself has applicability irrespective of that recognition. (8) The most recent statement supersedes national legal order since national law explicitly or implicitly relates to international law. (9) The idea that a state's sovereignty is a necessary attribute conveys the idea that the state has absolute authority. The ability to provide binding orders is typically considered to be the definition of authority. Since authority is a feature of normative order, it cannot be formed by facts. Sovereignty can only exist in normative orders. Our investigation revealed that international law determines the scope and basis for the applicability of national law through its principles of effectiveness, and that, as a result, the superiority of international law over national law seems to be imposed by the legislation's actual text. (10) The theory of primacy of national law is relied upon subjective philosophy. This subsequently create States subjectivism or egoism. It ultimate consequence is State solipsism.

The matter to choose whether pluralistic or monistic legal standing are the matter of epistemological postulate. Now we have to choose the only one among those choices, whether seeing law according to the existing doctrine that “In contrast to experience, law is logic, or "law has not been logic—it has been experience”. The New York Convention 1958 is a law which is created based upon empirical facts rather than the propositions of international customary law—the fact that according to the will of the States, recognition and enforcement of foreign arbitral awards should be absolutely determined by municipal law of the contracting States. It has been obvious that New York Convention 1958 has chosen pluralistic legal standing within relationship between national and international law.

1.3 New York Convention is Adoption of Pluralistic Legal Theory

Before eventually revised by the ECOSOC, the title of the convention which is recommended according to ICC Draft is the “Convention on the Enforcement of International Arbitral Awards”. ECOSOC revised the title of the draft of the convention

become the “Convention on the Recognition and Enforcement of Foreign Arbitral Awards.” [13] The quintessential words in question here are “recognition” and “foreign”. Influenced by Belgian and USSR delegation who had been suggested that the title of the Convention should use the term “recognition and enforcement” rather than simply “enforcement”, ECOSOC asserted: “The fact that the delegation of national states had been intended to add the word “recognition” before the title had been recommended according to ICC Draft reflecting that foreign arbitral award cannot be enforced since the state where the awards will be executed unwilling to priorly recognize the awards. Or, validity of the awards is determined by national law rather than international law. This “States’ recognition requirement” is obviously character of pluralist theory. “

The pluralist character of the convention can also seen through the phrase “international” as seen in ICC Draft which was replaced through ECOSOC Draft with the word “foreign”, that is “foreign arbitral awards”. The reasons for ECOSOC was not using the phrase “international”, but “foreign” are as follows: “The Committee believed that arbitration between States was often alluded to when the term "international arbitral awards" was used by the International Chamber of Commerce (E/C.2/373). The Committee adopted the title "Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards," which more accurately reflects the purpose of the Convention because this Draft Convention does not address arbitration between States but rather the recognition and enforcement of arbitral awards made in another country.”

According to the New York Convention of 1958's substantive provisions I (1), I (3), II (1), II (3), and V (2), there is little doubt that these provisions accept pluralist legal theorists with regard to the interplay between domestic and international law. The phrases "...not considered as domestic awards in the State where their recognition and enforcement are sought"..., "reciprocity", "...which are considered as commercial under the national law of the State making such a declaration...", "...concerning a subject matter capable of settlement by arbitration...", "...unless it finds that the said agreement is null and void, inoperative, or incapable of being performed..." The determination of when foreign arbitral awards can be recognized and enforced by the States will absolutely depend on the law of the national States rather than based on international law. The subject of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country. [14]

The word “reciprocity” means “fact create law”—depend on the States action factually, while the word “commercial” is evaluative. The U.S. Supreme Court concluded in 1922 that antitrust laws did not apply to baseball since the exhibition, albeit made for money, was not to be considered trade or commerce. As Levi remarked, interpretational variances may exist even within one State. Baseball was assumed to be treated the same as in the previous Supreme Court judgment when the Court was asked to decide once more in 1953 on the application of the Sherman Act to baseball. Finally the most barbaric word, “public policy”, is a quit common term which according to pluralist intended to be construed by the contracting States of the Convention.

1.4 The Province of New York Convention Determined

The above controversial terms, pluralist eventually simplify to overcome the verbal controversies according to "back to fact argumentation". As Ibbetson once put it: "...the tension set up when the legal definition of an institution gets too far removed from its popular conception-Omnis definitio in iure civili periculosa est; parum est enim ut non subverti potest." This legal positivistic argumentation has been arrived at one proposition: "because the convention had been factually vested to the States to determine the conditions which should be met for the recognition and enforcement of foreign arbitral awards (international arbitral awards), hence the "fact create law" shall prevail. [15]

On the ground of different purpose of domestic and international relations, van den Berg creates dichotomy of domestic and international public policy: "Due to the dichotomy between domestic and international public policy, not everything that is regarded to be relevant to domestic relations is also relevant to international relations. This difference states that fewer issues are regarded to come under public policy in foreign disputes than in domestic ones. The divide is supported by how domestic and international relations serve different goals."

What van den Berg has been put forwarded is obviously confusing, and of course, lack of certain juridical basis. The questions of why domestic relations does not necessarily pertain to public policy in international relations, and on what reasoning the purpose of domestic and international relations should be distinguished, is absolutely groundless and unclear. Notwithstanding the New York convention is intended to make foreign arbitral awards enforceable in other States, but since the Convention delegating to the contracting States discretionary power to determine public policy of its own State based upon their respective national law—it will become legitimate for the entire of the contracting States construing "public policy" as well as public policy of their respective national States. Again, the Convention is clearly state: "...public policy of that country".

Dichotomy between national and international public policy is derived from legal positivistic consideration, that is "fact creates law" consideration. In fact, because the "State" is considered priorly exists, for instances: "the State of Indonesia", the United States of America, the State of England, etc, the only law considered exist is therefore the State or municipal law. This factual inquiry 's consideration, however, is obviously superfluous. It was so because the "State" was not a factual existence, but a language to convey certain concept—the concept of the State. Except "language" either spoken or written are also considered as facts—a superfluous and implausible consideration—the only facts of the word "State" are therefore individuals and the territory where they are.

If uniformity of law is the purpose of international law—because one fact cannot be governed by two contradict or different legal orders, it is not easy to identify the New York Convention 1958 as an international law properly so-called. This kind of law is essentially national law rather than international law. If we have to use the term "international" to mention such convention, it may in formal consideration because once again, it was essentially municipal law. Obstacles to enforce foreign arbitral

awards was not conducted by parochialist municipal judges, but because positivistic consideration of the will of the small group of the creator of the convention. J. G. Starke called this phenomenon as "facon de parlel", which in this discussion should be considered as the only will or wills which operate are those of the individuals who create the convention.

The way out to determine the meaning and the scope of a general word s called such as "commercial" or "public policy" can not be determine by it grammatical definition itself" because this effort will become meaningless, but by which legal order the above barbaric word should be legally interpreted, either according to national or international law. Of course, this writing highly recommend that the meaning and the scope of the word "public policy" should be determine and interpreted according to international law—with no any exception. Since we considering "uniformity legal order" is the ultimate purpose of international law in pursuing justice and legal certainty, the dichotomy between national and international public policy will be disappear. Hence, the above rules of the New York Convention 1958 should be construed on the province of monistic consideration on the relationship between national and international law.

2 Conclusion

Interpretation is the way to correct law when it was not or less correct based upon standard (principle, justice, fairness, morality). To avoid abuse of moral arguments, morality should be perceived as operational morality as well as morality as duty. Rejection to enforce foreign arbitral awards cannot relied upon the reasons that the awards contravene to the idea of morality as aspiration.

Within perspective of the nature of the relationship between national and international law, the New York Convention 1958 is obviously the adoption of pluralist or dualistic legal theory. The philosophical basis of this theory is subjectivism or egoism philosophy which emerging the State solipsism. The consequence is, in this matter, the general or evaluative words such as "foreign", "commercial", or "public policy" of the New York Convention 1958 should be interpreted according to national or municipal legal order, while at the same time positioning international law hierarchically as subordinate of municipal law.

To avoid the above unintended circumstances, the above rules of the New York Convention 1958 should be construed on the province of monistic consideration on the relationship between national and international law. The New York Convention 1958 is an international law which is factually created by the States, but since the substance contravene to the purpose of international law: "uniformity of nationals legal order", the convention is not international law.

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