

# *A Theoretical Study on Nationality and Cancellation of International Commercial Arbitration Awards*

**Beibei Guo**

*Tianjin University of Finance and Economics, Tianjin, China  
guobeibei202212@163.com*

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**Abstract:** The international commercial arbitration award refers to the award made by the arbitration tribunal in international commercial arbitration cases. The determination of the nationality of an arbitral award plays an important role in international commercial arbitration, and the determination of the nationality of an arbitral award also plays a decisive role in the implementation of international commercial arbitration awards. The determination of the nationality of an award in international commercial arbitration is usually based on the implementation region of the case. The court of the state with the nationality of the award can exercise the right to revoke and supervise the award results in commercial arbitration cases. The foreign country without the nationality of the award can only choose to recognize or refuse to implement the revocation and supervision. Once an arbitral award is revoked, the arbitral award will no longer be legally binding. And a foreign arbitral court that does not have the nationality of the award can refuse to recognize the enforcement of the arbitral award.

## **1. Introduction**

In international commercial arbitration, the nationality issue mainly refers to the issue of the awarding country of the arbitral award. It is a legal symbol of the award as a legal instrument of a specific country and also a part of the legal order of that country. "Nationality" has two meanings in international commercial arbitration. First, from the perspective of arbitration supervision, the courts of most countries only have the right to revoke their own arbitral awards. In modern international commercial arbitration practice, the mainstream of legislation is to take the place of arbitration as the criterion for judging the nationality of the award. In addition to the standard of place of arbitration, the determination of arbitration nationality mainly includes the legal standards and mixed standards applicable to the arbitration procedure. Due to the different standards for the determination of arbitral awards in different countries, there have been multiple nationality awards and stateless awards. Multinational award means that both the country where the arbitration is conducted and the country where the arbitration procedure is applied claim that the award is a domestic award, excluding the jurisdiction of the other side. A stateless award means that the award becomes stateless because the relevant countries have not claimed that the award is a domestic award. Whether it is a multinational award or a stateless award, it will bring a cumbersome procedural burden to the recognition, revocation and enforcement of the award, which is not conducive to the efficient handling of commercial disputes [1].

## **2. International determination criteria for international commercial arbitration awards**

### **2.1. Traditional standards**

According to the traditional standards, the criteria for determining the nationality of international commercial arbitration awards can be roughly divided into regional standards, procedural law standards, and mixed standards. Regional standards are mainly based on Article V. (1). e of the New York Convention: 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, which means that the nationality of an international commercial arbitral award is usually based on the final award made by the court of the country where the award is enforced. [2] Procedural law standards refer to whether the arbitral tribunal makes the award on the basis of its own procedural law or foreign procedural law, and whether the place of arbitration is in its own country is irrelevant. The intention is to expand the jurisdiction of domestic courts over international commercial arbitration cases. Germany used to be one of the main proponents of the standards of arbitration procedure law, arguing that an arbitral award made in accordance with German arbitration law in foreign territory should be regarded as a German award, thus exercising the right to revoke it. Mixed standards mean that only the award made in the country and applying the national procedural law is the national award. Either of the two standards is indispensable, otherwise it will not constitute a domestic award, but will be recognized as a foreign award for processing. For example, an arbitral award made by the application of foreign procedural law in the territory of the former Yugoslavia shall be regarded as a foreign arbitral award if it is not inconsistent with the mandatory rules of the former Yugoslavia. Therefore, in accordance with this provision, arbitral awards made outside the former Yugoslavia and awards made by the application of foreign procedural law are regarded as foreign awards. In addition, the nationality of international commercial arbitration awards also includes multiple nationality awards and stateless awards. Multi-nationality award refers to an award that excludes the other side from having jurisdiction over it because both the country where the arbitration takes place and the country where the law of the arbitration procedure applies claim that the award is its own domestic award. A stateless ruling refers to a ruling that becomes stateless because the relevant countries do not claim that it is their domestic ruling. The multiple nationality ruling and stateless ruling will make the ruling cumbersome and not conducive to the conduct of the ruling. To sum up, in the actual determination of nationality of international commercial arbitration awards, it is more objective and definite. However, in some cases, regional standards cannot play its due role, and the judgment principle should be based on the traditional standard and supplemented by the standard of arbitration procedure law.

### **2.2. Theory of non-domestic arbitration**

Non-domestic arbitration, is a new theory that has gradually developed from practice since the 1950s. This view holds that international commercial arbitration is the result of a voluntary contract concluded by the parties, and is not affiliated with any public institution or linked to a specific country, so there is no distinction between domestic and foreign awards. The legal effect of the non-domestic arbitration theory is not directly conferred by the domestic law of the country where the arbitration takes place. According to the procedures, its award cannot be directly controlled by domestic law, but depends on the degree of recognition of the national courts that recognize international commercial arbitration awards. The higher the degree of recognition, the stronger the legal effect. Even if the international commercial arbitration award is revoked by any of the national courts, the national court that enforces the award can still exercise the award and enforce it by virtue of the domestic arbitration law. The theory of non-domestic arbitration demonstrates the greatest respect for the parties to arbitration to choose the applicable law and arbitration rules independently. In traditional standard international commercial arbitration, the parties often choose procedural rules that are favorable to

themselves. Therefore, the choice of the place of an international commercial arbitration award is often neutral in terms of economics or contract content, which ultimately leads to uncertainty in the determination of the applicable law. In the actual international commercial arbitration, due to the different nationalities of the parties, their arbitration legislation and practice are also different, making the legal consequences more difficult to predict, which is one of the reasons why the non-domestic arbitration theory can be accepted and applied by most people [3]. For example, in the case of *Hilmarton Ltd v. Soci   Omnia de traitement et de valorisation (OTV)*, Hilmarton is a British company and OTV is a French company. The two parties have disputes during the performance of the contract for French companies to provide consulting services in Algeria. As the French company refused to implement the application of the British company, the dispute between the two parties evolved into international commercial arbitration and was handed over to the arbitral tribunal for award. The final award pointed out that according to Algerian law, the middleman was prohibited from paying commissions, so the contract was invalid. The British company was not satisfied with the award, so it filed a new appeal and submitted it to the Swiss court for a ruling, requesting the cancellation of the previous ruling, which was revoked by the State Court of Geneva on the grounds of arbitrariness. After the award was revoked, the British company re-initiated arbitration in Switzerland. The ruling held that the agreement to pay the commission did not violate Swiss law, and the contract between the two parties was valid. Since the British company has fulfilled its contractual obligations, the French company should pay the commission according to the amount agreed in the contract.

### **3. Theoretical study on setting aside of international commercial arbitration awards**

#### **3.1. Setting aside of international commercial arbitration award**

The setting aside of international commercial arbitration awards mainly includes the following situations: First, the parties to the arbitration agreement lose their capacity to act or the arbitration agreement is invalid due to some form. For example, according to *Clive M. Schmitthoff's Select Essays on International Trade Law*, international commercial arbitration requires the parties to the dispute to reach an arbitration agreement voluntarily. The conclusion of an arbitration agreement needs to be based on the capacity of both parties. Therefore, if one of the parties to the international commercial arbitration is incompetent, the arbitration agreement violates the principle of voluntariness of both parties, and the court can set aside the international commercial arbitration award.

Second, the award was set aside due to the procedural error of international commercial arbitration. According to Article 25(3) of the UNCITRAL Model Law on International Commercial Arbitration, If the international commercial arbitration process violates the normal procedure, the international commercial arbitration exceeds the authority, the international commercial arbitration procedure violates the agreement or violates the laws and regulations, etc., the arbitration proceeding will be deemed to have a procedural error. International commercial arbitration needs to be conducted fairly, and the international commercial arbitration award must also comply with the minimum procedural standards to ensure the smooth conduct of international commercial arbitration. The arbitration procedure conforms to the agreement of the parties. Therefore, if there is a procedural error in international commercial arbitration, the parties to international commercial arbitration have the right to request for setting aside of the award [4].

Third, the disputed items in international commercial arbitration are irrevocable. The disputed items in international commercial arbitration are sometimes irrevocable. The disputed items need to be stipulated by relevant laws and regulations, and the parties have no right to decide. In addition, different countries often have different regulations on arbitrable items in international commercial arbitration. Arbitrable matters in one country may be quite different from the situation in another. Therefore, the disputes in international commercial arbitration need to be determined in accordance with the relevant provisions of the law of the arbitrating country.

Fourth, if the international commercial arbitration award violates public policy, it needs to be revoked. According to Article 2 of the New York Convention, the revocation of international commercial arbitration awards in violation of public policy is the most common position that is recognized by almost all legal systems. Public policy refers to the last safety valve set by sovereign countries to safeguard their basic needs in social, political, economic, legal and regulatory, religious or moral aspects. Therefore, international commercial arbitration awards that violate public policy can be set aside.

Fifth, other situations in which the international commercial arbitration award has been setting aside. The Model Law on International Commercial Arbitration clearly provides for the cancellation of most international commercial arbitration awards. However, in some countries, there are some cases in which the Model Law on International Commercial Arbitration does not provide for the cancellation of awards, which are the cancellation of other international commercial arbitration awards. It mainly includes the international commercial arbitration award without specific reasons, the international commercial arbitration award that is not signed or the place of arbitration is not indicated as required, and the international commercial arbitration award has fraud, bribery or perjury [5].

### **3.2. The court with the right to revoke the award of international commercial arbitration**

According to the relevant provisions of Articles V and VII of the New York Convention: only the national courts that have the right to enforce the award and the states which own the law that the arbitration award relies on have the right to revoke the international commercial award. First of all, the national court that has the right to enforce the award, i.e. the court of the country where the arbitration is located, refers to the national court that has the final right to the award in an international commercial award. In the legislation and practice of international commercial arbitration, except for a very small number of countries, the arbitration laws of almost all countries stipulate that the country with international arbitration power in its territory has the right to supervise the award, that is, the court of the place of arbitration. The lower court of the country where the arbitration is located has the right to exercise supervision over the award according to the law at the request of the parties, it also has the power to revoke the international commercial arbitration award. For countries and regions whose domestic legislation adopts the "Model Law on International Commercial Arbitration", the court of the country where the award is made needs to exercise the power to revoke the country's award according to law [6].

Second, a state sometimes may have the power to set aside an arbitration award if the award is based on its law. It is generally believed that the state which owns the law that the award is based should be understood as the court of the country where the award is made in international commercial arbitration. The underlying laws and regulations are usually the New York Convention. Theoretically, if the parties agree to arbitration, they can choose to apply the laws of other countries. However, in the practice of international commercial arbitration, the laws of different countries may have different interpretations [7]. For example, in the case of *National Thermal Power Corporation v. The Singer Company*, the case was finally arbitrated in London. However, the Indian side stated that the law adopted in the arbitration of the case should be the Indian law. Afterwards, the two parties had a dispute over the choice of law, so the two parties started a dispute over which country's law to choose. In the end, the two parties decided to leave the decision to the British courts for ruling. The British court finally stated that since both parties arbitrated the case in the London court, the law applicable to the arbitration also needs to be adjudicated by English law. However, the Indian side believed that the Indian law should apply to the arbitration award made in London, England. If an arbitration award is made under an arbitration agreement governed by Indian law, even if the award is made in a country other than India, it will not take into account the provisions of the relevant Indian laws and regulations. Therefore, the lower court was requested to set aside the English arbitral award based on this opinion. The British court held that the award should be enforced in accordance with the British act, but the

Indian side requested that the award shall be revoked. In the end, the two sides fell into a dispute.

To sum up, in international commercial arbitration, the national court annulment principle of legal ownership of the award is rarely applied. Regardless of whether it is based on the laws of each country or the relevant provisions of the New York Convention, the national courts that have the right to enforce the award and the national court that has the right to use the law of the award have the right to enforce the provisions of the award in accordance with the law, which is likely to cause contradictions in practice. For example: in the case *National Thermal Power Corporation v. The Singer Company*, the Indian side did not agree with the decision made by the British court, so there was a situation where the British side agreed with the decision, but the Indian side requested the Indian court to revoke the ruling. The country that has the right to enforce the award is the United Kingdom, so the British courts have the right to revoke the award. Indian courts could hold that the arbitral award was not conducted in accordance with Indian law. Since the award was not rendered in accordance with the Indian law, the Indian side sought to annul the award.

#### 4. Conclusion

To sum up, the following conclusions can be drawn: the determination of the state of arbitration award in international commercial arbitration should take the arbitral region as the main standard and the applied law as the auxiliary. If the nationality of the parties is different, the legislation and practice are also different, and the non-domestic arbitration theory needs to be adopted. The cancellation of the international commercial arbitration award mainly includes the incapacity of the parties to the arbitration agreement or the invalidity of the arbitration agreement in a certain form, the invalidity of the award due to the error of the international commercial arbitration procedure, the irrevocability of the dispute in the international commercial arbitration, the violation of public policy and other situations of the cancellation of the international commercial arbitration award, etc. Both the national courts that have the right to enforce the award and the national courts that have the right to use the law may be possessed with the right to set aside the international commercial arbitration award.

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