Settlement of Conflict, Recognition and Enforcement of International Arbitral Awards

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ABSTRACT

Conflict exists by the day due to the existence of various human needs, greed and differences in one's background and upbringing. Differences are natural and even beneficial but must be kept in control so as not to cause any unnecessary repercussion. One must seek readiness and find amicable solution to their conflict in such a way which is less painful and non destructive.

Keywords: *settlement, conflict, Arbitral Awards*

Introduction

Arbitration is one of the established methods for resolving disputes between parties both at national and international level. As with arbitration generally, it is a creature of contract, i.e., the parties' decision to submit any disputes to private adjudication by one or more arbitrators appointed in accordance with rules the parties themselves have agreed to adopt, usually by including a provision for the same in their contract. The main reason that parties elect to have their international disputes resolved through arbitration is to avoid the uncertainties associated with litigation in national courts and the resulting need to enforce judgments in a foreign court.

International arbitral and judicial awards are of considerable importance, for they are an important "subsidiary means for the determination of the rules of law" as provided in Article 38 of the Statute of the International Court of Justice. They are also important from the point of view of the progressive development of international law, a task which Article 13 of the Charter places under the responsibility of the General Assembly of the United Nations.

The Meaning of the words 'Recognition and Enforcement' in the Context of International Arbitral Awards

Over the years, there have been many attempts to understand the meaning of the words 'recognition and enforcement' in the context of international arbitral award. These attempts have contributed significantly to the development of the international arbitral tribunal as one of tools for dispute settlement. In 1939, the permanent Court of International Justice in the ***Societe Commerciale de Belgique*** (1939) held that "recognition of an award as *res judicata*, which means nothing else than recognition of the fact that the terms of the award are definitive and obligatory".

It has also been suggested that 'recognition' is a purely 'defensive' measure, used to prevent a court from re-hearing a dispute already adjudicated upon in arbitration.

In ***Dallal v Bank Mellat*** (1986), the court treated an attempt by a party to re-litigate the decision of arbitral tribunal as "an abuse of the process of the court". **Luzzato** (1980) in his lectures entitled "International Commercial Arbitration and the Municipal Law of States", views

the word 'recognition' as signifying solely that an arbitral award is binding, whereas 'enforcement' implies "the capability of the arbitral award and that enforcement proceedings are initiated upon it". However, he acknowledges that the distinction "is devoid of practical significance" in the usual practice of international commercial arbitration.

Van den Berg (2005), on the other hand, sees the retention of the words "recognition and enforcement" in contemporary international conventions as nothing more than a matter of style.

The distinction between recognition and enforcement does however retain some significant meaning if taken in relation to an arbitral award rendered against a state - **R. Von Mehren** and **Croff** (1982), in their title, "International Arbitration Between Private Parties and Government: Treaty and Statutory Developments" point out that due to the possibility of a successful plea of sovereign immunity, which would block execution, it may be that an arbitral award rendered against a state will be 'recognised' by a state court as *res judicata* (final), but that 'enforcement' will not be possible.

The Importance of Recognition and Enforcement of International Arbitral Awards by National Legal Systems

On the question as to why the recognition and enforcement of international arbitral awards by the national legal system is thought to be so important, the answer has much to do with the practical desire to ensure that the arbitral award will be effective.

Park and **Paulsson** (1983), in their title, "The Binding Force of International Arbitral Awards", advocated the need for a legal system to legitimise the arbitrator's authority if the award is to be more than an unenforceable attempt at conciliation. This is true because it is often necessary to employ the enforcement mechanisms of a national legal system in order to make an award effective.

This point was reflected in the judgement of the English Court of Appeal in ***Delmia Dairy Industries Ltd v National Bank of Pakistan*** (1978). In this case, the Court of Appeal upheld that "any award against a person who is unwilling to obey it can be enforced only by the machinery of some system of law" (1978). In other words, an award can often be enforced only through the machinery of a national legal system unless a specific agreement of the parties has created an independent method of enforcement.

Reason for the Need of Mechanic of Recognition and Enforcement of International Arbitral Award

One of the best methods or mechanics of recognition and enforcement is the traditional sanction, i.e., a disciplinary proceeding or even expulsion. It has been reported that in over ninety per cent of ICC awards, compliance has been voluntary (Paulsson : 1983). Another reason is that in connection with private transnational commercial arbitration, the parties, usually two business entities, are more inclined to obey the award of the tribunal of their choice than they are to obey the decision of the court.

These considerations of free choice and the desire to protect one's reputation are one of the many reasons why states are more willing to have their disputes settled by international arbitral tribunal.

However, there are also some states for political and economic reasons do refuse to comply voluntarily with arbitral award and for this reason it does become necessary to institute domestic enforcement proceedings. If this happened, it would surely cause difficulties as most multi-state

litigations are enormously expensive and complicated. The **Libyan American Oil Co.** v **Government of the *Libyan Arab Republic case (1977)***, which has incurred enormously expensive multi-state litigation is a good example of the difficulties that may arise if a state refuses to comply with the terms of an award.

Analysis on International Convention on Recognition and Enforcement of International Arbitral Award

There are four main International Conventions which directly deal with the question of recognition and enforcement of international arbitral award:

1. Geneva Convention on the Execution of Foreign Arbitral Awards 1972.
2. New York Convention 1958.
3. The 1961 European Convention on International Commercial Arbitration, a
4. The World Bank sponsored Convention on the Settlement of Investment Disputes Between States and National of Other States 1965.

The Geneva Convention signatories cover most of the European states but were limited largely to the continental states of Europe. Article 1 of the Geneva Convention imposed on signatory states an obligation to recognise as binding and enforce "in accordance with the rules of the procedure of the territory where the award is relied upon" any arbitral award covered by the Protocol on Arbitration Clauses of 1923.

Under the 1923 Protocol, the parties had expressed their willingness to arbitrate between parties under the jurisdiction of different contracting states in relation to contractual disputes or other matters capable of arbitration (Art. 1). In Article 3 of the 1923 Protocol, the parties agreed "to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral award made in its own territory ...".

Here, the party wanting to obtain recognition of such arbitral award must prove that:

- the submission to arbitration had been valid under applicable law;
- the subject matter was capable of settlement by arbitration "under the law of the country in which the award is sought to be relied upon";
- the arbitral tribunal has been duly formed;
- the award was "final" in the country where it was made; and
- the enforcement would not be contrary to the public policy of the forum or enforcing state.

Article II (II) of the Geneva Convention 1972, on the other hand, authorised courts to refuse enforcement if:

- the award had been annulled where made;
- there was no due notice of the arbitration proceedings communicated to the party against whom the award was rendered; or
- the award dealt with matters beyond the jurisdiction of the arbitral tribunal.

Under Article III (III), the party challenging the award could also raise any other defense to enforcement based upon improper procedures. (An open ended list of reasons may be given here). However, the party would bear the burden of proof concerning such issues.

It can be said that the 1927 Geneva Convention, though providing a significant advance upon earlier state practice, is still inadequate as it still made enforcement of foreign arbitral awards very difficult for the party seeking to rely upon such an award.

A more significant advance was made with the signing of the New York Convention, 1958. **Troobhoff** and **Goldstein** (1977), in their title, "Foreign Arbitral Award and the 1958 New York Convention: Experience to Date in U.S. Court", pointed out that the New York Convention "represents the culminating efforts by such organizations as the International Chamber of Commerce to secure a multilateral treaty providing businessmen with effective and trustworthy methods of ensuring that the manner in which they have chosen to solve their transnational disputes will be effective".

Article V set out the ground upon which state refusal to enforce may be based. Article V of the New York Convention makes it clear 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 recognition and enforcement is sought, proof that one of the grounds for refusal is applicable".

Under Article V (1), recognition and enforcement of arbitral tribunal award may be refused if it is proved that,

1. the parties to the arbitration were not competent or that their agreement to arbitrate was not valid;
2. no proper notice of the appointment of arbitrators or of the arbitral proceeding was communicated to the party against whom the award is invoked;
3. the award rendered was beyond the jurisdiction of the arbitrators;
4. the composition of the tribunal was not in accordance with the agreement or with the law of the country where the arbitration took place or that the procedure were improper;
5. or
6. the award is not yet binding or has been set aside in the country where rendered (for whatever reasons).

In addition, Article V (2) provides that recognition and enforcement may be refused if:

1. the subject matters was not capable of arbitration under the law of the country where enforcement is sought; or
2. enforcement of the award would be contrary to the public policy of the enforcement jurisdiction.

As a whole, the New York Convention represent real progress in attempting to limit the grounds upon which national court might base their refusal to enforce a foreign arbitral award.

Later, in 1961, the European Convention on International Commercial Arbitration was drafted in part as a response to the perceived inadequacies of the New York Convention (1958). This Convention is open for signature or accession by member states of the Economic

Commission for Europe and by state admitted to the Commission in a 'consultative capacity' (European Convention Article X(1)).

The 1961 Convention limits the ground for refusal of enforcement by national court set out in the New York Convention, i.e. it restricted the application of Article V(1)(e) of the 1958 Convention.

On the other hand, Article IX(2) allowed refusal to be enforced based upon the quashing of an award by a court in the country where rendered only when award has been set aside for reasons enumerated in Article IX(1). This Article IX (1) set out six reasons for refusal to enforce, i.e.:

1. incapacity of the parties or a party to the arbitration agreement;
2. invalidity of the arbitration agreement under the chosen law, or failing a choice, under the law of the country where the award was made;
3. improper notice of proceedings to the party requesting the setting aside of the award;
4. impermissible extension of the award beyond the terms of the agreement to submit to arbitration (except where any such aspect of the award may severed, in which case the remainder of the award may stand);
5. improper constitution of the arbitral tribunal; and
6. inadequacy of the arbitral procedure due to non-conformity with agreement to arbitrate or the terms of the Convention.

In short, the approach of the European Convention on International Commercial Arbitration is more supportive of arbitral award than the New York Convention. Unfortunately, the 1961 Convention has restricted applicability. It has no application to majority of arbitral award between states and foreign private parties because a majority of these awards resulted from agreement between Western corporations and less developed countries, which is not a party to the Convention.

The ICSID (International Convention of the settlement of Investment Disputes) 1966, between states and national of other states is another convention which dealt directly with the question of recognition and enforcement of international tribunal award. Its Article, 54(1), *inter alia*, provides that:

> "each contracting state shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by the award within its territories as if it were final judgment of a court in that state".

This would mean that here the problem of recognition and enforcement under the other Convention should not arise.

Here, to gain recognition and enforcement of the ICSID award, all that is required is the presentation to the enforcing court of a copy of the award certified as authentic by the ICSID Secretary General (ICSID Convention – Article 54(2)).. Nonetheless, there are two limiting preconditions for the applications of the ICSID Convention. First, the state party to any contractual agreement must have ratified the Convention. So too the national state of the private party. Secondly, the parties to the contractual agreement must expressly have chosen to submit to the jurisdiction of ICSID and that intention must be shown in writing. Due to the above reason, in its entire history, only nine arbitral awards have been rendered under ICSID auspices - (ICSID., 1984 Annual Report).

Defence to Recognition and Enforcement of International Arbitral Award

Mainly, there are six main defences to recognition and enforcement of international arbitral award generally advocated by states, based on:

1. argument that the award needs to be binding;
2. argument that the award needs to be foreign;
3. Domestic Public Policy justification;
4. Sovereign Immunity defence;
5. Act of State Doctrine and
6. 'forum non-convenient' principle.

From the argument that the award need be binding, Harnic suggested that the word's 'binding' has been universally accepted to mean that the award in the rendering country is not open to arbitral or ordinary judicial review, irrespective of the admissibility of an action to set aside. So, a 'binding award' would then mean any award that imposes definitive obligations upon the parties and that it is not open to further arbitration or judicial appeal. Nowadays, most state has adopted a more pro-enforcement interpretation.

Most Civil Law Countries of Continental Europe had refused the enforcement of an award that they deemed to be domestic even if it had been rendered in another country.

The same positions have been taken by the U.S. court in ***Bergeson v Joseph Muller*** **Corp** (1983), when they held that only arbitral award rendered outside the United States could be enforced by the U.S. Courts under the New York Convention. This posed problems where the award was rendered in another state could not be enforced due to delocalized procedures adopted by states.

This problem has been settled in ***Society Europeene d'Etudes et d'Entreprises v Yugoslavia*** (1975), and in the ***Society Europeene d'Etudes et d'Entreprises. C. Republigue de Yougoslavie*** (1985) where the courts take the position that "the New York Convention applies to 'national' awards "made ... in another contracting state". Here neither the requirement that an award be 'binding' nor the requirement that it be non-domestic or 'made in' another country would have the effect of precluding enforcement under the New York Convention.

On the issues of public policy justification to refuse recognition and enforcement of international arbitral award, it was well settled in a number of cases.'

In **Persons and Whitmore** (1975), *"Overseas Co. v Society Generales de L'industrie du papier"*, the U.S. court held that

> "The New York convention's public policy defence should be construed narrowly. Enforcement of foreign arbitral award may be denied on this basis only where enforcement would violate the forum state's most basic notion of morality and justice" (1975).

This position is also taken in ***Mitsubishi Motor Corp v Soler Chrysler-Plymouth Inc*** (1985), where the U.S. Supreme Court holds that:

> "An international arbitral award could be enforced even if it dealt with questions of U.S, antitrust law",

thus, reversing a public policy exception to enforcement. These decisions illustrate the contemporary trend which limits the public policy justification for non enforcement to fundamental issues of procedural fairness. Recent decision of the courts, in India, France, Switzerland, Germany and the U.K. have all emphasized the need to restrain in imposing notion of municipal public policy upon international arbitral procedures.

Some states like the U.S. and U.K. have allowed exception to recognition and enforcement base on "State Immunity justification". (United States Foreign Sovereign Immunity Act & U.K. State Immunity Act 1978).

In France, in the **Liamco case (1977)** where the arbitral award was first brought to the *tribunal de instance de Paris,* the President of France granted state immunity status and the court recognised the award as valid and binding but yet unenforceable, at least against the Libyan property, dedicated to sovereign as opposed to commercial ends.

In ***Ipitrade International** SA v **Federal Republic of Nigeria*** (1978), the U.S. Court held that a state :

> "agreement to adjudicate all disputes arising under the contract in accordance with Swiss Law and by arbitration under International Chamber of Commerce Rules constitutes a waiver of sovereign immunity".

This decision had been followed in other U.S. cases, including those of **Maritime International Nominees Established v Republic of Guinea** (1981), **Libyan American Oil Co. v Socialist People's Libyan Arab Jamahiriya** (1980) and ***Birch Shipping Co. v Embassy of United Republic of Tanzania***.(1980).

In ***Eurodif Corp** v **Islamic Republic of Iran*** (1984), the French Court held that "a state could cot claim immunity from executive if the underlying transaction was of a commercial nature and the assets subject to execution related to that transaction". Here it would be useful to look at the nature of the transaction because it would help to determine whether the assets sought to be enforced against are 'commercial' or really 'sovereign'. Accordingly, this would help in determining enforcement jurisdiction. All these decisions point out that a state initial agreement to arbitrate now constitutes a complete waiver of sovereignty immunity, even at the stage of enforcement.

In ***Duke of Brunswick** v **King of Hanover*** (1844), the U.S. Supreme Court elaborates of the Act of State doctrine:

> "Every sovereign state is bound to respect the independence of every other state, and the court of one country will not sit in judgement on the acts". (6 Beau. 1: 1844).
>
> However, this position has been qualified by the U.S. Federal District Court in ***National American Corp** v **Federal Republic of Nigeria***. (1978)

In this case, the U.S. Federal District Court pointed out that the Act of state doctrine should not viewed as a 'talisman', affording 'blanket protection' from all consequences flowing from any particular state action.

This view was generally accepted by the U.S. Supreme Court in the **Sabbatino Case** (1982) In this case, the U.S. Supreme court held that the Act of State Doctrine was compelled by neither international law nor the constitution. Its continuing validity depends on its capacity to reflect the proper distribution of function between the judicial and political branches of the government on matters bearing upon foreign affairs.

This U.S. Supreme Court approach was borrowed and reflected by the English Court in ***Ruttes Gas and Oil. v Hammer***. In this case, the House of Lords, held that the courts could refuse to render judgement on act of foreign states when there are "no judicial or manageable standards". If there are manageable judicial standards to enable a court to evaluate state, conduct, standards which may be derived, presumably, from international custom as well as from express treaty commitments, a national court is under no obligation to refuse to review a foreign act of state. This House of Lords decision represents a more flexible approach in the development of the act of state doctrine.

'Forum non-convenient' principle is another defence which may be used by a company or court in not recognizing and enforcing the award of the international tribunal. Under this principle of 'forum non-convenient', it can be argued that such court is not the best forum to decide a particular case. This defence based on 'forum non-convenient' principles had been used in the **Bhopal Case**, a case concerning a claim made by some individual victim of the Bhopal Union Carbide disaster in India. The proceedings were files in the New York court. The court ruled that the New York court was not a proper forum to decide the matter, as all the evidence and harm happens in India, and the Indian Court is better suited to decide the case.

One way to get around the problem of limiting access and problems of recognition and enforcement of international arbitral awards is through treaty or convention making equal access to court by state party. One good example is the Nordic Convention 1934 on the Protection of Environment in Scandinavia, which allows individual state to bring its case before the court of another state party to the convention. Another example is the Brossal Convention, which allows EU individual states to take judgment from another state for other states to enforce.

Conclusion

There are many advantages and disadvantages of arbitration. Parties often seek to resolve their disputes through arbitration because of a number of perceived potential advantages over judicial proceedings:

1. When the subject matter of the dispute is highly technical, arbitrators with an appropriate degree of expertise can be appointed.
2. Arbitration is often faster than litigation in court.
3. Arbitration can be cheaper and more flexible for businesses.
4. Arbitral proceedings and an arbitral award are generally non-public, and can be made confidential.
5. Because of the provisions of the New York Convention 1958, arbitration awards are generally easier to enforce in other nations than court judgments.
6. In most legal systems, there are very limited avenues for appeal of an arbitral award.

However, some of the disadvantages of arbitration can be that:

1. An arbitration agreement are sometimes contained in ancillary agreements or in small print in other agreements, and consumers and employees sometimes does not know in advance that they have agreed to mandatory binding pre-dispute arbitration by purchasing a product or taking a job.
2. If the arbitration is mandatory and binding, the parties might waive their rights to access the courts and have a judge or jury decide the case.
3. In some arbitration agreements, the parties are required to pay for the arbitrator, which adds an additional layer of legal cost that can be prohibitive, especially in small consumer disputes.
4. In some arbitration agreements and systems, the recovery of attorneys' fees is unavailable, making it difficult or impossible for consumers or employees to get legal representation; however most arbitration codes and agreements provide for the same relief that could be granted in court.
5. If the arbitrator or the arbitration forum depends on the corporation for repeat business, there may be an inherent incentive to rule against the consumer or employee.
6. There are very limited avenues for appeal, which means that an erroneous decision cannot be easily overturned.
7. Although usually thought to be speedier, when there are multiple arbitrators on the panel, juggling their schedules for hearing dates in long cases can lead to delays.
8. In some legal systems, arbitral awards have fewer enforcement remedies than judgments; although in the United States, arbitration awards are enforced in the same manner as court judgments and have the same effect.
9. Arbitrators are generally unable to enforce interlocutory measures against a party, making it easier for a party to take steps to avoid enforcement of an award, such as the relocation of assets offshore.
10. Rule of applicable law is not necessarily binding on the arbitrators, although they cannot disregard the law.
11. Discovery may be more limited in arbitration.
12. The potential to generate billings by attorneys may be less than pursuing the dispute through trial.

As a whole due to the vast spectrum of conflicts which exist at international and national level, and include multiplicity of areas, factors and issues, domestic, social, commercial, political, economic, religious, racial, human right and humanity, constitutional and sovereignty, indigenous and environmental, one may have to resort to multiple courses of action in order to come to an amicable solution, and not only dependent an arbitration alone. This may include also resort to negotiation, mediation and good offices, inquiry, conciliation, domestic law court, advisory opinion, The International Court of Justice, Settlement by Regional Machinery and Settlement by The United Nation, be it the General Assembly, the Security Council or various other United Nation entity.

One may have to be carefully selective and sincere in the name of finding a lasting solution which is not only amicably accepted but also less painful and non-destructive.

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