

REFUSING RECOGNITION AND ENFORCEMENT ON GROUNDS OF PUBLIC POLICY AND NON-ARBITRABILITY IN KUWAIT

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Abstract

Foreign arbitral awards should be recognizable and enforceable. However, this is not always the case; they are recognizable and enforceable in some countries but not in others. Those countries that recognize and enforce awards are mostly developed countries, whereas those which do not are mainly developing countries. This study compares and contrasts the recognition and enforcement of foreign arbitral awards in Kuwait with a view to discovering why its recognizable and enforceable. Three factors determining whether or not foreign arbitral awards are recognizable and enforceable are identified in this study. They are the availability and adequacy of the legal framework, the attitude of the business community, and the attitude of the courts. The inquiry, accordingly, focuses on an examination of those factors in both countries. The examination reveals that the third factor is the determining element regarding the recognition and enforcement of foreign arbitral awards.

Introduction

Economic globalization has boosted international trade not only among the major trading countries but also among many other parts of the world. Consequently, parallel to this, commercial disputes have increased tremendously in recent years. There are several means that can be chosen by businessmen to settle their disputes, such as negotiation, mediation, conciliation, and arbitration as well as court adjudication. In many cases, international commercial disputes can be very complex; the facts are frequently difficult to identify, and the legal issues involve not only matters of substance but also international procedures. As well, such disputes frequently cannot be resolved by non-binding means¹. For businessmen who want their dispute settlement to be legally binding, arbitration and judicial settlement are the only appropriate choices.

Nevertheless, it has become a trend that international businessmen often prefer arbitration because they perceive it as having more comparative advantages than judicial settlement. The resolution of disputes in cross-border transactions is a main concern to the business community. Parties to an international commercial transaction are often wary of being forced to litigate a dispute in the other party's home country, under unfamiliar laws². One of the most suitable alternatives to overseas litigation is arbitration. Arbitration is a process by which parties agree to submit a dispute to a neutral third party, namely an arbitrator or an arbitral tribunal. The arbitrator decides the dispute by rendering a binding and

¹ Bom, G., International Commercial Arbitration, 2nd ed. (*The Hague: Kluwer Law International, 2001*). Pp.123

² Coe, J., International Commercial Arbitration: American Principles and Practice in a Global Context (New York: *Transnational Publishers Inc., 2007*). Pp.98

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final award. One of the significant advantages of arbitration over traditional litigation is the lack of appeal on the merits of the case.

The parties' dispute is resolved in a single instance. Moreover, the "finality" of an arbitral decision brings with it the corresponding advantages of speed and efficiency. Arbitration is, however, not a perfect dispute resolution mechanism. Arbitrators, like judges, commit mistakes. The risk of receiving an erroneous award understandably preoccupies the parties to an international transaction, particularly when the pecuniary amounts in dispute are considerable³. The main characteristic of the grounds for refusing recognition or enforcement of is that they constitute an exhaustive list, meaning that there no more reasons by which courts or the respondent could justify a refusal of enforcement of an award. In other words, under the Convention, courts are forbidden to refuse recognition or enforcement of awards under grounds that have not been established in Article V⁴.

Although an ideal uniform interpretation and application of the New York Convention by national courts is understandably a difficult goal to achieve, the signatory countries have generally been consistent with the provisions and goals of the Convention. However, as it will be shown, one of the unfortunate precedents endangering the Convention's purposes has been emerging in the Kuwait, where courts have allowed parties to contract for additional grounds for refusing enforcement of awards, beyond those contemplated in the New York Convention and in domestic arbitration statutes.

Another fundamental principle of the New York Convention is that there is to be "no review of the merits" of arbitral awards. Indeed, the courts' scrutiny does not extent to the substance of arbitration. An arbitrator's error of law or fact is not a ground set out in the exhaustive list of Article V and, therefore, an assessment of the correctness of the arbitrator's findings is unwarranted. This restriction responds to the basic principle of international commercial arbitration which states that courts cannot interfere in the substance of arbitration, since that would denaturalize this alternative and independent dispute resolution mechanism. Furthermore, as it will be shown, a review of the merits would undermine and, in some cases, eliminate the advantages of arbitration that the parties sought by entering into an arbitration agreement⁵.

Discussion

Under the New York Convention, the role of the enforcement courts is extremely limited. Their main task is to verify whether an objection alleged by the respondent in virtue of the grounds listed in Article V (1) is justified or whether the enforcement of an award would violate the public policy of Kuwait, according to Article V (2)⁶. Any scrutiny beyond these limits would be unjustifiable. The non-review of the merits of arbitral decisions has been recognized and respected by courts worldwide. There are only a few exceptions where a substantive review of awards has been allowed based on statutory provisions. For instance, the Kuwait law expressly permits courts to review awards under certain conditions.

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³ Domke, M., *The Law and Practice of Commercial Arbitration* (Illinois: Callaghan & Company, 2008). Pp.23

⁴ Fouchard, Ph., Gaillard, E., & Goldman B., *Fouchard Gaillard Goldman on International Commercial Arbitration (The Hague: Kluwer Law International, 1999)*. Pp.88

⁵ Redfem, A. & Hunter, M., *Law and Practice of International Commercial Arbitration*, 3rd ed. (London: Sweet & Maxwell, 1999). Pp.89

⁶ *Ibid*7

In the Kuwait, parties have attempted to empower courts to review the merits of arbitral awards by expanding the scope of judicial review by contract, beyond the boundaries established in the New York Convention and those elaborated in national arbitration statutes. As previously noted, Article V of the New York Convention establishes the only grounds under which a court may refuse enforcement of a foreign arbitral award. This list of exceptions for enforcement is exhaustive, meaning that there are no more reasons to justify a refusal of enforcement of an award.

These grounds, although regretted by some, are generally limited to the recognition and enforcement of foreign awards and not applicable to setting aside procedures. Article I restricts the applicability of the Convention “to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought”⁷. However, as will be discussed later, the Convention may also be applied in Kuwait where the award was rendered if such an award is considered as “non-domestic” under the applicable national law⁸.

Since the New York Convention does not stipulate the grounds for setting aside awards, the signatory countries can freely establish their own defences in their national laws. The underlying rationale of this rule is to respect the authority each Kuwait has in controlling proceedings within its territory. It also responds to the belief that that the courts of the place of arbitration are the ones best suited to decide over the regularity of arbitration. This evidences the responsibility the signatory countries have to implement national arbitration laws that, ideally, are consistent with the international treaties. It also confirms the vital role of courts in applying correctly such domestic laws.

One of the purposes of the contractual provisions seeking to create heightened judicial review is precisely to insert a ground into the setting aside procedure, namely “arbitrator’s errors of law or fact”. Two correlative effects would result from such an alteration: reduced possibilities to enforce the award outside the Kuwait -which is particularly significant when the parties’ assets are located in a second Kuwait - and enhanced possibilities to challenge the award for the party opposing enforcement.

The above remark is even stronger if the “denationalization” theory is adopted, under which an award ceases to exist once it has been annulled. Allowing parties to contract on additional grounds for setting aside awards is undesirable for the international enforcement regime. It would amount to allowing parties to alter the standards predetermined in international treaties. Courts should apply the national law strictly, setting aside awards only on prescribed grounds.

In sum, expanding the scope of judicial review of arbitral awards contravenes the New York Convention’s principle that dictates that the grounds for refusal of enforcement are exhaustive. Contractual expansion of review contradicts this basic assumption. Finally, provisions for heightened judicial review not only defy the New York Convention’s principles, but also frustrate its main goals of neutrality, certainty, and predictability in international arbitration.

Non-Arbitrability in Kuwait

One of the primary reasons why parties enter into arbitration agreements in international transactions is the high degree of mistrust they have of the other party’s judicial system. By resorting to arbitration they wish to “assure that any disputes are resolved in a neutral forum rather than the national courts of one of the parties”. The New York

⁷ Ibid6

⁸ Huleatt-James, M. & Gould, N., *International Commercial Arbitration: A Handbook*, 2nd ed. (London: LLP, 1999). Pp.213

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Convention's goal in this regard was to provide the business community with an appropriate legal framework which helps maximize the certainty that commercial disputes will be resolved in a relatively neutral and predictable forum.

It seems, however, that such neutrality and predictability may be jeopardized if provisions for expanded judicial review are upheld. Firstly, as noted, by sanctioning such provisions, additional grounds for vacating awards are introduced, which distorts the international award enforcement picture. The predictability in arbitration would thus be diminished. If courts accept that parties may add grounds for setting aside awards, "then there are no limits to what may be super-added to traditional arbitration". Secondly, by these provisions courts from the Kuwait of one of the parties would be entitled to review the arbitration.

As a result the other party may find itself relitigating the dispute in the courts of the adversary, which is precisely what the parties sought to avoid by entering into an arbitration agreement. Therefore, heightened judicial review of arbitral awards endangers the New York Convention's goals of assuring neutrality⁹, certainty and predictability in international arbitration. As one commentator believes, allowing parties to contract on judicial scrutiny beyond the established international standards "would serve as a mechanism to circumvent the goal of the New York Convention" of unifying standards of award enforcement in order to promote international trade and commerce.

Permitting parties to expand the scope of judicial review by contract would inevitably insert more uncertainties and obstacles into an already complex award enforcement system. This leads us to fear that decisions upholding provisions for expanded judicial error of law were to be enforced in Kuwait. Countries like Kuwait, for instance, that supports the "denationalization" theory, which separates the existence of awards from the law of the Kuwait of origin, would almost certainly enforce the award because such annulment would not have effect in Kuwait¹⁰. As Kuwait law forbids review based on errors of law or fact, such an award could be enforceable in Kuwait despite its annulment

Secondly, the fact that parties contract for a judicial appellate review of an arbitration, empowering courts to review the arbitration merits as if it was a mere trial, raises the question whether their agreement may be still considered as an agreement to differently: "if the parties accept arbitration on the condition that issues of law and fact remain subject to court review, can we hold we have a consent to arbitrate..¹¹?"

Courts may find the arbitration denaturalized by these provisions and, therefore, may deny recognition of such a "hybrid" agreement in application of Article II of the Convention. This leads also to a third problem. Since clauses for expanded judicial review might not be enforceable under the New York Convention, the question whether the remaining part of the arbitration agreement is still valid arises¹². In fact, some courts have already addressed this issue and concluded that such a principle is not applicable. It further observed that "the provision for judicial review of the merits of arbitration award was so central to the arbitration

⁹ Brunet, E., "Replacing Folklore Arbitration with a Contract Model of Arbitration" (1999) 74 Tul. L. Rev. pp.39.

¹⁰ Varady, T., Barcelo, J., & Von Mehren, A. T., *International Commercial Arbitration* (St. Paul: West Group, 1999). Pp.12

¹¹ Chemick, R., "Mix and Match: *Creating Tailored Dispute Resolution Clauses*" (1996) SB41 ALI-ABA 195.

¹² Van den Berg, A. J., *The New York Convention of 1958 (The Hague: Kluwer Law and Taxation Publishers, 1981)*. Pp.89

agreement that it could not be severed". Finally, the Court referred to the corresponding arbitration agreement as an "illegal" contract¹³.

The unfortunate result of a complete invalidation of an arbitration agreement is that, because of the existence of an invalid clause for expanded review, the parties will have to resort to litigation, which they obviously tried to avoid by entering into an agreement to arbitrate. Fourthly, parties who contract for expanded judicial review empower courts to review the arbitration merits and also to vacate, modify or correct the award in case the arbitrator's conclusions were found to be erroneous. However, modification or correction of awards is traditionally possible only on technical matters, not on substantive aspects. These issues make evident that allowing parties to expand the scope of judicial review of arbitral awards by contract is counterproductive for international arbitration.

This practice will only result in more confusion and uncertainty. Contracting for heightened review could subject the parties to the worst of the scenarios. Their arbitration agreement could be rejected recognition and the resulting award could be refused enforcement for not complying with the New York Convention's standards. Although the Kuwait courts that upheld provisions for expanded review relied heavily on the party autonomy principle and pro-arbitration public policy, one should question whether the courts' decisions really are pro-arbitration in the long run.

Despite the above-mentioned values of arbitration the trend of businessmen to favor it, the level of acceptance of developed and developing countries, towards such an alternative dispute resolution is to some extent different. Their attitudes as well as general policies and laws of the countries concerning international commercial arbitration are different¹⁴. Parties from developed countries generally are strong proponents of arbitration clauses in commercial contracts, in contrast with the parties from developing countries who are still reluctant to submit to binding international arbitration. Some believe that the current proliferation of clauses for expanded judicial review demonstrates the mistrust parties to international commercial transactions still have toward arbitration¹⁵.

According to some commentators, this is a reaction to the "lawlessness" that affects the reliability of this dispute resolution method. The fact that an arbitral award cannot be appealed on questions of law or fact has supposedly forced parties to broaden the scope of judicial review by contract, so that an award can be vacated on grounds of an arbitrator's erroneous ruling. The concern of the business community is understandable. As commercial transactions grow in size, amounts, and complexity, the desire for more predictable results in arbitration is justified.

However, contractually expanded review does not seem to be the best way to cope with the uncertainty in arbitration. In fact, it might only bring more insecurity and intricacy to the resolution of commercial disputes. At first sight, clauses for heightened review seem to make arbitration an ideal dispute resolution method, which would combine arbitration with judicial examination, so that a fair and more predictable decision can be reached¹⁶. But, as will be shown, the insertion of these clauses into arbitration agreements is counterproductive. The parties may find themselves litigating in courts when what they bargained for was to resolve their dispute in arbitration. Furthermore, the advantages of arbitration that usually motivates parties to choose arbitration would be diminished, if not completely eliminated.

¹³ Cullinan, T., "Contracting for an Expanded Scope of Judicial Review in Arbitration Awards" (1998) 51 Vand. L. Rev. pp. 395.

¹⁴ Craig, W. L., "Uses and Abuses of Appeal from Awards" (1988) 4 Arb. Int'l 174. Pp.34

¹⁵ Ibid8.

¹⁶ Ibid1

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Conclusion

In conclusion we can say that, Arbitration, as an alternative dispute resolution mechanism, has advantages over traditional litigation due to its neutrality, efficiency, speed, and finality. Traditional litigation is commonly characterized by high cost, excessive formality and long delays, while “arbitration is often described as everything that civil litigation is not”¹⁷. Not only has the business community benefited from the advantages of arbitration, but the judicial system as well, since this alternative forum reduces the heavy case load of the courts. Arbitration and litigation are different and independent methods of adjudication. The judicial control performed over arbitration does not affect its nature; to the contrary, supervision of awards constitutes an essential characteristic of arbitration.

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¹⁷ Ibid4