JUDICIAL REVIEW OF ARBITRAL AWARDS IN INTERNATIONAL ARBITRATION.

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Abstract. The situation in comparative law with regard to the judicial review of arbitral awards need a harmonization of different legal systems and uniform judicial interpretation in practice with regard to the scope of judicial review of arbitral awards. Expansion of judicial review so that the merits of the case, even to the extent relating to a point of law, could be revisited by national courts seems to be undesirable. Judicial review of the merits of arbitral awards by national courts clearly runs the risk of impinging upon arbitration as an effective method of dispute resolution. Parties to an arbitration agreement can no longer be confident that an arbitral award, once rendered, is final. Thus, an appropriate model of judicial review seems to lie in the recognition of the necessity of judicial review, but basically limiting it in scope to procedural irregularities and violation of due process. It follows that the only recourse permitted is setting aside, and this recourse can only be relied upon in accordance with the norms of the applicable law on arbitration, which usualy sets a list of grounds for setting aside and defines the time limit within which a motion to set aside may be submitted. Rights of appeal and review in a jurisdiction can seriously frustrate the advantages of international arbitration.

Keywords: arbitral awards, state courts, court judgment, judicial review, appeal of arbitral awards, regognition and enforcement of arbitral awards, conflict of jurisdiction, conflicting decisions, judicial scrutiny, annulement of awards, substantive law, procedural law, anti-arbitration injunction, extraterritorial jurisdiction.

Most legal systems now view international arbitration favorably and recognize awards as being similar in authority to court judgments. However, the international enforceability conferred on arbitral awards by national legal systems would be inconceivable without some form of review of the content of the award and of the conditions in which it was made.

Since there is no institutional system of review, aggrieved parties are forced to appeal arbitrators' decisions in national courts. Judicial review has been limited somewhat by statute and international accord in order to further the objective of arbitration which is to enable parties to resolve disputes promptly and inexpensively.

Arbitral awards are reviewed by the courts when a party applies for their recognition and enforcement, or when actions are brought to set them aside. The necessity of judicial scrutiny of the award is self-evident when the enforcement of the award is sought. A national court, scrututiny if the award is free from procedural irregularities and that the recognition of the award would not endanger the public policy of the place where the enforcement is requested.

The review of awards occurs both at the seat of the arbitration and in all countries where enforcement of the award is sought. The fact that an award is made in a state will suffice to give to this the courts of this state jurisdiction over an action to set it aside.

It is widely accepted that the courts of the seat of the arbitration have exclusive jurisdiction to hear any action to set an award aside, within the conditions and limits determined by the law of that country, whereas countries in which enforcement of

the award is sought can only agree or refuse to give effect to it in their territory [1].

State courts the best-suited for judicial review are the courts of the place where the arbitral proceedings are held i.e the arbitration seat. The possibility of judicial scrutiny of an arbitral award at the seat of arbitration enhances the integrity and efficiency of the arbitral proceedings: it reduces the risk of the rendering of arbitrary decisions by some arbitrators, increasing the confidence and trust of the business community in international arbitration. It furthers respect for arbitral awards abroad since it is understood that the award has been rendered subject to judicial scrutiny at the place where it was made.

Furthermore, from the arbitrator's point of view, it will significantly decrease the risk of any improper conduct on the part of arbitrators, and from the point of view of victims of flawed arbitral awards, it will considerably decrease the risk of being subjected to almost endless enforcement actions in different jurisdictions, as many jurisdictions will respect a lawfully rendered judicial decision setting the award aside.

From the point of view of the domestic legislature, the jurisdiction of the courts to hear all actions to set aside international awards made in a country is based on the idea of providing those involved in international commerce with an arbitral forum which takes a particular view of the control which the courts should exercise over awards.

The criterion relied on by courts to uphold their jurisdiction to set aside an arbitral award is usually the fact that the award was made on their territory. This simple geographical criterion has been adopted by the UNCITRAL Model Law, which provides in its Article 34 that an award can be set aside, in a limited number of cases derived from the New York Convention, by the courts specified by each country in Article 6 as having jurisdiction to hear the main issues arising in connection with the arbitral proceedings.

Article 1, paragraph 2 further provides that those courts have jurisdiction "only if the place of arbitration is in the territory of the country in question.

Most modern arbitration laws also use the seat of the arbitration as the factor determining which awards can be the subject of an action to set aside before the local courts. The undisputed inference from this provision is that: (i) the national courts of the seat have jurisdiction over an action for annulment of awards rendered within their territory; and (ii) those courts are not empowered to assume jurisdiction over annulment of awards rendered outside their territory.

The advantages of this solution, that is, the exclusive jurisdiction of the courts of the seat, are numerous, among which one may refer to predictability and avoidance of any conflict of jurisdictions. It is clear that if only the courts of the seat exercise jurisdiction over actions for annulment of arbitral awards, this will provide the required degree of predictability for all the parties concerned, which will, in itself, result in security and stability. Moreover, no conflict of jurisdictions, positive or negative, which is the potential source of conflicting decisions or so-called floating awards, would ever arise.

Judicial review at the arbitral *situs* enhances efficient control of aberrant arbitral behavior, promoting confidence within the commercial community. Situs review also enhances efficient arbitration by furthering respect for awards abroad. Without a right to have procedurally unfair awards vacated at the *situs*, victims of injustice must prove an award's illegitimate character de novo wherever it might be presented for recognition. However, there are domestic arbitration laws, which admit the rewiew of arbitral by courts other than the enforcement court.Although the Model Law has provided for the exclusive jurisdiction of the courts of the seat over any annulment action, the heterogeneity stems from the fact that some countries have not adopted the Model Law in their national legislation and some others, though adopting or being under the influence of the Model Law, have followed other regimes with respect to the issue of jurisdiction, This situation leads to extraterritorial jurisdiction of national courts over the annulment of arbitral awards. Such regimes normally allow national courts to exercise jurisdiction over an arbitral proceeding held, or the annulment of an award

rendered, outside their territory. The extraterritorial jurisdiction is, in some cases, exercised directly by assuming jurisdiction over an action to set aside; and, in some others, indirectly, in the form of an 'anti-arbitration injunction' preventing an arbitral proceeding from going forward, or an 'anti-enforcement injunction' precluding the winner from enforcing the award in other territories.The concurrent exercise of jurisdiction by the courts of different states on the same matter is itself a source of problems, among which the risk of conflicting judgments is the most notable.

For example, were they to retain jurisdiction on the basis of the procedural law, the courts of others states might set aside awards held valid by the courts of the seat of the arbitration. Accepting a more universally-recognized criterion for determining jurisdiction, such as that of the seat of the arbitration, avoids those difficulties.

Concerning the scope of judicial review, most states have restricted the scope of judicial review to procedural irregularities and violation of public policy. However, the need of extension of review of an award in the respect of international public policy is obvious, due to the extension of the domain of arbitrable matters,

The nature of the review performed by the courts implies that they should be entirely free to examine the circumstances of the case, both legal and factual. That is the necessary corollary of the liberalism of the courts as regards the arbitrability of the dispute in particular. It therefore would seem appropriate for the trust placed by the courts in the arbitrators as a matter of principle to be accompanied by a subsequent review of the award which prevents the arbitrators from avoiding censure by the courts through careful reasoning based on the facts alone.[2]

The courts will not conduct an extensive review of an award to check that it does not violate public policy, in accordance with the principle prohibiting substantive review.The judge reviewing the award should not substitute his or her own findings to those made by the arbitrator.Indeed if a judge examines all the legal and factual elements of the case to assess whether the award in contrary to the public policy or not, this does not necessarily mean that he or she is carrying out a substantive review of the award. [3]

In certain jurisdictions the courts may review the merits of the dispute, when the annulment of the award is shougt. Thus, as for instance England, the scope of judicial review, in addition to scrutinizing the procedural integrity of the arbitral award, has been extended to a right to request the substantive review of the award's holdings on the legal merits.

A few jurisdictios permit more extensive review of the merits of international arbitration awards. They provide for judicial review of arbitral awards on the same grounds that are available with regard to first instance court decisions [4] Excessive intervention of national courts, even under the guise of achieving substantive fairness, is in contradiction with the objective expectation of the parties who submit their disputes to arbitration, as opposed to courts, and there seems to be no justification to deny the parties their contractually agreed upon expectation.

Certain arbitral regimes, for some theoretical and practical reasons, advocate the idea of elimination of judicial review by the courts of the seat by the mandatory elimination of judicial review and voluntarily exclusion through an agreement the possibility of judicial scrutiny by the courts of the seat.The idea of eliminating the judicial control of international arbitral awards was first introduced and experienced, for a certain period of time, in Belgian law, under which the courts were prevented from any judicial scrutiny of the award in arbitrations taking place in Belgium, as the seat of arbitration, if none of the parties was a national or resident of Belgium.

The elimination of judicial review, and reserving any judicial control only for the enforcement courts, has serious drawbacks for the international business community and may also be regarded as a defect for an efficient regime of international arbitration.

If, for example, an award is vacated on a ground of local law that would not be a valid ground to prevent enforcement under the Convention, the award in most cases will still not be enforced because it was vacated in the

place where made.

Nonetheless, the Convention's provisions make possible the enforcement of a vacated award. First, Article V(1) (e) states that enforcing courts "may" deny enforcement of a vacated award, thereby appearing to allow discretion to enforce an award even if it has been set aside in the place where it was made.'

Second, Article VII provides that the provisions of the Convention "shall not ... deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.'

This clause, referred to as the "more favorable right" provision, allows a party to take advantage of any local law of the enforcing jurisdiction that would provide a greater right to enforcement than the rendering state. Finally, parties should be given options either to contract out of all review or to contract into review on the merits of the dispute. While in domestic transactions good arguments can be made for uniform arbitration regimes, the special needs of international business call for greater freedom of contract.

Under the arbitration laws, the right to challenge an award can be expressly waived. Hence, those jurisdictions do grant the contracting parties the opportunity to choose between arbitral finality and restraint on arbitral decision making. The parties may, by an explicit declaration in the arbitration agreement or by a later agreement, exclude any application for the setting aside of an arbitral award, in case none of them is a physical person of Belgian nationality or a physical person having his normal residence in Belgium or a legal person having its main seat or a branch office in Belgium.

Swiss law also gives the parties the option to exclude recourse against an award. If they intend to do so, they must expressly provide for such exclusion. The Swiss courts have rightly been strict when examining the parties' intentions to make such exclusion.

This approach is somewhat isolated in comparative law; it is of considerable importance to the conception of the review of arbitral awards by the courts of the seat. The fact that parties can now choose to exclude all control at the seat of the arbitration substantially affects the philosophy underlying that control. The grounds on which an award may be set aside under recent international arbitration legislation are generally based on the same philosophy underlying the grounds for refusing recognition or enforcement found in the relevant international conventions.

Generaly, the grounds for setting aside an award or refusing enforcement include the absence, nullity or expiration of the arbitration agreement, the irregular appointment of the arbitral tribunal, the incompatibility of decisions by the arbitrators with the terms of their brief, the failure to comply with the requirements of due process, and situations where recognition or enforcement of the award would be contrary to international public policy.

In most arbitration laws on international arbitration, courts cannot review the merits of the dispute in the context of an action to set aside an award or to obtain its enforcement. Errors of judgment, whether of fact or of law, are not in themselves grounds on which the award can be set aside or refused enforcement. The enforcement courts are seized by way of an ex parte application and therefore would perform only appeals against arbitral awards–which would allow the Court of Appeals to re-examine the merits of the dispute–would not be admissible in international arbitration. The courts would verify only that the existence of the award has been proven by the party relying on the award and that recognition is not manifestly contrary to international public policy.

The review of compliance with international public policy exercised by the enforcement court in ex parte proceedings is thus clearly no more than a prima facie control. The enforcement judge can either grant or refuse enforcement, but is never entitled to modify the decision reached by the arbitrators. Appeals against arbitral awards–which would allow the Court of Appeals to re-examine the merits of the dispute–would not be admissible in international arbitration.

However, it is beyond doubt that an award procured by fraud, by relying on forged

documents, or by concealing documents of decisive influence is substantially flawed and cannot be given recognition as a valid arbitral award. An efficient arbitral regime should provide for a form of redress against such an award, the unfairness of which is such that it could not be tolerated by the arbitration community.

Due to the importance of the matter has been providing for a possibility of revocation of an award in case of fraud, by enabling the arbitrators to reconsider the case.

The Model Law, for the obvious reason of restricting the grounds for judicial review, has not considered issues like fraud, forgery or concealment of documents of substantial importance as separate grounds for setting aside an award. A view has been expressed to the effect that these grounds may well be covered by the notion of public policy.

Parties opting for international arbitration under Model Law regimes must accept a risk that the proceedings may on occasion go egregiously wrong on the facts or on the law and that judicial review will be limited, generally, to the exclusive procedural and jurisdictional grounds of Article 34(2) of the Model Law. It should, however, be noted that, like any other ground for revision *stricto sensu*, they should be treated as exceptional grounds for judicial redress and should therefore be given restrictive scope in terms of interpretation. Each country develops its own balance between finality and review. The sistems vary, but it appears that there is a global trend in favor of arbitration, limiting consequently the review of the awards.

In order to adopt a pro-arbitration and pro-enforcement approach of the courts it is important to set out the extremely high standards of proof to be met when attempting to set aside an award based on a breach of natural justice or a claim that a tribunal has acted beyond its powers.

These high thresholds mean that a party seeking to set aside an award cannot rely on vague notions of procedural injustice; its allegations must be focused, directed and evince a clear breach of procedural fairness. A party should also not expect to have an entire award set aside based on limited allegations of breach because awards can be set aside either in whole or in part

Refrences

[1] Fouchard, Gailliard and Goldman on International Commercial Arbitration (E. Gailliard and J. Savage eds., Kluwer, 1999, para 1565.

[2] Hossein Abedian. 'Judicial Review of Arbitral Awards in International Arbitration'. Journal of International Arbitration 28, no. 6 (2011): 589–626.

[3] Fouchard, Gailliard and Goldman on International Commercial Arbitration (E. Gailliard and J. Savage eds., Kluwer, 1999, para 1605.

[4] Emmanuel Gaillard, The rewiew of internatioanal arbitral awards. IAI Forum Digon-12-14 September 2008, page 173.

[5] Gary B. Born, International Commercial Arbitration, Wolters, volume II, page 2649.