ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS

Report and Preliminary Draft Convention adopted by the Committee on International Commercial Arbitration at its meeting of 13 March 1953

The text which follows was originally published in 1953 as ICC Publication no 174, which is no longer available for distribution. It is reproduced here [The ICC International Court of Arbitration Bulletin Vol. 9/No.1 – May 1998] *as a historical reference in the ongoing debate on the future of the New York Convention. The Preliminary Draft Convention served as the basis of the discussions that led to the adoption of the final text of the Convention in 1958. For reference purposes, the page numbers of the original publication are indicated in square brackets.*

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FOREWORD

The 1927 Geneva Convention on the enforcement of foreign arbitral awards was a considerable step forward, but it no longer entirely meets modern economic requirements.

The present brochure develops the criticisms of the Convention made by the business community at the last Congress of the International Chamber of Commerce, held in Lisbon in 195 1. At the same time, it describes the practical details of a new system of enforcement, limited to awards made in respect of international commercial disputes.

These explanations are followed by the text of a preliminary draft convention, which is submitted for the consideration of governments. The adoption of such a convention would greatly increase the efficiency of international commercial arbitration, by ensuring a rapid enforcement of arbitral awards rendered in accordance with the will of the parties.

I. REPORT

A. Background

At its Lisbon Congress (195 1), the ICC adopted a resolution which it was hoped would be followed up by an International Conference with a view to obtaining the adoption of a new international system of enforcement of arbitral awards.

It should be recalled that the studies and research undertaken by the Commission on International Commercial Arbitration in 1950 on the initiative of the Chairman, Sir Edwin S. Herbert, had borne out the ICC in its conviction that the system established under the 1927 Geneva Convention no longer corresponded to the requirements of international trade. Criticizing the Convention's main defect, which consists in the enforcement of only those awards that are strictly in accordance with the rules of procedure laid down in the law of the country where the arbitration took place - consequently, national awards only - the ICC considered that there could be no progress without full recognition of the conception of international awards.

In actual fact, the idea of an international award, i.e. an award completely independent of national laws, corresponds precisely to an economic requirement. It is certain that a commercial agreement between the parties, even for international transactions, will always be linked tip with a given national system of law. Nevertheless, the fact that an award settling a dispute arising in connection with this agreement will produce its effects in different countries, makes it essential that it should be enforced [8] in all these countries in the same way. The development of international trade depends on this.

Only by giving full value to the autonomy of the will can this result be attained in the field of conflict of laws.

Legal circles have until recently shown a marked opposition to recognizing autonomy of the will as a valid source of private international law which, being ideally the science of conflict of laws, presupposes that all legal relationships are subject to some national law.

But at the same time, it would be hard to imagine the sense of frontier and of sovereignty disappearing, economically to start with and later politically, without the simultaneous establishment of international forms of procedure along similar lines.

Furthermore, it should be pointed out that at the very moment when a supposedly scientific approach is tending to repudiate autonomy as a source of law, the texts of conventions (and in particular the Rome Institute's Draft Uniform Law) are emphasizing in many cases that the provisions set forth will only be valid if the parties have not arranged otherwise, thus confirming the autonomy of the will.

Finally, important as may be the opinion of legal circles, it is nevertheless to meet the requirements of international trade, which are perfectly clear, that conventions are elaborated.

However, since the aim is more particularly to facilitate the enforcement of awards relating to international commercial disputes, it is necessary to give a precise definition thereof.

The present report and preliminary draft convention were drawn up to meet all these considerations.

B. Terms and Conditions of the Draft

1. The draft must begin with a statement of its purpose as reviewed above. The idea of an international award is very broad, and its definition may differ with the particular system of law concerned. It would therefore be inadvisable to stipulate a generally applicable qualification in a convention intended to be signed by a large number of states. Consequently, without seeking to define the legal implication of international awards, it would seem wise to mention only the nature of the disputes to be dealt with by the awards whose enforcement would be subject to the Convention.

It seems that the purpose aimed at might be met by stating that awards to which the future convention applied would relate to disputes between persons subject to the jurisdiction of different States, or to disputes involving legal relationships on the territories of different States.

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2. The 1927 Convention lays down in Article I five conditions for the enforcement of an award abroad, and, in Art. 2, adds three others. Art. 3 finally sets up a further possible obstacle to enforcement abroad.

These conditions may be grouped under three heads : a) those relating to the public order of the country where enforcement is demanded; b) those relating to the agreement between the parties and, finally (c) those relating to the law of the country where the award was made. The Convention deals with them without any apparent order.

The conditions insisting on the public order of the country in which enforcement is sought and on that of all legal systems (such as respect of the rights of defence) cannot but be maintained in principle.

Likewise, the conditions relating to the agreement between the parties cannot but be respected.

Finally, the conditions relating to the law of the country of arbitration may be applied to awards whose procedure is governed by national law, though they may be attenuated.

The following comments should therefore be examined.

a) The system should, in recognizing their existence, govern the outcome of awards whose origin and procedure depend entirely on the agreement between the parties.

As regards the existence of awards whose procedure depended solely on the agreement between the parties, their origin is unquestionably to be found in Art. 2, first para., of the 1923 Protocol according to which: "The arbitral procedure, including the constitution of

the Arbitral Tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place." Although the occurrence of the conjunction "and" which links the two methods of determining the procedure has caused some to doubt the option allowed under this provision, a certain jurisprudence and a large body of opinion have held that intervention by the law of the country is entirely secondary to the agreement between the parties.

However, this uncertainty might have been able to justify efforts to modify this provision, had it not seemed, finally, that it would be likely to cause further obstacles and that it could easily be overcome by the insertion of a suitable provision in the draft, all the more so since this provision would only be applied to awards to which the new Convention applied.

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b) Since arbitration is always voluntary, it must be based on an agreement between the parties, evidence of which must be given so that the enforcement of the award can be granted.

If this is the basic principle, it would seem useless to open the irritating discussion on whether the arbitration agreement should be valid "under the law applicable thereto". It is, on the contrary, far simpler to provide a more general provision under which the judge called upon to enforce the award shall be satisfied that there exists an agreement stipulating settlement of disputes by arbitration, if written evidence is supplied.

In this way by requiring only that an "agreement" be evidenced, a uniform rule is laid down which excludes the question as to the specific form which might be required by the law of the country of arbitration for arbitration clauses or submissions.

c) Next to be settled is the arbitral procedure. As was previously stated, it must be allowed that this procedure can stem from two sources, one contractual and the other legislative. All that is required is that it should be clearly expressed. This is the object of the second condition.

d) Lastly there remains the question of means of recourse. On this matter, it should be possible to obtain considerable attenuation as compared with the requirements of the 1927 Convention.

It is recalled that the 1927 Convention required that the award should become final in the country where it was made (Art. I d), and that it would not be so if it was "open to opposition, *appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it was proved that any proceedings for the purpose of contesting the validity of the award were pending".

This requirement has seemed both burdensome and inadequate in many cases. It is burdensome in that, before enforcement abroad is sought, it means that notice must be

given of the award in the country where it was made, so as to set running the lengthy legal periods within which recourse must be had. Moreover as in the case of "*opposition en nullite*', there is (in France, for instance) no time-limit for starting such procedure.

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It is inadequate in that the 1927 Convention, by mentioning specifically only cases of "*appel, opposition, pourvoi en cassation*", was obliged to add that it would only be so in countries where such forms of procedure exist (in all cases, this refers exclusively to the European Continent), thus leaving in uncertainty the effect of means of recourse established by other legislations as well as that of other means of recourse provided for by the law of such countries where the aforesaid means of recourse exist (e.g. *"requete civile*").

Since then, it has appeared advisable to consider the problem from a more practical angle and to envisage only the case of awards effectively set aside.

It may be argued that means of recourse may be resorted to in the country where the arbitration took place, or that the party against whom the award was made, after enforcement abroad, may contest the validity of the award in the country where it was made. The answer is that the said party will have to introduce, in the country where enforcement was sought, the necessary procedure to check the effects of the enforcement order. The judges in the foreign country will decide in each case whether to accede to such a request. In any case, it must be remembered that the finality of the awards rendered is essential to arbitration and that in most cases resort to means of recourse is only had for delaying purposes. Hence, there should be no doubt that it is scarcely the task of an international convention to encourage such tactics by over-emphasizing the means available for opposing enforcement.

e) Similarly, it has not seemed advisable to retain the provision set forth in the last paragraph of Art. 2 of the 1927 Convention which in the case of an award not covering all the questions submitted, empowers the competent authority to postpone the enforcement or to grant it subject to guarantee. Under most systems of law, however, the fact that the arbitrators have not dealt with all the questions submitted does not constitute a case

for setting aside the award but merely for revising it by "*requete civile*" for instance, or some other means. Having in mind the principle set out above that means of recourse should as far as possible be banned from arbitration, it seems indeed preferable to leave open the question of how to settle a problem which evidently does not lend itself to a both clear and universally valid solution.

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f) Similarly, it seemed preferable not to retain Art. 3 of the 1927 Convention, mentioning, in general terms, all the other grounds for contesting the validity of an award. On account

of the vagueness of its terms, this provision further facilitated obstruction tactics, which must be banned.

g) Finally, while Article III of the Draft Convention mentions all the grounds on which the competent authority will be able to refuse recognition or enforcement of the award, it is clear that such refusal will not be given in the same way in each case.

When the refusal is based on considerations of public policy of the country where the award is relied upon, the competent authority will be in a position to refuse, *ex officio*, recognition or enforcement.

On the other hand, in all other cases, it is clear that only the party against whom the award is invoked can decide whether the circumstances in which refusal is possible exist and, if so, whether it wishes to avail itself of them. The Draft Convention must therefore establish this distinction.

Its text should then read as follows:

11. PRELIMINARY DRAFT CONVENTION

ART. I. - The present Convention shall apply to the enforcement of arbitral awards arising out of commercial disputes between persons subject to the jurisdiction of different States or involving legal relationships arising, on the territories of different States.

ART. II. - In the territories of any High Contracting Party to which the present Convention applies, an arbitral award shall be recognized as binding and shall be enforced in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.

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ART. III. - To obtain the recognition and enforcement mentioned in the preceding article, it will be necessary:

a) that there exists between the parties named in the award a written agreement stipulating settlement of their differences by means of arbitration;

b) that the composition of the arbitral authority and the arbitral procedure shall have been in accordance with the agreement of the parties or, failing agreement between the parties in this respect, in accordance with the law of the country where arbitration took place.

ART. IV. - Recognition and enforcement of the award shall be refused if the competent authority to whom application is made establishes:

a) that recognition or enforcement of the award would be contrary to public policy in the country in which it is sought to be relied upon;

b) that the subject-matter of the award is not capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;

c) that the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that being under a legal incapacity, he was not properly represented;

d) that the award deals with a difference not Contemplated by the agreement of the parties or that it contains decisions on matters not submitted to the arbitrators;
e) that the award the recognition or enforcement of which is sought, has been annulled in the country in which it was made.

The circumstances referred to in (c), (d) and (e) of the present article may only be invoked by the party against whom recognition or enforcement of the arbitral award is sought.

ART. V. - The party claiming the recognition of an award or its enforcement must supply:

a) The original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made;

b) Documentary or other evidence to prove that the conditions laid down in Articles I, II and III have been fulfilled.

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ART. VI. -The provisions of the above Articles shall not deprive any interested party of the right of availing 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.

ART. VII. - The present Convention, which will remain open to the signature of all States, shall be ratified. Ratifications shall be deposited as soon as possible with the Secretary-General of the United Nations, who will notify such deposit immediately to all the signatories.

ART. VIII. - The present Convention shall come into force three months after it shall have been ratified on behalf of two High Contracting Parties. Thereafter it shall take effect, in the case of each High Contracting Party, three months after the deposit of the ratification on its behalf with the Secretary-General of the United Nations.

ART. IX. - The present Convention may be denounced on behalf of any Member of the United Nations or non-member State. Denunciation shall be notified in writing to the

Secretary-General of the United Nations, who will immediately send a copy thereof, certified to be in conformity with the notification, to all the other Contracting Parties, at the same time informing them of the date on which he received it.

The denunciation shall come into force only in respect of the High Contracting Party which shall have notified it and one year after such notification shall have reached the Secretary-General of the United Nations.

ART. X. - A certified copy of the present Convention shall be transmitted by the Secretary-General of the United Nations to every Member of the United Nations and to every non-member State which signs the same.

(Translation)