The Relation between State Courts and Arbitral Tribunals

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Outline

• Introduction
  – Why is the Relation between Courts and Arbitration Complicated?
  – Conflicting Interests
• (Theoretical and Practical) Basis of Arbitration
• Development of the Relation between Courts and Arbitration
• The Approach of the UNCITRAL Model Law on Arbitration
• Conclusion
  – Arbitration as Part of the Rule of Law
Lawyers, Judges, court proceedings and arbitration

- **Studying law** (at least in continental Europa) is learning and understanding how Courts (Judges) decide cases
  - Law as an instrument of state authority

- **Studying arbitration law** is learning and understanding how to avoid that Courts (Judges) decide cases
  - Law as an instrument of party autonomy and private decision-makers (arbitrators)
Conflicting interests

• Courts/Judges
  – Law as exclusively with courts
  – The last word on law in society is with courts
  – Thus inherent tendency to intervene in arbitration

• Parties to Arbitration
  – Avoiding court proceedings
  – However, maybe also seeking court intervention because of being unhappy with arbitration agreement (regret)
  – Ensuring enforcement of arbitral award
Conflicting Interests

„The great paradox of arbitration is that it seeks the co-operation of the very public authorities from which it wants to free itself“

(Jan Paulsson)
Basis of Arbitration

- Territorial or Jurisdictional Theory
- Pluralistic Theory
- Autonomous Legal Order Theory
- Conventional Arrangement/Individual Freedom Theory
- Arbitration as a Necessity of Economic Relations
Territorial or Jurisdictional Theory

• Based on its sovereignty the State grants the right to arbitration, therefore
  – State law is always applicable (lex loci arbitri)
  – Enforcement of arbitral awards is subject to State law

F.A. Mann, Lex Facit Arbitrum

“Just as, notwithstanding its notoriously misleading name, every system of private international law is a system of national law, every arbitration is a national arbitration, that is to say, subject to a specific system of national law. The lex arbitri cannot be the law of any country other than that of the arbitration tribunal’s seat. No act of the parties can have any legal effect except as the result of the sanction given to it by a legal system. Hence, it is unavoidable to ascertain such system before the act of the parties can be upheld. When we say in the conflict of laws: ‘contracts are governed by the law chosen by the parties,’ we do so, and can do so, only by reason of the fact that the rule is part of the law of a specific legal system.”
Territorial or Jurisdictional Theory

• Problem
  – Theory as such might be convincing
  – However, positive law in many jurisdictions is different
    • place of arbitration and place of enforcement of award might be different
    • enforcement is independent of law applicable to award
    • in some jurisdictions, parties may delocalize, i.e. choose freely other places for seat of arbitration, different from applicable law
    • etc.

• Overall
  – 19th century
  – does not fit with reality of globalized law and society
Pluralistic Theory

• See above
  – International awards are not integrated in legal order of State where they have been issued (French Court des cassation)
  – Primary/secondary jurisdiction (US Federal Courts)

• Problem
  – Justifies possibly chaotic legal situation of competing legal systems in arbitration
  – Does not explain fact that at the end, it is party autonomy that decided on establishment and conduct of arbitration
Autonomous Legal Order Theory

"The French concept of arbitration is based on the premise that there is an arbitral legal order, which is distinct from the legal order of individual States .... It is this arbitral legal order - and no national legal order - that confers juridicity to arbitration."

Autonomous Legal Order Theory

- Problem
  - ignores recognition and enforcement

“Despite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law“
Conventional Arrangement Theory

“It is the following principle, conceived as a guide to other social institutions, such as courts and legislators, in their interaction with arbitrators: consensual arrangements for the resolution of disputes should be presumed valid; the value of freedom is so great that its curtailment cannot be justified by mere suppositions about its abuse.”

Arbitration as Individual Freedom
ECHR, Tabbane v. Switzerland (application no. 41069/12), Judgment of 24 March 2016

27. En revanche, lorsqu’il s’agit d’un arbitrage volontaire consenti librement, il ne se pose guère de problème sur le terrain de l’article 6. En effet, les parties à un litige sont libres de soustraire aux juridictions ordinaires certains différends pouvant naître de l’exécution d’un contrat. En souscrivant à une clause d’arbitrage, les parties renoncent volontairement à certains droits garantis par la Convention. Telle renonciation ne se heurte pas à la Convention pour autant qu’elle soit libre, licite et sans équivoque (Eiffage S.A. et autres (décision précitée) ; Suda, précité, § 48 ; R. c. Suisse, no 10881/84, décision de la Commission du 4 mars 1987, Décisions et rapports (DR) no 51 ; Osmo Suovaniemi et autres c. Finlande (déc.), no 31737/96, 23 février 1999, et Transportes Fluviais do Sado S.A. c. Portugal (déc.), no 35943/02, 16 décembre 2003). De plus, pour entrer en ligne de compte sous l’angle de la Convention, la renonciation à certains droits garantis par la Convention doit s’entourer d’un minimum de garanties correspondant à sa gravité (Pfeifer et Plankl c. Autriche, 25 février 1992, § 37, série A no 227).
Arbitration as a Necessity of Economic Relations

• Problem of theory of inidividual freedom/conventional arrangement
  – can not explain the „last“, the „final“, the „ultimate“ legal reason for arbitration
  – „why“ remains

• General problem of systems dominated by States/state law, but establishing rules being independent of state will/law
  – public international law in general

• Arbitration as Necessity
  – second best
  – normative values + factual reality
Development of Relation Arbitration-State Court

• Long time, some jurisdictions even until late 20th century
  – general supervisory jurisdiction of State courts
  – possibility of loosing party to challenge arbitral process on any possible mistake on points of law
Development of Relation Arbitration-State Court

- However,
  - US Supreme Court, Burchell v Marsh, 58 US 344, 349 (1855)
    “If the award is within the submission, and contains the honest decision of the arbitrators, after full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or in fact. A contrary course would be a substitution of the judgment of the chancellor [the judiciary] in place of the judge chosen by the parties [the arbitrator], and would make an award the commencement, not the end, of litigation.“
  - Heyman v Darwin (1942), House of Lords
    • Validity of contract does not affect validity of arbitration clause
    • Doctrine of separability
Development of Relation Arbitration-State Court

– „one step“ adjudication

  • German Federal Supreme Court BGHZ 53, 315  
  (27 February 1970)

  „There is every reason to presume that reasonable  
  parties will wish to have their relationships created by  
  their contract and the claims arising there from,  
  irrespective of whether their contract is effective,  
  decided by the same Tribunal and not by two different  
  Tribunals … Experience shows that as soon as a  
  dispute of any kind arises from a contract, objections  
  are very often raised against its validity …“

The General Assembly,

Recognizing the value of arbitration as a method of settling disputes arising in international commercial relations,

Convinced that the establishment of a model law on arbitration that is acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations,

Noting that the Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law at its eighteenth session, after due deliberation and extensive consultation with arbitral institutions and individual experts on international commercial arbitration,

Convinced that the Model Law, together with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Arbitration Rules of the United Nations Commission on International Trade Law recommended by the General Assembly in its resolution 31/98 of 15 December 1976, significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations,
Status map


- Legislation based on Model Law
- Legislation based on Model Law adopted only in certain subnational jurisdictions

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Article 5. Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Court involvement according to UNCITRAL Model Law

Art. 8 (stay of court proceeding in case of arbitration agreement)
Art. 9 (interim measures by a court)
Art. 11 (exceptional appointment of arbitrator by court)
Art. 13 (challenging an arbitrator)
Art. 14 (termination of mandate of arbitrator by court decision)
Art. 16 (challenge of decision of tribunal on jurisdiction before court)
Art. 17 H and I (recognition and enforcement of interim measures)
Art. 17 J (court-ordered interim measures)
Art. 27 (court assistance in taking evidence)
Art. 34 (setting aside an award)
Art. 35 and 36 (recognition and enforcement of award)
2. Although the provision, due to its categorical wording, may create the impression that court intervention is something negative and to be limited to the utmost, it does not itself take a stand on what is the proper role of courts. It merely requires that any instance of court involvement be listed in the Model Law. Its effect would, thus, be to exclude any general or residual powers given to the courts in a domestic system which are not listed in the Model Law. The resulting certainty of the parties and the arbitrators about the instances in which court supervision or assistance is to be expected seems beneficial to international commercial arbitration.

Pathak v Tourism Transport Ltd - [2002] 3 NZLR 681

[24] It is generally accepted that there are four principles which can be distilled from s 5 of the Act which articulate the philosophical bases upon which the Act is underpinned. Those four principles can be summarised as follows:

(a) Party autonomy
(b) Equality of treatment
(c) Reduced curial involvement in arbitral process
(d) Increased powers for the arbitral tribunal
Arbitration as Part of the Rule of Law

- Arbitration as one of the means of peaceful settlement of disputes
  - See Art. 33 UN-Charter
  - “… any dispute, …, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”

- No monopoly of State in the area of adjudication/dispute settlement
  - Only exceptions criminal law, family law
Arbitration as Part of the Rule of Law

- Arbitration as exercise of individual freedom as a human right
  - See, e.g., ECHR, German BGH
- Any exercise of individual freedom has limits
  - fundamental State function of ensuring the overall rule of law
  - State monopoly of use of power (force) (enforcement)
- Arbitration is
  - not avoidance of Court proceedings
  - but exercise of mutual efforts of private parties and State to effectively promote peaceful settlement of disputes