International Journal of Management and Applied Science, ISSN: 2394-7926 Volume-7, Issue-3, Mar-2021
http://iraj.in

INTERNATIONAL COMMERCIAL ARBITRATION: IMPEDIMENTS TO THE DEVELOPMENT OF COMMERCIAL LAW?

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Abstract - Despite the fact that arbitration might divert cases from litigation, courts and arbitration are deemed to be mutually beneficial and cross-fertilizing. Finality and confidentiality are the most controversial areas in which potential impediments to the development of law might be found. This article submits that finality of arbitral award would not be a real impediment when courts remain in a supervisory role with a light touching hand. However, the impediment brought by confidentiality is real. It would certainly be a desirable move when more sunshine is allowed into arbitration. The benefit is threefold: (a) it would enable clients to be properly advised; (b) it would help foster better decision-making by arbitral tribunals; and (c) it would contribute, rather than create impediments, to the development of commercial law.

Keywords - Confidentiality, Finality, Party Autonomy, Public Interest

I. INTRODUCTION

International commercial arbitration is a well-established and popular alternative dispute resolution mechanism and enjoys a high reputation for its neutral, speedy, efficient cost-effective and privacy-protecting proceedings. However, Lord Thomas of Cwmgiedd, the Lord Chief Justice of England and Wales, regarded the widespread usages of arbitration clauses as 'a serious impediment to the development of the common law,'mphasizing that when more commercial disputes have gone to arbitration and few could overcome the high hurdle for an appeal to the Commercial Court, it is 'to the detriment of the wider interests of the common law' which underpins the markets, trade and commerce. His Lordship's view echoes Lord Neuberger's remark that 'an increase in awards and a concomitant decrease in judgments … is that the law does not develop, that it becomes ossified.'

Undoubtedly, both Lord Neuberger and Lord Thomas have pointed out an issue of profound importance: Has international commercial arbitration created impediments to the development of commercial law? Or, on the contrary, it has injected healthy nutrition, such as efficiency in dispute-solving and collaborative competition, into a growing commercial law?

This essay focuses on two salient features of international commercial arbitration, i.e. finality of arbitral award and confidentiality in arbitration, and evaluates the impact they have brought to the commercial law. It is divided into three parts: First, it discusses the two competing policy objectives, namely party autonomy and public interest in developing the law. Second, it appraises the pragmatic compromise between courts and arbitration and see whether the right balance has been kept. Third, it examines whether finality of arbitral award or confidentiality in arbitration have created any real impediment to the development of commercial law respectively, and explores what the preferable solutions are.

II. THE TWO COMPETING POLICY OBJECTIVES

When considering how much courts' interference to arbitration people should tolerate, Mr. Justice Coleman pointed out that there exit 'two policy objectives which were in conflict: first, party autonomy and the desirability for finality of awards; second, the need to preserve and develop English commercial law as a valuable national asset.' The balance is to be stretched between courts' respect for parties' choice as indicated in the arbitration agreement and the wider state and public interest in ensuring that the law keeps pace with change and is well developed.

A. Party autonomy and other values of arbitration

Party autonomy stands at the core of the regime of arbitration. The conceptual basis of this autonomy, in a wider sense, is freedom of contract: parties are free to arrange their own regime of rights and obligations, and are free to choose the way to solve their disputes. It covers a wide range of freedoms: the freedom to choose the law applicable to their contract, to choose the seat of arbitration, to choose arbitrators, and to determine how the proceedings should be conducted. Nonetheless, party autonomy is not absolute. There are restrictions on it, aiming to ensuring that the choice of law is bona fide and is not contrary to mandatory rules and public policy.

It is believed that commercial law, including the mechanism of commercial dispute-solving, shall be user-friendly. In the eyes of businessman, arbitration is more user-friendly (compared with litigation) for a couple of reasons: (a) flexibility – as a symbol of party autonomy, parties can tailor their own procedure rather

than to follow the fixed litigation rules; (b) neutrality – parties are given an opportunity to choose a neutral place and a neutral tribunal for the resolution of their dispute; (c) efficiency – the arbitral award is final and is not subject to appeal except in narrow circumstances; (d) confidentiality – it is not conducted publicly and the parties privacy could be well protected.

All these features of arbitration constitute the values injected by practice of arbitration into the development of commercial law. It is submitted that there are three noteworthy contributions brought by international commercial arbitration. First, international dynamics. In the major seats of arbitration, such as London and Paris, cases are brought by businessman from all over the world. Take London Commercial Court, 25.76% of cases commenced during 2015 related to international arbitration, 69.26% were claims in the fields of banking, finance, commodities, shipping, maritime disputes and insurance and reinsurance. The dynamic sorts of claims and their cross-nation nature play a significant role in ensuring a dynamic development of law. Second, harmonized practices. The increased globalization of world trade and investment resulted in increasingly harmonized arbitration practices, which have been represented in sophisticated rules of arbitration institutions. As a result, they developed a 'common procedural language' which, to various extent, bridge the divide in legal cultures across nations. Third, nourishment to judges' experience. It is not uncommon that judges, especially those in London, before they serve the courts, have sat in arbitral tribunals or appeared as counsels in arbitrations. The practice in arbitration would be carried into their role as judges. Retiring judges who go on to sit as arbitrators would take their perspective from courts back into arbitration, which depict the 'relentless circle of legal life' and consequently create 'a more holistic, cultural understanding' between judges and arbitrators. Such cultural nourishment to judges would undoubtedly enhance their ability in doing practical justice.

B. Public interest in developing the law

In the common law system, courts play a vitally important role in developing the commercial law on the basis of the doctrine of precedent. Generally speaking, the common law developed by courts brings clarity, predictability and certainty in the law, which is 'of primary importance in all commercial transactions.' The important role of courts in developing the law, as summarized by Lord Thomas, is embodied in the following three aspects:

First, courts provide judgments with refined and tested legal reasoning to commercial disputes. They articulate and explain rights. They lay down definitive rulings on the scope and interpretation of contractual clauses and financial instruments. They embrace the up to date development in the commercial and financial field, such as block chains, big data, and keep the commercial law dynamic and up to date. The law thus developed and clarified.

Second, courts enable public scrutiny of the law by invoking public debate or debate in the commercial marketplace, which in turn generate legal issues back to the courts or to parliaments when necessary. Open justice enable people 'to watch, debate, develop, contest, and materialize the exercise of both public and private power,' resulting from which the wider interests of commercial industry and of the common law in general would be much better served. Third, courts ensure publicity of laws. The law is not developed underground and is not hidden from view. Certainty and predictability, which are indispensable attributes of commercial law of high quality, could be achieved by making the law publicly accessible. The rule of law is thus upheld in international markets. It is no wonder that Lord Thomas concluded that 'resolution of disputes involving legal issues before the court is the best way not only of determining the dispute but of developing the law.'

To develop a prosperous commercial law, it is highly necessary for both courts and arbitration to develop a mutually supportive and reinforcing relationship. A sound balance has to be kept by joint effort from both sides.

III. THE PRAGMATIC COMPROMISE: A RIGHT KEPT BALANCE?

How to maintain the strengths of arbitration by showing respect for party autonomy on the one hand, and to ensure a healthy diet for courts for the development of commercial justice? It is discovered that the approach the courts in the major arbitral seats adopted to challenge arbitral awards is for the most part inherently pro-arbitration, or non-interventionist; and even when the leave is granted, the successful rate is extremely low.

A. Section 69: a high hurdle to overcome

Though the pro-arbitration approach is also prevalent in England and Wales, the UK Arbitration Act 1996 ('the 1996 Act') seems to be a remarkable exception in the world which allows appeals on a question of law in the case of an international arbitration. Section 69 of the 1996 Act, which enacted the seminal decision of the House of Lords in The Nema, laid down the combined requirements for a leave to appeal which essentially require that there is a question of law, which substantially affected the rights of the parties and on which the arbitrator's decision was either obviously wrong or which, being a question of general public importance was at least open to serious doubt, and it had to be just and proper for the court to

determine the question.

It is generally believed that they place high hurdles for any application to overcome. According to statistics provided by Sir Eder, during the three-year period 2013-15, there were an average number of 70 applications in the Commercial Court for leave to appeal under section 69, with leave being granted in under 20 cases (about 30%); and there were only 5 appeals to the Court of Appeal, with 4 rejected. Only one appeal finally reached the Supreme Court, Bunge SA v Nidera BV, where the Supreme Court reversed all the lower tribunals and laid down a landmark judgment by providing guidance on the assessment of damages arising out of a wrongful repudiation of a sale of goods contract.

B. Is the balance right kept?

Long before Lord Thomas called for relaxing section 69 of the 1996 Act in order to 'rebalance the relationship' between courts and arbitration, this narrow gateway is remarked by Sir Robert Finch to have adversely inhibited the necessary and 'regular throughflow of commercial cases that arise in arbitrations in order to continue to develop and refine English commercial law in a way that is most relevant to the market.' Is it out of the right balance between the two competing policy objectives, namely respect for party autonomy and preserving the public interest in developing the law?

The responses to the remarks made by the Lord Chief Justice cover a spectrum of mixed views. Coleman J agreed that the high hurdle imposed by section 69 of the 1996 Act 'let just enough cases through' to reach the courts, preferred 'a greater flexibility' and believed that the commercial law would 'benefit from just few more published judgments'. In contrast, Lord Saville, the main architect of the 1996 Act, made a warning on the opposite, 'To expand the right to appeal from arbitration awards would, far from helping to develop English Law, be calculated instead to drive international commercial arbitration away from London, to the great loss of this country.' Strongly agreeing with Lord Saville, Sir Bernard Eder was unpersuaded that the common law is being stifled or hindered because there are fewer appeals. He disagreed with Lord Thomas that the UK went too far and with any suggestion that section 69 should be changed, for reasons that allowing more appeals clashes with party autonomy and will 'operate to the great detriment of international arbitration in this country', and that foreign private litigants have no duty to finance the development of the English common law by pursuing appeals to courts. Lord Gross also maintained that there exists a complementary and mutually supportive relationship between London arbitration and courts, and 'the right balance' is achieved and kept.

Notwithstanding how divided the opinions of this issue are among the legal profession, the thought-provoking question raised by Lord Thomas, 'Has international commercial arbitration created impediments to the development of the commercial law?' deserves a careful examination.

IV. FINALITY AND CONFIDENTIALITY: IMPEDIMENTS TO DEVELOPMENT OF COMMERCIAL LAW?

It is the parties' choice of where their dispute is best solved, but potential impediments to development of the common law might flow from their choice. If compared with the above-mentioned three aspects of how courts develop the law, it seems that there are two potential impediments brought by arbitration: finality of arbitral award and confidentiality throughout the proceedings. They will be examined in turn in the following parts.

A. Is finality of arbitral award an impediment?

The first potential impediment, which is also one of the selling points of arbitration, is the finality of arbitral award which prevents parties from appealing to courts. Most institutional rules provide unequivocally that an arbitral award is final and binding, such as the ICC Arbitration Rules Art 34(6) and LCIA Rules Art 26(8). The law of the seat of the arbitration might contain a mechanism for challenging an arbitral award, but these provisions are principally focused on ensuring that the arbitration has been conducted in accordance with basic rules of due process, respecting the parties' equal right to be heard before an independent and impartial arbitral tribunal within the boundaries of their arbitration agreement. Countries which have adopted the UNCITRAL Model Law would allow an arbitral award to be challenged on limited grounds relating to the ajudicability of the claim in question, procedural grounds and substantive grounds. These grounds are taken from Article V of the New York Convention, based on which recognition and enforcement of an international award may be refused.

There exists the conflict between the desire for finality and for an appeal mechanism on the merits. According to the 2018 International Arbitration Survey, finality is regarded one of the 7 most valuable characteristics of arbitration as perceived by users, but the same Survey reports that lack of appeal mechanism on merits is one of the complaints commonly made about arbitration. On the one hand, finality brings certainty to parties and efficiency to the dispute-solving. That is what parties aim for when choosing arbitration.

On the other hand, the finality of arbitral awards bars the possibility of public scrutiny of the decision when there are no courts (no matter the High Court or an

appellate court) could have chance to review them or to articulate the relevant legal principles involved in the disputes. It seems undeniable that when few cases could have chance to reach the courts, many opportunities for courts to address on important legal points have been lost. Those handful appeals from arbitration which finally reached the final appellate level do contain profound legal points. Bunge SA v Nidera BV serves a good example, where the UK Supreme Court provides guidance on the assessment of damages arising out of a wrongful repudiation of a sale of goods contract. A more recent example could be found in Fulton Shipping Inc of Panama v Globalia Business Travel SAU (The New Flamenco), where the UK Supreme Court laid down important principles regarding claimable damages for charterer's repudiation of a time charter, an issue of which has general importance to the shipping market.

The dilemma then exists – which value is more worthwhile: certainty and efficiency in dispute-solving, or reasoned argument which is refined and tested before a number of tiers of courts? From the perspective of developing the law, it is submitted that the value brought by tiers of courts' review does not outweigh the value of efficiency brought by finality of the arbitral decision. It is not an impediment; rather, to obtain remedies in time, is a worthwhile ingredient a sound commercial law system should embrace.

Would courts, then, be left in a situation for want of 'feedstock' when many cases are close filed in arbitration? If it is the case, it is not arbitration which is blameworthy. It is the parties' legitimate individual free choice of arbitration. They owe no duty to encourage appeals so as to develop the law. Courts shall not be in a position as passive as to wait or to 'beg' cases from arbitration. Rather, they shall take initiatives to bring themselves up to date and to embrace the challenges. The courts in London have been seen undertaking some tasks to improve the features of court litigation: for example, the specialist Financial List and Financial Markets Test Case Scheme was introduced in 2015, enabling parties to obtain definitive guidance on novel market issues even though no cause of action exists between them; taking advantages of the benefits of technology, such as adopting e-filing; reforming the litigation procedures in keeping with market demand; and enhancing international engagement through the mechanism of the Standing International Forum of Commercial Courts. All these efforts taken by the English judiciary show that the true 'feedstock' of courts lies in their determination to be innovative, to facilitate movement of judicial resources and to make full use of the world-class legal profession based in London.

B. Is confidentiality an impediment?

The second potential impediment to the development of commercial law brought by arbitration is its 'closed door' hearing. There seems to be no uniform approach to confidentiality. It is the default position in most commercial arbitrations. In the English law, and in Singapore as well, it is taken as an implied obligation in arbitral agreements.

It seems a widely reached consensus that keeping arbitral awards underground is undesirable and moving towards transparency is the trend. As criticised by Lord Thomas, the lack of openness denudes the ability of the public to access the law, to understand how it has been interpreted and applied, to fully understand their rights and obligations, and to properly plan their affairs accordingly. Sir Bernard Rix, while admitting the benefits of confidentiality, also provided the resounding warning that the lack of transparency in arbitration would 'mean that our commercial law is going underground,' and 'we are more and more losing sight of the basic feedstock of our commercial law', which will inevitably result in damaging the public interest when 'more and more decisions on areas of commercial law become inaccessible to the public arena.' Lord Neuberger remarked that 'lack of openness is viewed with suspicion and concern by most sectors of society', and 'there is a real risk that, if there is no transparency, many arbitrators will feel relatively free to do what they want rather than to give effect to the law.' The problem of confidentiality and privacy triggers challenging questions, as Ben Juratowitch QC put them: 'First, how can the question be properly debated if reasons are not given and published? Second, without published reasons, how can clients be properly advised as to what the ICC might be expected to do in similar circumstances, and what impact should or should not have on a party's choice of arbitrator?'

A desirable move then is improving the visibility of arbitral awards and substantializing their contribution to the development of commercial law. A stream of suggestions has been brought forth among the judicial circle. They could be summarized under the following heads:

(a) To publish the awards in a systematic and accessible basis. This proposal finds support from Lord Neuberger who suggested publishing excellent awards by excellent arbitrators. Lady Justice Gloster added her voice to his Lordship. Sir Bernard Rix also proposed the possibility to impose a certain period of time (such as 6 months or a year) when the awards are visible to the public.

(b) To publish the awards in anonymized form. This suggestion seems to achieve a balance between party privacy and publicity of the law. Sir Bernard Rix raised this possibility and suggested it to be a default rule unless the parties object. However, it was regarded as 'a highly regressive suggestion'. Doubts have been

raised that one would be slow to rely on awards where full factual circumstances, which can be essential to understanding what was decided and why, cannot be appreciated.

(c) To 'un-develop' the implied obligation of confidentiality in common law. It is advised to consider whether this implied obligation had been extended to widely to cover arbitral awards.

No matter which method(s) would be taken, it seems clear that confidentiality and privacy in arbitration is a real impediment to the development of law. As Ben Juratowitch QC put it, 'Secrecy is a habit, not a need.' This is particularly true when more and more claims involving public interest, such as breach of competition law and standard form commercial contracts.

V. CONCLUSION

Despite the fact that arbitration might divert cases from litigation, courts and arbitration are deemed to be mutually beneficial and cross-fertilizing: on the one hand, prosperous arbitration practices attract businesspersons and their cases from all around the world, which bring potential international commercial cases to courts of seat, and enrich the international experiences of the judges sitting in courts, who in turn would weave these threads into the fabric of commercial law; on the other hand, courts of seat assist arbitration in making available the state's coercive powers to enforce arbitral orders, supplying 'maximum support' and 'minimum interference'. The balance seems being kept right.

Finality and confidentiality are the most controversial areas in which potential impediments to the development of law might be found. As discussed above, finality of arbitral award would not be a real impediment when courts remain in a supervisory role with a light touching hand. However, the impediment brought by confidentiality is real. It would certainly be a desirable move when more sunshine is allowed into arbitration. The benefit is threefold: (a) it would enable clients to be properly advised; (b) it would help foster better decision-making by arbitral tribunals; and (c) it would contribute, rather than create impediments, to the development of commercial law.

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