Mauritius Roundtable Discussion

organised by YIAG, ICC YAF and Young ICCA

Part 2: Bottlenecks encountered when enforcing an award from a Mauritian and global perspective

"Some comments on the Miami Draft of Prof. A. J. Van den Berg" - *Presentation of Jamsheed Peeroo*[*]

The Miami Draft which Professor Van den Berg presented to us today is the culmination of decades of often tumultuous debate on various provisions of the New York Convention of 1958 (NYC). It sheds light on the NYC's grey areas and solves the main difficulties commonly encountered in its application. The learned Professor tactfully approaches various issues and provides realistic solutions which have the benefit of being readily acceptable to the legal systems of the various Member States of the NYC. The Miami Draft highlights a path that legislators and courts could and I hope will follow in order to render international arbitration even more efficient. It is truly the natural evolution of the New York Convention and the time has come for the world of arbitration to focus on establishing the Miami Draft in practice.

I have selected three important issues for discussion in this part of the Roundtable. My first two remarks will constitute attempts at extracting possible solutions to two minor differences, but which are consequential nonetheless, between a very modern Miami Draft and, firstly, the innovative piece of legislation which is the International Arbitration Act 2008 (IAA), and secondly the bilingualism and unique composition of the Mauritian legal system, which draws from the English and French legal traditions. The third and final point concerns a difficulty that arbitration practitioners have faced in the past and that they are likely to encounter again and again at the stage of enforcement or annulment of awards.

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I. SCOPE OF APPLICATION OF THE NEW YORK CONVENTION

The Miami Draft has, in its Article 1, two objective criteria that render it applicable:

a) The parties have their place of business or residence in different States, OR
b) The subject matter of the arbitration agreement relates to more than one State

Taken together, these criteria cover a wide range of arbitrations. However, they might arguably fall short of including a number of specific types of arbitrations under Mauritian law.

Two hypotheses in the Mauritian context under the IAA:

1. Under Section 3(2)(b)(iii), Mauritian parties are allowed to expressly agree that their arbitration is international, thus making the IAA applicable to it. This is so regardless of whether a different State is concerned or of the places of business or residence of the parties.

2. Under Section 3(2)(b)(iv), the scope of the Act specifically covers arbitration between shareholders of a GBL company.

    - There is doubt as to the meaning of the words: "relates to more than one State" – the subject matter of the arbitration clause in this case could arguably be construed as being limited to the setting up of a Mauritian GBL company, a matter which therefore does not relate to more than one State.

    - The two shareholders who are parties to the arbitration may also have their "place of business or residence" in the same foreign State, not therefore triggering the application of the first criterion.

The result in these two distinct examples is the same: the awards will not be subject to the regime of the Miami Draft under the proposed Article 1(2): while treated as

international awards under the law of the State in which they were rendered, they will not be enforceable in any other State.

These awards would however fall under the scope of Article I of the NYC for the purposes of enforcement in other countries simply because they would have been made in "a State other than the State where the recognition and enforcement of such awards are sought", i.e. Mauritius.

While adopting a newly defined scope in order to clarify some existing problematic areas under the NYC may be desirable, the risk of excluding other cases which were otherwise governed by the NYC must nevertheless be minimized.

Questions / Possible solutions:

- Should the Miami Draft be expressly limited to enforcing "international" awards rather than covering all "foreign" awards, regardless of whether they were rendered in a domestic or an international arbitration?
    - There seems to be no such limitation in the NYC.
    - Note however that the NYC is arguably limited to the enforcement of awards whereas the Miami Draft clearly also governs the enforcement of arbitration clauses. The criteria for enforcement of the arbitration clause must coincide with those relating to the enforcement of the award in any given arbitration.
- A criterion similar to that of the IAA to give effect to the freedom of choice of the parties of making their arbitration international could potentially avoid many problematic cases.
    - The parties will have to systematically express their choice of making their arbitration international even where there is no doubt that it would be so under the seat's international arbitration legislation, as in our second hypothesis, in order to avoid the risk of their award being rejected in other States.

- But this may be a difficult provision to accept under the public laws of many countries.

- Instead of the internationality of the award being expressly defined as in Article 1 of the Miami Draft for each court to apply, could an express stipulation be included making it a matter to be governed by the law of the seat of arbitration and decided upon by the courts of the seat of arbitration?

  - Such a solution could promote uniformity in enforcing awards by largely eliminating the risk of conflicting decisions on the issue and be in line with the objective of Article 5 in upholding the exclusive jurisdiction of the court of the seat of arbitration on the international validity of the award.

  - There is the risk that citizens of the same country might go to international arbitration in another jurisdiction where their arbitration would be international, thus avoiding domestic court proceedings in their own country or their local arbitration regime.

    - A specific reservation preventing the application of the convention to an arbitration clause or award between parties who are exclusively its nationals and which would be considered as a domestic arbitration under its laws could be made by those Member States who decide not to allow their own nationals to resolve domestic disputes by way of international arbitration.

    - But no Member State would prevent enforcement of an award among foreign parties who are permitted by their State of origin or the seat of arbitration to go to international arbitration.

  - If the requirement of internationality were stated separately and made subject to the law of the seat and to a decision of the court of the seat, the scope of the convention would still have to be defined:

    - the criterion of "arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought" could be carried over from the NYC;

- this criterion could be extended to cover arbitration clauses the likely result of which would be the issuance of arbitral awards described above;
- the requirement of internationality of the award could be stated in Article 3(1) (note that Article 3(1) could in fact be replaced by this requirement since its current wording may create uncertainty when read with Article 7); and
- the requirement of internationality of the arbitration clause could be stated in Article 2. Note that such an approach would also carry the advantage of concentrating issues pertaining to the arbitration clause at the court of seat of arbitration.

II. LANGUAGE TO BE USED

Under Article IV(2) of the NYC, an award which was not made in an "official language of the country" in which enforcement is sought must be translated into that language for it to be enforced. It is unclear whether Mauritius has an "official language" at all. If there is one, then it is undoubtedly the English language. What about awards rendered in the French language?

By virtue of Article VII(1) of the NYC, certain provisions of national law may also apply. For many reasons, it is my view the preferred interpretation of VII(1) should be that the provisions of the old Civil Procedure Code that are more favourable to enforcement of awards are not repealed by the NYC, which was implemented into domestic law under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001.

- Under Article 1028-9 of the Civil Procedure Code, awards rendered in English as well as awards rendered in French are enforceable without the need for such awards to be translated into the official language of the country.

- It is useful to also mention that under Section 4(3) of The Investment Disputes (Enforcement of Awards) Act 1969, a translation is only required where the copy of the award to be produced before the Court is neither in English not French.

Under the Miami Draft:

Article 7 of the has the benefit of being less ambiguous than Article VII(1) of the NYC in providing that the provisions of domestic law that remain applicable are limited to those strictly allowing enforcement of awards, thereby excluding those that would prevent enforcement.

However, on the issue of awards rendered in the French language, Article 7 might not prove as useful as Article VII(1) of the NYC because according to the new wording, a provision of domestic law can only be used if it amounts to a "legal basis" on which one can rely in order to allow enforcement. Can a stipulation of domestic law allowing for awards in French to be enforced without translation be properly regarded as a "legal basis" for enforcement? Arguably no.

The effect of Miami Draft would therefore be to implicitly repeal Article 1028-9.

The problem on the issue of the award rendered in the French language therefore lies with the configuration of the current position in Mauritian law and its reliance on Article VII(1). Similarly, any other domestic provisions which rely on Article VII(1) of the NYC are thus likely to be implicitly repealed by a transposition of the Miami Draft into national law if they are not capable of forming a "legal basis" for the enforcement of an award by virtue of its Article 7.

As an alternative, will the courts be able to rely on the new wording proposed in Article 4(4) of the Miami Draft?

Article 4(4) of the Miami draft greatly enhances the text of the NYC by providing for the enforcement of an award rendered in a language other than the "official language of the court" unless the court or the other party requests a translation.

Unfortunately, it doubtful whether French will be seen in arbitration proceedings as an "official language" of Mauritian Courts, the more so since Article 7 might not have allowed Article 1028-9 to survive.

On the other hand, the proposed Article 4(4) of the Miami draft allows for more flexibility by eliminating the precondition of a translation except where the court or the other party so requests. It is likely therefore that where enforcement is not contested, the award rendered in French will be enforceable in practice without the need for translation.

Possible solutions for discussion:

- Amendments to current legislation regulating procedure before the Supreme Court could expressly make the French language an "official language of the court".

- The Miami Draft could carry forward part of the original wording of Article VII(1) of the NYC to the effect that not only a "legal basis", but also a "right" in domestic law may be invoked in order to enforce what could be described as "an award which is otherwise unenforceable". After all, the learned Professor himself chose as title for Article 7: "More Favourable Right".

  In the context of this issue, but also generally, for the sake of certainty and in order to prevent any confusion or conflict with Article 5, the provisions of Article 7 should expressly be made subject to it, for instance by inserting, as a condition, that "the legal basis or right does not contravene the mandatory grounds for refusal stipulated in Article 5".

III. CONFIDENTIALITY – A LACUNA IN THE NYC

Finally, I would like to talk about the very important issue of confidentiality in the context of the NYC. In order to illustrate this slightly different type of bottleneck in enforcing awards, I will use a hypothetical situation:

Let us take the case of a contract involving the transfer of technical know-how, trade secrets or other sensitive information to a licensee - the transferee. Following a dispute the transferor obtains substantial damages against the transferee in an award which contains various pieces of the sensitive information.

Commercial arbitration proceedings are usually kept confidential. However, at the stages of enforcement or setting aside, there is doubt.

The transferee threatens the transferor that he will challenge the award before the relevant court or apply for annulment at the seat of arbitration if the transferee does not settle for less. If this threat materialized, the result in most courts, if not all, would be that the sensitive contents of the award would be disclosed in open court proceedings and risk falling in the hands of the competitors of the transferor.

In some jurisdictions the aggrieved party may apply for a court order for such and such information to be kept off the record.

I would like to submit that under national rules for international arbitration:

- All proceedings before national courts in relation to international arbitrations should be held in private.
    - An exception should however be made where privacy would be against the public interest, such as in relation to arbitrations involving states or public authorities, public companies or corruption. The court should take into account the scope of any duty of confidentiality arising from the arbitration clause or any other contractual instrument, from any applicable law(s), or from any order by the arbitration tribunal.

- Interested parties should be allowed to have access to sensitive material upon application to the Competent Authority or Court holding the records of the proceedings and upon showing a legitimate personal interest.

- Judgments should be published but they should first be edited in order to delete the parties' names and to protect all sensitive information.

A short stipulation could also perhaps be envisaged in the Miami draft in order to ensure that Member States take necessary steps in order to uphold the principle of confidentiality existing in arbitration proceedings both at the stage of enforcement of the arbitration agreement and at the stages of enforcement and setting aside of arbitration awards.