

The Internationalisation of International Arbitration

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The Creation and Operation of an International Court of Arbitral Awards

H.E. Judge Stephen M. Schwebel

In these days of proliferation not only of international litigation but of international courts, there may seem room to question the utility of establishing another court of the kind just proposed by Howard Holtzmann: an international court to resolve disputes which arise over challenges to the validity of international commercial arbitral awards.

Judge Holtzmann's proposal would, *inter alia*, remove from national courts the decision which today is theirs under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards to decide on the specified, limited grounds on which recognition and enforcement of an arbitral award may be refused under the Convention. Among those grounds is whether the subject-matter of the dispute is not capable of settlement by arbitration under the law of the State in which the national court sits, and whether recognition or enforcement of the award would be contrary to that State's public policy. The new International Court of Arbitral Awards would have exclusive jurisdiction to determine all these questions. But execution of its decisions will necessarily still rest with national authorities.

Is there a need for such a new court? There is, by way of notable example, no reason in principle why the International Court of Justice cannot resolve disputes about the validity of international arbitral awards, if those disputes arise on, or are raised to, the inter-State level – as, exceptionally, some such disputes have or have been. But the International Court of Justice as its Statute is currently written deals only with contentious cases between States. If an

individual or a corporation wishes to contest the disposition by a national court of a challenge to the recognition or enforcement of a foreign arbitral award, that individual or corporation could appeal to the International Court of Justice only if the State of which he or it is a national were to exercise its discretion so as to institute on his or its behalf an action against the State in which the national court was sitting, alleging, for example, a violation of an international obligation imposed on parties to the New York Convention. Accordingly, as things now stand, there is no international court with an effective capacity or jurisdiction whose processes can be directly activated by a private party which seeks the recognition or enforcement of a foreign arbitral award. The need is there, and no existing international court can meet it. So the case for creating such a new International Court of Arbitral Awards is, for that and all the other reasons set out by Howard Holtzmann, sound.

One might therefore contemplate that UNCITRAL should set about drafting an international convention which would provide for the creation and establishment of an International Court of Arbitral Awards, whose jurisdiction would be limited to deciding upon challenges to the validity of international commercial arbitral awards. A convention may be envisaged which, in its preambular clauses, would:

- (a) recall the pertinent provisions of the New York Convention;
- (b) note that disputes over the recognition and enforcement of arbitral awards come before national courts;
- (c) recall that those disputes have encountered disparate disposition;
- (d) affirm that uniformity and consistency of result in the disposition of challenges to international arbitral processes and awards will promote the effectiveness of international commercial arbitration, and that the faithful implementation of pertinent treaty obligations equally will promote the international contractual and trading relationships which rely so heavily on those processes; and
- (e) state that, accordingly, the States Parties have resolved to establish an International Court of Arbitral Awards to render original, final and definitive judgment on the validity of such awards when and where challenged.

That Court might be composed of 11 – or possibly 15 – judges, selected to represent the principal international legal systems and civilisations, and the principal trading and arbitrating nations, of the world. The Statute of the International Court of Justice provides that,

in electing its judges, in the body as a whole the representation of the main forms of civilisation and of the principal legal systems of the world shall be assured. Moreover, there is a "gentlemen's agreement" in force, pursuant to which the 15 seats of the International Court of Justice broadly mirror in their geographical distribution that of the UN Security Council: the Permanent Members of the Security Council each have one of their nationals elected to the Court; as are three Africans, two from the Americas, etc. The International Labor Organization, in the composition of its governing body, gives weight to insuring the inclusion of the principal industrial Powers. The International Maritime Organization similarly affords a leading role in its Council to the principal shipping States. Given the fact that so much of the volume of international commercial arbitration involves States which are leaders in international trade, judges should be drawn from some of those States as well as from the principal legal systems. But not only from those States. The world as a whole must be represented. Indeed much of the point of establishing such a court is to ensure that States whose courts may not so frequently encounter disputes over the recognition and enforcement of arbitral awards in international commercial cases do recognise and enforce arbitral awards, if necessary with supervening reference to the International Court of Arbitral Awards.

The Convention should provide that, once it is ratified by a prescribed number of States – say, 45 – it shall come into force and that the parties to the Convention shall then meet to elect the judges of the Court. The electors should all be parties to the Convention and no other States (such as the generality of the membership of the UN General Assembly) should be entitled to vote. The Convention should provide that judges shall serve under conditions similar to those of judges of the International Court of Justice but, however, not in one respect: it would provide for a single, non-renewable term of 15 years. (Judicial independence may be enhanced by debarring re-election.) It should also provide that the judges of the Court shall initially serve on call as the case load of the Court requires, with a view to the Court being constituted as a full-time body only as and when the volume of litigation requires. Judges of the Court would be responsible only to the international community.

As Judge Holtzmann has submitted, the Convention should provide that the function of the Court is to decide upon the validity – the recognition and enforcement – of international commercial arbitral awards; it would, as noted, have exclusive jurisdiction, *inter alia*, over questions of whether recognition and enforcement of an

international commercial arbitral award may be refused for any of the reasons set forth in the New York Convention. (The International Court of Justice would retain its established competence as the Court to which questions of the validity of arbitral awards between States, and between States and public international organisations, could be referred.) The new Court would not be entitled to consider the merits of the disputes which had been referred to arbitration, or the merits of resultant arbitral awards, except insofar as examination of the validity of an arbitral award might require, as typically it would not.

The Convention should provide for the law to be applied by the Court:

- (a) the New York Convention or whatever other treaties then in force which govern international commercial arbitration;
- (b) any law prescribed by the parties to the arbitration agreement to be applicable;
- (c) any law which would be governing by virtue of the rules of conflicts of laws;
- (d) the customary law of international arbitration;
- (e) international public policy; and
- (f) the general principles of law recognised by nations partaking in the international arbitral community.

The Convention should provide for the adoption of Rules of Court by the Court and for the establishment of a Registry to service the Court.

The Convention should further require the Parties and their courts to give effect to and enforce the judgments of the International Court of Arbitral Awards. It should provide that national, state and local courts of whatever level or character shall be bound to give full faith and credit to those judgments. While execution in a country – usually the respondent's home State – of an international commercial arbitral award would still require action by national authorities, a party seeking enforcement would come armed with the binding decision of the new International Court which will have already settled the question of the validity of the award. Thus, although the ministerial function of executing the judgment or order of the new International Court would be in the hands of local authorities, those authorities would be treaty-bound to act promptly to carry out those orders and judgments.

Questions of particular interest are, at what stage may the question of the validity of an international commercial arbitral award be referred to the new Court and by whom?

If a national court were to remain (as today it is) empowered to pass upon the validity of an arbitral award, the party challenging its recognition and enforcement, or the party seeking it, would be entitled to appeal that decision to the International Court of Arbitral Awards. But Judge Holtzmann's proposal is designed, rightly, to avoid introducing another judicial layer; the new Court would substitute for national courts in deciding challenges to the validity of arbitral awards. It would not act as a court of appeal on this or any other issue. Thus, whenever in a Convention State a challenge to the recognition or enforcement of an arbitral award were to be made by one party, the other could move to remove that challenge to the new Court which would have exclusive jurisdiction over it, and the national court would be bound to accept that motion.

Perhaps there should be an additional mode of recourse as well, one that is analogous to the procedure under which courts of the Members of the EC may be entitled or may be obliged to refer to the Court of Justice of the European Communities questions which come before them of interpretation of the Treaty of Rome. Courts of States party to our Convention might, in the absence of such a motion of a party, be authorised or even required to refer to the new Court *proprio motu* any question of the recognition or enforcement of an international commercial arbitral award. The national court would, under such recourse, be equally obliged by the Convention's terms to give effect to the judgment of the new Court on the validity of the award.

So much for the composition, competence and operation of an International Court of Arbitral Awards. I wish to speculate now on how well such a court could be expected to function.

That necessarily is uncertain. But if the experience of the International Court of Justice in dealing with problems of the validity of international arbitral awards may be seen as suggestive, then there is ground for hazarding that a court so constructed, using building blocks found in the Statute and experience of the International Court of Justice, should function effectively.

The International Court of Justice, and its predecessor, the Permanent Court of International Justice, have had occasion to deal with a number of international arbitral awards or processes. In the main, these have been arbitral awards or processes of an interstate character. But a few have also involved an arbitral proceeding between a State and an international organisation or an appeal from an executive council of an international organisation. The Permanent Court of International Justice examined three appeals from arbitral awards of mixed arbitral tribunals established after

the First World War which, even though proceedings were not inter-State, gave the Permanent Court appellate jurisdiction; and it also considered a request to enforce an arbitral award between a State and a foreign company.

I do not propose to review these cases. But I shall comment on aspects of the cases with which the International Court of Justice has dealt which involve two large questions: first, the obligation to submit a dispute to arbitration, and, secondly, where a dispute has been submitted, the validity or nullity of the resultant arbitral award. While the latter group of cases is more pertinent to our discussion than the former, I refer to all of these cases because they uniformly demonstrate the care with which the Court has upheld the integrity of the international arbitral process and its resultant awards.

In three cases in which the obligation to submit a dispute to arbitration was the essential issue, the Court made the following holdings of particular interest:

- The Court's jurisdiction to decide upon whether there is an obligation to arbitrate is divorced from any holding on the merits of the dispute, which is the exclusive province of the arbitral tribunal.
- Whether a dispute subject to arbitration exists is a matter of objective determination and not self-determination by a party. Equally, whether a dispute has been settled by negotiation or other agreed means of settlement is a matter of objective determination.
- Where there is an international obligation to arbitrate, that obligation cannot be forestalled by a party's claim that arbitration is not timely or appropriate, e.g. because related proceedings are pending in one of its courts.
- Where there is an international obligation to arbitrate, a party is not obliged to exhaust local remedies which may be provided by the courts of the other party as a precondition of recourse to arbitration.
- Where a State has concluded a treaty providing for arbitration of disputes arising thereunder, which specifies reference to arbitration at the request of either party, that State is obliged, at the request of the other party, to co-operate in constituting the tribunal, in particular by appointing its member. Otherwise the method of arbitral settlement provided for would completely fail in its purpose.
- Where an appointing authority, in this case the UN Secretary-General, is charged with appointing the third member of the

arbitral tribunal where the parties do not agree upon him, and where the arbitral clause contemplates a three-member tribunal operating by majority decision, the appointing authority is not empowered to appoint the third member in the absence of a party's appointment of its member.

- Where, however, an international arbitral tribunal has been fully constituted, its proceedings cannot be rendered nugatory by the withdrawal of an arbitrator.

Let us turn now to the two cases in which the International Court of Justice dealt with questions of the validity or nullity of an arbitral award.

In the case concerning the *Arbitral Award Made by the King of Spain on 23 December 1906*,¹ (an award which purported to settle a large territorial dispute between Nicaragua and Honduras) the Court emphasised that it was not a court of appeal and could not pronounce on whether the arbitrator's decision was right or wrong, but only on whether the award was a nullity. It held that the third arbitrator designated by national arbitrators (the King of Spain) had been duly appointed. In rejecting Nicaragua's initial challenge to the award's validity, the Court held that it was within the power of the nationally appointed arbitrators to interpret and apply the treaty articles in question in order to discharge their function of organising the arbitral tribunal. Both Honduras and Nicaragua had officially accepted the appointment of the King of Spain. No question was raised in the arbitral proceedings before the King with regard either to the validity of his designation as arbitrator or his jurisdiction. In these circumstances, the Court was unable to hold that the designation of the King of Spain as arbitrator was invalid.

Nicaragua's challenge to the validity of the award also invoked excess of jurisdiction, essential error and lack of reasons. Honduras countered that Nicaragua had refrained from challenge to the award for years and that it was clear and capable of execution. The Court found that Nicaragua by express declaration and conduct had accepted the award as valid and that it was no longer open to Nicaragua to challenge the award's validity. Moreover, even if Nicaragua were not so debarred, the award was valid.

The Court rejected Nicaraguan contentions that the King of Spain exceeded his powers. It found no precise indication of any essential error which would render the award a nullity. The

¹ Case concerning the *Arbitral Award made by the King of Spain on 23 December 1906*, ICJ Reports 1960, p. 162.

appraisal of the probative value of evidence was within the discretionary power of the arbitrator and not open to question. As for the alleged lack of reasons, the Court found that the award dealt in logical order and in some detail with all relevant considerations and contained ample reasoning and explanations in support of the arbitrator's conclusions. Its operative clause was clear and perfectly capable of execution. The Court for all these reasons held that the award was valid and binding and that Nicaragua was under an obligation to carry it out – which in fact it did.

The question of the validity of an arbitral award was more recently considered in the case of the *Arbitral Award of 31 July 1989*.² Guinea-Bissau and Senegal had concluded an arbitral agreement requesting the tribunal to answer two questions: the first related to the legal force of an agreement of 1960 between the former colonial powers delimiting maritime boundaries; the second, to be answered in the event of a negative answer to the first question, concerned maritime delimitation between their successor States, Senegal and Guinea-Bissau. The arbitration agreement also required the tribunal to annex a map to its award. The tribunal concluded that the 1960 agreement was valid and could be opposed to both parties; that it had to be interpreted in the light of the law in force in 1960; and that accordingly it did not operate so as to delimit maritime areas which did not then exist (such as the exclusive economic zone). Thus the tribunal did not find it appropriate to answer the second question or to annex a map.

The operative clause was adopted by a vote of two to one, but the tribunal's president, who voted with the majority, appended a declaration which stated that he would have preferred that the award had been otherwise cast so as to permit an answer to the second question as well.

Guinea-Bissau challenged the validity and indeed the very existence of the award, principally on the grounds that the president's declaration demonstrated that in substance he did not support the award for which he had voted and that the award accordingly lacked majority support; and that the tribunal committed an *excès de pouvoir* through inadequate reasoning, failure to resolve the whole of the dispute by answering both of the questions put to it and failure to attach a map.

Again the Court emphasised that its proceedings concerned only the alleged inexistence and nullity of the award and were not an appeal from it. It held that the absence of an arbitrator when the

² *Arbitral Award of 31 July 1989*, ICJ Reports 1991, p. 53.

award was delivered was of no legal effect. As to the claim that the award was not supported by a real majority, the Court held that, even if, *arguendo*, there were a contradiction between the views expressed by the tribunal's president and the award, such a contradiction could not prevail over the vote. The Court observed that, as the practice of international tribunals shows (in particular of the Iran – United States Claims Tribunal), it sometimes happens that a member of a tribunal votes in favour of a decision of the tribunal even though he might individually have been inclined to prefer another solution. The validity of his vote remains unaffected by the expression of such differences in a declaration or separate opinion.

As to the claim of nullity based on the tribunal's not answering the second question, the Court held that it was clear that the tribunal decided that, as it had given an affirmative answer to the first question, it did not have to answer the second. The Court recalled the consistently held rule that an international tribunal has the right to determine its own jurisdiction and for this purpose has the power to interpret the instruments which govern its jurisdiction. The Court did not have to inquire whether or not the arbitration agreement could be interpreted in a number of ways and to choose which was preferable; it would then be acting as a court of appeal. The Court simply had to decide whether the tribunal acted in manifest breach of the competence conferred upon it by the arbitration agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction. As to the alleged absence of reasons, while the Court found the reasoning brief and subject to further development, it nevertheless found the statement of reasoning, if succinct, to be clear and precise.

Accordingly the Court rejected the contentions that the award was null and void and found that it was valid and binding for both parties, which had the obligation to apply it.

These two cases, and the others to which I have summarily referred, demonstrate the Court's concern for the integrity of the arbitral process. If a new Court were to be established of the character which Judge Holtzmann has proposed, there seems reason to believe that it would manifest that same concern, and contribute, in the 21st century, to a more effective system of international commercial arbitration throughout the world.³

³ For a pertinent recent survey, see Shabtai Rosenne, "The International Court of Justice and International Arbitration", *Leiden Journal of International Law*, "The Flame Rekindled: New Hopes for International Arbitration", *Special Issue on International Arbitration*, Vol. 6, No. 2, August 1993, p. 297.