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Session: Overview of the International Legal Instruments and Principles on the Recognition and Enforcement of Foreign Arbitral Awards: Panama Convention, New York Convention and UNCITRAL Model Law on International Commercial Arbitration

The Attitude of Courts at the Seat of Arbitration and its Impact on the Development of International Arbitration

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Introduction

My presentation examines the involvement of national courts in international arbitration references and particularly discusses the importance of a pro-arbitration attitude for the courts at the seat of arbitration. This discussion is relevant because national courts are generally categorised as either supportive or non-supportive (even hostile) towards international arbitration and it appears such categorisation impact on the numbers of arbitration references located in a venue within the state. Research has shown that there is a correlation between the perception of courts in a particular jurisdiction and the number of international arbitration references with their seat in that jurisdiction. The 2010 Queen Mary University Arbitration Survey found that parties are persuaded to choose a venue with enhanced formal legal infrastructure (defined as "the national arbitration law, track record in enforcing agreements to arbitrate and arbitral awards, neutrality and impartiality of legal system"). This discussion is therefore relevant because it engages the arbitration related laws and attitudes of the courts in these states. Judicial pronouncements also contribute to the development of international arbitral jurisprudence. In addition, the hosting of international arbitration references in a state bring much needed income to both the legal services, hospitality and transportation sectors which will lead to an increase in tax revenues for the various governments, so economically, this should be encouraged. This presentation focuses on the laws and judiciary of the sixteen member states of OAS from The Caribbean: Antigua & Barbuda; Barbados; Belize; Cuba (on the basis of the 2009 OAS Resolutionresolution AG/RES. 2438 (XXXIX-O/09)); Dominica; Dominican Republic; Grenada; Guyana; Haiti; Jamaica; St Kitts & Nevis; St Lucia; St Vincent & the Grenadines; Suriname; The Bahamas; and Trinidad & Tobago.

Some Data

Of the 35 OAS member states 30 are parties to and have implemented the New York Convention (while 5 of the Caribbean State members are not parties to the Convention); 19 are parties to the Panama Convention (to which one of the 16 Caribbean State members is party); 24 are parties to the ICSID Convention (4 of the Caribbean States are not parties while 2 have signed the Convention) while the arbitration laws of 11 OAS States are modelled after the UNCITRAL Model Law on International Commercial Arbitration (none of the Caribbean State members are Model Law jurisdictions). Globally, there are 152 state parties to the New York Convention; 150 state parties to ICSID and 67 States have laws based on the UNCITRAL Model Law. This data points to the

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importance and so focus of this presentation on the New York Convention. [See Schedule below for details on the data].

Outline of presentation

I will briefly mention the New York Convention and its scope (1); then examine the different stages in an arbitral reference when a national court *may* be relevant and engage in some detailed discussion of some articles of the New York Convention on what a court should do in an action covered by an arbitration agreement under its article II and recognition and enforcement of arbitral awards under its articles III and IV (2); and finally raise some questions for discussion on the attractiveness of Caribbean OAS member states as venues for international arbitration with some suggestions on how to action this (3).

1 New York Convention

This refers to the UN Convention for the recognition and enforcement of foreign arbitral awards, made in New York in 10 June 1958. As already noted it currently has 152 member states from every continent in the world {see UNCITRAL website for a full list of its member states}. There are 19 members of the Panama Convention who are also parties to the New York Convention. Both conventions regulate the enforcement of arbitral awards [The Montevideo Convention of 1979 includes enforcement of judgments (and arbitral awards) rendered in civil, commercial or labour proceedings]. The New York Convention primarily regulates the recognition of arbitration agreements and the effect of concluding a valid arbitration agreement; the recognition and enforcement of arbitral awards; and the grounds to challenge such awards.

Article I.1 New York Convention:

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement is sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

Article 1 Panama Convention:

> An agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to respect to a commercial transaction is valid. …

The New York Convention applies to foreign awards so not just international awards: see for example the decision of the English courts in IPCO v NNPC [2005] EWHC 726. The Convention is supportive of the arbitral process since under Article II a court in a Convention state undertakes to refer parties to arbitration where there is an arbitration agreement and not proceed with the application. This is the case where one party so applies. This is so because since the arbitration agreement is a creature of contract, all its contracting parties can decide not to proceed with the arbitration and they should not be forced to go to arbitration. However where one party wishes to arbitrate, then the courts will support both parties by recognising and upholding their contractual bargain and enforcing it.

Article II.3 New York Convention:

> The Court of a Contracting State, when seized of an action in respect of which the parties have made an agreement within the meaning of this article, shall, be at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

On enforcement of awards, courts from New York Convention states are encouraged to be pro-enforcement.

Article III New York Convention:

> Each Contracting State shall recognize arbitral awards as binding and enforce them 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. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV New York Convention:

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
    a. The duly authenticated original award or a duly certified copy thereof;
    b. The original agreement referred to in article II [the arbitration agreement] or a duly certified copy thereof.
2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

So the starting point for Convention States is the recognition of the binding nature of the arbitral award. In my view the equivalent provision under article 4 of the Panama Convention is more explicit. It provides:

Article 4 Panama Convention:

> An arbitral decision or award that is not appealable under the applicable law or procedural rules *shall have the force of a final judicial judgment*. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties. (Emphasis added)

This clearly evidences the final and binding nature of arbitration awards and also clarifies why such awards may be challenged on limited grounds without a full re-hearing. Thus, with a final and binding arbitral award, the court of the Convention state is required to recognise and enforce such award. It may happen that the respondent to such application may wish to challenge the award on

any of the article V New York Convention grounds, then the view taken by most courts of member states is to stay the enforcement and hear the application for challenge first. This is usually not a problem if both applications are made in the same jurisdiction. However where the applications are made in different Convention states, then it will depend on the legal philosophical leaning of each of the states, on whether to enforce the award or to stay proceedings until the challenge decision has been made. We can refer again to the IPCO v NNPC case for the view of the English courts on this which will be to stay enforcement. See IPCO v NNPC [2014] All ER (D) 188 or [2014] EWHC 576 (Comm). However see the recent Dallah v Pakistan decisions from the French courts (Cour d'Appel, Paris, Feb 11, 2011, 09/28533, 09/28535, 09/28541) and the English courts ([2010] UKSC 46)

National courts in Convention states pledge not to require more onerous conditions from parties seeking to enforce arbitral awards under article IV of the New York Convention, than they will require for the enforcement of domestic awards. Therefore to obtain the enforcement of a Convention award, the applying party need produce the arbitral award and relevant arbitration agreement and though not expressly stated in the article, pay the court fees. This provision clearly evidences the supportive and pro-enforcement bias of the New York Convention. For more details on this see Emilia Onyema, "Formalities of the Enforcement Procedure", in Emmanuel Gaillard & Domenico Di Pietro (eds) *Recognition and Enforcement of Arbitration Agreements and International Arbitral Awards – the New York Convention in Practice,* (2008) Cameron May Publishers, pp 595 – 610.

2 National courts in international arbitration

Courts play important roles in arbitration. This is regardless of the delocalisation theory which argues that since arbitration is based on contract by virtue of party autonomy the state should have no input except the parties make recourse to it (courts). At various stages of the arbitral reference, states through their laws and courts may become involved in arbitration. The relevant courts are those at the seat of arbitration or where enforcement of the award is sought. Courts can be requested by a party to the arbitration agreement to uphold the agreement and require the other party to comply with the terms of their arbitration agreement. This is usually done through an application for an anti-suit injunction. Courts can also assist with ensuring the arbitration gets off the ground by assisting the parties in commencing the reference and in the appointment of the arbitrators. These are all supportive measures that can be granted by courts to assist the arbitral reference before the arbitral tribunal is constituted. Courts also assist parties who may require an urgent measure of protection at this stage or any other stage before the award is performed. Upon the formation of the arbitral tribunal, courts can assist with collection of evidence; witness summons; interim or urgent measures applications and their enforcement. In some jurisdictions (for example, England (ss.42-45 EAA is on court powers to support arbitration) and under article 17 of the Model Law) the tribunal can order interim or urgent measures which the courts will enforce. Courts can also determine questions of arbitrator challenges during the reference. After the award has been rendered and published to the parties, the courts may also be engaged where the award debtor fails to perform it so that the award creditor needs court assistance to enforce the award. It is primarily with this phase that the New York Convention engages.

Generally empowering courts to act in relation to an arbitral reference should not be a problem especially where the court acts in a supportive manner. It is important that disputing parties have access to courts (particularly those at the seat of arbitration) if they need to. However, it becomes a

huge problem where courts intervene frequently and effectively allow their institution to be used (usually by one of the disputing parties) to frustrate and delay the process. Such actions frustrate the choice made by the parties to resolve their dispute through arbitration and not before the courts through litigation. Mention must be made of the fact that some judges may feel the need to guard their jurisdiction. However such feelings are misplaced because the arbitration process does not replace the courts and remains subject to the power of the courts. The arbitral process supports the courts and the courts should support the arbitral process in return so that there is a symbiotic relationship which will enhance the effectiveness of the business of dispute resolution.

So why do parties elect to arbitrate instead of litigate their cross border disputes? The reasons include: lack of trust of the courts and legal system of their contracting party; lack of an international judgments enforcement convention comparable to the New York Convention, though within the OAS structure there is the Inter American Convention on Extra Territorial Validity of Foreign Judgments and Arbitral Awards of 1979 (Montevideo Convention). See data from QMUL 2006 International Arbitration Survey on Corporate Attitudes and Practices. See also, Emilia Onyema, "Power Shift in International Commercial Arbitration Proceedings" (2004) vol 14 nos1&2, *Caribbean Law Review*, pp 62-77).

3 Questions for discussion

How can Caribbean OAS states make themselves more attractive as venues for international arbitration references?

Some suggestions:

A) Update or modernise their arbitration laws – the UNCITRAL regime is one option.
B) Encourage member states to ratify the New York Convention (and other relevant conventions on arbitration).
C) Continue to disseminate knowledge and share experiences on arbitration with relevant stakeholders. This will include judges and attorneys and other professionals involved in arbitration.
D) Encourage the setting up of arbitration institutions (or a regional arbitration institution) in the states and exchanges between these institution(s) and other well established arbitration institutions.
E) The states should pursue a clearly focused policy that is supportive of arbitration.
F) Embark on marketing of the states/region as a destination for arbitration.
G) Include arbitration agreements in your contracts!

Conclusion

On the basis of publicly available data on OAS member states and their convention ratification statuses, I examined the various stages of the arbitral reference when national courts may be required to engage with the process and how through such engagements, such courts can support or frustrate the arbitral reference. I examined various provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, relevant to upholding the arbitration agreement and enforcing the arbitral award. I also raised some questions on the nomination of venues within Caribbean OAS states as seats for international arbitral references and finally made some suggestions on how these states can develop their presence in international arbitration.

Schedule A: Convention status of OAS States

No	Name of State	Panama Convention 1975	New York Convention 1958	ICSID Convention 1965	Model Law
1	*Antigua & Barbuda*	-	03/05/1989	-	-
2	Argentina	01/05/75	12/06/1989	11/18/1994	-
3	*Barbados*	-	14/06/1993	12/01/1983	-
4	*Belize*	-	-	Signed: 12/19/1986	-
5	Bolivia	04/29/99	27/07/1995	-	-
6	Brazil	11/27/95	05/09/2002	-	-
7	Canada	-	10/08/1986	12/01/2013	1986-1999
8	Chile	05/17/76	03/12/1975	10/24/1991	2004
9	Colombia	12/29/86	24/12/1979	08/14/1997	-
10	Costa Rica	01/20/78	24/01/1988	05/27/1993	2011
11	*Cuba*	-	30/03/1975	-	-
12	*Dominica*	-	26/01/1989	-	-
13	*Dominican Republic*	07/07/08	10/07/2002	Signed: 03/20/2000	-
14	Ecuador	10/23/91	03/04/1962	-	-
15	El Salvador	08/11/80	27/05/1998	04/05/1984	-
16	*Grenada*	-	-	06/23/1991	-
17	Guatemala	08/20/86	19/06/1984	02/20/2003	1995
18	*Guyana*	-	24/12/2014	08/10/1969	-
19	*Haiti*	-	04/03/1984	11/26/2009	-
20	Honduras	03/22/79	01/01/2001	03/16/1989	2000
21	*Jamaica*	-	08/10/2002	10/14/1966	-
22	Mexico	03/27/78	13/07/1971	-	1993
23	Nicaragua	10/02/03	23/12/2003	04/19/1995	2005
24	Panama	12/17/75	08/01/1985	05/08/1996	-
25	Paraguay	12/15/76	06/01/1998	02/06/1983	2002
26	Peru	05/22/89	05/10/1988	09/08/1993	2008
27	*St Kitts & Nevis*	-	-	09/03/1995	-
28	*Saint Lucia*	-	-	07/04/1984	-
29	*St Vincent & the Grenadines*	-	11/12/2000	01/15/2003	-
30	Suriname	-	-	-	-
31	*The Bahamas*	-	20/03/2007	11/18/1995	-
32	*Trinidad & Tobago*	-	15/05/1979	02/02/1967	-
33	United States of America	09/27/90	29/12/1970	10/14/1966	1988-2010
34	Uruguay	04/25/77	28/06/1983	09/08/2000	-
35	Venezuela	05/16/85	09/05/1995	-	1998
	Total	19	30	24	11

Comparators: 30 of the 152 New York Convention states; 24 of the 150 ICSID member states; 11 of the 67 Model Law Jurisdictions.

All Caribbean member states are italicised. Cuba is listed by virtue of the OAS 2009 Resolution resolution AG/RES. 2438 (XXXIX-O/09)