

Critical Analysis of Recognition and Enforcement of International Arbitration Awards in Malaysia and Saudi Arabia (Comparative Study)

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Abstract

This paper discusses the requirements for recognition and enforcement of arbitral awards in the context of Malaysia and Saudi Arabia for the enforcement and acknowledgement of such awards, and to highlight the entailed processes in both countries. This study was achieved through the use of quantitative analysis, where data was collected from libraries and published reports. Specifically, this paper is an attempt to provide clarification to the Arbitration law in both countries relating to the requirements of recognition and enforcements of international arbitration awards. Both the Malaysian Arbitration Act 2005 and Saudi Arbitration Act 2012 were compared with the Convention on Settlement of Investment Disputes 1965 (ICSID Convention). The main objective was achieved by concentrating on providing an insight into the nature of enforceable arbitral awards and the requirements of enforcement.

Keywords: international arbitration, arbitration award, recognition, enforcement.

1.0 Introduction

In the current times, international arbitration is becoming the most optimum dispute settlement tool that promotes international trade and investment. AAs such, various treaties and laws have been established and adopted, and specific institutions have been created for the facilitation and enhancement of the arbitral functioning (Yahiel & Cranston, 1985). The lack of international conventions in Malaysia and Saudi Arabia in this matter required national Acts namely the Malaysian Arbitration Act 2005, and Saudi Arbitration Act 2012 to be established. Added to this both countries are members of several bilateral conventions and international treaties concerning Arbitration.

2.0 The Nature of International Arbitration Awards

Arbitration is of two types – international and domestic arbitration. This paper is only concerned with the former type, which is deemed to be an extensively utilized method of dispute resolution in the context of international trade. The increasing importance and requirement for inter-state trade and the relations it creates between enterprises throughout borders assist in the development of international dispute resolutions. Arbitration possesses many distinct advantages over national courts proceedings and these include close venue, confidential and expedient processes, expert-handling and enforceable awards in various legal systems (Sklenyete, 2003). The decisions of arbitral tribunals are referred to as award, orders, or findings, among others. Due to the lack of consensus on the meaning of the decision terms in legal circles, it is logical that the responsible authorities use the term ‘award’ with caution as it has legal implications that are significant when enforcement is called for (Fouchard, Gaillard, Goldman, & Savage, 1999). Such term encapsulates final awards that disposes of claims brought to the tribunal and other decisions that the tribunal renders on the substance issues, any competence or procedure, particularly when the tribunal refers to its decision as an ‘award’ as mentioned by (Fouchard et al., 1999).

According to the Malaysian Arbitration Act 2005, international arbitration awards are those that stem from arbitration involving a party whose business is located internationally, or where the arbitration seat is out of Malaysia and the parties to the arbitration proceedings agreed that the subject matter is related to a business in various states (s.2).

With regards to Saudi Arabia, international award has no exact definition although international arbitration has been summarized in Article 3 of the Saudi Arbitration Act 2012 where it is referred to as arbitration ‘where the dispute is related to international commerce and it is considered international commerce when the head office of both parties exists in several places’. The article adds that lack of place of business would place the consideration to ‘the place of residence’ (Article 3). It also states that when both parties head office are in the same country, arbitration may only be international arbitration if it is ‘the place of arbitration is in another country – where the substantial part of obligation is out of the head office country and the most part of the conflict is not in the head office country’ (Article 3). Moreover, the parties may only turn to arbitration in any organization if the matter is ‘out of the Kingdom of Saudi Arabia’ and if ‘the subject matter of the arbitration agreement is relevant to several countries’ (Saudi Arbitration Act, Art. 3). In sum, the awards resulting from the above cases of arbitration instances are referred to as international arbitration awards.

On the other hand, the ICSID convention does not have the same ruling as both countries in that it provides that the states that are parties to the contract should acknowledge and enforce its award issued by the sought country's ordinary courts, where the winning party is the one that seeks the award enforcement (ICSID Convention Rules, s.6, art. 54). It neither recognizes the arbitration as international nor local as it is only concerned with the arbitral committee's preference to appoint arbitrations from a nationality that is different from that of the parties, until and unless the parties have expressed otherwise in their arbitration agreement (ICSID Convention, Rule 1, s.3). In other words, the onus of considering the award to be domestic or international is left to the signatory states and because the seeking party would request the ICSID arbitration award to be enforced in a country that is a member to the Convention, the award should be enforced according to the Convention's guidelines. The researcher feels that the ICSID attempts to facilitate the recognition and enforcement of its awards in the contracting state as it requests countries to refer to its awards as national award. More importantly, an arbitration tribunal does not have the power of award enforcement, unlike the courts. Nevertheless, because the arbitral parties gave their consent to follow the decision of the tribunal, the award issued by the tribunal is capable of legal enforcement. To reinforce the enforcement further, the national court wherein the enforcement is sought, often agrees to enforcing arbitration awards except when the arbitration procedure is embroiled in a matter that is incompatible with public policy or if there is any procedural irregularity (Roberts & Palmer, 2005). Specifically, in this matter (Fouchard et al., 1999) demonstrated in the *Arbitration and Dispute Resolution Law Journal* that less than 5% of the arbitral awards have been refused enforcement by courts.

Furthermore, the international arbitration award is only enforceable if it is final and binding, and it is considered final when the proceedings of arbitration come to an end, and it is binding, when the law under which the arbitral award was made is binding. With a final and binding arbitral award, the seeking party may take recourse in a competent court in the sought country to recognize and enforce the award. In this regard, the Malaysian Arbitration Act 2005 states that the arbitration proceeding is terminated by a final award, where such an award is final and binding on the parties to the arbitration (Art. 34 (1), 36 (1) irrespectively. In Saudi Arabia, Saudi Arbitration Act 2012 provides that the arbitration proceedings shall be terminated following the issuance of the award that ends the dispute. Article 39 of the Act adds that the tribunal may issue any provisional or partial awards, before making the final one, which ends the entire dispute (Art. 39 [5]). The same subject matter is addressed in Article 40 (1) of the Saudi Arbitration Act 2012 where it is provided that the arbitration tribunal shall render the final award, which will culminate in ending the dispute within the parties' agreed upon period. The Act failed to mention that the arbitral award is binding on the involved parties as the Malaysian Arbitration Act 2005 and the ICSID Convention Rule expressly provided. Specifically, the ICSID Convention states that the awards will be binding between the parties and it will be considered as the final judgment in the country where the award is obtained (Rule 53, 54) and further, such an award can be set aside only by a three-man committee appointed by the Chairman of ICSID's administrative council (Jonathan W. Lim, 2014).

Both countries (Malaysia and Saudi Arabia) consider the arbitral award final following the rendering of the award. Nevertheless, non-party countries consider such an award final when it is certified by the High Court where the arbitration proceedings took place. In Malaysia, the international arbitration award shall not be acknowledged if it was set aside or suspended by the court wherein the arbitration took place and it does not require for the award to be certified by the same court (Malaysian Arbitration Act, s.39 1 (vii)). The Act places the onus of proof on the losing party as to the refusal of the award by the court where the arbitration took place. On the other hand, in Saudi Arabia, the Saudi Arbitration Act 2012 fails to provide any article addressing the matter, whether in the case of refusal of recognition and enforcement of the award or the certification of the authority/court wherein the arbitral proceedings took place. Meanwhile, in the ICSID Convention, it is expressly mentioned that the final award will be considered final after its certification by the Secretary-General of the ICSID center (ICSID Convention Rules, Art. 54 (2)). The Convention also considers the award binding on the parties to the arbitral proceedings indicating that the losing party is legally bound to comply with the award and that the winning party legally has a right to demand such compliance. Suffice it to say that non-compliance will be deemed to be a breach of legal obligation.

3.0 Requirements of Recognition and Enforcement of International Arbitration Awards

Owing to its easy and convenient enforcement across the globe compared to court judgments, international awards are deemed to be a popular dispute mechanism for international contracts according to Greenwood & Reid (2014). They added that this situation is compounded by the fact that most countries are members to the New York Convention 1958 and international enforcement is, more often than not, covered by treaties and provisions, where the contracting parties differ from one jurisdiction to another (Greenwood & Reid, 2005).

Generally, an arbitration award is final and binding on the parties, unless they agreed otherwise, and is subject to any right of either party to the challenge the award in the courts based on jurisdictional, procedural grounds or error of law. In other words, the successful party cannot directly enforce the award without the

court's assistance.

In Malaysia, the application for enforcement should be in writing and it should be made to the high court with the duly authenticated original award or a copy of the same and the original arbitration agreement or a copy of the same (Malaysian Arbitration Act 2005, s.39). The Act adds that if the award or the agreement is in any other language other than English or Bahasa Malaysia, a certified translation of such documents in the English language should be attached (s.39).

Similarly, in Saudi Arabia, international arbitration awards are enforced through a competent court – the winning party is to forward the original award or an attested copy of the same, along with the original copy of the agreement to the said court (Saudi Arbitration Act 2012, Art. 53). The Act also provides that if the award is issued in a language other than Arabic, a translated and certified translation of the same should be forwarded to the competent court (Art. 53).

It is evident that both countries have similar requirements for the recognition and enforcement of international arbitration awards. The Malaysian Arbitration Act 2005 is clear as to the documents to be submitted and the approach to be followed but as to the Saudi Arbitration Act 2012, the drafter may be confused as to the submission of award to the competent court as the question arises as to the number of times the copy of the award should be submitted (formally and informally) and the number of competent court that the seeking party should submit the copy of the award to.

As for the ICSID Convention, in this regard, provides that the seeking party submit a copy of the award certified by the Secretary-General. It does not state the requirement of submitting the agreement or any other document. Each signatory state shall then notify the Secretary-General of the designation of the competent court/authority for this purpose and of any change in such designation. The question arises, as the rules furnished by the ICSID are clear, and both the countries are parties to the Convention, should the ICSID award seeking party in both countries submit just the copy of the award without the copy of the agreement? The compliance of both countries is mandatory because when the state signs and accepts to be a party to the Convention, it becomes bound by the convention rules, and any breach thereof would result in adverse consequences.

4.0 The Grounds for Refusal or Annulment of the International Arbitration Award

According to (Cleary, 1994) and based on the judgment passed in the (Pizzurro, 1992), the arbitral award is binding on the parties and may only be vacated or annulled by a court on the grounds provided by the National Arbitration Act – which include corruption, fraud or hearing irregularities, or exceeding arbitrator's power like going beyond the agreement's scope.

Additionally, the international arbitration award should be binding for its enforcement but after it is rendered, the award is exposed to double judicial review – first, in the country of origin for setting aside and second, in the sought country for enforcement. Also, even if the award has not been suspended in the country of the seat of arbitration, other countries can still deny its enforcement, which would lead to conflicting decisions. For instance, in the case of *Dallah Real Estate & Tourism Holding Co. V. the Ministry of Religious Affairs, Government of Pakistan [2011]*, the award was reviewed twice. While the award was rendered in France and setting aside proceedings were pending in the same, the award was sought for enforcement of the award in England by Dallah. However, the English court refused to enforce it on the grounds that it lacks valid arbitration agreement. Thereafter, the court of appeal in France reached with an opposite conclusion with the England's court and certified the award on the setting aside proceedings (van den Berg, 2014). Here, the question arises, what will happen if the pending application of setting aside proceedings takes longer than the enforcement proceedings in the country of the arbitration seat? In such a case, after enforcement the court in France set aside the award. It is appears that the international arbitration award is faced with several steps prior to reaching its conclusion, whether to enforce or refuse enforcement.

This double review is apparent in the context of the Federal Republic of Germany as addressed by its Arbitration Law 1998 s. 1060 (2). According to the Law in the stated section, "an application for a declaration of enforceability shall be rejected and the award set aside if one of the grounds for setting aside under section 1059 sub-section 2 exists". It adds that basis for setting aside shall be ignored if at the time of the enforceability application, the setting aside application on the grounds of such basis was rejected. These grounds include – expiration of time limits established by s. 1059, sub-section 3 prior to application for setting aside application German Arbitration Act 1998.

In the context of Germany, the situation is such that when the legislator is aware of refusal of arbitral award enforcement and but misses the application for its appeal in the sought country, the award is later set aside in the country of the seat of arbitration to avoid double judicial review. In both Malaysia and Saudi Arabia, rules should be established to avoid the same. For instance, the enforcement country can wait for the application of setting aside in the country of the seat of arbitration prior to enforcing the award, and there should be a time limit for forwarding an application in the country of the seat of arbitration. Also, the international arbitration award should be certified by the court of origin to steer clear of conflict as in the Dallah case.

More specifically, in case of Malaysia, the Malaysian Arbitration Act 2005 provide two distinct sections under different titles; application setting aside the arbitral award and refusal to recognize and enforce the arbitral award. Both terms are synonymous and have the same function, which is primarily to annul the arbitral award (Malaysian Arbitration Act 2005, s.37 and s.39). The researcher is convinced that the legislator should combine both sections under the heading refusal or annulment of the arbitration award as both entail the same rules and by differentiating them they cause confusion on which rule to follow.

In the Saudi Arbitration Act 2012, the terms governing the annulment of arbitral award is covered under Chapter Six Art. 50. Such rules are similar to the ones provided by the Malaysian Arbitration Act 2005 although I would recommend that the Malaysian legislators take note from the Saudi Arbitration Act 2012 as to the drafting of the annulment arbitral award application.

As for the ICSID Convention Rules, the terms concerning annulment of arbitral award differ from those laid down by the Arbitration Acts in both countries. Numerous applications have been forwarded to the Secretary-General of the Center with the claim of improper constitution of tribunal or of the tribunal's exceeding its power, or corruption of one of the tribunal members, or a diversion from the basic procedural rule, or the awards baseless granting and while the New York Convention primarily calls for Convention States to enforce arbitral awards rendered in other member states, according to (Rosen & Ho, 2014). Many convention states adopted the 'reciprocity reservation', which confines their obligations to acknowledge and enforce the awards rendered in another member state – in fact, over 75 countries, with the inclusion of the U.S., China, India, Japan, Korea, and the U.K. have adopted such reservation. In other words, the place of legally rendering of award can impact the analysis of its enforcement (Rosen & Ho, 2014)

In this regard, Rau (1996) contended that the Convention included the "reciprocity reservation" to tackle specific countries ignored to extend their commitment to non-signatory states by not enforcing awards from such states in a simple view of "if they won't enforce our awards, we won't enforce theirs" (Rau, 1996). The Convention is applicable in principal to foreign arbitration agreements and foreign or non-domestic awards but the signatory states allow making two reservations to the Convention's application. A major portion (two-thirds) of the Contracting States have refused to apply the Convention only to recognize and enforce awards that were passed in another member state's territory and one-third of the same promise to apply the Convention only to differences that arise out of legal relationships (contractual or non-contractual) that are considered commercial under the national law of the State promising such application and this includes Malaysia (ICCA, 2011).

Specifically, in Malaysia, the implementation of the 'reciprocity reservation' is exemplified in *Sri Lanka Cricket V. World Sports Nimbus Pte Ltd. [2006] 2 CLJ 316 CA*. In this case, the imposition of extra conditions was required before the Convention Award was enforced in Malaysia. The World Sports Nimbus was granted an arbitration award against the appellant, Sri Lanka Cricket in Singapore. The World Sports Nimbus was allowed by the High Court to enforce the award in Malaysia but an appeal to the Court of Appeal set aside the High Court's decision as no Gazette Notification declared Singapore as a member of the New York Convention. The decision was based on the rationale set out in sec. 2(2) of the Act of Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (CREFA). Based on this Act of 1985, the Yang Di Pertuan Agong may declare that any state included in the order is a party to the Convention in the Gazette, and that while in force, the order shall be valid evidence that the State is a member to Convention.

However, this CREFA was repealed by the new Malaysian Arbitration Act 2005 and rendered it inapplicable. Despite this fact, the section was again applied in *Lombard Commodities Limited V. Alami Vegetable Oil Products Sdn. Bhd. [2010] 2 MLJ 23*. In this case, the Putrajaya Court of Appeal did not recognize the U.K. arbitral award on the basis of the NYC provision and referred to CREFA s. 2 (2), which provides the mandatory declaration of a State to be a member in order for the award to be enforced (Azzat, 2010).

In Saudi Arabia, while three Gulf States namely Oman, Qatar and the U.A.E. did not express any reservations, Kuwait and Saudi Arabia expressed the 'reciprocity reservation'. Meanwhile, Bahrain adopted both the 'reciprocity and commerciality reservation (Gccarbitration, 2012)'. Moreover, the Saudi legal system is full of complications when it comes to enforcing international arbitration awards in light of the application of the 'reciprocity reservation' even among contracting states. According to the Article 8 (1)(g) of the Royal Decree No. M/51 dated 17/7/1402 H. corresponding to 11th May 1982, the Grievances Board Law is granted the authority to accept applications of enforcing international awards in Saudi Arabia. In this regard, (Beaumont & Al-Hashim, 2004) stated that based on Article 6 of the Rules of Pleadings and Procedures of the Grievances Board, issued by the Council of Ministers Resolution No. 190 dated 16/11/1409 H. corresponding to 20th June 1989, provides that for an international award to be enforceable in Saudi Arabia, it should satisfy two criteria. First, the applicant is required to show that the international award jurisdiction reciprocally enforce awards of Saudi courts. However, a specific guideline as to how an applicant seeking to enforce an international award in Saudi Arabia is to provide evidence to this is not provided by the Grievances Board Law or the Rules. Second, the applicant is required to show that the international award terms do not contradict with Islamic Law as enforced in Saudi Arabia – international awards often fall short on this second requirement as majority of commercial practices in

civil law and common law countries including conventional insurance and interest are not allowed in Islamic law and as such, they cannot be enforced (Group, 2007). This situation is evident in *Ninivo Company V. the Redec Company*, 185/2/q/149 where the Saudi court held the U.K. court award unenforceable although the applicant provided them with an official letter from the U.K. government saying that generally, the U.K. courts will enforce international awards in their home ground. The decision of the Grievances Board was based on the rationale that the letter failed to guarantee reciprocity and the Board refused to give credence to a U.K. lawyer's legal opinion as the draft was not considered an official letter. It is however important to keep in mind that the Grievances Board views the reciprocity issues on the basis of each case without precedence.

In this regard, the ICSID Convention does not include the 'reciprocity principle' in any of its rules indicating its satisfaction with the grounds for refusal of arbitration awards.

5.0 Conclusion

On the basis of the above discussion, a great similarity can be noted between the Arbitration Acts of both Malaysia and Saudi Arabia in light of the international arbitration awards enforcement. The requirements established in the two countries concerning the matter relate to the nature of the international arbitral award. Moreover, the two Acts are less similar to the ICSID Convention when it comes to requirements for recognition and enforcement of such awards.

The researcher recommends that Saudi Arabia makes some amends, specifically by inserting 'binding awards' in its Saudi Arbitration Act 2012 for jurisdiction not to accept application of enforcement of international arbitration award unless the court in the country of origin confirms it.

With regards to the 'reciprocity reservation' it is suggested that both Malaysia and Saudi Arabia revoke this principle as it adds complication to business transactions as some countries are not listed in Malaysian gazette and that some countries may refuse awards granted in Saudi Arabia for the simple reason of it being against their public policy and Saudi Arabia may reciprocate such an act.

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