

Absolute Finality of Arbitral Awards ?

by PIERRE LALIVE *

I. Introduction

During the last fifty years or so (or since the last World War), as everyone knows, international arbitration has met a spectacular success, which is still going on. And there is also no doubt that "international arbitration law" (to use a somewhat ambiguous expression) – together with the development of many national legislations – has made great progress. Let us just mention, by way of examples, the New York Convention of 1958 on the "recognition" of arbitral awards, the work of UNCITRAL (with its Model Law and its Arbitration Rules) and the present work of the UNCITRAL Working Group – not to cite many other institutions and rules.

From a "sociological" point of view, the fact is that many things have changed in the last fifty years or so. Let me mention, in brief and by way of introduction and if I may venture a few generalizations, a few elements which should be taken into account.

(1) Today, the activity of the international arbitrator can hardly be described, as it often was in the first half of the last century, as a "*nobile officium*". The fact is that it has become a business (especially for lawyers, experts, engineers, accountants and the like).

* Emeritus Professor, Geneva University, Member of the Institut de Droit International, Honorary President of the Swiss Arbitration Association and of the ICC Institute of World Business Law; Senior Partner, LALIVE Attorneys, Geneva.

A few years ago, two sociologists, one French and one American, Mr Yves Dezalay and Mr Bryan Garth, published a very interesting study under the title of "*Dealing in Virtue*"¹. Although somewhat dated in a few respects, this book remains very valuable, especially insofar as it analyzes in depth international arbitration practice and, for example, what the authors describe as the "conquest of the arbitration market by U.S. and English firms".

This phenomenon, which is still going on in several continents, is also very interesting inasmuch as it increases the importance in arbitration, not only of comparative law in this age of globalization, but also of conflicts of cultures, which should be distinguished from conflicts of interests.

(2) Another aspect of contemporary evolution is the extraordinary proliferation of arbitral institutions everywhere, together with the proliferation of more or less unnecessary regulations. There seems to be, in certain quarters, especially among lawyers, a certain legislative or regulatory "frenzy".

An independent observer may be permitted to have certain doubts about either the necessity or even the usefulness of many of these new regulations, which are said or supposed to help arbitration practitioners, while in reality they often jeopardize the flexibility supposed to be an advantage of international arbitration and in fact complicate the work of arbitrators and counsel rather than facilitate it.

(3) Now, when I try to contrast the present characteristics of international arbitration practice with the situation existing before the Second World War in the first half of the Twentieth Century, I do not wish to appear as a "*laudator temporis acti*". We have to be realistic and face the fact that we live in a globalized world, in an increasingly complicated society, characterized by increasing competition, economic, legal and political. As a result, and in spite of efforts at harmonization or unification, new legal difficulties, new legal conflicts (of cultures as well as interests), have appeared. International arbitration remains today the prevailing and normal way of solving international business disputes, in spite of the fact that it has become, perhaps inevitably, more and more complicated. The time has long passed since it could be described

¹ Chicago University Press, 1996, translated into French, Les Marchands de Droit.

(as has been the case before the Second World War), as "a simple, quick and cheap way of solving disputes between gentlemen" !

(4) It stands to reason that the quasi-universal success and expansion of international arbitration depends to a very large extent on the consent of the international community of States. They have come to recognize and even favour arbitration as a necessary private justice. The liberal attitude of modern States as regards both contractual autonomy and arbitration may be said to be motivated by a general recognition of the advantages or necessity of globalization and of international economic commerce.

It is René David (the great French comparatist, and author of an excellent treatise on international commercial arbitration)², who suggested that – in the absence of an international commercial court of justice like the International Court of Justice – there was in fact a kind of agreed division or repartition of tasks between, on the one hand, the States (and inter-governmental organizations) and, on the other, the private operators of international trade and the community of "merchants" (including non-governmental organizations).

This favourable attitude of States is shown for instance by national legislations limiting or excluding the jurisdiction of national Courts in case of a valid arbitration agreement, restricting the possibilities of "appeals" against Awards, or lending assistance for the enforcement of Awards.

(5) Another remark should be obvious: such consent or favour by States has inevitable limits. To attempt here even a short summary of such limits would of course go much beyond the scope of our subject. I need only refer the reader to the well-known decision of the Court of Justice of the European Communities in the famous *Eco-Swiss v. Benetton* case – where the Court states, in short, that the effectiveness of arbitral procedure justifies that:

*"control of arbitral awards should have a limited character and ... annulment of an award or the refusal of its recognition, should only take place in exceptional cases."*³

² "L'Arbitrage et le Commerce international", éd. Economica, 1982.

³ Recueil 1999, p. I-3055 - 1^{er} juin 1994.

This may well be seen as a correct summary of a general, not to say, universal position of States. But it remains to be seen in practice what is the precise meaning of the terms "limited character" or "exceptional cases".

(6) Moreover, one of the great problems faced today by international arbitrators – and later by national judges – is that of the autonomy of the international arbitrator confronted by international public policy or mandatory laws (either of the seat or of the applicable law – or laws⁴). On this important subject, it is sufficient to say here that, as we all know, the prevailing judicial practice, together with the majority of doctrinal writings, favours a very restricted and narrow application of international public policy as a ground for annulling or revoking arbitral decisions.⁵

(7) Third and last remark: should the same or different considerations prevail in international relations involving one State? And this suggests a question, important in theory as well as in practice, on which there is no agreed or universal answer: Is "Investor-State arbitration" a different kind, a different or specific category, to be distinguished from "ordinary international commercial arbitration"?

I do not intend to discuss that question here, for lack of space, and even less to answer it! It should suffice in this connection to mention the opinion of René David who rightly observed that, while it is common to speak of "arbitration" in the singular, there are in reality a fairly large variety of "arbitrations", no one having been able to prove the existence of a simple, monolithic or unique category or definition.

⁴ cf. the French concept of "*Lois de police*".

⁵ This is a reference to international public policy in the traditional, national sense of private international law, to be distinguished from the concept of "transnational (or truly international) public policy"; cf. P. Lalive ICCA Congress Series N° 3, 1986, p. 257 and *House of Lords in Kuwaiti v. Iraqi Airways* [2002] AC 883, at 1100 ff; cf. also ICSID Case N° ARB/00/7 - Award, in *World Duty Free v. Kenya*, at no. 139, 172-173.

II.

It is now time to turn to the "finality", or not, of international arbitral awards.

This is hardly a "new" topic and it may be said to have always existed ever since people resorted to arbitration. But it has become much more "present" or important today than it used to be, especially with the remarkable and recent development of Investor-State BITs (and the expanding activities of institutions like ICSID (with its Additional Facility), NAFTA, or the Energy Charter Treaty, not to mention again UNCITRAL, or the ICC, the LCIA, etc.) The question is simple: "should arbitral awards be "absolutely" final and binding, or should they be subject to "appeals" (in the narrow and in the wide sense of the term)?

Most, if not all, arbitration regulations (in particular in the case of "institutional arbitration") say that the arbitration award is "final and binding". For example, in the "Code of Sports – related Arbitration". Rule 46 reads: *"The award [notified by the CAS Court Office] shall be final and binding upon the parties."*

According to Art. 28(6) of the ICC Rules: *"Every Award shall be binding on the parties...[and] ... by submitting to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."*

In the case of Iran/US Claims, the Declaration of the Algerian Government (Article IV) and the Tribunal Rules of Procedure (Art. 32(2)) state that *"all decisions and awards of the Tribunal shall be final and binding"* – which by the way does not mean that they are "self-executing".⁶

⁶ On this, see Zachary Douglas in BYBIL, 2003, pp 151-228.

The Swiss Private International Law Statute (Art. 192) states that an Award "may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement... ." And the same Swiss Statute (in Art. 190) provides that:

- (1) "The award is final from the time it is communicated.";
- 2) Proceedings for setting aside the award may only be initiated:
 - a) where... (b)... (c)... (d)... (e)... ⁷

In France, Art. 1476 NCPC states that, as soon as it is delivered, the Award has, as regards the dispute, the authority of a "*res judicata*".

In a recent Note ⁸, a well-known French practitioner (Serge Lazareff) stressed the danger, for the effectiveness of arbitration, of the multiplication of setting aside proceedings and he called upon heavier judicial sanctions against the abuse of such proceedings and the repudiation of promises. Indeed, there is no doubt about the tendency of many attorneys, in many countries today (especially of course among "losing parties"), to use and abuse whatever possibilities legislation and case law offer to set aside an award or delay or paralyze its enforcement.

The arguments are well-known in favour of a really or absolutely final arbitration award, and the first of these is of course the (presumed) common intention of the parties to the arbitration agreement. They have decided to resort to international arbitration (rather than to a judicial decision) of a potential dispute; and this for a variety of rather well-known reasons (including the possibility of choosing the arbitrators and the procedure, including also, presumably, confidentiality, and perhaps mainly in order to save time, to be able to "turn the page" over their differences and quarrels so that they can resume their normal commercial relations ⁹. In other words, in the exercise of their autonomy of the will, they have deliberately assumed the so-called "arbitration risk".

⁷ + Art. 191 - [they] may only be brought before the Federal Supreme Court.

⁸ Published in the Cahiers de l'Arbitrage - July 2007.

⁹ Cf. the formula suggested by E. Minoli in Italy (cited by R. David, *op. cit.* N° 20): "*Far giustizia, conservando l'amicizia*".

Should they, then, be allowed to go back on their common consent and repudiate their choice when an award has been rendered, because one party (or, on more exceptional occasions, both parties) is so dissatisfied that resort to State justice and setting aside proceedings appear to be the desirable solution ?

III.

Justice or Finality ? Correctness or legal certainty ? In order to appreciate whether there is a need or justification for allowing "appeals" against international arbitral awards, it is useful to have a rapid look at contemporary practice and consider a few examples of somewhat controversial arbitral decisions (including judicial decisions in arbitration matters). And this scrutiny should not be limited to Investor-State relationships, notwithstanding their particular nature or degree of "specificity", because comparisons with commercial, "ordinary" arbitrations may well prove relevant and indeed illuminating.

Before entering into a brief review of examples of recourse (leading or not to annulment), two general observations seem called for, in order to gain a better view of the context: (a) one on the particular difficulty that exists, in many cases, for "outsiders", of interpreting and correctly understanding international awards; (b) the second on a comparison between the force of an award and that of a court decision.

(a) The first observation may seem too general or even marginal but is directly relevant, I submit, to the present topic, and in particular to the vexed question whether, in the ICSID system, there has been too many, or too few annulments of awards by *ad hoc* committees interpreting Article 52 of the Washington Convention.¹⁰ Experience shows that it may be very difficult for the outside reader or observer to properly understand an arbitral decision, unless

¹⁰ In a conference on the "Annulment of ICSID Awards", organized in 2003 by IAI in Washington, I took the opportunity, with particular reference to the first annulment decided, unanimously, by the *Ad Hoc* Committee in the *Klöckner v. Cameroun* case - to answer the criticism levelled by some writers based, in my submission, on insufficient understanding of both the annulled award and the Convention.

he has had access to the file and the full facts of the case. Some distinguished lawyers have thus been led, on occasions, to erroneous interpretations and comments, whether or not it was also the fault of the arbitrators themselves (or of members of an ICSID *ad hoc* Committee !) ¹¹

That observation should not, of course, be considered as some sort of bar or limit to the freedom of expression of commentators or critics of arbitral awards or of annulment decisions. But it might serve as a word of caution: critics would be wise to check their information and think with some humility of the difficulty of coming to a decision and drafting its reasons – before they venture to accuse an *ad hoc* Committee or an arbitral tribunal, for instance, of disregarding the parties' intention and "legitimate expectations" in order to replace them with the tribunal's "conviction", own understanding or "vision".

No one will of course challenge the statement that, in interpretation, the "fundamental duty is to give effect to the parties' words and actual intention" ¹² – rather than giving a priority to the interpreter's own subjective feeling or conviction. But a similar duty would seem to bear on all commentators, practitioners or doctrinal critics whenever they are called upon to analyze either the reasons given in an award or in a decision of an ICSID *ad hoc* Committee, or, for that matter, a State Court in arbitral matters.

(b) The second general observation is a passing reference to the finality of judicial decisions and to the philosophy underlying the concept of "*res judicata*". This reference or this comparison is useful in the present discussion although the arbitrator's activity is definitely *not* identical to that of a judge but, at best, "quasi-judicial". ¹³

¹¹ For instance because they exercised perhaps too much diplomatic restraint in the drafting of their decision. Practitioners as well as commentators should keep in mind that often neglected aspect of the arbitrators' task; cf. Erasmus' wise saying: "*Toute vérité n'est pas toujours bonne à dire ! Ce qui importe principalement c'est la façon de la proclamer.*" Hence a potential conflict with the duty to state reasons (cf. Articles 52(1) and 48(3) ICSID Convention).

¹² E. Gaillard, *op. cit.* in New York Law Journal, March 1, 2007.

¹³ A source of confusion here is the tendency of certain practitioners, institutions or legislators to lose sight of the distinction between *analogy* and *identity* (see for example the theory of civil irresponsibility or immunity of arbitrators).

