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Arbitration with Governments: "Domestic" v. "International" Awards

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Depending upon the circumstances, arbitration with governments may take the form of domestic arbitration or of a more or less sophisticated international process of adjudication governed by its own set of rules.

Submitting disputes to domestic arbitration may have the advantage of providing the arbitrators with well established procedural rules and of facilitating the recognition and enforcement of resulting awards. However, domestic arbitration is still subject in a number of countries to various forms of judicial control[1] and the state party may be reluctant to submit, however indirectly, to the jurisdiction of foreign courts. Furthermore, unless arbitration is conducted under institutional rules, the rules of procedure found in national legislations may not necessarily satisfy the requirements of the parties, either because these rules are not modern enough or lack flexibility.[2]

Having recourse in institutional arbitration may eliminate some of these problems but at a price which may not be negligible. Certain institutions, such as the International Chamber of Commerce, calculate their administrative charges and the arbitrators' fees on the basis of a percentage of the amount in dispute. In view of the fact that disputes with states often involve large sums of money, the costs of arbitration can be very substantial.

For these, and no doubt other, reasons, the parties may wish to remove the dispute from the reach of domestic law and to "internationalize" the arbitral process.

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[1]A dramatic example of judicial interference with an award is found in the decision of the Swiss Federal Tribunal of May 5, 1976 (102 ATF Ia 576 (1976)) in the case of Société des Grands Travaux de Marseille v. République Populaire du Bangladesh. This decision is summarized in Delaume, *State Contracts and Transnational Arbitration*, 75 A.J.I.L. 784 (1981), at 789-90.

[2]Note that the U.K. Arbitration Act 1979 and the French Decree of May 12, 1981 have been enacted for the purpose of increasing the attractiveness of London and Paris, respectively as international arbitration centers, particularly though not exclusively in regard to disputes involving states. *See, e.g.*, Park, *Judicial Supervision of Transnational Commercial Arbitration: The English Arbitration Act of 1979*, 21 HARV. INT'L L.J. 98 (1980); Delaume, *International Arbitration under French Law*, 37 ARB. J. 38 (1982).

This can be done by way of arbitral compacts providing for ad hoc arbitration or by submission to institutional arbitration governed by the ICSID Convention.

In this connection, however, it should be noted that, although these two techniques of internalization share a common objective, their respective effectiveness cannot be compared.

Ad hoc arbitration clauses vary significantly in detail and precision. In most cases, provisions concerning the conduct of the proceedings are formulated in general terms and leave to the arbitrators a significant margin of discretion. Furthermore, it is not at all sure that "internationalized" awards may benefit from the liberal treatment accorded to "foreign" awards by a network of treaties, including the New York Convention.

In contrast, the ICSID Convention provides a self-contained machinery operating in total independance from domestic law, including the law of the situs of arbitration and that of the recognizing forum. Proceedings under the convention are carried out under a set of truly international rules. Also, the convention provides a unique and expeditious procedure for the recognition and enforcement of ICSID awards.

Under the circumstances and subject to further consideration, it can be stated that the ICSID Convention offers an arbitration system for more effective than ad hoc international arbitration.

In order to appreciate the respective merits of domestic versus international arbitration and of ad hoc international versus ICSID arbitration, this paper will consider: (1) the options opened to the parties outside the ICSID machinery and (2) arbitration under ICSID.

I. Non-ICSID Situations

A. *To Go Domestic or International*

There is no consensus of opinion as to the respective merits of subjecting the proceedings to domestic law or of "internationalizing" procedural rules.

In the *Sapphire* award, which involved a dispute between a Canadian company and the National Iranian Oil Company[3] and in the *BP* award, between British Petroleum and Libya,[4] the arbitrators held that the award should be rendered in the context of domestic law, namely the law of the place of arbitration. As stated in the *BP* award:

> The effectiveness of an arbitral award that lacks nationality—which it may if the law of the arbitrator is international law—generally is smaller than that of an award founded on the procedural law of a specific legal system and partaking of its nationality.[5]

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[3]Sapphire Int'l Petroleums Ltd. v. National Iranian Oil Co., March 15, 1963, 35 I.L.R. 136 (1967).

[4]B.P. Exploration Co. (Libya) Ltd. v. Government of the Libyan Arab Republic, October 10, 1973, 53 I.L.R. 297 (1979).

[5]*Id.* at 309.

The opposite view prevailed in the *Aramco* award,[6] which involved Saudi Arabia, and in the *Topco* award,[7] which related to a dispute between two U.S. oil companies and Libya. In both cases, the arbitrators held that the arbitration was directly governed by international law, on the ground, *inter alia*, that the jurisdictional immunity of the state party to the dispute excluded that the proceedings could be subject to the law of another state and in particular the law at the place of arbitration.

These decisions raise a number of provocative questions. The *BP/Sapphire* doctrine starts from the premises that reliance on the *lex loci arbitri* affords guidance to the arbitrators and should, in view of the network of bilateral treaties and multinational conventions on the subject, facilitate the recognition and enforcement of arbitral awards. Against this view, it can be said, as was done in *Topco*, that considerations relating to enforcement are "not within the jurisdiction of the arbitrator,"[8] or perhaps more precisely should be of greater concern to the parties than to the arbitrator. In other words, the arbitrator should have no more concern for the ultimate enforcement of his award than a court of law for the recognition and enforcement abroad of a judgment involving a transnational situation. In both cases, it is the responsibility of the parties to assess, from the point of view of effectiveness, the respective merits of choosing between arbitral and judicial litigation and to bear the consequences of their choice.

Another objection that can be made to the *BP/Sapphire* doctrine is that it assumes too readily that the parties, one of which is a state, are always willing to submit to the *lex loci arbitri* and accept the supervision of the local judicial authority for the sole purpose of securing an "effective" award. In this connection, it may be appropriate to recall that the English Arbitration Act 1979, abolishing the special case procedure, was enacted for the purpose, among others, of assuring foreign states that, by submitting to arbitration in London, they would no longer have to fear that the submission implied acceptance of the judicial supervisory authority of the English courts.

The *Aramco-Topco* doctrine avoids these objections, but lends itself to the criticism that it places excessive emphasis on considerations of sovereign immunity as a factor of determination. To hold that procedural rules should be "internationalized" solely because of reasons of jurisdictional immunity is to ignore the fact that submission to arbitration is in itself a waiver of that immunity. Unless it is assumed that, in submitting to arbitration, a state does so with mental reservations, there is no reason to

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[6]Saudi Arabia v. Arabian American Oil Co., 27 I.L.R. 117 (1963).

[7]Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of the Libyan Arab Republic, 17 I.L.M. 3 (1978); 53 I.L.R. 389 (1979).

[8]*Id.* ¶ 12. *See also* von Mehren and Kourides, *International Arbitration between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 A.J.I.L. 476 (1981) at 537; Delaume, op. cit. note 1 *supra*, at 792.

believe that the submission should have an impact upon the nature, domestic or international, of procedural rules.

The *LIAMCO* award, which involved Libya,[9] adopts an intermediate position. Considering that in the absence of express agreement between the parties it is incumbent upon the arbitrator to determine the applicable procedural rules and that such a determination should be made "independently of the local law of the seat of arbitration"[10] the arbitrator held that: (1) the seat of arbitration should be fixed in Geneva, Switzerland; and (2) that:

> The Arbitrator, in his procedure, shall be guided as much as possible by the general principles contained in the Draft Convention on Arbitral Procedure elaborated by the International Law Commission of the United Nations in 1958.[11]

This approach, which is consistent with the modern view which deemphasizes the significance of the *lex loci arbitri*, does not necessarily solve all problems. In particular, it does not answer the argument made by the supporters of the *BP* doctrine that "international" awards might not be as easily enforced as a domestic award. In fact, however, the internationalization of the procedure in *LIAMCO* proved immaterial to the recognition of the award in a number of countries parties to the New York Convention.

B. *Issues of Recognition and Enforcement*

Between the rendering of the *LIAMCO* award and the ultimate settlement of *LIAMCO's* claim against Libya, *LIAMCO* succeeded in having the award recognized in France[12] and in Sweden.[13] Presumably, although this does not appear clearly from the reported decisions, recognition was granted on the ground that, notwithstanding the rules adopted by the arbitrator, the award was a "Swiss" award because it was "made" in Geneva and, therefore, qualified for recognition under the New York Convention.

This characterization of the award also prevailed in the United States,[14] where much emphasis was placed upon the fact that the award was "rendered" in Switzerland and that, under the reciprocity concept embodied in the New York Convention, the United States had a treaty commitment to give effect to the award.[15]

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[9]Libyan American Oil Co. v. Government of the Libyan Arab Republic, April 12, 1977, 20 I.L.M. 1 (1981).

[10]*Id.* at 42 (p. 82 of the award).

[11]*Id.* at 43 (p. 83 of the award).

[12]T.G.I. Paris March 5, 1979, Procureur de la République v. Société LIAMCO, Clunet 1979, 857.

[13]C.A. Svea June 18, 1980, Libyan American Oil Co. v. Socialist People's Arab Republic of Libya, 20 I.L.M. 893 (1981), annotated by Paulsson, Clunet 1981, 544.

[14]Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahiriya, 482 F. Supp. 1175 (D.D.C. 1980), referring to Ipitrade International S.A. v. Federal Republic of Nigeria, 465 F. Supp. 824 (D.D.C. 1978). *See also* the U.S. government's brief and memorandum reproduced in 20 I.L.M. 161 (1981), at 169-70.

[15]This characterization is also implicit in the judgment of the Swiss Federal Tribunal (T.F. June 19, 1980, Socialist Libyan Arab Popular Jamahiriya v. Libyan American Oil Co., 20

In other words, these decisions mean that for the purposes of the convention the relevant consideration is the location of the seat of arbitration and that awards rendered in a contracting state are capable of recognition in other contracting states regardless of the domestic or international character of the rules governing the proceedings.

From the viewpoint of international arbitration this approach is encouraging. Yet a word of caution is necessary because decisions rendered in other countries appear to lend support to the *BP* doctrine.

Thus, in *N.V. Cabolent v. National Iranian Oil Co.*,[16] a Dutch court experienced no problem in recognizing the binding character of the *Sapphire* award, which was not only rendered in Switzerland but, as mentioned earlier, was deliberately subjected to the procedural law of the Canton of Vaud, i.e. to the law prevailing at the situs of arbitration.

However, the decisions rendered by Dutch courts in connection with proceedings for the recognition in the Netherlands of the award rendered in the dispute between *Société Européenne d'Etudes et d'Entreprises (SEEE)* and *Yugoslavia* cast a shadow on the status of "delocalized" or "internationalized" awards,

In order to set up the Dutch decisions in proper perspective, it should be recalled that the award had been rendered in the Canton of Vaud, Switzerland, by two arbitrators instead of an uneven number of arbitrators as required by the law of the Canton of Vaud.[17] When the award was submitted to the Cantonal Tribunal for registration, the Tribunal held that since the Cantonal Rules of Procedure had not been followed, the award could not qualify as a local award and that registration must be denied. At the same time, the Tribunal stated that its decision did not preclude the validity of the award under other legal systems.[18] On appeal the judgment was affirmed by the Swiss Federal Tribunal.[19]

These decisions seemed to imply that the award might be a "delocalized" or an "internationalized" award. This issue of characterization was submitted to the Dutch courts in recognition proceedings brought by the SEEE in the Netherlands. More precisely the issue was whether the award met the tests set forth in article I(1) of the New York Convention and could be regarded as an award "made" in the territory of Switzerland.[20]

I.L.M. 151 (1981)). In that case, however, the court held that the sole fact that the award had been rendered in Geneva did not establish sufficient contact with Switzerland to authorize Swiss courts to assume jurisdiction and to permit execution against the assets of Libya in Switzerland. *See also* J.F. Lalive, *Swiss Law and Practice in Relation to Measures of Execution against the Property of a Foreign State*, 10 NETH. Y.B. INT'L 153 (1979).

[16]Hague Court of Appeal November 28, 1978, 9 I.L.M. 152 (1970).

[17]Award of July 2, 1956, 24 I.L.R. 761 (1957); Clunet 1959, 1074.

[18]Trib. Vaud, February 12, 1957, Société Européenne d'Etudes et d'Entreprises v. République Populaire Fédérative de Yougoslavie, Rev. Crit. Dr. Int. Pr. 1958, 359.

[19]T.F. September 18, 1957, Rev. Crit. Dr. Int. Pr. 1958, 366 at 367.

[20]Both Switzerland and the Netherland have made the declaration that they would apply the New York Convention only to awards "made in the territory" at other contracting states.

According to the Hague Court of Appeal, the "making" of an award should not refer only to the geographical location of the seat of arbitration; this concept should include also a reference to the municipal law of the state in which the award was rendered. In view of the fact that the Swiss courts had held that the award did not satisfy the requirements of Vaud law, the court of appeal felt that the award was not a "Swiss" award and was, therefore, not entitled to recognition in the Netherlands.[21]

On appeal, the Hoge Raad (the Dutch Highest Court) quashed the Hague court's decision on the ground, *inter alia*, that neither the provisions of article I(1) of the convention, nor the "Travaux Préparatoires" justified the construction adopted by the lower court.[22]

Upon remand from the Hoge Raad, the Hague Court of Appeal persisted in refusing to recognize the award, but this time on another ground, namely that the award was contrary to Dutch public policy.[23]

A new appeal was taken to the Hoge Raad. The Hoge Raad entertained the appeal insofar as it concerned the public policy argument, but held that in final analysis, recognition of the award should be denied on the basis of article V(1)(a) of the convention, i.e., because as a result of the decisions of the Swiss Courts, the award was no longer capable of execution in Switzerland, and consequently of recognition in the Netherlands.[24]

The exact significance of the Hoge Raad decisions is somewhat uncertain. The 1973 decision seems to support the view that an "international" award may qualify for recognition under the convention so long as it is "made" in the territory of a contracting state. However, the 1975 decision reverts to considerations which, in addition to the place of making of the award, would seem to "re-nationalize" the award by bringing it within the legal system of the country in which the award is "made."[25]

Whatever their exact meaning, the Dutch decisions make it apparent that the status of "non-national" awards is not as settled as could be desired. In this connection, a Belgian decision also deserves mention.

In *Socobel v. Greek State*,[26] an award had been confirmed in proceedings before the P.C.I.J. The Belgian company in whose favor the award had been rendered sought to garnish debts owing to the Greek government,

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[21]Hague September 8, 1972 (as translated into French), Revue de l'Arbitrage 1974, 313.

[22]Hoge Raad October 26, 1973, as translated by Gaja, *International Commercial Arbitration, New York Convention* (1978) no. V, 18, at 2.

[23]Hague October 25, 1974 (as translated into French), Revue de l'Arbitrage 1974, 322.

[24]Hoge Raad November 7, 1975 as translated by Gaja, op. cit. note 22 *supra* (1978) no. V, 35, at 2-3.

[25]Parallel with the Dutch proceedings, the SEEE has sought recognition and enforcement of the award in France. The French proceedings, which began in the 1960s, are still pending. Unlike the Dutch decisions, the French judgments rendered so far do not deal with the applicability of the New York Convention. While they deny recognition to the 1956 award, this solution is based on other considerations. For a review of these cases, *see* DELAUME, TRANSNATIONAL CONTRACTS (1980 updating), ¶ 13.16.

[26]Trib. Civ. Brussels April 30, 1951, 18 I.L.R. 3 (1951), JOURNAL DES TRIBUNAUX May 20, 1951, 298.

which pleaded immunity. The plea of immunity failed, but the garnishment was vacated on the ground that neither the award nor the P.C.I.J.'s judgment had been granted recognition in Belgium. This decision implies that recognition of an international award would depend upon the rules obtaining at the recognizing forum.

In view of the inconsistent results reached at the time of recognition of "international" awards, the question arises whether this legal uncertainty should act as a deterrent to internationalizing techniques.

If legal issues were the sole factor of decision, the prudent lawyer would probably answer the question in the affirmative.

However, arbitration with governments is not motivated solely by legal considerations. More often than not, the parties do rely on the good faith and credit of the government involved and its willingness to comply with the terms of an award.[27] Although compliance may take some time and result in negotiated settlements,[28] arbitration is usually an effective method of adjudication. If it is expected that measures of coercion be necessary, the problem should be solved by specific provisions in the form of waivers of immunity from execution. This, however, is a factor which has no bearing upon the domestic or international character of the arbitral process, since it is common to both types of arbitration,[29] as well as to ICSID arbitration, albeit in a somewhat different context.

II. ICSID Arbitration

A. *A Self-Contained System*

As already mentioned, the ICSID Convention provides a self-contained arbitration machinery. Under the convention, consent to ICSID arbitration, once it is given, is irrevocable and if a party fails to participate in the proceedings, the other party finds in the convention and the Arbitration Rules supplementing it effective means for the proceedings to take place and result in an arbitral award.

ICSID arbitration functions in total independance from domestic courts.[30] If there is need to appoint arbitrators, the convention confers upon the Chairman of the Administrative Council of ICSID the power to

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[27] *See, e.g.*, von Mehren and Kourides, op. cit. note 8 *supra*, at 538-9.

[28] *Id.* op. at 545 in regard to the BP, Topco and LIAMCO awards.

[29] It is to be noted that waivers of immunity from execution are much less frequent than waivers of immunity from suit for the simple reason, among others, that states are unwilling to subscribe to provisions which cast a doubt on their willingness to comply with adverse decisions. *See* DELAUME, op. cit. note 25 *supra*, ¶ 12.05.

[30] Note, however, that a contracting state may require exhaustion of local remedies as a condition of its consent to ICSID arbitration (article 26 of the convention). So far, this exception has had little practical significance. None of the ICSID clauses known to the secretariat requires exhaustion of local remedies. The same is true in regard to domestic investment laws referring to ICSID as a means of settlement of investment disputes and of the overwhelming majority of bilateral investment treaties in point.

make the necessary appointment.[31] Once the tribunal has been constituted, the tribunal finds in the provisions of the convention and of the Arbitration Rules adopted by ICSID effective means to conduct the proceedings and to bring them to their ultimate conclusion.

Furthermore, article 53(1) of the convention provides that the parties are bound by the award and that the award is not subject to any appeal or to any other remedy, except those provided in the convention.[32] In other words, ICSID awards are truly international awards subject only to the rules set forth in the convention and are not open to attack on any ground in the courts of contracting states.

As soon as the parties are notified of the terms of an ICSID award, they must abide by and comply with it. This principle, which is clearly formulated in article 53 of the convention, is consistent with the consensual character of ICSID arbitration and the rule that the parties must comply with their undertakings in good faith.

In order, however, to anticipate the fact that a party may not immediately comply with an award, the convention provides an original and effective procedure for the recognition and enforcement of ICSID awards. This procedure, which now deserves consideration, eliminates the pitfalls which may still exist in the path of non-ICSID international awards.

B. *Recognition and Enforcement of ICSID Awards*

Article 54(1) of the convention provides that each contracting state shall recognize an ICSID award and enforce the pecuniary obligations imposed by the award as if it were a final judgment of a court in the recognizing state.

In addition, article 54(2) of the convention makes the procedure for recognition and enforcement as simple as possible. Any party to an ICSID award may obtain recognition and enforcement of the award by furnishing to the competent court or authority designated in avance by each contracting state a copy of the award certified by the secretary-general of ICSID.

The originality and the merits of the procedure set forth in the ICSID Convention are apparent. Under the convention, there is no exception, not even on the ground of public policy, to the binding character of ICSID awards and to their recognition and enforcement in contracting states. This procedure, therefore, constitutes major progress over existing rules concerning the recognition and enforcement of foreign or international awards. Furthermore, the lack of any distinction, for purposes of recognition and enforcement, between awards rendered against an investor or a contracting

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[31]This has been the case in eight (out of fifteen) disputes submitted to ICSID arbitration.

[32]Only two remedies are provided for in the convention, namely: revision of the award on the ground of newly discovered facts (article 51) and annulment because of serious procedural errors (article 52).

state maintains the careful balance between the respective interests of both states and investors, which is one of the major features of the convention.

Article 54 of the convention prevents the contracting state party to the dispute from raising at the time of recognition and enforcement of an ICSID award the defense of immunity from suit. In the system of the convention, recognition and enforcement are considered as constituting the ultimate phase of the arbitration process and the contracting state party to the dispute is deemed to have waived any defense, including immunity from suit, which would interfere with the ICSID machinery and would be inconsistent with the consent given by that state to ICSID arbitration. In other words, the convention rules regarding recognition and enforcement are independent from other rules concerning measures of execution, and possible immunity issues, following recognition and enforcement. *Benvenuti & Bonfant v. The Government of the People's Republic of Congo*,[33] illustrates this remark. In that case, an ICSID award had been granted recognition by the *President of the Tribunal de Grande Instance* of Paris, but the president had qualified the order granting recognition by stating that if the award creditors wanted to execute the award against Congolese assets in France, they would have first to seek his authorization. On appeal, the court of appeal reversed that part of the lower court's order regarding execution. It held that article 54(2) was intended to facilitate the recognition and enforcement of ICSID awards in contracting states and that it limited the functions of the recognizing forum to ascertaining the authenticity of the award as certified by the secretary-general of ICSID. The court stated that:

> [T]he order granting recognition and enforcement to an arbitral award does not constitute a measure of execution but is only a decision preceding possible measures of execution.[34]

and that, therefore, in addressing the issue of immunity from execution at the time of recognition, the president of the tribunal had exceeded his authority.

First, and to date the only, decision in point, the judgment of the Court of Appeal of Paris deserves approval. By segregating issues of recognition and enforcement from subsequent measures of execution it is in complete accord with the provisions of the convention. This is the time to recall that if article 54 provides for an effective procedure regarding the recognition of ICSID, article 55 acknowledges also that this procedure shall in no way "be construed as derogating from the law in force in any contracting state relating to immunity of that state or of any foreign state from execution." In other words, as soon as an ICSID award is recognized, it becomes a valid title on the basis of which measures of execution can be taken, e.g. in the form of attachment, provided, however, that, if such measures are directed

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[33] Paris June 26, 1981, 20 I.L.M. 878 (1981); Clunet 1981, 843.

[34] 20 I.L.M. at 881.

against state property, execution is possible under the law of the state in which execution is sought.

Because the ICSID Convention surrenders measures of execution to domestic rules of immunity, it is possible that, as in the case of other arbitral awards, those rendered under the convention be subjected to a different treatment in contracting states.

Although this possibility cannot be ignored, there is nevertheless a significant difference between the rights of an award-creditor under the convention and those of a party to a non-ICSID award. In this connection, it must be noted that the fact that in adhering to the convention, contracting states do not surrender their own right to immunity from execution in no way relieves them of their obligations under the convention.

In particular, it is clear that if a contracting state party to a dispute invoked immunity from execution, either in its own courts or in the courts of another contracting state, in order to frustrate enforcement of an ICSID award, that state would violate its obligation to comply with the award. In that case, the state involved would be exposed to various sanctions, which are expressly provided for in the convention and deserve attention.

In the first place, failure to comply would restore the right of the contracting state whose national is the award-creditor to give diplomatic protection to its national and to bring an international claim on its behalf. Under article 27(1) of the convention, diplomatic protection is suspended during the period beginning with the date of consent to ICSID arbitration and ending with compliance with the terms of an ICSID award. It may also terminate with the dismissal of the investor's claim by the arbitral tribunal. However, article 27(1) provides expressly that diplomatic protection may be exercised again if the contracting state party to the dispute fails "to abide by and comply with the award rendered in such dispute."

In the second place, should the issue of non-compliance raise a question of interpretation or application of the ICSID Convention, the contracting state whose national is involved would have the right to submit the question for adjudication to the International Court of Justice, unless both contracting states agreed on another method (e.g. by arbitration) of settlement.[35]

In other words, although the convention does not purport to change existing rules of immunity from execution, it nevertheless imparts a new spirit to the rules by which the game may be played.

III. Multipartite Arbitration

The present discussion would not be complete without mentioning an issue, which is likely to gain importance in the years ahead, namely the problem of multipartite arbitration.

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[35] Article 64 of the convention.

In order to illustrate the nature of the problem, let us take an example which is based on real facts, though considerably simplified for the clarity of the expose.

Suppose that company A, a corporation controlled by several multinational companies, invests in a mining venture in country B, under an investment agreement providing for ICSID arbitration. Suppose also that the venture is financed in part by a loan made to country B by the World Bank which, consistent with its traditional practice, provides for ad hoc international arbitration,[36] and that the loan is secured by various undertakings from the private sponsors of the project, including take or pay contracts between them and company A providing for ICC arbitration. Suppose further that each set of documents contains a force majeure clause relieving the obligor from its obligations in the event of political interference with the project by country B and that the issue of interference is submitted for decision to each and all of the arbitral tribunals.

In a case such as this, it is conceivable that the various tribunals reach different conclusions by means of different routes and at different speeds. Both during the proceedings and at the time of enforcement of the respective awards, these parallel procedures may be totally uncoordinated and lead to inconsistent findings.

At the present time, there is no real remedy to the problem. The problem has been the object of much attention by specialized institutions, such as the ECE and the ICC, and is under active consideration by the ICSID Secretariat. It is too early to tell which practical recommendations may emerge from these various studies, but it is clear that the problem is here to stay and that it cannot be ignored.

Conclusion

At the end of this brief inquiry into some of the features of arbitration with governments, only one thing is clear and it is that if international arbitration is to be preferred, the preference should be for ICSID arbitration.

Beyond this, the choice between domestic and international arbitration remains very much a question of circumstances and of confidence in the arbitral process as an effective means of settling disputes with governments. If the parties operate in a climate of mutual trust, international arbitration may be an acceptable solution. When this is not the case, domestic arbitration is likely to offer definite advantages, not only in regard to matters of procedure but, most important, in regard to the recognition and enforcement of the award.

In this connection, it is interesting to note that discussions are proceeding among the United States, Iran and the Netherlands to determine to what

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[36] General Conditions, § 10.04. DELAUME, op. cit. note 25 *supra*, ¶ 14.01.

extent the awards rendered by the Tribunal set up under the Claims Settlement Agreement might qualify for purposes of recognition as valid awards under Dutch law. Although the issue has not yet been settled, the fact that it is under consideration is nevertheless highly significant.[37]

[37] *See, e.g.*, Feldman, *Implementation of the Iranian Claims Settlement Agreement—Status, Issues and Lessons: View from Government Perspective*, in PRIVATE INVESTORS ABROAD, PROBLEMS AND SOLUTIONS, 75 (1981), at 97-98; Audit, *Les "Accords" d'Alger du 19 janvier 1981 Tendant au Règlement des Différends entre les Etats-Unis et l'Iran*, CLUNET 1981, 713 at 767-68 and 775.