IN SEARCH OF INTERNATIONAL JUSTICE

Policy & International ADR.

The previous articles in this series **"In Search of Justice"** examined policy and procedure from the domestic context, noting the impact of judicial policy making. In this final article, the impact of judicial policy making is considered from the private international law perspective.

Whilst there is little the domestic litigant can do to circumvent the incidence of judicial policy making which impacts both upon litigation and arbitration, it is a factor to be taken into account by the prospective international commercial litigant when approaching the question of choice of law and jurisdiction during contract formation negotiations, since the judicial policy of the chosen forum may have a significant impact on the outcome of any future dispute arising out of that contract.

The arbitral process provides some limited protection against the vagaries of judicial policy-making and thus enhances the predictability of outcomes. The problem during contracting lies in the fact that the nature of future disputes is unpredictable. Even before the central issues gets to be considered, jurisdictional issues are often fiercely contested once it becomes clear to the parties that the governing law of one state might well produce a more favourable outcome to the dispute than that of another state. Whilst it is understandable that a party will argue any factor in their favour including jurisdiction, the choice of jurisdiction is a lottery at the time that the decision is made. The parties should be prepared to live with that decision for good or for bad. The way to ensure that that is the case is to take great care, in terms of clarity and completeness in the drafting of the choice of law and jurisdiction. Then, providing there are no loopholes, there should be no scope for expensive litigation about jurisdiction and governing law. If in hind sight the decision proves to have been unwise, that is too bad.

The main focus here is on the unpredictability of the courts when dealing with policy issues inherent in the governing law when faced with enforcement hearings under the ***Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958.*** Article V provides as follows :-

1 *Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*

   (a) The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

   (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

   (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

   (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

   (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2 *Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country' where recognition and enforcement is sought finds that:*

   (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

   (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Mirror provisions are set out in s103(2)&(3) Arbitration Act 1996 as far as the UK is concerned. Article V(1) is uncontroversial. It covers much of the same ground as sections 67, 68, 72 and 73 Arbitration Act 1996. An action to enforce a Convention Award may be pursued under section 66 Arbitration Act 1996 as confirmed by section104.

The policy issue is that set out in Article V(2). What then might be deemed to be capable of settlement by arbitration under the law and how might that differ from country to country? and how might public policy differ from state to state? Are these predictable matters and is should the parties be expected to anticipate such matters in advance?

Whilst it is trite law that ignorance of the law is no excuse and it is taken as a given that the citizen knows the law of the land (*even though this is unlikely to be the case beyond broad concepts),* how reasonable is it to expect someone to know the law of a foreign land? Should someone seek advice from an expert in foreign law before concluding a contract? Whilst that might seem extreme, it may well be a worthwhile precaution if it would not be possible to enforce that contract in the place where the other party keeps his assets, pre-supposing that one knows where that is at the time of contracting. Since nothing in the contract could remedy the situation the choice would be between making the contract or walking away. An even worse scenario would be one where the other party moves their assets to another jurisdiction after the contract is concluded. So much for taking sensible precautions.

For example, gambling is perfectly lawful in many countries and gambling debts enforceable in their court of law. This is not the case in England and Wales.

The English courts go out of their way to be even handed in all this and thus an additional twist to the tale is that they will not enforce an arbitration award where it is contrary to the law of the land of the country where the supposed liability was incurred. Thus in ***Daad Sharab v Usama Salfiti*** [1996] EWCA Civ 1189 the court had to determine whether or not mediation was contrary to Libyan Law. In the circumstances they decided that the activities of an agent were not contrary to that law and hence they were able to find for the claimant.

By contrast in **Soleimany v Soleimany [1998] APP.L.R. 02/19** which involved the export of carpets from Iran, whilst a foreign award held that monies were due under the contract between two disputing brothers, the English court refused to enforce the contract because of illegalities that took place in Iran. The conduct was not illegal in England.

There tends to be a great deal of global communality regarding basic legal provision. That which is illegal in one country but lawful in another is likely to be related either to social oddities (e.g. dowries are permitted in some societies but not in others) or to special circumstances such as trade barriers to export/import. Nonetheless, in our highly mobile modern world, it can be anticipated that from time to time, litigants will fall foul of the policy exception to the New York Convention.

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