Buried in Oblivion? The Significance and Limitations of the European Convention on International Commercial Arbitration

Kluwer Arbitration Blog
November 2, 2010

Christian W. Konrad (Konrad & Justich)

Please refer to this post as: Christian W. Konrad, 'Buried in Oblivion? The Significance and Limitations of the European Convention on International Commercial Arbitration', Kluwer Arbitration Blog, November 2 2010, http://arbitrationblog.kluwerarbitration.com/2010/11/02/buried-in-oblivion-the-significance-and-limitations-of-the-european-convention-on-international-commercial-arbitration/

The European Convention on International Commercial Arbitration 1961 (ECICA) is a multilateral treaty regulating certain aspects of international arbitral proceedings. Some of its provisions cover issues also governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, also known as the New York Convention (NYC), which was concluded three years earlier than the ECICA. However, the ECICA's scope is broader than the NYC's as it regulates issues such as the appointment of arbitrators, the applicable law, objections to jurisdiction and competing competences of state courts.

The ECICA originates from 1950s, when the idea was originally proposed, but it wasn't concluded until 21 April 1961 and entered into force in 1964. At the moment, it has 31 members, including most EU states and several non-EU members such as Russia.

In today's international arbitration practice, the ECICA's significance is best known in regard to the same issue governed by the NYC: the enforcement of arbitral awards. The ECICA itself does not provide means of enforcing arbitral awards. Rather, in an enforcement context, it serves as a supplement to the NYC in cases which entail the successful challenge of the award to be enforced.

More specifically, the ECICA stipulates a limitation of Art V(1)(e) NYC by setting out that the successful setting aside of an award, in the country in which it was made, does not automatically constitute a ground for refusal of enforcement. Rather, successful setting aside proceedings are only relevant if the award was set aside based on one of the reasons set out in Art IX (1) ECICA. These are almost identical to the grounds for refusal of enforcement provided in Articles V(1)(a) to V(1)(d) of the NYC. Both contain the reasons of party incapacity, invalidity of the arbitration agreement, violation of due process (lack of notice and right to be heard), an excess of the authority of the arbitrator (including partial enforcement of those parts of an award which are covered by the arbitrator's authority) and finally, an irregularity in the composition of the arbitral tribunal or the arbitral procedure.

However, the ECICA does not refer to the grounds of lack of arbitrability and violation of public policy. Therefore, if an award has been set aside in the country of origin on the basis of these reasons, the enforcing state's courts may not refuse enforcement of the award on this basis. Even though several countries have adopted a similar or even more favorable regime into their national laws, this facilitation of enforcement is widely considered the ECICA's most prominent feature, and national

courts of the member states have relied on it repeatedly in the past, in favor of enforcement.

Two other issues regulated by the ECICA have mostly remained unappreciated in the past. Firstly, the ECICA explicitly provides that legal persons of public law can validly conclude arbitration agreements. This term has a wide scope and includes public corporations, the state itself and any of its independent state agencies as well as any federal states. This provision overrides any contradictory law within the home state's jurisdiction. However, it is possible for contracting states to make a reservation on this issue. So far only Belgium has made use of this possibility.

Secondly, the ECICA contains provisions that may help overcome the problem of defective (sometimes referred to as "pathological") arbitration agreements. While the application of national arbitration laws would often lead to the invalidity of such clauses, the ECICA provides a mechanism for determining certain details of ambiguous and unclear arbitration agreements. This mechanism assists with the decision of whether the parties to an arbitration agreement have to refer their dispute to ad-hoc or institutional arbitration and, in case of institutional arbitration, which institution a dispute must be referred to.

Considering this, the question arises as to why the ECICA often seems to be considered a peculiarity of no more than academic interest. On the one hand, it provides for a limitation of the refusal of enforcement of arbitral awards. On the other hand, it constitutes a tool for overcoming problems that have been, and may continue to be, the subject of controversy and lengthy discussions. The most likely explanation for this lack of appreciation is the convention's limited scope of application. It depends not only on both the state of the award's origin and the state of enforcement being members of the ECICA, but also requires that all parties to an arbitration agreement must have their place of residence or seat in a contracting state. Coupled with the fact that the convention has been ratified only by 31 states (most notably, Switzerland not being amongst them), this is most certainly the ECICA's gravest limitation.

It remains to be seen whether these limitations, coupled with the modernisation of national arbitration laws, which often already incorporate features of the ECICA, will cause the ECICA to become an oddity, buried in oblivion, or whether new initiatives will lead to some form of rebirth of the features of the convention. This could either be through a (new) European legal instrument on arbitration or, on a broader scale, by means of adoption into a truly international (i.e. world-wide) instrument, such as the NYC. In this regard, it is interesting to note that the Hypothetical Draft for a new NYC by Albert Jan van den Berg (available, amongst other sources, online here on Kluwer Arbitration at http://www.kluwerarbitration.com/document.aspx?id=KLI-KA-0946036-n) picks up on the feature of limiting the effect of a successful challenge on the enforceability of the award. Based on the goal of modernizing the 50-year-old NYC, the grounds for refusal of enforcement have been considerably rephrased and tidied up. Notwithstanding this, the limitation of relevance of a successful challenge in the draft corresponds to that provided for in the ECICA. Setting aside of an award in the state of origin does not constitute a ground for refusal of enforcement if it is based on a violation of public policy (which is deemed to include matters of arbitrability).

It is subject to speculation and considerable dispute whether, when, and to what extent, this attempt at straightening out the wrinkles of the NYC will be successful in the future. If it is, and if it does indeed incorporate the enforcement-feature of Article IX ECICA, the European Convention on International Commercial Arbitration will, in its present form, most likely become a relic of the past.