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Arbitration Awards as Works of Art

John P Gaffney (Al Tamimi & Company) · Wednesday, June 1st, 2016

It is generally accepted that arbitral tribunals enjoy a "liberty of decision", which I have suggested as meaning, "the freedom of the arbitral tribunal from external restraint, compulsion, or interference in making its decision…"[1] Such a right may be viewed as a facet of the justiciable right to freedom of expression, since the exercise of the right manifests itself in the tribunal's written arbitration award.

The New York Convention provides recognition of the arbitral tribunal's "liberty of decision". Article II (3) of the Convention implicitly requires a domestic court to respect the arbitral tribunal's liberty of decision unless, of course, the arbitration agreement, the legal basis of the tribunal's very existence, is invalid for one or more of the reasons enumerated in that provision.[2]

The justiciable nature of the arbitral tribunal's freedom of decision is also manifested in the New York Convention's checks and balances on the enforcement and recognition of arbitral awards, which are remarkably similar to the checks and balances placed on the exercise of justiciable rights, such as the right to freedom of expression.

Compare Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR), which concerns the right to the freedom of expression and information, with Article V of the New York Convention. The former declares that the exercise of the right to freedom of expression carries with it special duties and responsibilities. It may be subject therefore to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order, or of public health or morals.

Article V of the New York Convention appears to recognize, in an arbitral setting, the "special duties and responsibilities" of the kind to which Article 19 of the ICCPR refers. Article V elaborates in detail the corresponding duties and responsibilities (in the form of restrictions) implicitly imposed on the arbitral tribunal on the exercise of its liberty of decision.

These duties and responsibilities are largely, although not exclusively, focused on protecting the rights of others (e.g., the parties to the arbitral proceedings to whom the responsibility that accompanies such a right it is largely owed) and on respecting the public policy of the relevant jurisdiction to the extent they conflict with exercise of a tribunal's liberty of decision.

It is submitted that the tribunal's liberty of decision should be taken into account where the recognition or enforcement of an arbitral award is challenged. International civil rights law and

practice make clear that post-publication measures may well constitute interference with right to the freedom of expression.[3]

The refusal to enforce an arbitral award is arguably no less a restriction on the arbitral tribunal's liberty of decision than a refusal to authorize the performance a play is a restriction on the author's freedom of expression.[4] If viewed in this way, the impact of foreign judgments concerning the arbitral award at the seat of arbitration or in other countries, so –called "award judgments," could assume much less importance than appears at present.[5]

For instance, to what extent would a court in "Country C", faced with a challenge to a decision to enjoin the performance of a play or the exhibition of a work of art in Country C, consider the impact of judgments rendered in any other country in which the work originated ("Country A"), or in any other country ("Country B") in which the work was sought to be published, performed or exhibited?

While such judgments might be considered by the court of Country C, it is not likely to place much weight on efforts of other jurisdictions to enjoin (or otherwise) the freedom of expression of the author in considering whether to uphold or enjoin the author's freedom of expression in its own jurisdiction.

In the context of the ongoing debate of the impact of foreign judgments on the recognition and enforcement of international awards, it thus may be helpful to conceive such applications as involving potential and possibly unwarranted restrictions on the tribunal's liberty of decision, by analogy with the right to freedom of expression.

The analogy with the right to freedom of expression may be less helpful in the case of so-called "set-aside judgments", where, for instance, the court of the seat has annulled the award, since it is difficult to conceive of the equivalent of the "annulment" of a work of art. Its physical destruction would of course prevent it *de facto* from being performed or exhibited in other countries, which is a not very useful analogy for the *de jure* effect of annulment of arbitral awards.

It may be more helpful to draw a distinction between the physical existence of the work and its status as a work of art that merits legal protection: the refusal of a court in Country A, to use the example above, to recognize the work as work of art deserving of protection under the right to freedom of expression, may be more akin to annulment of an arbitral award, in which case, the approach advocated in this paper remains pertinent to even set-aside judgments.

The suggested conceptualization of arbitral awards as works of art, which is intended to complement the substantial scholarship in this area, thus may assist in the analysis of whether to grant effects to award or set-aside judgments in court cases concerning the recognition and enforcement arbitral awards.

[1] J. Gaffney, "The Liberty of Decision of the Arbitral Tribunal", TDM, Vol. 6, No. 1 (March 2009).

[2] Article II (3) provides "3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said

agreement is null and void, inoperative or incapable of being performed."

[3] See e.g., Jacobs and White, The European Convention on Human Rights (5th ed.), p. 427.

[4] Ulosoy and ors v Turkey (App. 34797/03), 3 May 2007.

[5] See e.g., M. Scherer, "Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' the Wrong Road?", Journal of International Dispute Settlement, Vol. 4, No. 3 (2013), pp. 587–628.

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