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New York Convention Article II(3) – 'Refer the Parties to Arbitration' – Shield or a Compelling Measure?

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The obligation of contracting states to recognize arbitration agreements and refer the parties to arbitration is provided in Article II of the New York Convention 1958 (the 'Convention'). This post will endeavor to evaluate the meaning of the phrase 'refer the parties to arbitration' used in Article II(3) of the Convention and whether this phrase can be read to mean 'refer the disputes to arbitration'. This analysis draws on a recent trend in Pakistan as domestic litigants seek compelling directions from national courts to initiate, and participate in, foreign arbitrations against counter parties. Such requests rely upon Article II(3) of the Convention read with Section 3 of Pakistan's Recognition & Enforcement (Foreign Agreements and Arbitral Awards) Act, 2011 ("2011 Act"). As per Section 3(1) of the 2011 Act (read with its preamble), a High Court in Pakistan has the 'exclusive jurisdiction' to 'adjudicate and settle matters relating to and arising out of' the recognition and enforcement of arbitration agreement under the Convention. These phrases, on first glance, appear to offer a wide scope and a reason to believe that a court in Pakistan is empowered to compel parties to arbitrate even though, traditionally, under the Convention, courts of contracting states have not resorted to such measures.

Legislative History

Article II was introduced and incorporated less than three (3) weeks before the Convention was adopted. As per the *travaux préparatoires* available on the Convention's website, on 6 March 1958, the UN Secretary General highlighted the issue of recognition of the arbitration agreements and the need for a provision which would prevent a party to an arbitration agreement from 'sabotaging' that agreement by bringing the dispute before a regular court in the contracting state (See paragraph 25). Thereafter, Article II was proposed and refined by the contracting states several times (as an additional protocol and, later, as a new article in the Convention) before being finalized as Article II of the Convention.

Article II(3) is a refined version of Article 4 of the Geneva Protocol, 1923 ('Protocol'). A textual comparison of Article 4 of the Protocol with Article II(3) of the Convention will highlight some key points:

- First, the use of the word 'seized' (in past-tense) in both articles presupposes the fact that a tribunal, or a court, must be adjudicating an issue between the parties to the arbitration

agreement.

- Second, the word ‘dispute’ has been substituted with ‘action’ in Article II(3), which widens the type of legal proceedings that may be brought by a party to the arbitration agreement before the court of the contracting state.[1)]
- Third, the phrase ‘regarding a contract’ was changed to ‘in a matter’, which also broadens the scope of issues that may be brought in an action before the court of a contracting state.[2)]
- Fourth, the phrase ‘on the application of either of them’ was changed to ‘at the request of one of the parties’, but this change appears to be inconsequential given that any party to the arbitration agreement may apply to the court, seized of an action, for reference to arbitration.
- Finally, both Articles are consistent in using the phrase ‘refer the parties’.

This textual comparison shows that the scope of Article 4 of the Protocol was expanded in Article II(3) of the Convention. It includes more classes of legal proceedings (not just disputes) that may be brought by a party to the arbitration agreement in respect of any differences arising from a broadly defined legal relationship (contractual or not). It is equally important to re-emphasize that Article II(3) of the Convention does not offer any other, or additional, meaning except that it is intended to place an effective mechanism against a party seeking to sabotage the arbitration agreement by bringing the dispute before a national court.

The UNCITRAL Guide to the Convention has also deliberated on this issue in its chapter on Article II[3)] and concluded that even though the *travaux préparatoires* are silent on the scope of the obligation of courts to refer parties to arbitration but courts of the contracting states fulfill their obligation to refer the parties to arbitration in two ways namely, either by declining jurisdiction, or by staying judicial proceedings, in the presence of an arbitration agreement. As per the UNCITRAL Guide, these approaches are consistent with the obligation of the courts of contracting states to refer the parties to arbitration. A similar view is set out in the Handbook of Judge – Guide to the Interpretation of the 1958 New York Convention issued by the International Council for Commercial Arbitration.[4)]

International Precedents

As a review of Pakistani law alone leaves the analysis ambiguous, international precedents are instructive. The English judgment rendered by Lord Mustill in *Channel Group v. Balfour Beatty Ltd*[5)] offered a compelling interpretation to Article II(3) of the Convention. Lord Mustill held that Article 1(1) of the English Arbitration Act, 1975 is not para-materia to Article II(3) of the Convention and that the Convention envisages a procedure similar to the former English practice where the order of the court when called into being a reference to arbitration meant that both parties were at once compulsorily remitted. Lord Mustill also held that the 1975 Act requires and empowers the court to only stay the action, thereby cutting off the claimant’s agreed method of enforcing his claim and that it was up to the claimant to initiate arbitration or not. Lord Mustill concluded this issue by holding that since the legislature had ‘deliberately’ opted for a defensive mechanism in the English law rather than a compelling measure therefore, the court would restrict to staying legal proceedings without referring the matter to arbitration.

In *Westco Airconditioning Ltd. versus Sui Chong Construction and Engineering Ltd* [1998] 1 HKC

254, the Hong Kong High Court disagreed with Lord Mustill's interpretation of Article II(3) in *Channel Group's* case. According to the judgment, 'what the statute means when it says "refer the parties to arbitration" is not "refer the dispute to the arbitrators", as Lord Mustill suggests in relation to the Convention, but refer the parties to the process of arbitration that the parties have agreed to undertake, and, if this involves a preliminary step that the parties have agreed, to complete that step.' This interpretation reinforces the position that the phrase 'refer the parties to arbitration' is not a compelling measure but, instead, it is a shield to protect against a party to the arbitration agreement that intends to breach it by bringing an action before the court of a contracting state.

Likewise, Emmett J of the Australian Federal Court in *Hi-Fert Pty Ltd. versus Kuikiang Maritime Carriers Inc* [1998] FCA 558,[6] while interpreting Section 7(2) of the International Arbitration Act, 1974 which incorporated Article II(3) of the New York Convention, held that the expression 'refer the parties to arbitration' can have two technical procedural meanings, namely, a court directive staying the Court proceedings or a court directive imposing arbitration on the parties. According to Emmett J, the first directive is logical as the expression 'refer the parties to arbitration' should not be taken as having the meaning of obliging the parties to arbitrate (i.e. the compulsive effect) since the Convention does not require a Court directive to go to arbitration if a party refuses to participate and that it is up to the parties, or at least one of them, to decide whether an arbitration should take place or proceed. An award can indeed be issued in the absence of the other party.

Conclusion

Thus, to conclude, the logical interpretation that must follow from the *travaux préparatoires*, UNCITRAL Guide and the above case precedents is that the phrase 'refer the parties to arbitration' in Article II(3) of the Convention means declining jurisdiction or staying of legal proceedings (as applicable in a contracting state) because Article II(3) of the Convention provides a defensive mechanism against a party which attempts to sabotage its contractual commitments in an arbitration agreement. It is triggered, and should only be relied upon, when one party to the arbitration agreement commences legal proceedings before a national court, which court is then seized of that action and the other party may request the national court to refer the parties to arbitration. The national courts do not appear to be empowered to go beyond declining jurisdiction, or staying of legal proceedings, and compelling the parties to arbitrate in an action pending before it because Article II(3) of the Convention does not envisage the compelling directive of reference of disputes to arbitration. Thus, although the author is unaware of any Pakistani case law directly addressing this question, Section 3(1) of the 2011 Act is unlikely to empower Pakistani courts to compel parties to arbitrate. This is also supported by the fact that Section 3(2) of the 2011 Act envisages filing of an application for 'stay of legal proceedings' pursuant to Article II of the Convention in a High Court where proceedings are pending. Similarly, Section 4(1) of the 2011 Act requires filing of an application for stay of proceedings before any other forum where a party initiates legal proceedings in violation of the arbitration agreement.

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References

?1 'Action' is defined in Black's Law Dictionary, 9th Edition at definition No.4 as 'a civil or criminal judicial proceeding – Also termed action at law'.

?2 Envisaged in Article II(1) of the Convention to include all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration'.

?3 See paragraphs 59 to 64 in the chapter on Article II.

?4 See Chapter II at Part II.3 titled 'How To Refer Parties To Arbitration' – 'The "referral to arbitration" is to be understood as meaning either a stay of the court proceedings pending arbitration or the dismissal of the claim for lack of jurisdiction, in accordance with national arbitration or procedural law.'

?5 [1993] 1 All ER 664 at paras 54 to 60.

?6 See page 7 of Emmett J's reasoning.

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