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Interlocutory Judicial Review of Challenge Decisions of Arbitrators Under the Model Law: A Flawed Procedure in Need of Reform

Filip Nordlund · Saturday, June 19th, 2021

Under Article 13(3) of the UNCITRAL Model Law, a party challenging an arbitrator may 'appeal' a decision of the tribunal or other body hearing that challenge to a court or other authority (the "***Challenge Appeal Mechanism***"). The purpose of the Challenge Appeal Mechanism is to make the arbitral process more efficient by permitting judicial review immediately after denial of a challenge in order to avoid any delay and/or controversy that may arise as result of having a challenged arbitrator conduct an arbitration. However, as this post discusses, that is not how the appellate mechanism functions in practice. This post, therefore, examines why the Challenge Appeal Mechanism is flawed and how it should be reformed.

An Imperfect Understanding of the Arbitral Process

The process of drafting the Model Law commenced in the late 1970s. The final text was adopted in 1985 by the General Assembly of the United Nations. At the time, most States were unfamiliar with the concept of international commercial arbitration. Indeed, it was only four years earlier, in 1981, that France became the first State to enact a law specifically addressing international commercial arbitration.[1)] It is perhaps little wonder, then, that the Model Law reflects an imperfect understanding of how an appellate procedure ought to function. There are, in particular, three key deficiencies in the appellate procedure as set out in the Model Law.

First, the Challenge Appeal Mechanism is inefficient. While the applicable time limit under Article 13(3) stipulates that the challenging party must submit any appeal within 30 days of having received notice of the decision rejecting the challenge, the judicial review process of challenge decisions is unregulated and takes considerable time in many jurisdictions due to court backlogs and tactical delays by parties.[2)] The Challenge Appeal Mechanism, therefore, fails to achieve its principal purpose of settling challenges quickly.

Second, the Challenge Appeal Mechanism unwisely restricts the ability to appeal challenge decisions to the challenging party only. Unlike a rejected challenge, a sustained challenge will severely disrupt the arbitral process as the proceedings are unable to continue until the challenged arbitrator has been removed and replaced, absent special circumstances permitting a truncated

tribunal to proceed with the arbitration (in the case the tribunal consists of three or more members).[3] The present wording of Article 13(3) prevents courts from correcting erroneously sustained challenges even though the impact on the proceedings and the need for the courts to act as a safety valve is greater in such circumstances rather than in situations in which a challenge has been rejected.

Third, the Challenge Appeal Mechanism *prima facie* breaches the principle of equality of arms by providing the parties with unequal rights to seek judicial review of challenge decisions.

In addition to the above, as courts can be expected to accord challenge decisions by arbitration institutions considerable deference, and rarely remove arbitrators in cases where the institution has rejected the challenge, the appellate mechanism is, by and large, redundant in administered arbitration.[4] Indeed, the Challenge Appeal Mechanism may be considered superfluous in both *ad hoc* and administered proceedings as parties are able to have challenge decisions reviewed by courts under the Model Law in the context of either an application to set aside an award or by request to resist enforcement of an award.[5]

The foregoing notwithstanding, interlocutory judicial review of challenge decisions serves a purpose. It is highly unsatisfactory for parties to be forced to participate and incur costs in proceedings with manifestly biased arbitrators. The Challenge Appeal Mechanism provides parties with another opportunity to have such arbitrators removed. Accordingly, any reform of the Challenge Appeal Mechanism should retain judicial review of challenge decisions in certain circumstances.

A French-inspired Solution

National courts support arbitration in one of two ways, by 'helping' or 'protecting' the proceedings.[6] The former is the 'English way', in which courts take a more active role in the arbitral process and seek to 'help' arbitration, *e.g.*, English courts may, on the application of a party to arbitral proceedings determine any question of substantive jurisdiction of an arbitral tribunal[7], while the latter is the 'French way', in which courts will seek to 'protect' the arbitral process from any interreference, *e.g.,* if a dispute arising under an arbitration agreement was brought before the French courts, the court would declare itself incompetent unless the arbitral tribunal had not yet been seized of the matter and if the arbitration agreement was manifestly void or inapplicable.[8] The two countries' divergent policies for assisting the arbitral process are also reflected in their approaches to interlocutory judicial review of challenge decisions. Under English law, courts have the power to review challenge decisions in, but not limited to, international *ad hoc* and administered proceedings.[9] The French approach, by comparison, provides that a court may only decide a challenge in international *ad hoc* proceedings in the absence of an agreement by the parties.[10]

The Challenge Appeal Mechanism is closer to the English than the French approach; however, in order to improve the appellate procedure it may be sensible to learn from the French in this regard. The Challenge Appeal Mechanism should be restricted to *ad hoc* proceedings only, but be

available to both sides of a challenge (the "***Reform Proposal***"). This would increase the efficiency of administered arbitration by curtailing unnecessary court involvement while retaining judicial review in *ad hoc* proceedings to safeguard the arbitral process in the absence of an arbitration institution. By providing access to the Challenge Appeal Mechanism to both the challenging and the non-challenging party this approach would also remove the inherent unfairness in the current legal framework. Admittedly, this would remove interlocutory judicial review of challenge decisions in administered arbitration; but, bearing in mind that situations where such a review has a substantive impact on the proceedings is rare, it is, on the whole, more sensible to deal with any such situations through review of the final award at the end of the proceedings.[11)]

Towards a Common Framework for International Commercial Arbitration Law

There is an old Brussels joke. How do you tell the difference between a British official and a French one? The Briton says 'This idea works fine in theory but will it work in practice?' while the Frenchman says 'This idea works fine in practice but will it work in theory?'. Fortunately, although the Reform Proposal advocated above may be considered to be French-inspired, it nonetheless represents a solution which works both in theory and practice by incorporating features of both the English and French approach.

The proposal narrows the application of the Challenge Appeal Mechanism to *ad hoc* proceedings only in line with the 'French-way' of seeking to 'protect' arbitration from court interference; however, it also expands the parties' ability to invoke the coercive, supportive and corrective powers of the courts at the appropriate juncture, if needed, during the proceedings by providing both sides of a challenge with the right to seek redress through the courts, in line with the 'English way' of seeking to 'help' arbitration.

Finally, by borrowing from both the leading common law jurisdiction and the civil law jurisdiction in the field of international commercial arbitration[12)] the proposal may gain acceptance among a wide variety of States with different legal, social and economic systems in accordance with UNCITRAL's mission of harmonising and unifying international trade law.

References

?1 C. A. Fleischhauer, *Foreword of the Guide to the 1985 UNCITRAL Model Law*, in H. M. Holtzmann and J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary (*1989), p. v.

?2 *See* M. A. Gomez, *Article 13: Challenge Procedure*, in I. Bantekas et al (eds.), *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (2020), pp. 250-251.

?3 *See* G. Born, *International Commercial Arbitration* (3rd ed. 2020), ¶ 12.07.

?4 G. Born, *International Commercial Arbitration* (3rd ed. 2020), ¶ 12.06[B][1].

?5 *See* Model Law, Arts. 34(2) and 36(1).

?6 E. Gaillard, *The influence of French legal thinking on the development of arbitration law*, Paris Arbitration Week 2019, 4 April 2019, https://www.youtube.com/watch?v=O3nYCp_FgK4 (last accessed 11 May 2021).

?7 English Arbitration Act 1996, Art. 32.

?8 French Civil Procedure Code, Art. 1448.

?9 English Arbitration Act 1996, Art. 24.

?10 French Civil Procedure Code, Arts. 1456 and 1506(2).

?11 *See* G. Born, *International Commercial Arbitration* (3rd ed. 2020), ¶ 12.06[B][4].

?12 In the *2021 International Arbitration Survey: Adapting arbitration to a changing world* by Queen Mary and White & Case, London, being a common law jurisdiction, is identified, together with Singapore, as the most preferred seats for international arbitration worldwide, while Paris is identified as the fourth most preferred seat for international arbitration worldwide and the highest ranked civil law jurisdiction.

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