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THE RELATION BETWEEN COURTS AND ARBITRATION: SUPPORT OR HOSTILITY

by

Luca G. Radicati di Brozolo♦

Abstract:

In an ideal world mediation is almost invariably the preferable method for the settlement of disputes, even compared to arbitration. However, there are many situations where a settlement, whether as a result of mediation, of negotiations or by whatever other means, is simply not possible for a variety of objective or subjective reasons, and recourse to a traditional dispute settlement mechanism becomes unavoidable. Whatever the problems of arbitration in the vast majority of cases it is still the only viable dispute settlement mechanism for international transactions. The differences in State attitudes toward arbitration may lead States and their courts to engage in behaviors that other States, as well as practitioners and commentators who follow the more prevalent views on the law and practice of arbitration, may view as unjustified interferences with the arbitral process. Despite the crucial role of the New York Convention, arbitration is still not subject to a far reaching mandatory harmonization and remains unregulated at the international level. States accordingly retain a broad freedom to favor it but, conversely, also to treat it with distrust. This could leave arbitration in a state of anarchy. Nonetheless, over the past decades there has been a spontaneous evolution towards shared values and approaches in a large number of States. This has led to the emergence of a sort of common law of arbitration.

Keywords: Arbitration; national laws; New York Convention.

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Unlike most other presentations at this conference¹, this one will not focus on mediation or other alternative dispute resolution methods, but on arbitration. In an ideal world mediation is almost invariably the preferable method for the settlement of disputes, even compared to arbitration. It is cheaper, faster and especially less contentious than court litigation and arbitration and can have significant benefits for the relation between the parties. Today there is an increasing understanding of the advantages of mediation and a move towards it, in some systems even supported by the legislation.

However, there are many situations where a settlement, whether as a result of mediation, of negotiations or by whatever other means, is simply not possible for a variety of objective or subjective reasons, and recourse to a traditional dispute settlement mechanism becomes unavoidable. Whatever the problems of arbitration (increasing complexity, contentiousness, duration, costs etc), in the vast majority of cases it is still the only viable dispute settlement mechanism for international transactions. In contrast to court litigation, that is almost without exception heavily influenced by national peculiarities difficult to understand or to deal with for foreigners, arbitration provides a more neutral venue than national courts, allows parties to tailor the proceedings to their needs and operates with rules and procedures that are now to a large extent harmonized.

Of course arbitration is not suited for all kinds of disputes, in particular small disputes, and in some cases its comparative advantages over court litigation may be less significant, such as in straightforward disputes in a domestic context or even when the parties come from homogeneous legal environments or have sufficient familiarity with and trust in the court system that will ultimately exercise jurisdiction. Save in these situations, and in those where a party has sufficient bargaining power to impose its own courts (and has a relative certainty that such a forum selection will be enforceable), will generally be the dispute settlement mechanism that should be very seriously considered by anybody engaging in international business transactions, including those involving China.

Arbitration has now become almost a transnational system of justice. This is not only because private parties systematically have recourse to it, but also because States recognize the importance of arbitration in the interests of promoting international business transactions and to a greater or lesser extent tend to favor it, as is witnessed by the almost universal acceptance of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 9, 1958.

¹ This paper is a revised version of a presentation given at the conference on “Alternative Dispute Resolution Models in China and Western Countries Practice” organized in Pisa by Scuola Superiore Anna on November 25-26, 2011. For a more extensive discussion by this author of the issues addressed in this paper (with comprehensive references) see L.G. RADICATI DI BROZOLO AND L. MALINTOPPI, *Unlawful interference with international arbitration by national courts of the seat in the aftermath of Saipem v. Bangladesh*, in *Liber Amicorum B. Cremades*, La Ley, 2010, p. 993; L.G. RADICATI DI BROZOLO, *The impact of national law and courts on international commercial arbitration: mythology, physiology, pathology, remedies and trends*, (2011) *Paris J. of Int'l Arbitration/Cahiers de l'Arbitrage* 663; L.G. RADICATI DI BROZOLO, *Arbitration and the draft revised Brussels I Regulation: Seeds of home country control and of harmonization?*, (2011) *J. of Private Int'l Law* 423; L.G. RADICATI DI BROZOLO, *The control system of arbitral awards: A pro-arbitration critique of Michael Reisman's 'Normative architecture of international commercial arbitration'*, *ICCA Congress Series No. 16, Proceedings of the ICCA 50 Conference, Geneva, May 2011*, forthcoming.

There remains nonetheless a tension between arbitration and domestic legal systems. Non-experts frequently misjudge the nature of the relation between international arbitration and national law. The role of national law and of national courts, particularly those of the seat of the arbitration, in relation to many important aspects of the arbitration is often underestimated, and even disregarded altogether or, instead, overestimated. In many circumstances the influence of national systems is perfectly normal and to be expected, and at times even to be welcomed, whilst at other times it may appear unwarranted and disruptive. An understanding of these aspects is useful to assess the scope of party autonomy in this field and how best parties to an international arbitration can take advantage of it, and at the same time to identify to some of the pitfalls and to the possible consequences and remedies.

Although a favorable and liberal attitude towards arbitration is now widespread, it is by no means universal. There remain States that still adopt fairly restrictive approaches and even interfere with the process in various ways. These include some that are parties to the New York Convention.

The differences in State attitudes towards arbitration are not of themselves surprising. They are a consequence of the lack of harmonization of the law of arbitration at the international level. The New York Convention, which is the basis of the system of international arbitration, governs only two, albeit crucial, elements of arbitration, i.e. the enforcement of arbitration agreements and of arbitral awards (in the latter case when they circulate beyond the frontiers of the State of the arbitral seat). Even in relation to these two aspects the Convention is very far from imposing a harmonized regime, since many of the concepts which are crucial to its application are not spelled out in detail and remain susceptible to different interpretations and applications. Additionally, the Convention does not provide for a judicial or other mechanism capable of guaranteeing its harmonized application.

All other matters not touched by the New York Convention, from the appointment of the arbitral tribunal and standards of arbitrator independence to the grounds for setting aside and the nature of the review of arbitral awards, not to mention more abstruse issues like the binding effect of the arbitration agreement to non-signatories or its effects in relation to multiple contracts, are therefore completely unharmonized at international level. Consequently States are free to govern all those matters as they please. The main instrument which attempts to bring about a certain level of harmonization is the Uncitral Model Law on International Arbitration, which however is not binding and moreover is silent on many matters.

In spite of its limited scope and of the fact that that was not its purpose, the Convention has had an extremely significant impact on the development and harmonization of the law of arbitration in the Contracting States. These have been essentially the product of the competition between legal systems unleashed by the Convention. The obligation imposed on Contracting States to recognize agreements for arbitration abroad in combination with the obligation to enforce foreign awards has a

very powerful effect. It allows parties to commercial transactions to opt out of a given legal system and to opt into the arbitration system of their choice simply by designating the seat of the arbitration, whilst at the same time allowing them to obtain the desired effects within the legal system they opted out of by means of the guaranteed recognition of the ensuing award.

It is largely as a consequence of this that many States that initially adopted a restrictive and interventionist stance in matters of arbitration have been induced to evolve towards more liberalized regimes. This has resulted in a broad convergence between the arbitration regimes of many diverse legal systems, and to the very broad acceptance of the role of party autonomy and of the wisdom of limiting court control over arbitral proceedings and awards. As a byproduct, most States now consider the seat of the arbitration as the connecting factor between an arbitration and their legal systems and recognize the freedom of the parties to make this choice.

This has not sufficed to bring about a complete harmonization. There still exist divergences, at times significant ones, between different legal systems even as to how they apply apparently similar rules, including those of the New York Convention, as well as in their overall attitude towards arbitration. Differences exist also amongst countries considered to have the most arbitration-friendly regimes.

As mentioned, certain countries have remained unaffected by the evolution of arbitration law. Those countries sometimes adopt behaviors perceived as prejudicial to arbitration and at odds with mainstream solutions and which sometimes are, or appear to be, in violation of the New York Convention. Regrettable as it may be, the fact that some countries are less favorable to arbitration, and at times are hostile to it, is understandable. After all, in many now arbitration-friendly countries the approach was less open in the recent past. Progress in this direction has required a change in culture and more often than not the intervention of the legislator and an open attitude of the courts, coupled with an understanding of the advantages that furthering arbitration can bring to the development of business relations and, even more selfishly, to the local legal services industry. These factors do not always occur at the same time in all countries, and the differences in local culture, traditions, economy and exposure to international transactions easily explain why some countries have been reluctant or slower to embrace the prevailing trends. However, it is encouraging that, given the right climate, progress can occur fast. A case in point is obviously Latin America and, foremost amongst Latin American countries, Brazil, which until not long ago was perceived as hostile to arbitration but has readily adopted a completely different attitude. Similar examples exist in Asia.

The differences in State attitudes toward arbitration may lead States and their courts to engage in behaviors that other States, as well as practitioners and commentators who follow the more prevalent views on the law and practice of arbitration, may view as unjustified interferences with the

arbitral process. Depending on the circumstances and the perspective, almost any type of intervention by national courts in relation to arbitration may be seen as an interference.

This is the case when a court dismisses an arbitration exception and exercises jurisdiction on the merits of a dispute alleged to be covered by an arbitration agreement on grounds relating to the existence, validity or form of the arbitration agreement or to its effects in the case at hand or to the arbitrability of the subject matter. This is also the case when a court issues an injunction against the parties or the arbitrators prohibiting the holding or the continuation of the proceedings or adopts a measure removing the arbitrators or when it declares an award null and void or inexistent. It is also the case when a court refuses to recognize or enforce an award.

Such decisions can obviously be based on a variety of reasons, such as the inexistence or invalidity of the arbitration agreement, the malfunctioning of the proceedings, arbitrator bias, conflict with fundamental interests of the State whose court issues the measures and so on, violation of due process, violation of public policy and so on. The reason why in some circumstances they may be considered unwarranted is that they rest on interpretations and applications of the relevant notions which depart from more broadly accepted ones. However, while they may be viewed by some as inappropriately interfering with arbitration, and can give rise to problematic situations, such decisions are not necessarily attributable to a preconceived anti-arbitration attitude or characterized as illegal.

Given the lack of harmonization of arbitration law, of generally accepted rules on the allocation between States and their courts of jurisdiction in relation to arbitration and to arbitration related disputes and of an international or supervisory jurisdiction in such matters, it is to some extent inevitable that there may be different outcomes, and conflicting assessments as to the acceptability of any given solution, between the courts of different States, between courts and arbitrators or between courts and arbitral institutions. These differences can be the product of genuine divergences of views.

There will also unavoidably be occasions where State courts exploit their prerogatives in relation to an arbitration in ways and for reasons that are not widely shared and that may even be difficult to classify as bona fide. Likewise, given the opportunity, litigants will attempt to leverage on these divergences tactically by seeking to obtain from State courts measures favorable to them, even if they appear to run counter to what could be viewed as arbitration orthodoxy.

In the face of such differing attitudes, the question is therefore what the courts, the parties and the arbitrators may or should do when faced with potential conflicts between court proceedings and arbitration or more simply with the prospect of a perceived interference or acceptable decision. The answer is very much influenced by the lack of overarching international obligations (save the two laid down by the New York Convention) and of mechanisms capable of ensuring a uniform and coordinated application of the rules and, more generally, of an international control system of international arbitration. As a result of this, States are largely free to deal with arbitration as they wish.

Consequently, at the end of the day the parties and the arbitrators will be guided essentially by considerations pertaining to whether their actions may be upheld or hampered by the legal systems that are relevant from time to time.

Courts have no international obligation to defer to the decisions of the courts of other countries, including those of the seat, in matters of arbitration, be they relating to the functioning of the arbitration or even to the validity of the award. No such obligation derives from general international law or from the New York Convention or, normally, from multilateral or bilateral conventions. Even within the European Union there is no such obligation, since Regulation (EC) 41/2001 (the Brussels I Regulation) does not apply to decisions relating to arbitration.

Even in relation to the decisions of courts relating to awards, as I have discussed in some depth elsewhere², the position according to which States should refuse to enforce awards annulled at the seat is not supported by any legal or policy reason, and is not contradicted by Article V(1)(e) of the New York Convention.

There are weighty grounds to hold that States ought to recognize foreign annulments, and thereby refuse to enforce awards vacated abroad, only when the grounds for the annulment are in line with those for refusal of recognition of Article V of the New York Convention, obviously excluding Article V(1)(e), or at most with those foreseen by the law of the enforcing State. There is particular merit in not recognizing foreign annulments that are the result of untoward actions in the country of the annulment. In this vein it has been convincingly argued that courts other than those of the seat have a free-standing obligation under the New York Convention to assess issues of validity and scope of arbitration agreements and to resolve these issues consistently with the Convention, irrespective of the determinations of the court of the seat, which would have to be disregarded if they are incorrect, or at least blatantly incorrect.

The same approach applies to other foreign decisions that the courts of a given State may view as unjustifiably interfering with arbitration. It can also be used to uphold the legitimacy of other types of counter-interventions by State courts aimed at reacting against interferences with arbitration by the courts of other States, such as anti-suit injunctions in support of arbitration.

Arbitrators too may on some occasions (usually with the support of at least one of the parties) view as unjustified certain decisions or orders of State courts, such as those seeking to revoke their authority or in some way attempting to hinder the normal course of the arbitration. In such circumstances arbitrators may well feel that they are acting in line with the will of the parties, perhaps with the decisions of the institution running the arbitration, and with generally accepted principles governing international arbitrations. In other words, they will tend to consider that they have nothing to reproach themselves for and that it is the court that is failing to act correctly.

² See L.G. RADICATI DI BROZOLO, *The control system of arbitral awards, op. cit.*

Since, unlike courts, arbitrators are not the organs of any State, they owe their primary allegiance to the parties from whom they have received the mandate to settle their dispute and who would normally expect them to go on with their task regardless of the pressure of the State that recourse to arbitration was presumably intended to avoid in the first place. From a purely practical point of view, in many cases arbitrators may be in a position to disregard the orders of the court which they view as unjustified or outright illegal. The question thus is whether they should do so.

The answer may be partly different depending on whether the courts from which the allegedly illegal interference emanates are those of the place of arbitration or of another country. If the interference comes from the courts of a country other than the seat of the arbitration, there seems to be no cogent reason why the arbitrators should take it into consideration, save for the practical matters alluded to below. Although there is no generally applicable rule granting supervisory jurisdiction over arbitration only to the courts of the seat, this principle is by now very consistently followed by States, and attempts by other States to exercise their jurisdiction in respect of arbitrations are viewed with serious skepticism.

The situation is more complex when the interference comes from the courts of the seat. Although, as mentioned, arbitrators are not the organs of any State, including the one of the seat, it could be said that in addition to their allegiance to the will of the parties they owe a certain allegiance also to the law of the seat. Under normal circumstances, the legal system of the seat is the one that is considered to provide the framework of the arbitration and the one whose courts have supervisory jurisdiction over it. And indeed it is fairly generally accepted that, when the courts of that country operate within the “normal” boundaries of their powers, the arbitrators should abide by their decisions. This is also often the expectation of the parties.

One could thus say that the arbitrators’ power to disregard decisions of the courts of the arbitral seat should not lightly be presumed. The problem is obviously whether this deference should be maintained also when the intervention of the courts exceeds the boundaries of “normality”, in other words when it is illegal, or perceived as such. The answer to this question should in principle be negative. The difficulty, however, lies in establishing the standards according to which the intervention of the State court is to be characterized as illegal.

The first source to look to in matters of arbitration, the will of the parties, will usually be of scarce assistance because the parties will not be in agreement, given that the court’s intervention is likely to have been provoked by one of them to the detriment of the other. The other beacon, i.e. the law of the seat, will be equally unavailing because according to that law the intervention will by definition be legal. Not much can probably be made of the expectations of the parties in choosing the

seat.³ It is implausible that the choice of a given seat can be interpreted as a full acceptance of whatever decision of the local courts, irrespective of its terms and of its impact on the arbitration⁴.

One is hence left with what could be termed general principles of international arbitration. The point is that such principles are not easy to identify with certainty, given the above-mentioned disparity of approaches to this subject matter. Moreover, whatever principles might be held to exist could be classified as simply the expression of the most arbitration-friendly cultures, and thus of one of the possible conceptions of arbitration, and therefore not susceptible of universal recognition⁵. Equally delicate is the question of who has the power to decide that the decisions of the national court are illegal under whatever standard is utilized.

In this situation the arbitrators are left largely to their own devices. As mentioned above, they should of course not lightly disregard the decisions of the courts of the seat. On the other hand, neither need they supinely bow to any order or injunction coming from such courts if, by some reasonable standard, they consider it unacceptable. Not surprisingly, there is by now a considerable body of practice that shows that in certain situations arbitrators are prepared to disregard “illegal” or otherwise unacceptable interferences of State courts and to proceed with the arbitration. Amongst the best known cases are *Salini v. Ethiopia*, *Himpurna v. Indonesia*, *Saipem v. Petrobangla*, *Hubko v. Wapda*, *Copel v. UEG* and *National Grid v. Argentina*⁶, the first three of which were cases in which the interferences stemmed from the courts of the seat, whilst in the other cases they came from the courts of other countries. In such cases the tribunals invoked a variety of principles and considerations, foremost amongst which the need to accord proper deference to the will of the parties and the need for the arbitrators to fulfill their mandate, as well as the obligations deriving from the New York Convention.

There are, however, also practical considerations. Arbitrators faced with a court order they may consider unwarranted will have to take carefully into account its actual consequences and territorial and personal reach, regardless of whether the interference comes from the courts of the seat or from those of another country. In some cases, continuing with the arbitration or otherwise disregarding the orders of the courts can come at a cost. The arbitrators or their assets or their families may be, or may risk becoming in the future, subject to the jurisdiction of the State whose courts issue the measures. Proceeding in contempt of the measures could have dire consequences for the arbitrators, or indeed for some of the parties or their counsel. Moreover, the practical functioning of the arbitration may prove

³ For a discussion of the relevance of party expectation in this context see L.G. RADICATI DI BROZOLO, *The control system of arbitral awards*, *op. cit.*.

⁴ See note **Errore. Il segnalibro non è definito.** below and corresponding text. and L.G. RADICATI DI BROZOLO, *The control system of arbitral awards*, *op. cit.*, Section D.4(c).

⁵ For a discussion of this point see L.G. RADICATI DI BROZOLO AND L. MALINTOPPI, *Unlawful interference*, *op. cit.*, § 32 seq.

⁶ For a discussion of these cases see E. GAILLARD, *Legal Theory of International Arbitration*, Martinus Nijhoff, 2010, p. 71 seq. and L.G. RADICATI DI BROZOLO AND L. MALINTOPPI, *Unlawful interference*, *op. cit.*, § 5 seq.

difficult or even impossible, if the tribunal is truncated or if there are obstacles to hearing witnesses or experts, carrying out inspections or collecting the evidence, if some of these actions have to be performed on the territory of the State that issues the measures.

Disregarding the orders of the court can also impact on the fate of the award. This will certainly be unenforceable in the country whose courts are responsible for the interferences. Moreover, if the seat of the arbitration is in that country, the award is likely to be set aside or declared inexistent by its courts, with possible further consequences on its unenforceability in those countries which still adhere to the classic view on the unenforceability of annulled awards.

This in itself need not be a bar to the continuation of the proceedings, because the parties, or at least one of them, may have an interest in an award even if it is unenforceable, for instance simply because of its declaratory effects. Furthermore, although traditionalists may raise eyebrows, the award might be enforceable in other countries despite its annulment. As argued above, where the annulment is “unjustified”, this may actually in certain circumstances be the preferable solution.

Arbitrators will therefore have to balance all these elements with care. They should not presume that they are free to act completely outside the boundaries of State law. On the other hand, they are entitled to exercise a measure of good judgment and to depart from court orders that appear seriously flawed when assessed according to sound standards and at odds with the reasonable expectations of the parties and with broadly accepted practices. On yet another plane, the arbitrators cannot be expected to adopt a course of action that creates particular hazards for themselves or for others.

Nowadays perhaps the majority of legal systems tend to favor arbitration and therefore exercise their legislative, adjudicatory and enforcement jurisdiction over international arbitrations in ways which do not unduly interfere with them and are actually supportive of them, although undeniably to different degrees.

In most cases the parties can achieve the full benefit of this evolution by means of a well reflected choice of the seat of the arbitration. That allows them to choose an efficient and arbitration-friendly regime that ideally leaves them all the freedom they need or want, while at the same time being available to provide the necessary support and oversight when needed. If the arbitration only has contacts with countries that subscribe to a liberal vision of arbitration few problems are to be feared.

There are, however, States whose legislation or court practice do not favor arbitration and interfere with the arbitral process in ways which may seem undesirable or even unwarranted. Of course, there is no straight line between acceptable and unacceptable State interventions, since State attitudes in this field are dictated by different visions of arbitration that are for the most part permissible in the absence of internationally mandatory harmonization. Nonetheless, very significant departures of State practice from generally accepted standards can be considered detrimental to the interests of the participants in international business and of international commerce.

As discussed above, a first remedy lies in a type of self-help by other States and by the parties and arbitrators which consists in countering the perceived anti-arbitration measures by disregarding them and not granting them international recognition, as they are entitled to do owing to the lack of any mandatory obligation to recognize foreign decisions in matters of arbitration. Obviously this solution is viable only in limited circumstances. The question, therefore, is what can be done to change this state of things and to bring about a greater level of arbitration friendliness on the part of those countries, in Asia and elsewhere, that are still hostile to arbitration.

In addressing this issue it is worth bearing in mind that what may be perceived as anti-arbitration attitudes do not necessarily stem from an actual anti-arbitration bias. More often than not they are the product of a lack of knowledge of the evolution of the law and practice of arbitration at the international level as well as of a failure to understand the potential benefits of a greater acceptance of arbitration to international commerce. Based on the experience of those countries that now adopt a modern vision of it in their law and practice, the majority of which were far less liberal in their approach to it until not long ago, it is realistic to expect that an evolution towards more pro-arbitration attitudes on the part of States that have not yet embraced such attitudes can occur equally spontaneously. Such a development can be spurred simply by the imitation of foreign models, the emergence of a more sophisticated “culture” of arbitration and the perception that a more open attitude towards arbitration can bring concrete benefits or usefully complement the liberalization of the economy. In this context a very significant role can be played simply by raising the awareness of the importance and benefits of arbitration by means of appropriate educational programs for the judiciary and the legal profession, as well as of the potential users of arbitration.

A further stimulus toward greater respect for arbitration may come from the role of international courts and tribunals. Although, as mentioned above, the underpinnings of the law of arbitration in international law are relatively limited in scope, the case-law from different sources contains interesting threads that may raise the awareness of States of the need to respect arbitration⁷. All the decisions are inspired by the assumption that States are under some form of obligation to respect arbitration, the violation of which may entail international responsibility. The sources of such an obligation are varied, including the protection of private property and the prohibition of expropriation, which flow from the recognition that the right to arbitration has an economic content. Nevertheless, the principal source is naturally the New York Convention. Not even the precise contours of the obligation are easy to apprehend, and presumably only in rare circumstances will it be possible to draw concrete consequences from its violation.

⁷ For an analysis of this case law see L.G. RADICATI DI BROZOLO, *The impact of National Law and Courts on International Arbitration*, op. cit. p. 688 ff.

This is also because, owing to the lack of a dispute settlement provision in the New York Convention, essentially the only international venue in which a claim for violation of the New York Convention can be brought is in the context of a dispute based on a bilateral investment treaty and falling under the jurisdiction of the 1965 Washington Convention providing for the International Center for the Settlement of Investment Disputes. However, even in such cases it will not necessarily be easy to show the existence of a violation, since that will usually require proof of an expropriation or of denial of justice, with the added complication that denial of justice is often held to presuppose the exhaustion of local remedies.

Yet, the realization that the obligations flowing from the New York Convention and from other international sources are amenable to a particularly constructive interpretation, and that in some, although limited, circumstances there may even be a form of control of their respect, may have far-reaching implications in terms of furthering the respect for arbitration. In the shorter or longer term it can lead to the development of a broadly shared core of values and principles which will increasingly transcend national peculiarities.

To conclude, despite the crucial role of the New York Convention, arbitration is still not subject to a far reaching mandatory harmonization and remains unregulated at the international level. States accordingly retain a broad freedom to favor it but, conversely, also to treat it with distrust. This could leave arbitration in a state of anarchy. Nonetheless, over the past decades there has been a spontaneous evolution towards shared values and approaches in a large number of States. This has led to the emergence of a sort of common law of arbitration.

To the extent that States adhere to such common values, they will tend to respect each other's decisions on arbitration-related matters, thus giving rise to a seamless regime for arbitration.

However, in most parts of the world there are still States that for various reasons have not followed this path and therefore do not fully share the prevalent views on the respect to be accorded to arbitration agreements and awards, and more generally to the arbitral process. Arbitrations affected by their legal and judiciary systems may suffer from the actions of those States.

To some extent the anti-arbitration attitudes of those States can be neutralized by ad hoc measures by the courts of other countries and by arbitrators, sometimes simply by disregarding them. In other circumstances it may be possible to have recourse to international adjudication to obtain a finding of violation of internationally binding standards and possibly enforcement. In principle the States party to the New York Convention that feel that the Convention is not properly applied by other contracting parties could take the matter up at intergovernmental level to push for better compliance.

Admittedly, save in relatively limited circumstances, this "stick" is not of itself a very powerful incentive to induce States that do not yet embrace arbitration to its full extent to refrain from such behaviors and, more generally, to adopt a more arbitration-friendly stance. For the time being the

parties to international arbitrations will therefore continue to encounter, and to have to live with, interferences which may run counter to their expectations.

The prospects of an evolution towards such a stance are probably greater if the stick is used in conjunction with a “carrot”. This consists in persuading recalcitrant States that such an evolution is in their own self-interest in that it is instrumental to opening their economies and facilitating the participation of their businesses in international commerce.

If an unfavorable attitude towards arbitration largely prevalent until not long ago has been abandoned by States that have come to perceive the benefits of embracing arbitration, there is no reason why also the attitude of the holdouts of the more ancient mentality should not evolve in the same direction. It is well possible that, as a result of the combination of these factors, over time certain behaviors of States which appear unacceptable according to the more broadly shared visions of arbitration law and good practice will tend to fade away, if for no other reason, because they will increasingly be considered to be not “good form” or, more aptly, simply counter-productive and at odds with the participation in the New York Convention.

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