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International Arbitration and Judicial Intervention

ROBERT E. LUTZ*

The relationship of judicial intervention to international arbitration and conciliation is an intriguing topic. Such topics frequently require the skills of cartoonists to reveal their essential nature. I recently came across a cartoon in, I believe, *New Yorker Magazine* that had a sketch of a head angel sitting at Heaven's judgment table and across from him were the various "bad angels" with pitchforks and horns, etc. The head good angel assigns the various destinies in the following way: "Then it's agreed: Watson, Smith, Teller and Wilson go to Heaven; Jones, Paducci and Horner go to Hell; and Fenton and Miller go to arbitration." I'm pleased to be here on this blessed occasion.

I. THE BASIC PARADOX

My task is to address the topic of "International Arbitration and Judicial Intervention." Although a somewhat abstract title, it represents a very real nexus which is ever so important, most interesting and almost paradoxical: on the one hand, the judiciary is often essential in guaranteeing the integrity of the arbitral process, while on the other hand, the fear of involvement by the judiciary is precisely the reason many parties enter into arbitration.

A. *United States Legal Environment*

I start from the premise that the United States has one of the most accommodating environments for international commercial arbitration of any country in the world. Here on the west coast of the United States, there have been significant efforts to make the international arbitration environment even more advantageous than the rest of the country, especially for Pacific Basin parties. In Los Angeles, a

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number of leading business persons and lawyers established the Center for International Commercial Arbitration in 1986. Among the supporters of this effort have been the American Arbitration Association (AAA), the Asian/Pacific Dispute Resolution Center, and a wide variety of civic groups, including the Los Angeles Chamber of Commerce and the Mayor's Office.

The Center, which provides international arbitration and conciliation services, has adopted the UNCITRAL arbitration rules and also has conciliation rules. With the new California International Arbitration and Conciliation Act, California now has the finest legal environment for international arbitration in the country, if not the world. This is, of course, an appropriate and overdue development. After all, California is now the sixth largest economy in the world with nearly two-thirds of California trade and forty-percent of all west coast trade flowing through Los Angeles. The sixty mile radius around Los Angeles contains the second largest concentration of population, employment, business, industry and finance in the United States.

B. General Problems of Judicial Intervention

Returning to the topic at hand, International Arbitration and Judicial Intervention, it must be appreciated that transnational arbitration can never be totally divorced from court litigation. If for any reason one party refuses to cooperate, the other party must, at some point, seek judicial assistance. There are important trends, however, about the way in which judicial intervention may be employed and limited. In order to meet the needs of commerce, many countries have substituted judicial support for earlier interference with transnational arbitration, in particular with respect to the validity of arbitral compacts and the recognition of foreign awards. Noteworthy, in this regard are the United Kingdom's Arbitration Act of 1979, the 1981 French Decree, and the UNCITRAL Model Act. These have each, in their own way, removed a number of the obstacles created by judicial intervention. The New York Convention of 1958, the European Convention of 1961, and the Inter-American Convention of 1975 all provide limited grounds for denial of recognition and enforcement of foreign awards.

There are a number of areas in international arbitration where there are likely to be judicial intervention problems. These areas are: general or miscellaneous issues; the enforcement of the arbitral agreement itself; judicial control over the arbitral proceedings; and judicial

control over the award. The first three categories are briefly addressed in the following discussion.

II. AREAS OF JUDICIAL INTERVENTION

A. General and Miscellaneous Issues

There is a lack of consensus on what is the meaning of a "transnational" as opposed to a "domestic" award, resulting often in judicial intervention. Many countries crudely rely on geographical factors—the seat of arbitration or the nationality or residence of the parties involved—to characterize the transnational arbitral proceeding. Other countries, more progressive in their outlook on these matters, take into account party autonomy in the selection of procedural rules.

Differing judicial treatment of sovereign immunity also illustrates another possible area of judicial intrusion into international arbitration. From the date of execution of arbitral agreements through the proceedings and ultimately at the time of the enforcement of the award, the presence of a state as a party in an arbitration affords courts many opportunities to intervene in the proceedings and apply different standards. There are other areas of potential judicial intervention and these include questions that may arise as to the form of the arbitration agreement: whether the domestic law and relevant international conventions require the arbitral agreement to be "in writing," and what that term means. Certainly, in cases of ordinary commercial transactions (as contrasted with truly negotiated deals), it may be quite difficult to ascertain the appropriate meaning and, therefore, such cases may call for judicial adjudication.

The question of arbitrability is yet another area of potential judicial intervention. Even those countries most favorable to arbitration still restrict its use with respect to certain subject matter. Matters having high public policy potential as industrial property rights, anti-trust, securities and employment contracts may, in some cases, not be arbitrable. But, there is a trend rejecting that approach. We are seeing a substantial erosion of the aversion to arbitrate such issues, especially when the prescribed arbitration is "international" in character.

Judicial intervention may also occur on the issue of the selection of the seat of arbitration, especially where the site is in a "neutral" country where the legal system in fact may not be as friendly as originally supposed. And just the mere poor draftsmanship of an agree-

ment invites issues of interpretation and, therefore, judicial intervention.

Despite these possible areas of judicial intervention, George Delame, a commentator on these matters, has written that many of the real difficulties faced by the nexus of the courts and transnational commercial arbitrations can be avoided by giving due attention to matters relating to the formal and substantive validity of the arbitration agreement. Therefore, recourse to the judiciary should be confined within relatively narrow limits, and, specifically in the area of the enforcement of the arbitral agreement, to issues concerning: the scope of consent to the arbitration and its continued effectiveness; and to the severability of the arbitration clause from the main contract to which it relates.

B. Judicial Control Over Arbitration Proceedings

1. Initiation

Judicial control can occur with respect to the arbitral proceeding—both at the initiation of the proceedings, and during the arbitration. The modern view regarding this category of problems is that judicial involvement at these phases, should be supportive, not intrusive. It should refrain from interfering with the arbitrators' powers and assist them or the parties when the need arises. Judicial involvement, although supportive, draws its justification from the observation that the powers of arbitrators are not coextensive with those of the judiciary, and that courts may use their *imperium* to fill the gap.

At the initiation of an arbitration, you have the general principle in the United States and in other countries, that courts will stay judicial proceedings brought by one of the parties in violation of the arbitration clause. Also, at the initiation of arbitration, issues concerning the appointment, replacement, or removal of arbitrators may arise. These are normally handled in accordance with the arbitration rules specified in advance in the contract or agreed to at the time of arbitration. In arbitrations where one party does not cooperate—refuses to appoint another arbitrator, etc.—the other party may request the court to do so. There are some differences from country to country with respect to how courts might support the arbitral process and handle such recalcitrants. In the United States, pursuant to the Federal Arbitration Act, the federal courts may direct that arbitrations be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States.

2. During Arbitration

During the arbitration, it can be stated that courts generally exercise restraint in interfering with the conduct of the arbitration proceedings. However, judicial support might be necessary in some instances, such as where decisions beyond the powers of arbitrators and falling within the exclusive jurisdiction of the courts are required: where means of compulsion are necessary. This may occur where a party refuses to produce evidence. Few sanctions are really available to the arbitrator to compel such production, except that an arbitrator may often draw inferences against that party for his or her lack of cooperation. On the other hand, judicial support of the arbitral process on such occasions would add sufficient authority to compel cooperation.

3. Discovery

The question of the appropriateness of judicial intervention during an international arbitration is addressed by the uniquely United States pretrial phenomenon known as "discovery." Often perceived as a procedure which undermines the supposed advantages of arbitration, especially speed and cost, practitioners and commentators have nonetheless generally agreed that a limited form of discovery is helpful in the arbitral process. It can provide an important fact-finding capacity and can improve the quality and quantity of documentary evidence with which the arbitral tribunal makes its decision.

Notwithstanding these advantages, foreign parties in particular fear being involved in the wide-ranging prehearing discovery frequently associated with litigation in the United States, and inaccurately assume arbitrations are subject to the same kind of treatment. This misconception is due to a misunderstanding of how United States law applies to international arbitration. The procedures for obtaining evidence for presentation to an arbitral tribunal are not governed by the Federal Rules of Civil Procedure nor the procedural law of a particular state. Rather, the procedural rules for arbitral hearings are provided by the *rules* that the parties choose for the arbitration. For example, the AAA's rules provide that parties may offer evidence which is relevant and material to the dispute and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. The UNCITRAL rules, adopted in large part by the Center for International Commercial Arbitration in Los Angeles as well as by other centers of

arbitration, provide that the arbitral tribunal may require a party to deliver to the tribunal or the other party a summary of documents or other evidence which the party intends to present. The UNCITRAL rules further provide arbitral tribunal may require parties to produce documents, exhibits or other evidence as the tribunal shall determine. Incidentally, the Center for International Commercial Arbitration in Los Angeles specifically provides that, *unless* agreed to by the parties, there shall be no other "formal discovery." As a last example, section seven of the Federal Arbitration Act grants arbitrators broad discretionary powers to require the production of documents.

Given this legal framework which provides parties with the flexibility to determine the procedural rules applicable to their arbitration, and confers upon the arbitrator broad discretionary authority to determine the amount, if any, of discovery to be undertaken in a given arbitration, how do courts operate when one party requests discovery in aid of an arbitration proceeding? Generally, both federal and state courts have taken the view that courts should not significantly interfere at the prehearing stage of the arbitration by subjecting a party (foreign or domestic) to federal or state discovery rules which are likely to increase costs and delays.

Some cases have allowed discovery under the Federal Arbitration Act on the issue of whether there was an agreement to arbitrate (which the court must decide before staying a suit and directing parties to proceed to arbitration). Some have also allowed it on the issue of whether there are sufficient statutory grounds for vacating, modifying or correcting the arbitral award. However, in a long line of cases, courts have denied—with limited exception—requests by parties for discovery in aid of arbitration proceedings. The rule, then, is that discovery under court supervision will not be granted except under extraordinary circumstances and then only where it is shown to be absolutely necessary for the protection of the rights of a party. In short, necessity, rather than convenience, is the test.

The reasoning supporting this rule falls into two categories. The first line of reasoning relies on the notion of contractual autonomy. By voluntarily agreeing to employ arbitration as the mode for settling disputes, parties choose to utilize procedures peculiar to the arbitral process rather than those followed in judicial determinations. Having chosen to arbitrate, a party is estopped from urging through a request for discovery a blend of litigation and arbitration approaches.

The second line of reasoning argues that discovery is simply in-

compatible with a main objective of arbitration, which is to resolve the dispute within the shortest possible time. The availability of disclosure devices is a significant differentiating factor between judicial and arbitral proceedings. An arbitration proceeding, so the argument goes, is deliberately taken outside the court's realm and jurisdiction by the choice and commitment of the parties.

III. SUBSTITUTING JUDICIAL SUPPORT

Much more could be said about the ever present tension between judicial intervention and international arbitration. With the increasing use of non-litigation resolution processes and the judiciary's desire to reduce its dockets, one might presume that there would be judicial support for the international arbitration process. For transnational commerce to succeed, parties need the freedom to structure transactions to their satisfaction, which may mean limited intervention by the courts. By resorting to proper techniques of judicial avoidance, parties may eliminate most, if not all, of the issues likely to frustrate their legitimate expectations. Proper exercise of party autonomy, coupled with attention to basic issues of form, substance and care in drafting an arbitration agreement, should greatly facilitate the enforcement of arbitral agreements and their awards, and substitute judicial support for judicial control.

