

SHOULD THERE BE DIFFERENT REGIMES FOR ENFORCEMENT OF DOMESTIC AND INTERNATIONAL ARBITRAL AWARDS?

1.1. INTRODUCTION

1.1.1. When it comes to international law and municipal law; and how they are defined and interact, there are two controversial theories *i.e.* monism and dualism. Each theory has its supporters, and there is even another view that considers the dualist-monist theories as fiction.¹

1.1.2. The theory of monism considers that international law and municipal law form one body of knowledge *i.e.* 'law', which is seen as a single entity. However, this theory recognises the supremacy of international law where there are conflicts.²

1.1.3. This view emanates from the idea that international law is derived from the practice of states and national law is derived from states as established in international law and also from the belief that international law offers the best guarantee for human rights of individuals.³

1.1.4. On the other hand, the theory of dualism considers that international law and municipal law as independent of each other and exclusive, as they are based upon different jurisdictions, sources and subject of matter; and therefore no conflict between them is possible, but if it does exist, the majority of dualists are of the view that municipal law would be applied.⁴

1.1.5. These conflicting views can be seen reflected on the different approaches adopted by the states in their arbitration legislation, with some using dual regimes and the other using unified ones in dealing with domestic and international arbitrations.

1.1.6. In light of the above, the regimes driving the enforcement of domestic and international arbitral awards shall be explored with particular reference to England and Wales, Scotland and Australia in the following critical evaluation.

1.2. ENFORCING ARBITRATION AWARDS IN ENGLAND, WALES AND SCOTLAND

¹ 'Is the Dualist-Monist controversy in International Law simply a fiction?' Juristic <<http://mezinarodni.juristic.cz/51001/clanek/mpv1.html>> accessed 27 April 2014.

² *ibid.*

³ *ibid.*

⁴ *ibid.*

- 1.2.1. The legislation that underpins the arbitration process in England and Wales is the Arbitration Act 1996 (“the English Act”), and in Scotland it is the Arbitration (Scotland) Act 2010 (“the Scottish Act”). Both the English Act and the Scottish Act are closely based on the UNCITRAL Model Law and are broadly comparable to each other.
- 1.2.2. The English arbitration system is probably the most developed and most used in the world due to the considerable built up level of jurisprudence that has resulted in a more predictable and reliable resolution of arbitral disputes.
- 1.2.3. In Scotland, a new arbitral regime has been recently introduced under the Scottish Act, before which there was no clear codified arbitration regime; and the arbitration process was governed by old case law, piecemeal legislation and out-dated rules.⁵ Despite the presence of some key differences, the Scottish Act is heavily based on the English Act.
- 1.2.4. This similarity has indeed helped the Scottish Act to be instantly familiar to the international arbitration community and also the Scottish Courts to apply the vast English case law to interpret the Scottish Act.⁶
- 1.2.5. It should also be noted that one of the general objectives of the Scottish Act is to end the dual regime of arbitration⁷ and thus, both the English Act and the Scottish Act apply to all arbitrations and they are considered monist regimes as they do not distinguish between domestic and international arbitrations⁸.
- 1.2.6. In England and Wales, arbitral awards can be enforced under a number of different regimes *i.e.* the English Act, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“the New York Convention”), the Geneva Convention 1927, the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933 and under common law.⁹

⁵ ‘Arbitration in Scotland’ CMS

<http://eguides.cmslegal.com/pdf/arbitration_volume_1/CMS%20GtA_Vol%20I_SCOTLAND.pdf> accessed 28 April 2014.

⁶ ‘Advantages of Scottish Arbitration’ Scottish Arbitration Centre

<<http://www.scottisharbitrationcentre.org/index.php/arbitration/arbitration-in-scotland>> accessed 28 April 2014.

⁷ ‘The Arbitration (Scotland) Act 2010: A seminar series by CIArb (Scottish Branch)’ (Seminar 1, February 2011).

⁸ Sir Sydney’s argument whilst pro-*Sussex Justices* cited in Sam Luttrell, *Bias Challenges in International Commercial Arbitration: The Need for a ‘Real Danger’ Test* (Kluwer Law International 2009) 51.

⁹ ‘Enforcing International Arbitration Awards in England and Wales’ Pinsent Masons Advice Note

<<http://www.pinsentmasons.com/pdf/enforcinginternationalarbitrationawards.pdf>> accessed 29 April 2014.

1.2.7. However, under the Human Rights Act 1998, the English courts must ensure when enforcing an international arbitration award that it is consistent with article 6 (1) of the European Convention of Human Rights (ECHR).¹⁰

1.2.8. While in Scotland, awards can be enforced under the Scottish Act and the New York Convention. It is of note that the enforcement process applicable in any particular case depends on the seat and the rules of arbitration.¹¹

The English Act

1.2.9. The mandatory Section 66 'Enforcement of the award' of the English Act applies to all domestic and foreign arbitral awards where the seat of arbitration is in England and Wales or elsewhere but the enforcement is being sought in England and Wales.

1.2.10. Under this Section, the leave of the court is required to enforce an arbitral award in England and Wales, which once permitted, judgment maybe entered in terms of the arbitral award and enforced in the same manner as a court judgment or order.

1.2.11. However, Section 66 (3) provides that leave of the court to enforce an arbitral award shall not be granted if it can be shown by the party to whom the enforcement is sought, within a certain time subject to Section 73, that the tribunal lacked substantive jurisdiction to make the award.

1.2.12. The English Act also provides for enforcement of arbitral awards made under the New York Convention in Sections 100 to 103 and under the Geneva Convention in Section 99.¹²

The Scottish Act

1.2.13. Similar to Section 66 of the English Act, Section 12 'Enforcement of arbitral awards' of the Scottish Act applies to domestic and foreign arbitral awards, which includes arbitration seated under other jurisdictions of the UK.¹³

1.2.14. Under this Section, a party to an arbitration seated in Scotland may apply to the court for an order to enforce an arbitral award and accordingly, with the authority of the

¹⁰ Article 6 (1) of the ECHR 'fair and public hearing...by an independent and impartial tribunal'

¹¹ *Ibid.*

¹² *ibid.*

¹³ Arbitration (Scotland) Act 2010, Explanatory Notes.

court an award may be enforced as a final court award.¹⁴ Section 12(6) provides that arbitration seated outside Scotland may be enforced in the same way as domestic awards subject to the same requirements.¹⁵

1.2.15. Section 12 also provides that a court order to enforce an arbitral award may not be granted if the award is currently under appeal to the court, an arbitral process of appeal or review, a process of correction which has not been finally determined, or if the court is satisfied that the tribunal lacked jurisdiction. The onus of proof to show that the tribunal lacked jurisdiction is on the party disputing a request for arbitral award enforcement.¹⁶

The New York Convention

1.2.16. Although, as discussed above, the English and Scottish Acts are considered as monist regimes, the UK has a dualist legal system where national and international law are separate, which essentially means that treaty law has to be enacted by the parliament into national law to come into effect.¹⁷

1.2.17. Sections 100 to 103 of the English Act provide for enforcement in international arbitral awards under the New York Convention. An award subject to this Convention is recognised as binding between the parties and shall be enforced in England and Wales in the same manner as a court judgment or order. And Section 103 (2) of the English Act provides refusal grounds by the court to make such an order.

1.2.18. It should be noted that the procedure to apply for enforcement is the same as in Section 66 of the English Act discussed above and it is also worth noting that Part III of the English Act does not affect any right to rely upon or enforce an award made under the New York Convention at common law or under Section 66 of the English Act.¹⁸

¹⁴ 'Arbitration in Scotland' CMS

<http://eguides.cmslegal.com/pdf/arbitration_volume_1/CMS%20GtA_Vol%20I_SCOTLAND.pdf> accessed 28 April 2014.

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ 'EC Law – directly applicable and the doctrine of direct effect' Six Form Law

<http://sixthformlaw.info/01_modules/mod2/2_3_2_eu_sources/08_doctrine_of_direct_effect.htm> accessed 30 April 2014.

¹⁸ 'Enforcing International Arbitration Awards in England and Wales' Pinsent Masons Advice Note

<<http://www.pinsentmasons.com/pdf/enforcinginternationalarbitrationawards.pdf>> accessed 29 April 2014.

1.2.19. However, given the limited grounds for refusing recognition under the Convention and the wide discretion in Section 66 to refuse to enforce, going this route is likely to be more difficult than enforcement under the New York Convention.¹⁹

1.2.20. The Scottish Act consolidates a separate procedure for enforcement of arbitral awards under the New York Convention provided in Sections 18 to 22. Similar to the English Act, an award subject to this Convention is recognised as binding between the parties and shall be enforced as if it were an award of the Scottish court. And Section 20 'Refusal of recognition or enforcement' of the Scottish Act provides refusal grounds by the court to make such an order.

1.3. ENFORCING ARBITRATION AWARDS IN AUSTRALIA

1.3.1. Contrary to the English and Scottish approach, the arbitration in Australia is governed by two distinct statutory regimes; one is State-based to regulate domestic arbitration *i.e.* Commercial Arbitration Acts (collectively, the CAAs)²⁰, which has been recently replaced²¹.

1.3.2. And the other is Federal to regulate international arbitration *i.e.* the International Arbitration Act 1974 (Cth) ("IAA"), which has been amended by the International Arbitration Amendment Act 2010 (Cth).²²

1.3.3. The recent complete overhaul of the domestic regime came in response to criticism that arbitration in Australia had become too litigious and accordingly, this change was made to ensure that the new regime, which is modelled upon the Model Law, reflects international best practice and supports arbitration as a viable and effective alternative to litigation.²³

1.3.4. Likewise the amendments to the IAA are aimed at maintaining the position of the New York Convention and the Model Law as an integral part of the *lex arbitri* of Australia, and

¹⁹ 'England and Wales' Norton Rose Arbitration in Europe

<<http://www.nortonrosefulbright.com/files/england-25789.pdf>> accessed 24 April 2014.

²⁰ 'The Domestic and International Arbitration Landscape in Australia' Clayton Utz

<http://www.claytonutz.com/area_of_law/construction_and_major_projects/docs/Domestic_and_International_Arbitration_Sep_2012.pdf> accessed 24 April 2014.

²¹ New South Wales was the first state to enact the bill in October 2010 followed by South Australia in September 2011, Tasmania in October 2011, Victoria in October 2011, Queensland in March 2013 and Western Australia in August 2013.

²² *ibid.*

²³ *ibid*; Commercial Arbitration Bill 2012.

to ensure that the effect of judges decisions are consistent with accepted international norms.²⁴

Commercial Arbitration Act 2013 (Queensland)

- 1.3.5. Section 35 of the CAA 2013 'Recognition and enforcement' applies to domestic arbitral awards only. However, it also recognises arbitral awards made in other states or territories within Australia as binding and enforceable subject to the provisions of the same Section and Section 36.
- 1.3.6. This Section provides that for an arbitral award to be enforced, the original award or a copy it shall be supplied to the court and if it is not in English, the court may request a translation of it.
- 1.3.7. Section 36 provides the grounds for refusing recognition or enforcement of an arbitral award, some of which at the request of the party disputing a request for arbitral award enforcement provided that a proof for such request is furnished to the court.
- 1.3.8. And also if the court finds that the subject matter of the dispute is not capable of settlement by arbitration or if the enforcement of such award is against the public policy of this state.

International Arbitration Amendment Act 2010

- 1.3.9. On the other hand, the IAA applies exclusively to international arbitral awards. Section 7 'Enforcement of foreign arbitration agreements' and Section 8 'Recognition of awards' govern the enforcement process.
- 1.3.10. Unlike the English and the Scottish Acts, the IAA takes a stricter approach in dealing with the recognition and enforcement of international arbitral awards. Section 7 provides that a party to an arbitration agreement should be the government of a contracting country of the New York Convention or a party who was at the time of the agreement domiciled or ordinarily resident in a contracting country of the Convention. And Section 8 provides that the foreign award should be made in a country, which at that time, a Convention country.

²⁴ *ibid.*

- 1.3.11. The grounds for refusing to enforce foreign awards are provided in subsections 5 and 7 of Section 8 and the limits to what would be considered as an enforcement that is contrary to public policy are provided in Section 8 (7A).

1.4. CONCLUSION

- 1.4.1. The theoretical views of the relationship between international and domestic law described as monism and dualism generate considerable confusion because there is no agreed definition of such terms.²⁵
- 1.4.2. It is argued that the noticeable rapid development in international arbitration left no other option for domestic legal systems but to adapt and provide tolerable; and favourable regimes within which the international arbitration can flourish.²⁶
- 1.4.3. The effect of such development is the born of modern and liberalised arbitration regimes which have witnessed the transfer of favourable principles from the international arbitration onto the domestic level.²⁷
- 1.4.4. The mantra of a unified regime for international and domestic arbitrations has indeed became a new trend followed by many states, the success of which can be seen in the success of the Model Law; and portrayed by the Dutch legislator argument 'what is good for international arbitration is also good for domestic arbitration'.²⁸
- 1.4.5. Although, England, Wales and Scotland have a dualist legal system, they were keen on being part of this development wagon and have adopted monist regimes to deal with the arbitration process.
- 1.4.6. Similarly, in Australia despite having a dual regimes dealing with arbitration, thorough developments have been sought recently, especially to its domestic regime, to be on par with the international norms.

²⁵ David Sloss, *Domestic Application of Treaties* (2011), available at: <http://digitalcommons.law.scu.edu/facpubs/635>.

²⁶ Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 62.

²⁷ *ibid.*

²⁸ *ibid* 63.

- 1.4.7. Having a unified regime has definitely minimised the importance of the distinction between domestic and international arbitration.²⁹ However, as long as principles such as fairness and indiscriminate are maintained, the theories that consider the dualist-monist significance will be merely fiction.

²⁹ *ibid* 63.

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