Enforcement of an International Commercial Arbitration Award through the Government-Sponsored Courts in the Form of a Foreign Judgment: A Survey of Positive Elements

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Abstract - *The existence of effective and appropriate dispute resolution mechanisms is an integral part of international business activities; the lack of which can arguably undermine the development of international business. In order to meet the need of having an effective dispute resolution mechanism, international commercial arbitration (ICA) has been specifically designed for the resolution of disputes which arise out of cross-border business to business transactions as a private binding dispute resolution mechanism. One striking element of this mechanism is that it requires support from government-sponsored national courts (national court) for its effectiveness and efficiency. One such area is the enforcement of international commercial arbitration awards (ICAA) through national courts. Currently, there are two avenues of enforcement of ICAA. First, they can be enforced through the national courts of a country where enforcement of ICAA is sought. Second, such awards can be enforced as a foreign judgment. Unfortunately, the second avenue which entails different categories of foreign judgments has arguably been neglected by stakeholders of governments and international trade due to the drawbacks in the second avenue.*

The primary objective of this paper is to explore the possibility of expanding the JCFAA as another avenue for the international trading community who rely on the resolution of their commercial disputes via international commercial arbitration. The main argument put forward in this paper is that the enforcement of JCFAA can be made effective by bringing required amendments to the existing problematic areas of the existing legal framework. The argument of this article is supported by referring to the relevant provisions of the Reciprocal Enforcement of Judgments Ordinance No 41 of 1921 (REJO) in Sri Lanka and related literature. It must be noted that this paper is limited to exploring supportive elements embedded in the existing legal framework applicable to REJO, relevant provisions of the Arbitration Act No. 11 of 1995 in Sri Lanka, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958 and related literature on the subject matter of the discussion.

Keywords: Dispute resolution mechanism, international commercial arbitration, government-sponsored courts and international commercial arbitration awards and foreign judgments.

"It is a fundamental precondition for public confidence in any regulatory or legal framework that it should contain effective and accessible enforcement and redress mechanisms" (Patterson, 2001).

I. INTRODUCTION

The existence of effective and appropriate dispute resolution mechanisms is an integral part of international business activities; the lack of which can arguably undermine the development of international business. In order to meet the need of having an effective dispute resolution mechanism, international commercial arbitration (ICA) has been specifically designed for the resolution of disputes which arise out of cross-border business to business transactions as a private binding dispute resolution mechanism. One striking element of this mechanism is that it requires support from government-sponsored national courts (national court) for its effectiveness and efficiency. One such area is the enforcement of international commercial arbitration awards (ICAA) through national courts. Currently, there are two avenues of enforcement of ICAA. First, they can be enforced through the national courts of a country where enforcement of ICAA is sought. Second, such awards can be enforced as a foreign judgment. Unfortunately,

the second avenue which entails different categories of foreign judgments has arguably been neglected by stakeholders of governments and international trade due to the drawbacks in the second avenue. The following statement can be highlighted in this regard:

"…the recognition and enforcement of judgments given by the courts in disregard of an arbitration clause is uncertain; the recognition and enforcement of judgments on the validity of an arbitration clause or setting aside an arbitral award is uncertain; the recognition and enforcement of judgments merging an arbitration award is uncertain; and finally, the recognition and enforcement of arbitral awards, governed by the NY Convention, is considered less swift and efficient than the recognition and enforcement of judgments." (Commission of the European Communities, Brussels, 2009)

It is evident that foreign judgments based foreign arbitral awards take various forms and the uncertainty of the enforcement of foreign arbitral awards have been noted in related literature. In addition, it must be noted that there is a foreign judgment confirming a foreign award, which is delivered by a competent court in the country where the arbitration took place (Roth, 2007). The primary objective of this paper is to explore the possibility of expanding the JCFAA as another avenue for the international trading community who rely on the resolution of their commercial disputes via international commercial arbitration. The main argument put forward in this paper is that the enforcement of JCFAA can be made effective by bringing required amendments to the existing problematic areas of the existing legal framework. The argument of this article is supported by referring to the relevant provisions of the Reciprocal Enforcement of Judgments Ordinance No 41 of 1921 (REJO) in Sri Lanka and related literature (See, Janak De Silva and F.J. and Saram).

It must be noted that this paper surveys supportive elements embedded in the existing legal framework applicable to REJO, relevant provisions of the Arbitration Act No. 11 of 1995 in Sri Lanka (AA), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958 (NYC). The rest of the discussion will be presented in another paper as the second part of this paper. The second paper will examine three major problematic areas which make the existing mechanism inappropriate for the enforcement of foreign JCFAA and suggest a conceptual framework to make the enforcement of JCFAA a viable option for the international business community engaged in cross border trading activities. They include the scope of the judgment, reciprocity principle and the appropriateness of the forum used for the enforcement of foreign judgments.

Accordingly, this paper is structured in the following manner: following the introduction in this first section, the second section outlines the Sri Lankan legal framework applicable to the enforcement of foreign judgments. Third section describes the supportive elements for the development of the REJO as an option. Fourth section contains concluding remarks.

II. THE SRI LANKAN LEGAL FRAMEWORK

The enforcement of foreign judgments is regulated by the REJO in Sri Lanka. It is also important to note that there is an additional Enforcement of Foreign Judgments Ordinance No. 4 which was enacted in 1937 to regulate the enforcement of foreign judgments in Sri Lanka. However, the latter has not come into effect as a result of the lack of an order published in the Gazette in accordance with the relevant section of the ordinance (See F.J. and Saram) It is generally recognized that the recognition and enforcement of foreign judgments is based on theories such as "reciprocity and obligation" (Omoaka, 2004). It appears that the theory of reciprocity has been incorporated in the Sri Lankan legal framework, but there is a lack of clear evidence to show the commitment to the other theoretical element within the existing legal framework.

III. SUPPORTIVE ELEMENTS FOR THE DEVELOPMENT OF THE OPTION

Several reasons can be highlighted to justify the examination of the Sri Lankan legal framework applicable to the enforcement of JCFAA. They include theoretical underpinnings, party autonomy, the lack of legal barrier in the ICA legal framework and positive features underpinned in REJO.

A. Theoretical Underpinnings

The existing literature provides some evidence as to the importance of addressing the applicable

legal framework for the enforcement of foreign judgments confirming foreign arbitral awards. By noting the existence of "little scholarship" on "how foreign judgments confirming arbitral awards related to the original awards" (Roth, 2007). Roth recognizes the fact that "this relationship affects the litigation strategies of parties in actions to recognize and enforce arbitral awards, this issue deserves closer inspection than has been devoted to it." This writer further raises the following issues that are worth noting here: first, "What happens if the award holder prevails and secures a foreign judgment that upholds the validity of the arbitral award?" second, "How should such a foreign judgment relate to the award itself?" and third, "If the award holder then seeks recognition and enforcement from a court of a signatory to the New York Convention, what factors should guide the decision of that court?" (Roth, 2007).

In his writing, Roth provides useful insights into the effective use of the enforcement of foreign judgments-related legal framework for the enforcement of foreign judgments confirming foreign arbitral awards based on the US legal framework in light of the different theoretical approaches in relation to the enforcement of such judgments. For example, 'the extraterritorial merger approach', 'the parallel entitlements approach' and 'the limited in scope merger approach' (Roth, 2007). The importance of Roth's writing is that it provides arguably the possibility of the enforcement of foreign judgments confirming foreign arbitral awards and problematic areas that can be seen in the US jurisprudence in dealing with these judgments.

B. The lack of legal barrier in the ICA legal framework

Is ICA-related legal framework a barrier to develop this option? The answer to the above question is negative, given the permissive approach underpinned in the ICA-related legal framework. This assertion can be supported by several elements of the ICA-related legal framework. They include party autonomy, definition of arbitration, the grounds on which a foreign arbitral award can be challenged and Article VII of the NYC.

1. Party autonomy:

The expansion of this option can be justified by referring to the principle of party autonomy underpinned in the whole structure of the ICA-related legal framework; both nationally and internationally. From the national perspective, Section 5 of the AA can be cited as an example, according to which there is no bar denying the enforcement of foreign arbitration awards in the form of a foreign arbitral award or in the form of a foreign judgment confirming a foreign arbitral award. The crux of Section 5 gives priority to the parties' consent to arbitration not to impose a limitation on the enforcement of the final arbitral award, including a foreign arbitral award. As far as the NYC is concerned, it is well established that NYC promotes this principle to be taken into consideration when arbitration laws are drafted and such arbitration laws are interpreted by a tribunal or the judiciary.

By using the principle of party autonomy, one can further argue that such a foreign arbitral award can be further scrutinized during its enforcement at the place where such an award is made before it is submitted to the enforcement court. This possibility can be incorporated in the arbitration agreement. When they incorporate this option into the arbitration agreement, the parties can take into consideration the effectiveness of the judicial system of both countries, both confirming country and enforcement country. Especially, in cases where there is a reciprocity arrangement between two countries, given their international trade-related activities. In addition, by adhering to the principle of party autonomy, parties to an international transaction can use an arbitral award to enforce such an award in a country which is not a party to the NYC and also these countries which have ratified the NYC subject to reciprocal arrangement.

2. Definition of Arbitral Award:

The drafters of the NYC, AA and also REJO have not attempted to define an arbitral award so as to deny the possibility of the enforcement of foreign judgments confirming foreign arbitral awards. For example, Article 1 (2) of the NYC defines an arbitral award as follows: "The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted." A similar definition can be seen in Section 50 of the AA. None of these definitions make a reference to a foreign judgment. This position can be compared to the definition of a foreign judgment of the REJO,

according to which a foreign judgment includes an award as well. Based on this definition element in each legal instrument, one can logically contend that the enforcement of a JCFAA can be enforced under the REJO.

3. The grounds on which a foreign arbitral award can be challenged:

By referring to the relevant literature, it can be further argued that the grounds for challenging a foreign arbitral award embedded in NYC and national arbitration laws can be considered as a reason for moving towards the enforcement of a JCFAA. Apparently, grounds for the enforcement of a foreign judgment is less stringent than those of the ICA-related legal framework. Roth is of the opinion that "...an award holding party chooses to enforce the arbitral award as a foreign judgement, it may limit the grounds on which the defendant can object to its enforcement. This may lead a court to enforce an award that it might otherwise deem unenforceable under Article V." (Roth, 2007).

Roth further argues as follows:

"… a defendant could assert Article V defenses in a circuitous fashion by alerting the court to the apparent circumvention of the New York Convention that would occur in an action based on a confirmation judgment. However, there is no assurance that courts would be receptive to this type of argument. If not, then allowing award-holding parties to eliminate the Article V grounds as defenses would present a real danger." (Roth, 2007).

One can counter argue stating that this kind of danger will not occur as this approach can be adopted by the parties with their consent and also possible to expedite the enforcement of foreign arbitral awards as expected by the commercial needs of the disputants. Similarly, another counter argument can be made in terms of the following assertion made by Roth in his writing: "Nevertheless, this tactic has the potential to confuse and anger other signatories to the New York Convention by treating two claims based on the same underlying award differently" (Roth, 2007). That is, contracting parties to the NYC were well aware of the structure, underlying principles and also consequestions of the NYC when they ratified the NYC.

Moreover, many countries have made enabling laws giving effect to the contents of the NYC and taking no measures to avoid the use of recognition of a foreign judgment-related legal framework. Arguably, there is no harm in allowing commercial parties to an arbitration agreement to avoid the enforcement-related mechanism established under the ICA-related legal framework, especially to avoid the application of Article V of the NYC and 34 of the AA in Sri Lanka.

4. Article VII of the NYC and Arbitration Act of Sri Lanka:

Article VII of the NYC is also a promising Article which allows different enforcement mechanisms to be used. This will further provide an opportunity for the parties to an arbitration agreement to expand the enforcement of foreign arbitral awards in a country which is not a signatory to the NYC as well as countries which are parties to the NYC which have reservations in terms of the enforcement of foreign arbitral awards in non-signatory countries.

The Sri Lankan AA has also been designed in line with the above mentioned liberal approach adopted in the NYC. For example, the Arbitration Act in Sri Lanka does not exclude the application of REJO. The preamble of the AA states as follows:

"An Act to provide for the conduct of arbitration proceedings; to give effect to the convention on the recognition and enforcement of foreign arbitral awards; to repeal the Arbitration Ordinance (Chapter 93) and certain sections of the Civil Procedure Code (Chapter 101)..."

In addition, this permissive approach is further evident from Section 48 of the Act which provides as follows:

"For the avoidance of doubts, it is hereby declared that nothing in this Act shall apply to arbitral proceedings conducted under the Industrial Dispute resolution Act or any other law other than the Board of Investment of Sri Lanka Law, No. 4 of 1973, making special provision for arbitration."

Neither of preamble, nor Section 48 of the AA exclude the REFJA or make any restrictions on it. The drafters of the AA in 1955 could have simply made any reservation as the REFJO was enacted in 1921.

The reasons highlighted above indicate the promising elements that can be used to pay attention to the identification of areas which hinder the development of this option and provide appropriate solutions to overcome such concerns.

C. Positive features underpinned in REJO

There are several elements embedded in the REFJO that can be highlighted as positive features. First, a foreign judgment has been recognized useful because “its enforcement value, against local assets of the judgment debtor (even if the judgment debtor is not present in the jurisdiction) or
its preclusive effect (res judicata, issue estoppel an d Anshun estoppel), by mere recognition of the foreign judgment and the issues it determined” (Hogan-Doran, 2003). Secondly, in an application for the enforcement of a foreign judgment, In the case of Plexus Cotton Ltd. Vs. Dan Mukunthan, the Court has noted as follows:

“I also agree with the learned counsel for the petitioner that that in this type of applications the court has no jurisdiction to go into the merits of the case and the learned Judge erred by doing so. Therefore I set aside the order dated 7.6.2005 and direct the learned District Judge to proceed to register the judgment under section 3 (1) of the Ordinance."

“The court has no jurisdiction to go into the merits of the case” that prevents such a judgment from being subject to reopening a case already decided by another competent court.

Thirdly, claiming the limitation period which is incorporated in the recognition and enforcement of foreign judgments-related laws can be cited (See, Roth, 2007). This limitation period is broader than the ICA legal framework. If both parties are in agreement with the enforcement of foreign judgment mechanism, the lengthy time period will not be a barrier to the effectiveness of commercial arbitration mechanisms. Depending on the commercial interest of both parties, such a time period can be an additional advantage for their respective business activities.

Fourthly, reciprocal arrangements can be a positive move to be followed between countries bilaterally, given the difficulties associated with the enforcement of foreign judgments under a multilateral agreement, such as the Hague Convention in 1971 in the international arena (See Chanaka de Silva). Additionally, it is an effective measure to encounter challenges posed by different legal traditions adopted by the countries of the world; for example civil and common law traditions. Moreover, this move is arguably a better approach to reduce the complexities inherent in the legal traditions adopted by individual countries towards the reception of international treaties.

IV. CONCLUDING REMARKS

In view of the above survey, it is reasonable to conclude that there are supporting elements that can be taken into consideration as driving factors for expanding the existing statutory framework for the enforcement of JCFAA. It is an undeniable obligation of each country to revisit this option by properly evaluating these positive elements and the benefits given to the international trading communities who encounter disputes arising out of cross-border trading activities. A progressive approach should come from both national and international arenas because of the nature of cross-border trade-related disputes. For the purpose of expanding this option, not only the positive elements as surveyed in this paper, but also more research need to be pursued to extract issues which hinder the development of this option as an effective one.

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