Appraisal of the Success of the Instruments of International Commercial Arbitration vs. Litigation and Mediation in the Harmonization of the Rules of Transnational Commercial Dispute Settlement

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Abstract

In this study, an effort is made to comparatively assess the until now success of International Commercial Arbitration (hereinafter ICA), Litigation, and Mediation as proven mechanisms of transnational dispute settlement by comparatively analyzing the major instrument of International Commercial Arbitration vis-a-vis the instruments of International Commercial Litigation and Mediation. Accordingly, after detailed scrutiny of the relevant issues, the article argues that, although the ICA is not the only means of transnational commercial dispute resolution, by far, when compared to transnational litigation and mediation, ICA was and will continue to be the most successful (realistic) means of transnational commercial dispute resolution, which plays the dominant role of harmonizing the rules of transnational commercial dispute resolution. However, it is found out that, with time, the harmonization roles of the instruments of transnational commercial litigation and mediation are growing as viable alternatives to ICA.

Key Words

Commercial Arbitration, Litigation, Mediation, Dispute resolution, Harmonization

Introduction

The enormous expansion of international trade in the second half of the 20th century alongside the evolution of the global economy has intensified the cross-border movement of persons, goods, services, and capital, which in turn resulted in a plethora of international commercial contracts and a proportionate increase in transnational disputes.[1]

However, transnational commercial disputes have become uncertain, expensive, and cumbersome to be resolved uniformly and efficiently [2] due to, on the one hand, the lack of internationally applicable rules of substance and procedure on the applicable law, jurisdiction, and recognition and enforcement of judgments, the lack of international courts that has jurisdiction over such matters; the uncertainties that arise from the application of conflict of law rules on governing law, jurisdiction, and enforcement of court judgments, which is in turn due to the lack of international harmonized rules of conflict of law.[3]

On the other hand, international commercial disputes are characterized by a multiplicity of parties and proceedings, procedural complexity, a high opportunity of forum shopping, difficulty in enforcement of foreign judgments, and increased cost.[4]

The above problems necessitated the need to find cheaper, speedier, flexible, and less risky international solutions to international problems that provide the disputants with an *ex-ante* certainty and predictability in the resolution of their disputes.[5]

It is in this intention that, for the last many years, the international law-making bodies were striving to harmonize the applicable substantive and conflicts of law rules to regulate and establish effective transnational dispute resolution mechanisms such as ICA, transnational litigation, and mediation.[6] This article argues that ICA was and will continue to be the realistic means of transnational dispute resolution while transnational litigation and mediation will continue as an alternative by playing their part in dispute resolution.

Accordingly, this article contains three parts. Part one deals with the definition and role of ICA in the harmonization of transnational dispute settlement. Then part two deals with the role of the instruments of transnational commercial litigation to the harmonization of the rules of commercial dispute resolution. Then, part three assesses the role of the instruments of international commercial mediation in the harmonization of the rules of transnational commercial dispute resolution. Then, the final part contains the concluding remarks.

1. The Role of ICA in the Harmonization of the Rules of Transnational Commercial Dispute Resolution

1.1 Definition of International Commercial Arbitration

Almost all the relevant international instruments do not directly define ICA. This should not however imply that it is impossible to construct a consensual definition of the term. The term ICA is made up of three basic notions. These are International, Commercial, and Arbitration.[7]

At first, the term ‘international’ marks arbitrations that are purely ‘national’ from those that transcend national boundaries.[8] Secondly, the term international generally refers to the fact that the nature of the dispute or the nationality of the parties or the chosen place of arbitration is essentially *anational* or transnational or characterized by a foreign element.[9]

The term Commercial although it may cover a wide set of meanings, when it comes to arbitration, only applies to contracts that are ‘commercial’.[10] A non-exhaustive list of

commercial relationships is provided under the UNCITRAL Model Law.[11] Although there is no universally accepted definition of the term arbitration, arbitration can be conventionally defined as an effective method of resolving a dispute(s) according to parties' agreement, by obtaining a final and binding decision from independent, private, third-party decision-makers, who can be an individual or a group of individuals or an arbitral tribunal and without reference to a court of law (except enforcement by a court of law).[12]

Accordingly, ICA can be defined as a transnational, private or nongovernmental, confidential, and autonomous mechanism for resolving disputes that leads to a final and binding determination of the rights and obligations of the parties, who engaged in a cross-border commercial relationship through the decision of one or more private individuals selected by the disputants.[13]

In the following section, an effort is made to argue that ICA was and will continue to be, for the foreseeable future, the most realistic means of resolving transnational commercial disputes for the following four main reasons:

1.2 The Major Advantageous Features of ICA made it suitable for Dispute Resolution

In this regard, the following features of ICA are typical:

1.2.1 Party Autonomy

Unlike litigation, ICA provides the parties with autonomy over the process and the legal framework of dispute resolution.[14] As a result, disputants can predetermine the applicable substantive laws, the arbitration seat, and nominate the arbitrators.[15] The freedom to choose arbitrators ensures an increased trust and enables the parties to select skillful arbitrators for each case.[16] The parties are also at freedom to submit the arbitration to either *ad-hoc* or institutional arbitration.[17] Institutional arbitration, by providing the rules, infrastructure, and panel of arbitrators, results in the certainty of the procedure and trustworthiness of the arbitrators.[18] The overall outcome will be trust, security, and predictability of the process to the parties, which are typical traits of an attractive procedure of dispute settlement.[19]

1.2.2 Confidentiality

Unlike litigation, arbitral proceedings are essentially private that do not allow third-parties to have access to them.[20] Moreover, there is a high degree of confidentiality in the underway of the tribunal, which requires keeping the contents of the proceeding and the award confidential.[21] Scholars argue that public trials can harm arbitral proceedings.[22] ICA offers various degrees of confidentiality to the parties and enables them to preserves long-term relationships.[23] To that effect, the parties can ascertain confidentiality in the arbitral process by signing a confidentiality agreement as part of their dispute resolution clause.[24]

1.2.3 Finality

Unlike litigation, ICA is a one-step process that does not allow for appellate review, which results in a binding and final award with very limited grounds for judicial review.[25] By so doing, arbitration minimizes the risk of multiple proceedings for the parties.[26] Unlike mediated settlement agreements in which one of the parties may refuse to uphold the terms of the agreement thereby forcing the other party to file a separate proceeding, arbitral awards are generally final, binding, and not appealable on the merits and can generally be merely annulled based on exceptional grounds.[27] Besides, it is not generally a custom of arbitral institutions to include an appellate mechanism for arbitration.[28] Therefore, finality results in a speedier, efficient, and cheaper resolution of the dispute to the parties.[29]

1.2.4 Global Recognition and Enforcement

Unlike the case of foreign judgments and mediated settlement agreements, the global recognition and enforcement of the agreement to arbitrate and arbitral awards is the most important feature of ICA, which made it realistic.[30] Unlike a mediated settlement agreement [31], an agreement to arbitrate is not only an agreement to take part in arbitral proceedings but also an agreement to carry out the resulting arbitral award.[32] Arbitral awards have a similar legal effect as a court judgment and they will be directly enforceable by court action throughout the 163 member states of the New York Convention.[33] This is very significant to the parties because it guarantees *ex-ante* predictability and certainty in the resolution of their commercial dispute.[34]

1.2.5 Delocalization

Unlike litigation, ICA is an autonomous and *anational* institution that is not subjected to the framework of national legal systems.[35] Agreeing to arbitration allows a party to avoid litigation in an unknown foreign court jurisdiction.[36] Arbitration enables the parties to escape from the jurisdiction of national courts and pursue resolutions in delocalized, private proceedings.[37] Subjugating transnational disputes to national courts often gives rise to the risk of local bias, corruption, national public policy exceptions[38], delay, lack of cross border expertise by local judges, lack of knowledge and respect to foreign laws, and the risk of litigation in an unfamiliar language and so on.[39] Besides, the atmosphere of arbitration is generally considered less hostile than that of litigation.[40] Thus, ICA empowers the parties to escape the jurisdiction of hostile national courts by signing the agreement to arbitrate.[41]

1.2.6 Neutrality, Fairness and Equality

Parties to an international commercial contract usually come from different countries. By guarantying procedural equality and fairness of arbitrators in a neutral tribunal located in a third country, ICA reduces partiality and inequality between disputants.[42] Accordingly, unlike litigation, the dispute will be resolved in a neutral place of arbitration, rather than on the home turf of one of the parties.[43] Neutrality is also related to the appointment of neutral and impartial arbitrators by disputants that will preside on the case solely based on merit and expertise.[44]

1.2.7 Procedural Flexibility (Informality)

Unlike litigation, ICA provides the parties with the opportunity to tailor the dispute resolution mechanism to their favor by agreement. Accordingly, the parties can flexibly determine the number and qualifications of arbitrators, the location of the hearings, the language of the proceedings, or the rules of evidence.[45] In the absence of party agreement, the arbitral tribunal has the discretion to determine procedural matters.[46] In addition, arbitral proceedings are flexible and less formal than litigation, which gives the parties greater control over the procedures.[47] Moreover, flexibility by avoiding cumbersome procedures facilitates a speedier and cheaper resolution to the parties.[48]

1.2.8 Arbitration is Private (Contractual) In Nature

At first, unlike litigation, ICA is the product of the voluntary agreement between the parties to submit their dispute to arbitration.[49] Before there can be a valid arbitration, there must first be a written [50] and valid agreement to arbitrate.[51] This is recognized by both the New York Convention and the UNCITRAL Model Law.[52] Moreover, arbitration usually presupposes the existence of a dispute that is capable of settlement by arbitration, which the parties voluntarily submit for arbitration. On the contrary, the jurisdiction of national courts and the appointment of local judges are not dependent upon the will of litigants.[53] Therefore, the voluntary nature of ICA is fundamental to the parties who are presumed to go to arbitration consensually after a cost-benefit assessment.

1.3 ICA is supported by Strong International Legal and Institutional Framework

In this section, an effort is made to argue that ICA has significantly developed and become a realistic method of commercial dispute resolution in the last 60 years; on the one hand, due to the strong legal framework accorded to it by international commercial instruments, which facilitated the harmonization and enforcement of arbitral awards globally and on the other hand, the existence of international institutional framework of arbitration to administer arbitration in an expeditious, economical and neutral fashion.[54]

1.3.1 The Contribution of Strong International Legal Framework for the Success of ICA

1.3.1.1 The Existing International Instrument on ICA

The first of such efforts was the Montevideo Convention. This was adopted in 1889 and provided for the recognition and enforcement of arbitration agreements between certain Latin American states.[55] However, the first modern and genuinely international instrument was the 1923 Geneva Protocol. It had 40 member states. Like the case of the modern-day equivalent Conventions, the Protocol, at that time, had two objectives. Firstly, to ensure that arbitration clauses were enforceable internationally and secondly, to ensure that arbitration awards would be enforced in the territory of the states in which they were made.[56] The 1923 Protocol was followed by the 1927 Geneva Convention, which was intended to widen the scope of the Geneva Protocol by providing additional recognition and enforcement to awards made also within the territory of any of the contracting states.[57]

The other influential instrument was the Panama Convention, which has been ratified or adopted by 17 South American countries, the USA, and Mexico is similar in intent and effect

to the New York Convention. It has been influential in making arbitration much more acceptable in Latin American countries.[58] The other significant instrument was The European Convention on International Commercial Arbitration 1961. It complemented the New York Convention in the contracting states. It provides for several general issues concerning the party's rights in arbitration and specific limited reasons for refusing to recognize or enforce an award in another Contracting State.[59]

1.3.1.2 The Role of UNCITRAL for the Harmonization of ICA

The harmonization and development of ICA law have been the major objective of the UNCITRAL since its inception in 1966.[60] The increase in the use of arbitration as a means of transnational dispute resolution is also greatly attributed to the considerable work of the UNCITRAL.[61] The two fruitful contributions of UNICTRAL are:

i. The UNCITRAL Arbitration Rules 1976

This is the first major achievement of UNCITRAL in the field of dispute settlement.[62] These rules were modern and played a great role to reconcile the procedural differences between the civil and the common law systems. The rules were successful in being referenced in innumerable arbitration agreements and were adopted by a substantial number of arbitral institutions.[63] A new version of the rules was adopted in 2010.[64] The rules will apply to any new arbitration agreements, concluded after August 15, 2010, that adopt the UNCITRAL rules.[65]

ii. UNCITRAL Model Law 1985

The more comprehensive and final text of the Model Law was adopted by UNCITRAL in 1985, as a law to govern ICA.[66] The Model Law has been a major success. To date, the UNCITRAL Model Law has been adopted in 116 jurisdictions in 83 states.[67] The Model Law introduced the idea that it would be appropriate to have separate rules for domestic and international arbitrations. The Model Law was also successful in influencing domestic arbitration rules by provides essential default provisions to gradually improve and converge national arbitration laws.[68] In 2020, it has been adopted by 83 states in a total of 116 jurisdictions. Despite its success, however, the Model Law was revised in 2006.[69]

1.3.1.3 The Role of the New York Convention in the Harmonization of the Rules of ICA

i. The Success of the New York Convention in Enforcement of Arbitral Awards

The bedrock treaty for the preferred use of ICA as a means of transnational commercial dispute resolution is the New York Convention 1958.[70] The main purpose of the Convention is to facilitate the international recognition and enforcement of arbitral awards and thereby result in a speedier and cheaper settlement of disputes.[71] The New York Convention has been astonishingly successful in achieving these objectives.[72] By March 1, 2020, it had been accepted by 163 countries, including almost all of the major trading nations of the world, and with geographic diversity in ratification.[73]

Over the past 60 years, by guarantying prompt enforcement of the agreement to arbitrate and arbitral awards and party autonomy in determining the governing law and jurisdiction, the Convention has enjoyed a great deal of success in achieving its commercial objectives of providing disputants with an *ex-ante* certainty and predictability in dispute settlement, which resulted in the dramatic increase in the use of arbitration to resolve international commercial disputes.[74] Accordingly, all over the globe, to date, there are 1750 court decisions in more than 65 countries that have uniformly interpreted and applied the provisions of the New York Convention at issue in a dispute.[75]

Scholars argue that the New York Convention, by equipping national courts and tribunals with a durable (dependable) and efficient means of enforcement of arbitration agreements and awards, regardless of the place of the forum, has facilitated remarkable growth and success of ICA.[76] All the advantages of ICA enjoyed by the disputants in due course of dispute resolution are made possible via the instrumentality of the New York Convention that contained the needed tools, in its provisions, to achieve its intended objectives that are proven realized via high rate of global enforcement.[77]

It should be noted that arbitration would have been invaluable absent this international agreement to recognize and enforce arbitral awards at the place where the award debtor has sufficient assets.[78] By laying down the foundation for most national legislations governing the international arbitral process [79] and establishing uniform international standards for the recognition of arbitration agreements and arbitral awards, the Convention unified (harmonized) the legal regime and methods of deciding whether to recognize and enforce a foreign arbitral award.[80]

ii. How the New York Convention Achieved the Enforcement of Arbitral Awards?

The New York Convention imposes on its parties the obligations to recognize and enforce: (a) the agreement to arbitrate unless it is found to be void [81] and (b) foreign awards under the agreement and enforce them by efficient proceedings.[82] The provisions of enforcement are self-executing and directly applicable. Moreover, the fact that the Convention covers the arbitration agreements, the conduct of the arbitration itself, and the awards made it a comprehensive instrument that dealt with all major elements of the arbitral process.[83]

It is only based on few exceptional grounds that it is allowed to refuse to enforce an agreement to arbitrate for grounds of substantive invalidity under the ordinary principles of contract law.[84] The invalidity of arbitration agreements based on any other domestic ground is not allowed. Thus by eliminating the imposition of exceptional local grounds for the invalidity of the agreement to arbitrate, this rule resulted in the harmonious recognition of arbitration agreements. Similarly, the Convention is industrious in establishing a uniform international rule of validity and enforceability of foreign (non-domestic) arbitral awards.[85]

The purpose of these articles, which exclusively applies to foreign awards, is to ensure the speedy and efficient recognition of arbitral awards, giving effect to the parties' underlying objectives in agreeing to resolve their disputes by arbitration. The Convention also exhaustively enumerates seven exceptional grounds whereby recognition and enforcement of an award may be refused.[86] The exhaustive (limited) nature of the exceptional grounds to refuse enforcement is a testament to the commitment to enforce arbitral awards.[87]

The other significant achievement of the Convention is the international choice-of-law rules that govern the selection of the law applicable to international arbitration agreements. The rule requires the Contracting States to give effect to the parties' choice of law governing their agreement to arbitrate, and, in the absence of any express or implied choice by the parties, to apply the law of the arbitral seat.[88] The rule provided essential clarity concerning the law applicable to the parties arbitration agreement by guarantying the recognition of all material terms of international arbitration agreements including the parties' choice of the arbitral seat, the selection of institutional rules, the choice of arbitrators, and arbitral procedures.

The other attractive feature of the Convention is its potential to be applied in harmony with other favorable multilateral or bilateral agreements related to the recognition and enforcement of arbitral awards to which the contracting States are parties. Accordingly, the Convention

permits the party, who is looking for recognition and enforcement of an award, to avail itself from any other relevant agreements whether bilateral or multilateral, and from the domestic law of the Enforcement State.[89]

The New York Convention, by allowing states to make two specific reservations in due course of ratification, is proved flexible. One of them limits the Convention's application to awards in disputes having a commercial character and the other reservation pertains to reciprocity.[90] This empowered many member states to take advantage of the reservations considering their local scenarios and still be able to ratify the Convention.[91]

To conclude, the great deal of attention given by the provisions of the Convention to the recognition and enforcement of the arbitration agreement and foreign awards, the expedited and simplified recognition procedures, party autonomy regarding arbitral procedures, the limited grounds of refusal, and the prescribed choice-of-law rules were central to establish a robust legal framework for the underway of ICA. The Convention has been central to these developments by providing the foundation for contemporary ICA and being one of the pillars of today's broader international legal system of dispute resolution.[92] All the above qualities of the New York Convention enabled it to withstand the test of time and influence the lives of billions of people around the world.[93]

1.3.2 The Contribution of Strong International and Regional Arbitration Institutions for the Success of ICA

One of the main reasons for the dominance of ICA in transnational dispute resolution is the presence of strong international and regional arbitration institutions that have an irreplaceable role in the development and harmonization of ICA law and practice. By providing established uniform rules, these institutions aim to maximize the effectiveness of the arbitral process, whilst minimizing judicial intervention, other than when it is needed to support arbitration agreements and awards.[94] In addition, the availability of such arbitral bodies has boosted competition in specialized arbitration and empowered the parties to select one that is best suited to their needs. Institutional arbitration offers substantial advantages in terms of permanent existence, experience, quality control, modern institutional and procedural rules, specialized staff, and reasonable charges.[95]

For the purpose at hand, it suffices to simply enumerate four of the major International and Regional Arbitral Institutions that are playing a major role in the harmonization of ICA law

and practice. These are: (1) The International Chamber of Commerce (ICC) International Court of Arbitration [96], (2) The American Arbitration Association (AAA) International Center for Dispute Resolution [97], (3) The London Court of International Arbitration 1892 [98], and (4) Other Arbitral Institutions such as The Arbitration Institute of the Stockholm Chamber of Commerce (SCC), The European Court of Arbitration, the German Institute of Arbitration (DIS), the Netherlands Arbitration Institute (NAI), the Vienna International Arbitration Centre (VIAC), Singapore International Arbitration Centre (SIAC), and the Permanent Court of Arbitration in The Hague (PCA), and The World Intellectual Property Organization (WIPO) Arbitration and Mediation.[99]

1.4 The Dominant Role of ICA is Evident from Existing Empirical Research

With the rise of the global economy, private dispute resolution processes in general and ICA, in particular, have quickly become a vital component of international business relationships.[100]

Studies concluded on the attitude of corporations towards international dispute settlement mechanisms reveal an overwhelming preference for international arbitration over litigation in national courts and arbitration is found to be the first-choice method of binding dispute resolution.[101] A standard-setting study conducted by Strong S.I. in 2016 reveals that arbitration has been the primary means of resolving cross-border commercial disputes for decades after World War II and up to 90% of all international commercial contracts include an arbitration provision.[102] Similarly, a groundbreaking study in 2004 found out that 90 percent of respondents preferred arbitration to cross-border litigation.[103] Moreover, the revised version of the same study in 2006 showed a 73 % preference for ICA.[104]

Similarly, it is evident from the 2018 comprehensive International Arbitration Survey that 97% of respondents (who are practitioners, arbitrators, counsels, and experts) indicate that ICA is their preferred method of dispute resolution, either on a stand-alone basis (of 48%) or in conjunction with ADR (of 49%).[105] Moreover, an overwhelming 99% of the respondents stated that they would recommend ICA to resolve cross-border disputes in the future.[106] By comparison, these surveys showed, both in 2015 and 2018, that only 4% of respondents expressed that they would rather opt for commercial litigation to resolve a cross-border dispute.[107]

In addition, it is evident from the results of an International Arbitration Survey conducted in 2015 that 90% of the respondents indicated international arbitration as their preferred dispute resolution mechanism either as a stand-alone mechanism (56%) or together with ADR (34%).[108] Moreover, although due to its confidential and institutional nature, empirical studies and data are mostly unpublished and infrequent in the area of international commercial arbitration, over the years, not few numbers scholars have undertaken eye-opening empirical studies that exposed the dominant use of ICA and the various attributes, which made it the preferred mechanism of international dispute resolution compared to litigation and mediation.[109]

2. The Role of the Instruments of International Commercial Litigation in the Harmonization of the Rules of Transnational Commercial Disputes

2.1 The Hague Convention on Choice of Court Agreement (COCA) 2005

2.1.1 The Role of the COCA in the Harmonization of the Rules of Transnational Dispute Settlement

The COCA was adopted on June 30, 2005.[110] The Convention entered into force in 2015 between the EU and Mexico. By 2020, 3 other countries ratified it including Denmark, Singapore, and Montenegro.[111]

The COCA is designed to create a mandatory international legal regime for the enforcement of exclusive jurisdiction agreements and the recognition and enforcement of judgments resulting from proceedings based on such agreements.[112] The Convention has the objective to create an internationally uniform legal framework to promote transnational trade by encouraging judicial cooperation via the recognition and enforcement of judgments concerning the choice of court agreements.[113] By so doing, the Convention has the objectives to facilitate parties' autonomy in forum selection, cross border movement of judgments, enhance certainty and predictability to litigants, and harmonize the rules of choice of court agreements in member states.[114]

The COCA is well equipped with all the needed tools to achieve its specific and commercial objectives in transnational dispute settlement. Accordingly, the following are the basic features of the COCA that will influence the law and practice of transnational litigation and bring it as an alternative to ICA:

1. The chosen court in an exclusive choice of court agreement shall have jurisdiction to decide a dispute unless the agreement is invalid under the law of that state.[115] Accordingly, the designated court has no power to stay its proceedings on grounds related to *forum non-conveniens* or the *lis alibi pendens* doctrine.[116] First, this provision helps local judges to determine the court of jurisdiction. Second, by ascertaining the adjudication of the dispute in the selected court, this rule provides disputants, the required level of *ex-ante* security, certainty, and predictability that the court will resolve the dispute and the parties will not be frustrated after having selected a court.[117] Thirdly, the provision guarantees even greater certainty by presuming that a choice of court agreements is exclusive unless expressly stated as non-exclusive.[118] Fourthly, it also assures party autonomy and freedom to predetermine the court of jurisdiction by signing an exclusive choice of court agreements.[119] Because the identity of the forum is crucial in transnational litigation in determining the substantive outcome of a case, the ability to choose the forum court allows the parties to consider the related risk.[120] Fifthly, the exclusive nature of the agreement enables the parties to exclude, by agreement, hostile jurisdictions or choose a neutral jurisdiction including a court that has no factual connection with the dispute.[121]

2. Any court, in member states, other than the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies.[122] Accordingly, the courts other than the chosen court must decline jurisdiction if it is established that there is a valid and exclusive choice of court agreement in favor of the chosen court. The nominated court shall exercise jurisdiction whilst all other courts are required to stay and eventually decline jurisdiction unless in case of the stated exceptional grounds.[123] This rule is crucial to avoid unnecessary competition for jurisdiction, forum shopping, and parallel proceedings and provides a certain, predictable, speedier, and cheaper method of dispute resolution to parties.

3. A judgment given by the chosen court shall be recognized and enforced in the courts of the other Contracting States[124] and recognition and enforcement of such judgment may be refused only on the grounds specified in the Convention.[125] First, by imposing the duty of enforcement on member states, the Convention removes the element of discretion and thus a degree of uncertainty thereby promoting the use of national courts in transnational dispute settlement.[126] Secondly, by limiting the grounds of refusal to recognize and enforce the judgments of the selected courts, the Convention is proved pro-enforcement and facilitates the cross-border movement of judgments, providing a foundation for further international

judicial cooperation and harmonization of transnational litigation.[127] Thirdly, the ascertainment of recognition and enforcement of the judgments of the designated court throughout the courts of member states is crucial to the disputants because it avoids the further risk of re-litigation of the same cause of action in a foreign court due to the lack of recognition and enforcement in the first instance.[128]

4. Each Contracting State has the opportunity to declare that, its courts will recognize and enforce judgments given by courts of the other Contracting States designated in a non-exclusive choice of court agreement.[129] This rule is very significant for the harmonization of transnational litigation for it enables states to increase the productivity of the Convention by many folds.[130] Although nonexclusive agreements would not receive the benefits in articles 5 and 6, the resulting judgment could receive the benefits of recognition and enforcement on article 8.[131] By so doing, the scope of application of the Convention can be exceptionally extended to cover transnational disputes where the parties have signed a non-exclusive choice of court agreements.[132]

5. The scope of application of the Convention is exclusively limited to international cases in civil and commercial matters and there is a broad exclusion of subject matter.[133] Accordingly, it applies only to resolve disputes of international and commercial nature where an exclusive choice of court agreements is signed.[134] The specific application of the Convention to such disputes is a testament to its determination to contribute its part to the development of transnational commercial dispute resolution. Moreover, it should be noted that the broad exclusion mostly refers to non-commercial matters that are irrelevant for the Convention, and despite the exclusion, a large number of relevant commercial contracts still fall within the scope of application of the Convention.[135]

6. The Convention has passed through extensive deliberation procedure before adoption and the necessary post-adoption aids and adequate endorsements were made to it by relevant parties from 2005-2015.[136] The provisions of the Convention are ratified and incorporated into the National Laws of all of its member states. Moreover, the provisions of the Convention have been an issue at a dispute and were uniformly interpreted and applied in the High Court of Singapore in 2018.[137] The Convention is flexible and its provisions are suitable for harmonious application with other instruments.[138]

The above principles of the Convention are a testament that it is well equipped with the needed tools to achieve its specific and commercial objectives. Moreover, if backed by wide

ratification, like the New York Convention, the 2005 Convention, given it has been brought in to force only recently, has vast potential to alleviate the age-old problem of the lack of enforcement of court judgments in transnational commercial litigation.[139] The COCA is designed to provide international litigants with an alternative means of dispute resolution to arbitration.[140] The 2005 Convention acts as the analog for the New York Convention in litigation as it would afford to choice-of-court agreements and resulting foreign judgments many of the same advantages of enforcement that arbitral agreements and awards enjoy under the latter.[141]

2.1.2 The Success of the COCA as Instrument of Transnational Commercial Litigation

Although the COCA has the potential to bring in litigation as an alternative to ICA it will not be successful to compete with the dominant position of ICA in the short run. The major constraints for the success of the Convention are: the fact that the Convention was in force for only 5 years (compared to the 60-year-old New York Convention), it has a very limited number of signatories [142], it has not been ratified by the major trading states such as the USA, China, and India [143], its provisions are only applicable as between the courts of contracting states, which is a fact that made the future success of the Convention directly dependent on the amount and quality of ratification that it will attract [144], and its provisions are not adequately interpreted in national courts.

Moreover, the fact that the Convention has a narrow scope of application, a wider variety of exclusion from its scope especially intellectual property rights, the lack of provisions for parties with no choice of court agreements, the lack of protection for small and micro enterprises, and the lack of provisions for civil procedure rules, are also the other problems.[145]

However, it should be noted that, since the Convention has been enforced in 2015, its story is changing for increasing numbers of states are actively considering ratification.[146] Besides, as proved from the case law precedent in Singapore, the Convention is fully in force and applicable as between the courts of member states as a tool for transnational litigation. As a result, in the long run, as long as it is backed by wide ratification, there is no obvious reason why the Convention would not be successful.

2.2 The Hague Judgment Convention of 2019

2.2.1 The Role of the Judgment Convention in the Harmonization of the Rules of Transnational Commercial Dispute Settlement

The Hague Judgments Convention was adopted in 2019.[147] To date, the Convention is signed by only Ukraine and Uruguay and it is yet to be ratified and brought into force.[148] The Convention has the specific objective to facilitate cross-border trade by reducing the costs and risks associated with cross-border dealings and enhancing predictability and certainty in dispute settlement.[149] Accordingly, the Convention seeks to create a common, binding, multilateral framework for the recognition and enforcement of foreign judgments on civil and commercial matters among its member states.[150] By helping to escape national borders and enhancing transnational circulation and enforcement of judgments, the Convention helps litigants to enforce judgments awarded in other countries and acquire practical relief abroad based on it.[151]

The Convention seeks to alleviate the age-old problem of uncertainty of getting judgments recognized and enforced abroad due to the lack of an internationally enforceable litigation instrument.[152] The Convention seeks to provide the same certainty for court judgments that the New York Convention has provided for the recognition of arbitral awards.[153]

The Convention gives a great deal of emphasis to the international enforcement of foreign judgments by giving priority to identify the judgments that are eligible for recognition and enforcement, stipulating the process for recognition and enforcement of such judgments, by concerning only with the recognition and enforcement of final judgments given by a court, and by disregarding judgments from non-Contracting States.[154]

By providing the minimum bases of jurisdiction that make a judgment eligible for recognition and enforcement under the treaty, the Convention disregards the complex jurisdictional rules laid out by domestic laws for the recognition and enforcement of a foreign judgment.[155] Hence, any judgment that was made based on one of the bases of jurisdiction laid out in article 5 shall be recognized and enforced.[156] However, it should be noted that the decision to recognize and enforce judgments that are not eligible based on the stated grounds in the Convention is left to the discretion of the law of the domestic court, which still broadens the chance of enforcement.[157]

The Convention, by exclusively defining the criteria and grounds for refusing recognition or enforcement enhances legal certainty and predictability and simplifies the recognition and enforcement of a judgment in other jurisdictions, ultimately facilitating the global circulation of judgments and access to justice.[158]

The 2019 Convention is also characterized by exclusivity and specificity of subject matter and scope, it provides the necessary flexibility to acceding states via the possibility of declarations, and it is open to compatible application with other Conventions in the area.[159] Moreover, the fact that it is the product of 27 years of deliberation by the Hague Conference is a testament to its quality of adoption.

2.2.2 The Success of the Judgment Convention as Instrument of Transnational Commercial Litigation

Although the Convention is adequately crafted and well equipped with the tools to achieve its specific and commercial objectives, the fact that the Convention is only applicable between the courts of member states has made the success of the Convention directly dependent on the number of ratification it will attract in the future.

Accordingly, the following factors will constrain the success of the Convention to impact the landscape of dispute settlement: the facts that it is only adopted in July 2019, it has not been brought in to force yet, it has not attracted an adequate number and quality of ratification, its provisions are not incorporated into national laws and are not uniformly interpreted in domestic courts as an issue at a dispute. In the absence of all these qualities, at least for now, the Convention will remain to be a paper-tiger and until then the quest to develop an alternative transnational litigation instrument to arbitration will remain unfulfilled.

3. The Role of the Instruments of International Commercial Mediation in the Harmonization of the Rules of Transnational Commercial Disputes

3.1 The Singapore Convention on Mediation 2018

3.1.1 The Role of the Singapore Convention on Mediation in the Harmonization of the Rules of Transnational Dispute Settlement

The Singapore Convention on Mediation was adopted in 2018.[160] The Convention is ratified by only three countries namely Fiji, Qatar, and Singapore, and signed by 49 other countries.[161]

The Convention seeks to provide a uniform and efficient international framework for the recognition and enforcement of mediated settlement agreements to resolve international, commercial disputes.[162] By avoiding the uncertainties in the enforcement of mediated agreements, the Convention has great potential to bolster the use of mediation as a method for resolving cross-border commercial disputes and thereby avoiding the risk of re-litigation in case one of the parties fails to comply.[163]

The lack of a transnational instrument for giving legal effect to mediated settlement agreements is said to be a significant barrier to the willingness of international disputants to use mediation. Accordingly, the Convention will be able to give mediation the same type of boost that arbitration received from the New York Convention.[164]

The Convention applies to settlement agreements that are mediated, international, and commercial, and that are not subjected to a specific exclusion.[165] The delimitation of the scope to international commercial matters is a testament to its dedication to providing mediation as an alternative means of international commercial dispute resolution.[166]

Moreover, the Convention does not apply to settlement agreements that are enforceable as a judgment or as an arbitral award.[167] This rule, by avoiding possible overlap with existing and future Conventions, boosts both the compatible application of the Convention and the use of mediation as an alternative to arbitration and litigation.[168]

The other relevant attribute of the Convention is the fact that it does not require a seat for mediation (delocalization of forum) to be applied, which is crucial for speedier and cheaper dispute resolution.[169] The Convention gives particular priority to the recognition and enforcement of valid mediated settlement agreements by forcing courts from state parties to enforce them as per their domestic rules of procedure [170] and providing for exceptionally limited grounds for courts to deny recognition and enforcement of mediated settlement agreements.[171]

The Convention also provides the necessary degree of flexibility to ratifying states by guarantying their right to make two types of reservations to restrict the scope of application of the Convention.[172] Scholars argue that the inclusion of the rule on the reservation was one of the reasons for the successful adoption of the Convention in a relatively record time.[173]

Moreover, the Convention, by allowing disputants to resort to an alternative regime of dispute settlement, has shown that it is a pro-harmonization and compatible instrument, which gives priority for the efficient resolution of transnational commercial disputes.[174]

3.1.2 The Success of the Singapore Convention as Instrument of Transnational Commercial Mediation

All the above qualities show that the Convention is well equipped with all the needed tools to achieve its specific and commercial purposes.[175] However, whether the Convention will be successful in the future directly depends on the critical mass of states that choose to join the Convention and the underway of an effective scheme of awareness creation. Absent adequate number and quality of ratification, it will remain to be yet another futile effort in the broader quest to harmonize transnational methods of dispute resolution.[176]

Currently, given the fact that it is only adopted two years ago, it is ratified by only 3 countries, it is yet to be ratified by the major commercial nations, its provisions are not adequately transplanted into national laws and are yet to be an issue in a dispute and acquire uniform interpretation by courts; the Convention is far from achieving the success of the New York Convention.[177]

However, this does not imply that the Convention will not play its role until then. It can still help in resolving commercial disputes between contracting states as an alternative to arbitration. Mediation can still be used to resolve disputes that are not *arbitrable*. Studies also show that mediation can still be used in dispute resolution in combination with other mechanisms.[178]

Conclusion

When compared to litigation and mediation, ICA was and will continue to be the realistic means of transnational commercial dispute resolution. Various factors contributed to the relative success of ICA. On the one hand, the distinctive advantageous features of ICA such as party autonomy, confidentiality, finality, recognition and enforcement, delocalization, neutrality, and flexibility made it suitable to resolve transnational disputes. On the other hand, the availability of strong international legal and institutional frameworks on ICA is the other major factor that contributed to its success. The predominant use and success of ICA were not acquired instantly. It is rather the outcome of many years of concerted efforts of various

international law-making bodies such as the UNCITRAL and arbitral institutions to find an efficient transnational solution to international problems.

The most invaluable attribute of ICA that contributed to its success is the fact that the agreement to arbitrate and arbitral awards are recognized and enforced globally. The global enforcement of arbitral awards is the outcome of the success of the New York Convention 1958 in attracting a substantial amount and quality of ratification in 163 countries in the world. This ended the long-standing problem of the lack of recognition and enforcement of foreign awards in transnational dispute resolution and accorded to disputants an *ex-ante* certainty and predictability in the resolution of their disputes.

On the other hand, ICA is not the only means of transnational commercial dispute resolution. It is not even the default mechanism of dispute resolution for that matter. ICA became dominant not because it is perfect but also because of the lack of other realistic means of transnational dispute resolution. Recently, however, mainly due to the adoption of international instruments of dispute resolution on litigation and mediation, the latter methods are being considered as a viable alternative to ICA in the area of transnational commercial dispute resolution.

Accordingly, except for the difference regarding their basic nature, all the newly adopted Conventions are crafted as an analog to and to achieve the success of the New York Convention. Except for few discrepancies, they have stark similarities with the latter in terms of their intended specific and commercial purposes, the tools that they use to achieve such purposes, and their main objective of alleviating the long-standing problem of lack of global enforcement of foreign judgments and mediated settlement agreements.

The COCA 2005, the Judgments Convention 2019, and the Singapore Convention 2018 are inspired by the New York Convention in defining their scope of application (international and commercial), their specific and exclusive nature, their flexible and compatible nature, the priority they give to recognition and enforcement, the limited grounds stipulated for refusal to recognize and enforce, the fact that their application is limited between member states and so on. This is a testament to the devotion of the Conventions to develop a viable means of transnational dispute resolution in litigation and mediation as an option for ICA.

However, unlike the New York Convention, they will not result in a dramatic change in the current landscape of commercial dispute resolution and ICA will remain to be the dominant

method in that regard. This is because of the facts that, unlike the New York Convention, (1) these Conventions are only recently adopted and enforced, (2) their application is limited between member states and their success depends on the amount of ratification they will attract, (3) they are not adequately ratified and enforced in terms of number and quality of ratification, (4) Their provisions are not adequately transplanted into domestic laws, and (5) Their provisions are not uniformly interpreted in courts as an issue at a dispute. The cumulative outcome of the above points reveals that, currently, despite their adoption, the Conventions have little or no practical enforcement in dispute settlement. Hence, they are currently, unsuccessful to achieve their specific and commercial purposes in providing transnational litigation and mediation as an alternative to ICA.

Finally, in the future, however, with the needed support from international law-making bodies, if the Conventions attract wider ratification there is no obvious reason why they will not be successful in providing a wider and viable choice of alternatives to ICA.

Declarations

The author declares that there are no conflicts of interest.

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