

Development and Changes of the Value Orientation of the Finality of Awards System of International Commercial Arbitration

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Abstract

With the influence of the concepts such as “business field is battleground” and “time is money”, as one of the most important methods for resolving international economic disputes, international commercial arbitration’s effectiveness has always been recognized as the significant advantage of arbitration in resolving disputes compared with litigations. This paper points out the value deficiency of finality of awards system in arbitration under modern social background after analyzing the value orientation of finality of awards system. After analyzing why international arbitration has become the primary choice for resolving international economic disputes in a deeper scale, this paper explains that finality of awards system is not absolute correct and should compromise with the development of time.

Key words: Finality of awards system; Efficiency; Impartiality; Neutrality; Convenience

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INTRODUCTION

Arbitration is a dispute settlement system. It happens according to the arbitration agreement between the parties who are willing to hand over their disputes voluntarily to arbitral tribunal which is made up by unofficial arbitrators. It is one of the most important alternative dispute

resolutions. The finality of awards of arbitration equals to the court’s final ruling between the arbitrary parties and has restricted constraint upon them. In consideration of the effectiveness of dispute settlement, the value orientation of finality of awards in arbitration has changed with time.

1. TRADITIONAL VIEW: EFFECTIVENESS IS THE REFLECTION OF THE ADVANTAGE OF INTERNATIONAL COMMERCIAL ARBITRATION

Humankind’s desire is unlimited while the resources we have are always scarce. When endless desire meets scarce resources, conflict is inevitable. However, human is a kind of animal loves security and order.

History suggests that people all tried very hard to prevent uncontrollable chaos in places where political or social organizations and units are established, and also tried to set up some suitable order forms for the survival of human beings. Such tendency that requires the establishment of an orderly social life mode, is by no means an arbitrary or ‘contra natural’ effort made by human. ... This tendency is deeply rooted in the natural structure of which human is just a part (Bodenheimer, 1999, p.220).

The pursuit of order has made people set up dispute settlement mechanism voluntarily. Therefore, arbitration, as a third party who does not have any relation with the dispute, emerged at the right moment for settling disputes. Of course, arbitration was only limited within domestic area at that time. As a mechanism, it was first accepted by political countries during the age of ancient Greek and ancient Rome. *Lex Duodecim Tabularum* has rules of arbitration. According to Oxford Law Dictionary, arbitration was very popular among ancient Greek city-states. In Athens, people often appointed private arbitrators to settle disputes by following equity principle. Starting from the 11th century, Italy, France,

and UK and other countries' main markets' and port cities' commercial intercourses have developed greatly. Huge trade amount stimulated an increase in the market. In order to resolve different kinds of disputes in the market, merchants set up commercial courts in every main markets and ports to settle disputes.¹ Such commercial courts are the operational organs for the growth of commercial arbitration in European continent and the original name of it is Piepowder. Considering parties participating in the trial of dispute settlement are from different city-states, the rules and principles used by commercial courts is the so-called medieval merchant customary law. While such commercial court and the customary laws it used are the early forms of modern international commercial arbitration as well as international commercial arbitration laws.

When talk about the advantages of international commercial arbitration, we always compare it with litigation system which is more preferential by national legislation. Therefore, we can possibly get the result that arbitration is much easier, faster, costs less, non-administrational, can quickly and fairly settle disputes, and also gives enough freedom for the parties involved. It is then easy to get the conclusion that arbitration has advantages like flexibility, confidentiality, finality and convenient in execution. The finality among all the advantages which is also one reflection of litigation procedure simplicity is always recognized as a traditional advantage of international commercial arbitration. As far as in medieval age's commercial court, the rule of short trail time limit was set up. In market court, trail should finish before the parties drop out the dust on their feet; in maritime court, trail should finish within a day. Appeal is usually forbidden. Once the decision is made, it just has the finality. Finality always means the arbitration award has binding power upon the parties of the disputes. When the binding award is made², the parties must obey and the whole arbitration procedure finishes. This is now a common way for most countries around the world. Therefore, people get a conclusion in international commercial arbitration field that the arbitration procedure starts, arbitrators make award, award is binding, and the procedure ends. Just because there is no room for questioning in arbitration procedure, once the award is made, the procedure ends. Thus, the description of "finality of awards" appears in Chinese.

¹ Commercial court includes market court, fair court, merchant guild court, and city court. All kinds of commercial courts' procedures are fast and non-official. See Harold J. Berman (1993). *Law and revolution: The formation of the western legal tradition* (pp.421-422) (W. F. He, H. J. Gao, Z. M. Zhang, & Y. Xia, Trans.). Encyclopedia of China Publishing House.

² By going through materials, the author of this paper found that the word "binding" is used by English materials instead of the word "finality" which is often used by Chinese materials. The difference is quite interesting which has made the author doubt about the translation of "一裁终局" in Chinese because it seems to be a very misleading interpretation of the word.

Many Chinese scholars support the "finality of awards" in international commercial arbitration. Prof. Chen Zhidong clearly said in page 6 of his book "*International Commercial Arbitration Law*" that the finality of awards in international commercial arbitration is one of the outstanding advantages by comparing with litigation; Zhao Xiuwen also admits the finality of awards in his book "*International Commercial Arbitration and Its Applicable Laws*"; Liu Xiangshu also recognizes finality of awards as the main reflection of arbitration's rapidness in page 402 of his book "*Research on the Essential Issues of Private International Law*"; Xie Shisong also said

More importantly, because commercial arbitration follows the rule of finality of awards, when the parties choose arbitration, they don't have to get the final decision after two or more trails like litigation and they don't need to pay extra litigation fee or any other fees like litigations. So, due to the simplicity of procedures for dispute settlement, short trail period, and fast decision making speed, arbitration therefore brings down the cost for resolving disputes greatly (Xie, 2003, p.7).

All the above statements are derived from traditional arbitration, however, can such statements be stable as they used to be in a modern society full of economic globalization, networks, and organizations?

2. TRAPPED IN MODERN SOCIETY: LACK OF JUSTICE

Justice is the eternal life for procedures. Investigate respectively from process and result, impartiality has two standards. One is that everyone gets what he or she deserves to get resolved or under the same situation everyone is equally treated through certain process. Such standard is usually called as substantive justice. The other standard puts the process of dispute settlement at the first place for evaluation by considering the reason of the existence of procedures and the difference between justice and non-justice procedures. It is the procedural justice. (Rawls, 1988, p.79). As a way to settle disputes, arbitration has many values among which justice and efficiency are the most significant. In a sense, the reason that dispute parties choose arbitration is for the sake of efficiency. However, arbitration also has judicial spirit within itself. It shall conform to natural justice and cannot break the bottom line of natural justice. "Law philosophers generally think that justice has higher value in the process of dispute settlement" (Golding, 1987, p.232). Fundamentally speaking, dispute parties pursue the justice or impartiality of arbitration, or, in another way, the reason that dispute parties concluded an arbitration agreement before is based on the trust and expectation of arbitration awards' justice or impartiality. Justice or impartiality is "human's spiritual pursuit for making everyone get what he or she should have" (Bodenheimer, 1999, p.264). If arbitration cannot get the parties what they should get,

then to pursue the so called efficiency means nothing. All in all, when there is conflict between justice and efficiency during the process of settling disputes, we should always make sure efficiency go after justice. That is to say, we should pay more attention to justice. However, traditional international commercial arbitration theory also goes along with the view of domestic arbitration which thinks finality of awards is an advantage and a dominant advantage by comparing arbitration with litigation, is one of the important reasons that arbitration can compete with litigation, and the change of finality of awards means the overturn of the social footstone on which arbitration lies. With the flourish development of international commercial arbitration, we found that the traditional finality of awards mechanism in international commercial arbitration is not as fit as it was for the society. The position of international commercial arbitration in international dispute settlement system does not base on the coexistence of domestic arbitration and litigation.

Just as discussed in the previous parts of the paper, the reason that traditional theory supports finality of awards is established on the assumption that finality of awards may bring more benefit for the parties than litigation. However, only when the following two situations exist can the reason be one of the positive advantages: a. arbitrator never makes mistakes; b. even arbitrator makes mistakes, their mistakes are too small to put up with and the risk of mistakes can be covered by the pursuit of speed and efficiency (Knull, III & Rubins, 2000). But can these assumptions stand? Which theorist proves this conclusion through live cases and mathematical methods? In fact, not only there is no such proof, on the contrary, due to its international and professional attributes, international commercial arbitration has a high requirement on arbitrators. However, given the fact that every country's standard for being arbitrators is much lower than the standard for becoming judges, even judges are doubted by people for which appeal exists, then what is the reason for people to trust arbitrators? Furthermore, currently in the situation that international commercial exchanges expand speedily, interests involved in international disputes is not a small amount within our imagination, but is often hundreds of millions dollars. In every case of arbitration, maybe the money is just numbers for the arbitration tribunal, but for the parties, it's a pain which may be caused by an arbitration failure.

For the winning party of arbitration, the amount on the arbitration award is the real money he/she has; while for the losing party, even he/she can make sure the award is wrong, how can he/she calculate whether appeal can bring him/her more damage or not? Let alone the result of arbitration is not what the winning party wants. Since arbitration award cannot be mediated (here we only refer to pure arbitration without mediation methods), even the losing party is dissatisfied about the award and the winning party may not accept it totally. Therefore,

pursuing efficiency does not equal to giving up the right for justice.

Based on the above reasons, finality of awards in international commercial arbitration is not its fundamental advantage. Of course, maybe someone argue if it weren't because of the efficiency of finality of awards in arbitration, why are so many international commercial disputes settled by arbitration? According to Alan Redfern, Martin Hunter and other scholars, the answer is largely because of two things: one is that arbitration's neutrality can more easily to be accepted by both parties by comparing with courts; the second is the arbitration award is more likely to get the recognition and enforcement in international scope. The following part will explain why arbitration becomes the primary choice for international commercial area (Redfern, Hunter, & Blackaby, 2005, pp. 23-24).

3. REASONS THAT ARBITRATION BECOMES PREFERRED METHOD FOR SETTLING INTERNATIONAL COMMERCIAL DISPUTES

3.1 Neutrality

The particularity of international commercial disputes is just the internationality. Article 1 Paragraph 3 of the UNCITRAL Model Law on International Commercial Arbitration specially gives the following explanation on internationality:

An arbitration is international if:

- (a) The parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
- (b) One of the following places is situated outside the State in which the parties have their places of business:
 - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
 - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
- (c) The parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

Thus, it can be seen that for any country, the word "international" must contains two or more countries' interest. As judicial organ of a country, the court (or litigation carrier) represents the coercive force of the state and shows jurisdiction of a country (Liang, 2001, pp.102-103; Brownlie, 2002, pp.330-333). As the fundamental power of a country's sovereignty, jurisdiction always reflects the protection on national interests and the country's people's interests. Any country's judicial organ is unpredictable for the party out of its jurisdiction. Even

in modern society, the connection between each country has become more and more intense, absolute territorial of sovereignty and protection of domestic people's interests are no longer the only and final aim for each country, and foreign people's interests are paid more attention in international communication, no matter inwardly, emotionally, or from the essence of sovereignty, foreign parties cannot trust the other country's judicial organ thoroughly. However, after all, there is no international judicial organ surpassing national sovereignty in international community. When a dispute is required to be settled through litigation, it means the settlement must be made by judicial organ of a particular country. In such scenario, to choose either party's judicial organ will lead to the other party's doubts and worries. Under the atmosphere full of doubts and suspicions, it is not easy to resolve disputes and the judgment made is much easier be challenged by the parties which will reduce the effectiveness of the decision and is likely to cause endless litigation for the parties.

When analyzing arbitration method, it can easily be found out that since the jurisdiction of arbitration generated by the agreement between the parties. If there is no authorization of the parties, arbitration procedure can never happen. And the arbitrators who will settle the disputes between the parties are chosen by them directly or indirectly. The parties also have the right to choose arbitration agency, place of arbitration, arbitration rules, and applicable law for arbitration through agreement. In certain special cases, the parties can also choose the procedure law for arbitration. The autonomy of the parties gets full embodiment here (Chen, 1998, p.7). The parties of international disputes can totally choose an agency which both parties trust to make arbitration award voluntarily. For example, ICC International Court of Arbitration, International Center for Settlement of Investment Disputes (ICSID), Arbitration Institute of the Stockholm Chamber of Commerce, London Court of International Arbitration (LCIA) and other permanent arbitration agencies' neutrality can be guaranteed in international society. These agencies can keep a detached and independent status in international disputes settlement which is definitely an absolute advantage that court does not have. The parties can fully enjoy the arbitration process and such neutrality will eliminate their doubts and strengthen the authority of the award at last.

3.2 Convenient in Recognition and Execution

In fact, in the field of international commercial disputes, a decisive advantage of arbitration by comparing with litigation is the convenience it has in recognition and execution. Generally speaking, the same domestic case's court decision can be executed more effectively and fast than arbitration award. Once court makes judgment on a domestic case, the parties concerned with the judgment can apply for implementation of the judgment without

other formalities or to take further measures. For a domestic arbitration award, the arbitration institution and arbitrators both have no compulsory execution ability. In the situation that one party refuses to implement the award, the other party can only apply for compulsory execution in a court so that to achieve the goal of the arbitral award. But cases involving foreign elements have a totally different situation. The difficulty degree of recognition and enforcement of international civil litigation judgments and international commercial arbitration awards is very clear. In international commercial cases, court verdict is very simple to be made but the recognition and enforcement is very difficult to realize. Any country's judicial organs distrust other countries' and are very careful in judicial assistance between countries. But if arbitration is chosen, the result is different. First of all, many foreign courts prefer to recognize and execute arbitration awards made by foreign arbitration institutes. Many countries around the world are members of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter called the New York Convention). According to article 1 to 4 of the New York Convention, arbitration awards made by its members can easily be executed in other member states. Secondly, some countries have already imported and carried out the 1985 UNCITRAL Model Law on International Commercial Arbitration which makes arbitration awards' executions in such countries easier and more convenient and also difficult to raise questions against a particular arbitration award. Thirdly, some countries have especially issued certain laws to simplify arbitration awards' recognition and execution. For example, article 60 of 1996 British Arbitration Law. Chapter 189 of Nigeria federal law even made such rules on international commercial arbitration awards: applicant can only hand over a copy of the arbitration award to the Supreme Court for execution and once the copy is recognized by the Supreme Court it shall have the same effect as the judgment made by the Supreme Court. The parties do not need further declarations for the recognized copy and it can be executed at any local court. Spain allows its Supreme Court to judge the execution of foreign arbitration awards. Overall, the Supreme Court usually focuses on the effective promotion of arbitration awards' recognition and enforcement, tends to make international arbitration awards implemented as possible as they can. However, for foreign court sentences, there is no such preferential treatment.

In practice, the recognition and execution of two countries' court decisions is decided by bilateral or multilateral reciprocal treaties. Although the countries of both parties are members of the New York Convention, if there are no bilateral or multilateral reciprocal provisions deciding the recognition and execution of court decisions, the party who applies for execution have to apply for litigation in the other party's court again to request the court to admit the fact that it already gets effective

judgment. Only after that, the applicant can apply for the recognition and execution of court decisions. If the relation between the two countries turns from ally to enemy, then it is difficult to recognize or execute the court decisions.

In addition, the flexibility of arbitration and the freedom of choosing arbitrators are also absolute advantages of arbitration. Since there are already a great deal of discussions and explanations on the two advantages in academic field, the author of this paper will not further discuss such topic here. Some scholars said: the flexibility of arbitration, the recognition and execution of arbitration awards and the freedom of choosing arbitrators are the absolute advantages of arbitration which cannot be competed against by litigations; on the other hand, the confidentiality of arbitration, reasonable price of arbitration fee and fast speed of arbitration procedures are the comparative advantages of arbitration (Li, 2005).

Just as said by Clive M. Schmitthoff, “faster speed” does not always “correct” among “all the reasons that people are willing to settle disputes by arbitration”. “In the field of international arbitration, the main reason that they prefer arbitration is because it is the only method suitable for resolving international trade disputes” (Schmitthoff, 1996, 2005). The “only suitable method” mentioned here is just the above reason.

CONCLUSION

In conclusion, in the field of international commercial arbitration, finality of awards is not an absolute advantage and could be improved. The improvement will not affect the position of arbitration in the field of international commercial disputes but on the other hand can make commercial arbitration decision more reasonable and draw up the attention of more people. If we insist on

applying the finality of awards system or unilaterally pursue efficiency, lack of impartiality may appear which definitely not the original intention for resolving disputes is. Therefore, the consideration upon finality of awards system should be changed over time.

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