INTERFERENCE BY A LOCAL COURT AND A FAILURE TO ENFORCE: ACTIONABLE UNDER A BILATERAL INVESTMENT TREATY?

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I INTRODUCTION

The New York Convention was designed to promote the enforcement of international arbitral awards, with minimal interference by the courts of the country in which enforcement is sought.[1] Accordingly, Article V of the New York Convention provides few grounds for resisting the recognition and enforcement of awards. Those grounds are limited to awards made without jurisdiction, a party being subject to some legally relevant incapacity, a failure to comply with the rules of natural justice, the composition of the tribunal being contrary to the arbitration agreement or the law of the seat, the award having been set aside at the seat, the subject matter of the dispute not being capable of resolution by arbitration in the country where enforcement is sought or enforcement of the award being otherwise contrary to the public policy of that country.[2] Importantly, the New York Convention does not allow a court asked to enforce an international award to engage in a 'merits review' of the award; that is, it is irrelevant to the question of enforcement whether the award is correct in accordance with the *lex causae*. In theory, it is only the courts of the seat of the arbitration which have jurisdiction to review the merits of an award. Whether any review is possible in those courts is not a function of the New York Convention but is determined by the *lex arbitri*. This means that it is possible for the parties to choose a seat which does not allow a merits review of the award. If this is done, then the award will not, in theory at least, be the subject of a merits review in either the place where the award was made or the place where it is enforced. Many (but by no means all) parties will deliberately seek this outcome.

However, there are numerous examples where awards have been the subject of a merits review in the country where enforcement is sought, notwithstanding that country's ratification of the New York Convention.[3] Often that country is the home of the party required to make payment

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[1] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed 10 June 1958 (entered into force 7 June 1959) ('New York Convention'); see, e.g., G.B. Born, *International Commercial Arbitration: Commentary and Materials* (The Hague, The Netherlands: Kluwer, 2nd ed., 2001); L.A. Mistelis and J.D.M. Lew (eds.), *Pervasive Problems in International Arbitration* (Alphen aan den Rijn, The Netherlands: Kluwer, 2006).

[2] New York Convention, Articles V(1) and (2).

[3] See, e.g., *Oil & Natural Gas Corporation Ltd* v. *Saw Pipes Ltd* (2003) 5 SCC 705 (India) ('*ONGC*'); *Luzon Hydro Corp* v. *Hon Rommel O Baybay and Transfield Philippines Inc*, (Decision of the Philippines Court of Appeals, Manila, of of 29 November 2006, Special Former Fourth Division), CA-G.R. SP No. 94318, reproduced in A.J. van

pursuant to the award and the jurisdiction where all of that party's assets are located. Therefore, if enforcement is frustrated in this jurisdiction, the award may be of no value.

Often a merits review occurs because the enforcing court has, in a domestic setting, interpreted Article V widely. For example, in *ONGC* the Supreme Court of India refused to enforce an international arbitration award on the ground that it was contrary to forum public policy. The governing law which applied to determine the substantive issues in the dispute was the law of India. The Supreme Court reviewed the award and concluded that the arbitrators had misapplied Indian law. The Supreme Court ruled that it would be contrary to Indian public policy for an Indian court to enforce an award which had misapplied Indian law. In this way, notwithstanding the narrow grounds for review stipulated by the New York Convention, the Indian court engaged in a merits review and refused to enforce the award.

Such an outcome was not intended by the New York Convention, and where such outcomes occur they frustrate the primary purpose of the New York Convention. However, once it is ratified, the New York Convention should, in theory, be incorporated into the domestic law of each State party, and become part of each State party's *lex arbitri*. This means that it was always possible that the domestic courts of different countries would interpret the provisions of the New York Convention differently.[4] There is nothing surprising or inappropriate about this.[5]

Of greater concern, however, are situations which can arise where a court refuses enforcement not by reference to any legitimate interpretation of the relevant law but to protect the domestic party and frustrate the award. Obviously, such decisions are not made bona fide and the court is likely to disguise the real motive for the decision. However, where it does occur, a question can sometimes arise as to whether a bilateral investment treaty ('BIT') can provide relief to the beneficiary of an award.

The recent case of *Saipem S.p.A* v. *The People's Republic of Bangladesh* provides an opportunity to explore the circumstances in which a State could breach a BIT where its local courts interfere in the proceedings of an international commercial arbitration.[6] In this case, the interference in an arbitration by a Bangladeshi court, revoking the authority of the arbitral tribunal, was held to amount to an expropriation without compensation[7] by the Bangladeshi State in contravention of

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den Berg (ed.), XXXII *Yearbook Commercial Arbitration* (2007), 456 ('*Luzon*') (Philippines); *Resort Condominiums International Inc* v. *Bolwell* [1995] 1 Qd R 406 ('*Resort Condominiums*') (see especially Lee J) (Australia); and *Monégasque de Réassurances S.A.M. (Monde Re)* v. *NAK Naftogaz of Ukraine and State of Ukraine*, 311 F 3d 488 (2nd Cir, 2002) ('*Monde Re*') (United States).

[4] See, e.g., W.W. Park, 'Treaty Obligations and National Law', *Hastings Law Review*, 58 (2006), 251; K-H. Böckstiegel, 'Public Policy as a Limit to Arbitration and its Enforcement', *International Bar Association Journal of Dispute Resolution*, (2008), 123.

[5] Hopefully education programs will help reach an international consensus about the proper interpretation of the New York Convention to avoid anomalies such as those identified in the third footnote.

[6] *Saipem S.p.A* v. *The People's Republic of Bangladesh* (ICSID Case No ARB/05/7, Award of 30 June 2009) ('*Saipem*').

[7] It was common ground that no compensation was paid. Therefore, the question for the tribunal was limited to whether the disputed actions constituted an expropriation within the meaning of Article 5 of the BIT.

Article 5 of the Italy-Bangladesh BIT.[8] The case also raises the interesting and related question of whether a State may breach a BIT by failing to provide a sufficient enforcement mechanism under the New York Convention.

II *SAIPEM*

A *The Facts*

Saipem S.p.A. ('Saipem'), an Italian company, and the Bangladesh Oil Gas and Mineral Corporation ('Petrobangla'), entered into a contract for the construction of a gas pipeline in Bangladesh. The contract contained an arbitration agreement referring all disputes to ICC arbitration before a three-member tribunal in Dhaka.[9] Disputes arose, and Saipem commenced arbitration in accordance with the parties' agreement. Petrobangla raised a number of jurisdictional challenges which the ICC Tribunal dismissed in an Award on jurisdiction.[10]

During the ICC arbitration, the Tribunal denied a number of procedural requests made by Petrobangla.[11] These were: (a) a request to strike from the record the witness statement of a key Saipem witness who had not been present at the hearing (according to Saipem, due to actions taken by Bangladesh to prevent him from attending the hearing); (b) a request that all witnesses be allowed to be present in the hearing room during the entire hearing; (c) a request that a letter from Petrobangla which was not on the record be filed during the cross-examination of a witness; (d) a request to strike from the record a 'draft *aide-mémoire*' of the World Bank (which was sponsoring the project),[12] and certain cost calculations prepared by Saipem; and (e) a request that written transcripts be made of the tape recordings of the hearing.

Petrobangla reiterated these requests on two occasions before the Tribunal. Petrobangla also requested the ICC Tribunal to order Saipem to provide information about its insurance policy and claims made under it, which Saipem had refused to provide. The ICC Tribunal issued an order that Saipem's refusal to provide the requested information would be assessed when appropriate at a later stage in the proceedings.[13]

Following the ICC Tribunal's decision on these matters, Petrobangla issued proceedings in the First Court of the Subordinate Judge of Dhaka seeking to revoke the ICC Tribunal's authority. The basis of Petrobangla's claim was that the arbitrators had misconducted themselves and had

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[8] *Agreement Between the Government of the Republic of Italy and the Government of the People's Republic of Bangladesh on the Promotion and Protection of Investments*, signed 20 March 1990 (entered into force 20 September 1994).
[9] *Saipem*, para. 10.
[10] *Ibid*. paras. 25-7.
[11] *Ibid*. para. 31. See also *Saipem S.p.A v The People's Republic of Bangladesh* (ICSID Case No ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007) ('*Saipem* (Decision on Jurisdiction)'), para. 22.
[12] *Saipem*, para. 6.
[13] *Ibid*. paras. 32-3.

breached the parties' procedural rights when rejecting Petrobangla's procedural requests during the hearing.[14] Petrobangla also applied to the High Court Division of the Supreme Court of Bangladesh to stay all further proceedings of the arbitration pending before the ICC Tribunal and/or restrain Saipem and/or the Tribunal from proceeding further with the arbitration. The Supreme Court issued an injunction restraining Saipem from continuing with the arbitration, and subsequent decisions confirmed and maintained the stay of arbitration.

The First Subordinate Judge of Dhaka revoked the authority of the ICC Tribunal on the grounds that it had:

> conducted the arbitration proceedings improperly by refusing to determine the question of the admissibility of evidence and the exclusion of certain documents from the record as well as its failure to direct that information regarding insurance be provided. Moreover, the Tribunal has manifestly been in disregard of the law and as such the Tribunal committed misconduct.[15]

Further court proceedings ensued, culminating in an injunction being issued by the High Court Division of the Supreme Court of Bangladesh, restraining Saipem from proceeding with the ICC arbitration.[16] Nonetheless, the ICC Tribunal continued and rendered an Award in Saipem's favour.[17]

Petrobangla applied to the High Court Division of the Supreme Court of Bangladesh to have the Award set aside. However, the Court denied the application because it considered there to be 'no Award in the eye of the law' for it to set aside. This was because the ICC Tribunal's authority had been revoked and it had proceeded with the arbitration 'most illegally and without jurisdiction'. Moreover, the ICC Tribunal had been 'injuncted upon by the High Court Division not to proceed with the said arbitration case any further'. Saipem did not appeal this decision.[18] Petrobangla had no assets outside Bangladesh.[19] Therefore Saipem could not enforce the award in Bangladesh and was unable to enforce the award outside Bangladesh.

B *The ICSID Proceeding*

On 5 October 2004, Saipem filed a request for arbitration with the International Centre for Settlement of Investment Disputes ('ICSID').[20] At the hearing on the merits, Saipem contended that the courts of Bangladesh had acted illegally and/or without jurisdiction when revoking the ICC Tribunal's authority.[21] Saipem argued that this denied it the right to arbitration, which was a

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[14] *Ibid*. para. 35.
[15] *Ibid*. para. 40.
[16] *Ibid*. para. 47.
[17] *Ibid*. para. 50.
[18] *Ibid*. paras. 49-51.
[19] *Ibid*. para. 130.
[20] *Saipem* (Decision on Jurisdiction), para. 42.
[21] Bangladesh raised jurisdictional objections but the ICSID Tribunal held that it had jurisdiction to hear the claim: *ibid*. para. 161.

contractual right with an economic value. It argued that the actions of the Bangladeshi courts were attributable to the Republic of Bangladesh and, accordingly, that the State of Bangladesh had expropriated Saipem's right to arbitration in breach of Article 5 of the Italy-Bangladesh BIT.[22] For its part, Bangladesh contended that the courts of Bangladesh had the necessary supervisory jurisdiction to revoke the authority of the ICC Tribunal under Article 5 of the Bangladeshi Arbitration Act 1940.[23]

The ICSID Tribunal held that the acts of the Bangladeshi courts amounted to an expropriation by Bangladesh of Saipem's investment in Bangladesh, in breach of the Italy-Bangladesh BIT. Its reasoning can be summarised as follows.

The ICSID Tribunal held that the property being expropriated was 'Saipem's residual contractual rights under the investment as crystallised in the ICC Award'.[24] It held that the actions of the Bangladeshi courts amounted to an indirect expropriation as they were 'measures having similar effects' within the meaning of Article 5(2) of the Italy-Bangladesh BIT and that the actions 'resulted in substantially depriving Saipem of the benefit of the ICC Award'.[25]

The next question was whether the actions of the Bangladeshi courts (which were attributable to the State of Bangladesh) were 'illegal', thus giving rise to a claim of expropriation. Saipem argued that the actions of the courts were illegal for two reasons: first, the courts lacked jurisdiction to revoke the authority of the ICC Tribunal, and second, revocation of the ICC Tribunal's jurisdiction had been decided on spurious grounds.

The ICSID Tribunal rejected Saipem's first submission. It held that the assertion of jurisdiction by the Bangladeshi courts was not illegal and that Saipem had failed to establish that the ICC Court's authority as regards revocation was exclusive under the applicable Bangladeshi law.[26] In respect of the merits of the Court's decision to revoke the authority of the ICC Tribunal, the ICSID Tribunal rejected, for want of evidence, Saipem's allegation that Petrobangla had acted in collusion or conspired with the Bangladeshi courts.[27] However, the ICSID Tribunal found that the revocation of the ICC Tribunal's authority was both contrary to the principle of abuse of rights and the New York Convention.

1 *Abuse of Rights*

In making its finding on abuse of rights, the ICSID Tribunal reviewed the procedural orders of the ICC Tribunal which constituted the impugned conduct and 'did not find the slightest trace of

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[22] *Saipem*, para. 84. Saipem did not bring a claim on the ground of denial of justice because Article 9.1 of the Italy-Bangladesh BIT does not confer jurisdiction to the ICSID Tribunal in respect of such claims.
[23] *Ibid*. para. 86.
[24] *Ibid*. para. 128.
[25] *Ibid*. para. 129.
[26] *Ibid*. para. 144.
[27] *Ibid*. paras. 146-8.

error or wrongdoing'. The ICSID Tribunal held that the Dhaka Court's finding that the arbitrators 'committed misconduct' lacked any justification. The Dhaka Court did not refer to any Bangladeshi law which had been manifestly disregarded. It found that the Dhaka Court's decision was a 'grossly unfair ruling'.[28] The ICSID Tribunal said:

> Bangladesh does not even try to show that the ICC Arbitrators' conduct was somehow inappropriate, illegitimate or unfair. To the contrary, Bangladesh tries to justify the decision to revoke the authority of the ICC Tribunal exclusively on the ground that the test set forth in Article 5 of the [Bangladeshi Arbitration Act of 1940] is not stringent and leaves the authority free to extrapolate that the arbitrators may be likely to commit a miscarriage of justice. In none of its submissions in the present arbitration did Bangladesh even attempt to show that the ICC Tribunal committed misconduct and that such alleged misconduct could reasonably justify the revocation of the arbitrators.[29]

The Tribunal concluded that:

> the Bangladeshi courts abused their supervisory jurisdiction over the arbitration process. It is true that the revocation of an arbitrator's authority can legitimately be ordered in case of misconduct. It is further true that in making such order national courts do have substantial discretion. However, they cannot use their jurisdiction to revoke arbitrators for reasons wholly unrelated with such misconduct and the risks it carries for the fair resolution of the dispute. Taken together, the standard for revocation used by the Bangladesh courts and the manner in which the judge applied that standard to the facts indeed constituted an abuse of right ... In conclusion, the Tribunal is of the opinion that the Bangladeshi courts exercised their supervisory jurisdiction for an end which was different from that for which it was instituted and thus violated the internationally accepted principle of prohibition of abuse of rights.[30]

2 *Violation of the New York Convention*

In addition to its finding that the Dhaka Court had violated the principle of abuse of rights, the ICSID Tribunal also held that the Court's decision to revoke the arbitrators' authority amounted to a violation of Article II of the New York Convention because it de facto prevented or immobilised the arbitration that sought to implement the arbitration agreement, 'thus completely frustrating if not the wording at least the spirit of the Convention'.[31] We consider below whether a State's failure to provide a sufficient enforcement mechanism under the New York Convention may amount to a breach of a BIT.

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[28] *Ibid*. para. 155.
[29] *Ibid*. para. 156.
[30] *Ibid*. paras. 159 and 161.
[31] *Ibid*. para. 167.

III DISCUSSION OF THE ICSID TRIBUNAL'S DECISION IN *SAIPEM*

A *Generally*

This is a very interesting award because it examines the extent to which a State can be held liable in international law where a local court interferes with an arbitration. Arbitral proceedings are governed by the law of the seat of arbitration (the *lex arbitri*) and the courts of the seat have jurisdiction to supervise the arbitration including, in some jurisdictions, the power to conduct a merits review of the award, as has already been noted. In this case, the choice of Dhaka as the seat of arbitration meant that Bangladeshi arbitration law governed the proceedings as the *lex arbitri* and that the Bangladeshi courts had supervisory jurisdiction over those proceedings.

The *lex arbitri*, as it is domestic law, will typically reflect the public policy of the relevant country. Public policy varies significantly from country to country so that what is regarded as misconduct in one country may not be misconduct in another. Further, public policy relevant to arbitration can change rapidly. At the time of entering into an arbitration agreement, parties should engage in due diligence to ensure the *lex arbitri* suits them and their transaction.

It is submitted that the failure of a court to apply its domestic law properly, which serves to confer an advantage on a local investor and a disadvantage on a foreign investor, may amount to an abuse of the power of the court and a failure by the State to accord fair and equitable treatment (*inter alia*, in the sense that it may amount to a denial of justice)[32] and a failure to provide legal protection for the investment.[33] In addition, such conduct may breach an expropriation protection under a BIT, as was found by the ICSID Tribunal in *Saipem*.

However, were an ICSID tribunal permitted to find that it disagreed with the policy settings reflected in the *lex arbitri* and that, without more, the application of those policy settings constituted a breach of a BIT, many decisions of 'first world' courts would be capable of challenge because of different views about policy held by an ICSID tribunal.

Let us consider the approach taken by the ICSID Tribunal in the *Saipem* case. The bases on which the Bangladeshi court revoked the ICC Tribunal's jurisdiction are listed at paragraph 152 of the ICSID Award. In summary, the court considered the ICC Tribunal's conduct to be inappropriate because it: (a) allowed the admission of a witness statement without the witness being called when (perhaps) available to give evidence; (b) admitted into evidence a document without formal proof of the document (and therefore presumably the truth of its contents); (c)

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[32] See, e.g., C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2007), pp. 227-33; R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008), pp. 142-4; K. Yannaca-Small, 'Fair and Equitable Treatment Standard: Recent Developments' in A. Reinisch (ed.), *Standards of Investment Protection* (Oxford University Press, 2008), pp. 111 and 119-20 and J. Paulsson, *Denial of Justice in International Law* (Cambridge University Press, 2005), pp. 1 and 147-57.

[33] See, e.g., Dolzer and Schreuer, *Principles of International Investment Law*, pp. 151-2.

either did not rule on a discovery application in relation to insurance documents or otherwise did not allow discovery; and (d) rejected an application for a written transcript.

The first two grounds appear to be based on the failure to apply common law rules of evidence that would preclude the admission of a document into evidence without oral evidence as to its authenticity and, if admitted into evidence for the purpose of proving factual matters, the accuracy of the statements made in the document. In Australia, domestic arbitrations are governed by the *Commercial Arbitration Act* in force in the relevant Australian state or territory. Prior to the introduction of this legislation in Australia, and also for a time in England,[34] absent anything to the contrary in the arbitration agreement, an arbitrator had to comply with the applicable rules of evidence. A failure to do so in a serious way could have grounded an application for misconduct.[35] If it was recently considered appropriate that the applicable rules of evidence apply in Australian and English arbitrations (and that a failure to apply them may constitute misconduct), how can it now be said to be inappropriate in Bangladesh? As to the third ground, in a number of common law countries an inability to obtain discovery of relevant documents would be regarded as a serious irregularity. The fourth ground is curious, as it seems that the ICC Tribunal refused to allow written transcripts to be made of the tape recordings of the hearings. Why the ICC Tribunal would refuse such an application is not explained and is in any event very unusual.

When one looks at the ICSID Award, the reasoning (or absence thereof) is unsatisfactory and does not provide the usual analysis which would give comfort that the decision was correct (it may be correct – it is just not apparent from the Award). First, there is no explanation of the *lex arbitri* and no analysis as to why the decision of the Bangladeshi court offends the *lex arbitri*. It may be a function of the way in which the case was argued, but the Award contains no detailed analysis of the reasons justifying the conclusion that the Bangladeshi court did not apply the *lex arbitri* correctly, let alone that the court was acting in bad faith. Indeed, the decision merely summarises the arguments and then reaches a conclusion.

Secondly, the ICSID Tribunal appears to have proceeded on the basis that it is for Bangladesh to prove that the Bangladeshi court was correct in finding that the ICC arbitrators had misconducted themselves. As extracted above, the ICSID Tribunal bemoaned Bangladesh's failure to show that the conduct of the ICC Tribunal was inappropriate, illegitimate or unfair. This is curious. Saipem was the claimant and presumably the onus fell on it to prove that the Bangladeshi court's decision was not only in error (which occurs in any court system – that is why there is an appeal process), but that the error was in bad faith and constituted an abuse of right.

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[34] See, e.g., *In re Enoch and Zaretsky Bock & Co* [1910] 1 KB 327 and *WM Adolph & Co* v. *The Keene Company* [1921] 7 Lloyd's Rep 142.
[35] See, e.g., *Gas and Fuel Corporation of Victoria v Wood Hall Ltd* [1978] VR 385.

Thirdly, it is unclear what the ICSID Tribunal considered to be the scope of a court's discretion to revoke a tribunal's authority. The ICSID Tribunal said:

> It is true that the revocation of an arbitrator's authority can legitimately be ordered in case of misconduct. It is further true that in making such an order national courts do have substantial discretion. However, they cannot use their jurisdiction to revoke arbitrators for reasons wholly unrelated with such misconduct and the risks it carries for the fair resolution of the dispute.[36]

The Tribunal may have been of the view that all that need be established was that the court had incorrectly concluded that there had been misconduct. If that is what is meant, then this test is far too wide. Any error can usually be rectified by an appeal. However, in a common law country, if the decision is confirmed by the final court of appeal, then the ratio of that decision is the law, and, by definition, cannot be in error.

It is submitted that for Saipem to be successful in its claim for expropriation, it would have to establish the relevant Bangladeshi law and then analyse why, having regard to the facts, there was no breach of the relevant minimum procedural requirements of the *lex arbitri* which could justify a finding of misconduct. To make out the serious allegation against Bangladesh, Saipem should have been required to establish: (a) what (if any) rules of evidence or discovery of Bangladesh were required by the *lex arbitri* to be applied in the arbitration; (b) whether any relevant rules were broken by the ICC Tribunal; (c) if this was the case, whether the breach was of such a magnitude to constitute misconduct in accordance with the *lex arbitri*; (d) if there was misconduct, whether such misconduct was of such a magnitude, by the standards specified by the *lex arbitri,* to justify the removal of the arbitrators; and (e) if there was no misconduct, whether the error was a consequence of a genuine mistake or some lack of bona fides.

Even if the answer to (e) is that the court did not discharge its function with bona fides, the claimant would still need to establish that there was no way in which the error could be rectified. It is submitted that it is only when mala fides have been established and the error so created cannot be rectified, can it be contended that the State has failed to provide a suitable justice system and thereby 'expropriated' the cause of action. Similar questions could be posed in relation to the refusal to allow a written transcript. In each case it is necessary to establish what the *lex arbitri* is, and whether the ICC Tribunal complied with those rules.

B *Purported Breach of the New York Convention*

In addition to its findings on the issue of expropriation, the ICSID Tribunal also contemplated that a decision to revoke an arbitral tribunal's authority may amount to a breach of the New York Convention. The Tribunal said:

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[36] *Saipem*, para. 159.

> Technically, the courts of Bangladesh did not target the arbitration agreement in itself, but revoked the authority of the arbitrators. However, it is the Tribunal's opinion that a decision to revoke the arbitrators' authority can amount to a violation of Article II of the New York Convention whenever it *de facto* "prevents or immobilizes the arbitration that seeks to implement that [arbitration] agreement" thus completely frustrating if not the wording at least the spirit of the Convention.[37]

Article II of the New York Convention provides:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.[38]

What the ICSID Tribunal appears to be saying is that the decision by the Bangladeshi courts to revoke the authority of the ICC Tribunal is conduct which fails to recognise the agreement to arbitrate. The Bangladeshi courts had jurisdiction to supervise the ICC arbitration. Such jurisdiction includes a power to revoke the authority of the Tribunal if there had been misconduct on the part of the arbitrators. Accordingly, while a decision to revoke the authority of the Tribunal may frustrate the arbitration, a proper decision of that type could never constitute a breach of the New York Convention. This is so because the New York Convention does not regulate the supervisory jurisdiction of the courts at the seat. If there is merit in the argument, much more needs to be established.

In order for a decision to be properly based on such a ground, the issues noted above would need to be established concerning the court's failure to follow the relevant *lex arbitri* relating to the supervision of international arbitration (i.e. what the applicable rules of evidence and discovery are under the *lex arbitri*; whether the arbitrators failed to apply any relevant rules; if so, whether such breach was of sufficient magnitude to constitute misconduct under the *lex arbitri*; and whether such misconduct was of sufficient magnitude to justify removal of the arbitrators). If the *lex arbitri* had not been properly applied it would be necessary to establish that this was not just a mere error, but was a bad faith decision. There are no findings in relation to these matters in the *Saipem* case, nor did the ICSID Tribunal seem to consider them as relevant. It is unknown

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[37] *Ibid*, para. 167.
[38] New York Convention, Article II.

whether these issues were canvassed at the hearing. The Award, on its face, seems to suggest, by omission, that these issues were not important to the Tribunal's consideration.

C *What if the Reasoning in Saipem was Applied to other Non-enforcement Decisions?*

It is worth considering what the outcome would be if the reasoning of the ICSID Tribunal in *Saipem v Bangladesh* were applied in a number of other cases where local courts have refused enforcement. For instance:

- *Monde Re* is a United States decision in which Monde Re sought enforcement of an award rendered in Moscow in New York against Naftogaz and the State of Ukraine. The United States District Court for the Southern District of New York had dismissed the request for enforcement on the basis of *forum non conveniens*,[39] which allows courts to 'decline jurisdiction over complex and inconvenient lawsuits brought in the United States which implicate foreign parties only; require the application of foreign law; and entail no contacts with the interests of the United States'.[40] The decision was affirmed by the Court of Appeals for the Second Circuit. Could such a decision justify recourse to a BIT if one had existed?
- *Resort Condominiums* is a Queensland Supreme Court decision which concerned an arbitration arising due to a dispute over a licence agreement. The court noted that while the New York Convention states that recognition of an award may *only* be refused upon proof of one of the events listed in Article V(1), the *International Arbitration Act 1974* (Cth) (which implements the New York Convention in Australia) does not contain the word 'only'. On this basis Lee J concluded that the court had a residual discretion about whether to enforce arbitral awards.[41] This decision has been criticised,[42] and the relevant provision of the *International Arbitration Act 1974* has now been amended so that such an argument is no longer available in Australia. However, the question remains if a relevant BIT existed with an appropriate provision, would the decision of Lee J have constituted a breach of that treaty at the time it was made?
- *Australian Granites v Eisenwerk* is a Queensland Court of Appeal decision in which it was held that by agreeing to arbitration in accordance with the ICC Rules of Arbitration the parties intended to opt-out of the Model Law (which was formerly permitted under the *International Arbitration Act 1974*).[43] This decision was followed by the Singaporean High Court in *John Holland Pty Ltd (fka John Holland*

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[39] *Monegasque de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine*, 158 F Supp 2d 377 (U.S. Dist. S.D.N.Y., 2001).
[40] *Ibid*. 381.
[41] *Resort Condominiums*, 427.
[42] See, e.g., M. Pryles, 'Interlocutory Orders and Convention Awards: The Case of *Resort Condominiums v Bolwell*', *Arbitration International*, 10(4) (1994), 385.
[43] *Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH* v. *Australian Granites Ltd* [2001] 1 Qd R 461 ('*Eisenwerk*').

Construction & Engineering Pty Ltd) v. *Toyo Engineering Corp (Japan)*.[44] Both cases were the subject of heavy criticism. Subsequently, in both Australia and Singapore, the law has been changed so that the ratio of the case is not the law of either jurisdiction. Again, could such a decision be a breach of an appropriately worded BIT?

- Could the decision of the Supreme Court of India in *ONGC*, discussed earlier, constitute a breach of a BIT?
- *Luzon* is a Philippine Court of Appeals decision in which it was held that an arbitral award in respect of a contract governed by Philippine law was null and void for manifestly disregarding Philippine law and for being contrary to forum public policy.[45] The Court found that the award manifestly disregarded Philippine law because the contract was governed by Philippine law and the Tribunal failed to apply it correctly. Further, the award was contrary to Philippine public policy because it awarded costs to the successful party without first finding that the unsuccessful party had litigated in bad faith (which was a precondition to an adverse costs order under Philippine law).
- *Iran Aircraft Industries and Iran Helicopter Support and Renewal Company* v. *Avco Corporation* is a United States Court of Appeals decision in which the Second Circuit refused to enforce an award of the Iran-United States Claims Tribunal in favour of Iranian agencies and instrumentalities against Avco.[46] The court held that the award was unenforceable under Article V(1)(b) because Avco had not been afforded an opportunity to present its case. This was because at a pre-hearing conference (which neither counsel for the Iranian party nor the Iranian arbitrator had attended) the Chairman of the Tribunal had permitted Avco to substantiate its claims by submitting its audited accounts, rather than actual invoices. Subsequently the Chairman of the Tribunal resigned and was replaced. In its award, the Tribunal rejected Avco's claims for failure to produce the actual invoices, notwithstanding its earlier ruling that audited accounts would be sufficient to prove quantum. The court refused to enforce the award because the Tribunal had, 'however unwittingly', misled Avco and in so doing had 'denied Avco the opportunity to present its claim in a meaningful manner'.[47] This case appears to be justified in principle.

  However, the *Avco* decision was the subject of a further claim before the Iran-United States Claims Tribunal, this time between Iran and the United States.[48] In this case, Iran argued that the United States had breached its obligations under the Algiers Accords (the agreements between Iran and the United States which, among other things, established the Iran-United States Claims Tribunal),[49] by failing to enforce the *Avco* award. The Iran-United States Claims Tribunal held that the United States had

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[44] [2001] 2 SLR 262. However, this decision has since been overturned by legislation in Singapore.
[45] *Luzon*, 456-73.
[46] 980 F 2d 141 (2nd Cir, 1992).
[47] *Ibid*. 146.
[48] *The Islamic Republic of Iran* v. *United States of America* (Award No. 586-A27-FT of 5 June 1998) 34 Iran-U.S. Claims Tribunal Reports 39 ('*Iran* v. *USA*').
[49] Algiers Accords (1981) 20 ILM 223.

> breached the Algiers Accords because the Court of Appeal's decision in *Avco* was erroneous. This was because the Tribunal's award in Avco 'was based not on the absence of the invoices underlying Avco's claims, but on a lack of proof that those invoices were payable'.[50]

These cases demonstrate that there can be legitimate differences of opinion as to the meaning of certain provisions of the New York Convention. Of course, there can also be illegitimate bad faith decisions by courts to protect the interests of nationals and States. However, it is submitted that international arbitral tribunals called upon to consider the conduct of a national court will need to establish bad faith in the judicial process before being able to establish a breach of a treaty by a State. Further, any tribunal called upon to rule on such case should require detailed proof of the alleged illegitimate decision. The award should set out in detail why the conduct of the court falls outside a legitimate exercise of its jurisdiction.

IV CONCLUSION

The New York Convention provides an effective system for the enforcement of international arbitration awards. Unfortunately, there will be legitimate differences of opinion about the interpretation of its provisions. Over time, it is hoped that an international consensus will emerge so that merits reviews of awards by courts asked to enforce awards will disappear. In the meantime the resolution of the problem caused by different interpretations of the New York Convention is most likely to be resolved by debate and criticism of existing decisions.

More problematic is where the courts of a particular country refuse to enforce an award, or where the courts of the seat interfere with the arbitral process or otherwise interfere with an award, for ulterior illegitimate reasons. Drawing a distinction between such cases and cases arising from a legitimate difference of opinion about legal principle is always likely to be difficult. However, States should be wary because the actions of its courts may give rise to a claim under a BIT.

The nature of such an allegation is obviously serious. To be made out, the claimant must discharge a significant onus. Likewise, any tribunal which concludes that such onus has been discharged should, having regard to the seriousness of the allegations, set out its full reasoning. If this does not occur it is likely that countries, particularly those who were not involved, will not understand why the defendant country was held liable, and will be concerned that a similar fate awaits it.

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[50] *Iran* v. *USA,* para. 66.

The ICSID Tribunal in the *Saipem* case failed to set out the basis of its decision in sufficient detail to justify the conclusion reached.[51] Accordingly, it will raise concerns not only in Bangladesh but elsewhere as to the appropriateness of international arbitration as a dispute resolution process. Where an ICSID tribunal makes a finding that the value of a cause of action has been lost due to a court process, the claimant must satisfy a heavy burden of proof, and the quality of the tribunal's reasoning must be of the highest standard.

[51] Arguably, it was open to Bangladesh to file an application for annulment of the award under Article 52(1)(e) of the ICSID Convention on the ground that the 'award has failed to state the reasons on which it is based'. Bangladesh did not do so.