Is Sudan's Arbitration Act receptive to international commercial arbitration?

SUDAN

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Arbitration became a respected dispute resolution method in Sudan in 2005 with the passage of the new Sudan Arbitration Act 2005 (SAA or the 'Act'). Although the Civil Procedures Act of 1983 (CPA) includes arbitration as one of the procedures that parties may utilise to resolve their disputes, arbitration had not been accepted by the courts as a binding and final dispute process method until the Act. The new SAA made arbitration in Sudan an independent process where the courts have no power over the parties or the arbitrators except where the interference of the court is necessary to support the arbitral process.

This article focuses on the application of the SAA and highlights areas where its Article 46 does not support international commercial arbitration despite the fact that the SAA can be considered as based on the UNCITRAL Model Law.

The new SAA was initiated by some officials at the Justice Ministry without consulting legal practitioners. The lack of understanding of the ideals of arbitration has made arbitration in Sudan at times worse than litigation itself. The problems that legal practitioners have noticed in the SAA are endemic. Courts as well as lawyers have encountered difficulties in interpreting and implementing the law. The problem sometimes is not in the wording itself, but rather the mentality that used to apply under the CPA. For instance, there is nothing in the SAA that gives the court power to appoint an arbitrator for the defaulting or reluctant party, which frustrates the arbitral process. *In Alamin v Abualarki*,[1] the first instance court dismissed the claimant's request to appoint the respondent's arbitrator. The judge found the SAA does not give the court the right to appoint the parties' arbitrators and, in addition, the court is not a lawmaker able to create its own powers.[2] However, the Appeal Court overruled the first instance decision. This indicates that the first instance courts are not familiar with the new system and shows the difficulties disputants can get into when using the new law.

SAA and the enforcement of international arbitration awards

Sudan is not yet a signatory to the New York Convention. Ratifying the New York Convention before enacting UNCITRAL Model Law-type legislation or doing both simultaneously would have enhanced the performance of this important dispute resolving method. Without accession to the Convention, the new Act has *not* made Sudan more welcoming to international commercial arbitration.

Article 46 of the SAA creates a major stumbling block towards making the Sudan legal system friendly to international commercial arbitration. As a preliminary matter, the Article creates confusion by using the words 'foreign arbitral tribunal award' without giving any interpretation for this wording. Hence, there are many possible interpretations:

- a tribunal in an arbitration that is characterised as international pursuant to Article 7;[3]
- the nationality of the arbitrator(s);
- the seat of the arbitral tribunal regardless of the nationality of the arbitrators, which could be a Sudanese tribunal; or
- the existence of any foreign law or arbitrator in the process.

However, Article 46 was literally copied from the CPA,[4] except for one change in wording in the SAA to 'arbitral tribunal' instead of 'foreign judgment or order'. The CPA article is concerned with the enforcement of the foreign judgments, which makes the foreign seat interpretation (the third above-mentioned point) more likely to be the right interpretation of 'foreign award'. Nevertheless, there is no precedent to investigate the court's interpretation of this article. Apparently, neither the parties nor the lawyers are willing to start such a debate, so they avoid Sudan as a place of enforcement.

Turning to the conditions of enforcement that are considered to make the SAA hostile to international arbitration, Article 46 states:

> 'No execution of the award of a foreign Arbitration Tribunal shall be made, before Sudanese courts, save after verifying the satisfaction thereby of the following conditions:
> (a) the award, or order is passed by an Arbitration Tribunal or centre, in pursuance of the arbitration rules of jurisdiction of international arbitration, prescribed by the law of the country, in which it has been passed, and it has been final, in accordance with such law;
> (b) the opponents in the suit, in which the award has been passed, have been summoned and have been validly represented;
> (c) the award or order is not inconsistent with an award or order, which has been previously passed by Sudanese courts;
> (d) the award does not include what is inconsistent with public order, or morals in the Sudan;
> (e) the country in which the award, to be executed shall admit execution of Sudanese courts judgments in its territories, or under agreements of execution of award, which have been ratified by the Sudan.'

The first obstacle is the burden of proof: the party who is attempting to enforce an award has to convince the court that the award is free from all the conditions stated. The SAA uses the words 'No execution', which means that the court has no discretion to enforce the award unless the five above-mentioned conditions are fulfilled. Sub-articles (a) and (b) are clear and fair, and are the same grounds listed in the New York Convention[5] and Model Law.[6] They represent the fairness and finality of the arbitral process. The third condition is highly controversial. According to sub-section (c), the party who invokes the award has to search the Sudanese courts' judgments to prove the consistency of the award with Sudanese courts' judgments. In other words, the party against whom the award is invoked can frustrate the process of enforcement by finding a court judgment in the last 90 years that is inconsistent with the award its opponent is trying to enforce. The wording of the sub-article is completely vague and impracticable. Some practitioners believe that the court correlates this sub-section with the concept of *res judicata*. They believe that sub-article (c) shall be applied when the award contradicts a judgment in the same dispute with the same parties.

Mr Omer shares this opinion as well; he believes (in his interpretation of Article (306) CPA, where Article 46 has been adopted)[7] that the condition in sub-section (c) is restricted to a foreign judgment that contradicts a Sudanese judgment issued in the same dispute for the same parties. However, this interpretation departs from the plain meaning of the SAA and CPA wording. Indeed, nothing has been stated in the law that supports such an opinion; neither law mentions the words 'the same parties' or 'the same dispute' to limit its score. Maybe this interpretation is a trend to simplify the difficulty of the wording in both articles to make it executable and acceptable.

Sub-article (d) states that 'public policy' is a ground for setting aside or refusing enforcement of the foreign arbitral award. This is another barrier built by Article 46 in addition to the previous sub-articles, which extends the parameters of the court's discretion to refuse to enforce an award.

This ground has been used by national courts in many jurisdictions to frustrate attempts to enforce international arbitral awards,[8] especially when the state is the losing party. The future is likely to bring problems in the interpretation of public policy in Sudan, unless the higher courts give guidance as to the proper interpretation.

The concept of reciprocity comes at the end of Article 46, which adds a new difficulty to the party attempting to enforce the award. This party has to prove that the court of the seat is not reluctant to enforce Sudanese judgments or awards. That can be easy in the presence of bilateral or trilateral treaties between Sudan and the seat state.[9] However, in the absence of such treaty, no one can know for sure that the seat country will be willing to enforce Sudanese judgments or awards.[10]

To conclude, Article 46 treats arbitration as a 'virus' to Sudan's legal system, disregarding the ideals of international arbitration and increasing the power of the courts to block international arbitration in general. Some commentators say that parties tend to change the arbitral award to a judgment by seeking confirmation of the award in a court at the seat of arbitration. Once they have a court judgment, parties may follow Article 306 of the CPA to enforce it in Sudan. It is a strange path to enforce an arbitral award and, in fact, the same frustrating obstacles will apply for the judgment. But attempting to enforce a judgment rather than an arbitral award will avoid the confusion created by the SAA with respect to the definition of a 'foreign' arbitral

award in Sudan. It is clear that the drafters of the SAA and legal practitioners did not fully understand the process of arbitration. While the law purports to follow the international ideals of arbitration, it makes enforcement of international arbitral awards overly complicated.

Notes

1 Civil Appeal No 2370/2006, *Huda Abu Alaraki v Abdalla Al-amin* (unpublished).
2 Deraig, Ibrahim *Concluded Arbitral Principles,* (2008, Sudanese House for Books), pp 100-103.
3 SAA Article 7:
'In accordance with the provisions of this Act, the arbitration shall be international in the following cases: (a) where the headquarters of the business of the arbitration parties business is in two different states; (b) where the subject of dispute, included in the arbitration agreement is connected to more than one state'.
4 CPA Article 306.
5 NYC Article 5(b) & (e).
6 ML Article 36(ii) & (v).
7 Omer, Mohamed, *Civil Procedures Act 1983: The Regulations of Recourse & Execution Procedures*, (Vol 2, Buraag & Khateeb) p 319.
8 'Whatever the freedom surrounding international arbitration, a limit still exists to that freedom: public policy' B Hantaiau and O Caprasse, *Public Policy in International Commercial Arbitration*, cited in E Gaillard and D Di Pietro, Domenico, *Enforcement of Arbitration Agreement and International Arbitral Awards,* (2008, Camron May) p 787.
9 For example, Sudan is a contracting party to the Amman 1987 and Riyadh 1983 conventions endorsed by Arab countries.
10 This concept of reciprocity is not new in international or domestic arbitration laws or rules. In fact, many African states have restricted their ratification to the New York Convention with respect to reciprocity, A Asouzu, *International Commercial Arbitration and African States*, (2001, Cambridge University Press), pp 193-94.

The rise of arbitration in financial transactions: key issues for users and practitioners

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Arbitration traditionally had a limited role in international finance and financial services. While it has long been used to settle disputes amongst members of stock exchanges and in the insurance and reinsurance markets, courts – in particular those of England and New York – have been the fora of choice for the resolution of disputes arising out of international loans, bonds, derivatives and other complex financial products.

There is now a widespread recognition that this is changing. With globalisation and the increasing involvement of new types of market participants, in particular from emerging markets, arbitration clauses are now found much more frequently in financial contracts than ever before. Indeed, in parts of Asia, arbitration has become the market standard for certain types of transactions.

What does this development mean for financial market participants? What are the implications for the arbitration community? This article suggests that market participants need to make active and informed choices as to their dispute resolution options, and that to do so, they need to be familiar with the key features of arbitration. The arbitration community, on the other hand, needs to develop expertise in the financial products that they will increasingly have to deal with, and must examine ways to improve and tailor the arbitral process to address users' commercial needs.

The increasing use of arbitration in international finance

Ever-increasing volumes of cross-border trade and investment associated with globalisation lie behind much of the growth of arbitration over recent decades.