

Referral Of The Award From Judge Of Nullity To The Arbitrator A Comparative Study

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Abstract: In many common law countries, the judge of annulment often re-sends the award to the arbitrators to rule out the grounds of annulment. This study shows the advantages of this saving mechanism and considers solutions for it to be recognized and developed in civil law countries.

The arbitral award may contain irregularities that have to annul this award by judge of state. Nevertheless, faced with this risk of annulment, a saving mechanism consisting of the judge will be re-sent to the arbitrator to eliminate the reasons of annulment.

The practice of re-sending the award to the arbitral tribunal for further review is more widespread in countries where the common law has some influence, Hong Kong, Ireland, Malaysia, and Sri Lanka. For example, in England, annulment of award is considered a serious measure, and can be justified just if dismissal did not lead to a fair result.

Keywords: the judge of annulment - The arbitral award - the reasons of annulment - re-sending the award - the arbitral tribunal

Introduction

It is not surprising to see it accepted in various common law countries. The practice of referring the suit to arbitrators occupies a place next to the possibility of annulment of the award¹.

The success of the re-sending of the award to avoid annulment is manifested in the UNCITRAL model law on international commercial arbitration in its article 34, paragraph 4 “The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal’s opinion will eliminate the grounds for setting aside”².

This text contains a similar procedure to the known referral in the majority of common law systems Although the ways are different. Comparative studies show that the mechanism of referring of the award to the arbitrator to eliminate the causes of annulment is not known in all systems. If it is well known in many common law countries, the concept of referral is new in the majority of civil law countries.

The model law also provides for an action for annulment in its article 34 “(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

An arbitral award may be set aside by the court specified in article 6 only if:

the party making the application furnishes proof that:

a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

or the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or the court finds that: the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or the award is in conflict with the public policy of this State”.

An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal³.

The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to

give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

In civil law countries, resending the award was unknown, but recently some of civil law countries have adopted provisions of model law of resending the award to arbitrators⁴.

In fact, some civil law countries have accepted referral in recent texts. for example, according to Article 71, paragraph 7 of the Vietnamese Commercial Arbitration Law of 2010, “The council of judges may, at the request of a party and if the council considers it appropriate, adjourn a petition to set aside an arbitral award for a period not to exceed sixty (60) days in order to facilitate the arbitration tribunal in rectifying what in the opinion of the arbitration tribunal were errors in the arbitration proceedings, thereby removing the grounds for setting aside the arbitral award. The arbitration tribunal must notify the court when it has rectified errors in the arbitration proceedings. If the arbitration tribunal does not rectify errors in the proceedings, then the council of judges shall continue to hear the petition to set aside the award”.

The Belgian legislator adopted fundamental amendments to the Arbitration Law in 2013, for example the text of Article 1717, paragraph 6 in the judicial code "which affirms the text of article 34, paragraph 4 of the UNCITRAL Model Law".

According to article 1717 of the Belgian judicial code “6. The Court of First Instance, when asked to set aside an arbitral award, may, where appropriate and if so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such

other action as in the latter's opinion will eliminate the grounds for setting aside”.

Also, Article 54/6 of the UAE Arbitration Law No. 6 of 2018 decided “the Court, when asked to set aside an arbitral award may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time of up to sixty days in order to give the Arbitral Tribunal an opportunity to take any action or make any amendment to the form of the award as will eliminate the grounds for setting aside without affecting the substance of the award”.

However, it must be admitted that such an evolution in civil law countries remains timid. for the countries that provide for such a mechanism, we will see that their text sometimes still contains obstacles to developer the referral of the award.

In France, the legislator adopted an important amendment in 2011 to the arbitration texts, but it ignored the mechanism of referring the arbitral award to the arbitral tribunal⁵.

In fact, saving the award through this referral mechanism is more beneficial than Annulment of the arbitral award, both in terms of time and cost.

The reasons of the reform of the Belgian judicial code adopted the referral of the arbitral award, "article 1717, al. 6 of the Belgian judicial code dictated the annulment of the arbitral award must remain final means to treat potential irregularities. as soon as it can be corrected by a new intervention of the arbitral tribunal, this mechanism should be preferred"⁶.

Search Plan:

1-Referral and other corrective mechanisms

2-Appeal for rectification

3-The appeal of supplement

4-Appeal for review

5-The referring the award to the arbitrator

6-The scope of the referral of the award

1-Referral and other corrective mechanisms

Faced with an imperfect arbitral award, there are various corrective mechanisms, such as the interpretation procedure, the rectification procedure, the supplement procedure, the revision procedure and the annulment procedure. These procedures differ, however, from the referral of the award to the arbitrator to eliminate the reasons of annulment.

The appeal of interpretation of the arbitral award is recognized in the texts relating to arbitration, such as article 1485 of the French code of civil procedure, “The award releases the arbitral tribunal from the dispute which it settles. However, at the request of a party, the arbitral tribunal may interpret the award, repair the material errors and omissions which affect it or supplement it when it has omitted to rule on a claim. He decides after hearing the parties or those called. If the arbitral tribunal cannot be reconvened and if the parties cannot agree to reconstitute it, this power belongs to the jurisdiction which would have been competent in the absence of arbitration”⁷.

The model law also includes an article for this mechanism. Article 33, al.1. organize an interpretation procedure, the arbitrator cannot "modify the rights and obligations of the parties arising from the award under the guise of interpreting it" and "the interpretation only makes it possible to remedy the obscurity or ambiguity of the award"⁸.

In reality "the interpretation of the award is only useful when the decision itself suffers from such ambiguity that the parties can legitimately

disagree its meaning. On the other hand, obscurity or the possible ambiguity of the reasons does not permit to use an action for interpretation".

The procedure of interpretation and the procedure of referral of the award are indeed different, which justifies that the texts adopting the referral of the award also include rules relating to recourse for interpretation. Firstly, both cases are imperfect awards but with different degrees, in the context of an interpretation procedure, the award is imperfect, because its content is not clear⁹.

This defect does not normally constitute a cause for annulment of the award, while in the context of the referral procedure, the award contains a serious defect that could lead to its annulment.

Then, the appeal for interpretation is exercised without the intervention of the state judge, "the arbitrator generally interprets the award at the request of a party", independently of the annulment procedure.

Conversely, in the context of Referral procedures, the annulment judge who does the referral of the award to avoid annulment. also, the appeal for interpretation and the Referral of the award are distinguished with regard not only to the reasons for appeal but also to the procedure to be followed¹⁰.

2-Appeal for rectification

In rendering the award, the arbitrators may make material errors and a rectification procedure is provided to repair them in article 1485 of the French civil procedure code. The award releases the arbitral tribunal from the dispute which it settles.

However, at the request of a party, the arbitral tribunal may interpret the award, repair the

material errors and omissions which affect it or supplement it when it has omitted to rule on a claim. He decides after hearing the parties or those called¹¹.

If the arbitral tribunal cannot be reconvened and if the parties cannot agree to reconstitute it, this power belongs to the jurisdiction which would have been competent in the absence of arbitration. And article 63 paragraph 1 of the law on arbitration of Vietnam, "the arbitration tribunal may on its own initiative, within thirty (30) days from the date of issuance of the arbitral award, rectify any of the errors prescribed in clause 1 of this article and immediately notify the parties". And Article 33, paragraph 1 of the Model Law "The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this article on its own initiative within thirty days of the date of the award".

The arbitral tribunal cannot modify the meaning of the award. Moreover, the award cannot rectifier something not requested by the parties. On the other hand, the arbitral tribunal may repair the error relating to the designation of a party to the arbitral proceedings or affecting the date of the award¹².

It may also repair just a miscalculation, only purely material omissions, for example, the defective spelling of a proper name, the error in the typing of the manuscript was written by the arbitrators can be repaired by the procedure of correction.

For the appeal of interpretation, the correction of material errors is carried out without the intervention of the state judge by the request of a party, or by the office of the arbitrator, while the judge of annulment who carries out the referral of the award¹³.

Moreover, the referral of the award applies to cases where it contains a defect which can lead to its annulment. The judge is faced with two possible solutions, annul the award or re-send it to the arbitrators to save it, while the arbitrators have the power to rectify their decision to exclude any possibility of existence of omission or material errors, or the nullity of sentence.

In other words, the referral of the award and the appeal of rectification differ not only in their procedure but also in their field.

3-The appeal of supplement

The recourse of supplement exists in many legal systems such as in the French code of civil procedure article 1485, "The award releases the arbitral tribunal from the dispute which it settles. However, at the request of a party, the arbitral tribunal may interpret the award, repair the material errors and omissions which affect it or supplement it when it has omitted to rule on a claim. He decides after hearing the parties or those called. If the arbitral tribunal cannot be reconvened and if the parties cannot agree to reconstitute it, this power belongs to the jurisdiction which would have been competent in the absence of arbitration"¹⁴.

Also, article 63 paragraph 4 of the law on arbitration of Vietnam "If the parties do not have some other agreement, then within thirty (30) days from the date of receipt of an arbitral award, a party may request the arbitration tribunal to issue a supplementary award with matters raised during the process of the proceedings but not yet recorded in the award, and must immediately notify the other party of such request. If the arbitration tribunal considers such request legitimate, it shall issue a supplementary award within forty-five (45) days from the date of receipt of the request", and the model law article 33, al3 "Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within

thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days».

In the context of an additional appeal, the arbitrator decides on a request that he has not examined before, and it is necessary to clearly distinguish between the omission to decide, and the lack of reasons which constitutes a case of the action for annulment"¹⁵.

Here, we recognize that the arbitrator has the power to supplement his award if he has failed to rule on a claim. for this reason, the *infra petita* is not a case for opening an action for annulment".

Thus, according to French law, "the omission to rule does not constitute a case of opening to annul of the award". the referral to eliminate the reasons of annulment, and the additional appeal are also "a regularization by referral to the arbitrator".

The difference between the addition appeal which its defect does not lead to the annulment of the award, and the referral of the award which its defect may lead to annul the award.

As for the persons concerned, it should be noted that, in the context of the supplementary action, there is still no intervention by the state judge to suspend the annulment procedure to re- send the award to the arbitrators¹⁶.

4-Appeal for review

There is another appeal against an imperfect award: the appeal of review. Here, "this mechanism is an extraordinary means tending to annul a final award on the basis of serious defects which affect it, new facts or means unknown.

In principle, it derogates from final character of award, and not from the authority of *res judicata*, because its effect is the reopening of the initial instance and not the introduction of a new procedure"¹⁷.

Thus, article 1502 paragraph 1 of the French code of procedure provides that. The recourse for review is open against the arbitral award in the cases provided for judgments in article 595 and under the conditions provided for in articles 594, 596, 597 and 601 to 603¹⁸.

The appeal is brought before the arbitral tribunal. However, if the arbitral tribunal cannot meet again, the appeal is brought before the Court of Appeal which would have been competent to hear other appeals against the award.

The fraud that justify the admissibility of an appeal for review and found the retraction of the award is serious and contrary to the principle of fairness, so the law of arbitration does not allow them to prosper with impunity.

The appeal for review is not known in all systems, this is the case of Vietnam where such an appeal does not exist. However, appeal for review is not a French exception because Swiss arbitration law also recognizes this appeal.

In France, the appeal for review "confirm" the authority of the arbitral tribunal because it is the arbitral tribunal itself that hears this appeal, the appeal is brought before the arbitral tribunal¹⁹.

Moreover, the court of appeal decide this plea, even if it means referring the case to the arbitrators, if necessary, to render a new award. this brings the referral of the award and the appeal for review, because in the context of the referral of the award, the arbitrator also reconsiders the case.

However, the appeal for review is only open to the cases imitatively listed, and more precisely it is only open for the four cases provided for by article 595 of the French code of civil procedure, including fraud.

On the other hand, the scope of the referral of the award is wider because this mechanism exists to avoid annulment, the causes of which are precisely not limited to cases of revision, for example, when the award is not reasoned, the appeal for review does not apply. however, such a failure may lead to the annulment of the award and the referral of the award may then apply to it, so that the arbitrator eliminates this reason for annulment. in other words, the effects of review and referral are similar but their respective domains are different.

Appeal for annulment in France, article 1518 of the code of civil procedure specifies, "The award rendered in France in international arbitration can only be subject to an action for annulment"²⁰.

Also, article 69 of Vietnamese law "A party with sufficient evidence proving that the arbitration tribunal issued the arbitral award in any of the cases prescribed in article 68.2 on this Law shall have the right, within thirty (30) days from the date of receipt of such award, to lodge a petition with the competent court to set aside the arbitral award. A petition requesting an arbitral award be set aside must be accompanied by materials and evidence proving that such petition has [sufficient] grounds and is lawful.

2. If a petition is lodged out of time due to an event of force majeure, then the duration of such event shall not be included when calculating the time-limit for requesting the arbitral award be set aside".

The referral often results in replacing the old award containing an annulment clause by another award without reasons for annulment. This result may also produce in the annulment proceedings because there may be a new arbitral award, if the court annul the arbitral award, and there is a valid arbitration agreement.

For the annulment procedure, if the judge annuls the arbitral award, the arbitrator may feel sanctioned, and his liability may be engaged by the parties. On the other hand, for the referral, the award containing a defect is not annulled by the state judge, and the arbitral tribunal modifies it to eliminate the defect²¹.

5-The referring the award to the arbitrator

The referring the award to the arbitrator to avoid annulment is a useful mechanism. Does the model law condition a request of a party to referral the award to arbitral tribunal? Article 34, paragraph 4 of the model law conditions a request of a party to referral the award.

This model law solution was adopted by other legal systems. For example, according to article 71, paragraph 7 of the law of arbitration of Vietnam "provision within the framework of procedure of annulment of the award", "The council of judges may, at the request of a party and if the council considers it appropriate, adjourn a petition to set aside an arbitral award for a period not to exceed sixty (60) days in order to facilitate the arbitration tribunal in rectifying what in the opinion of the arbitration tribunal were errors in the arbitration proceedings, thereby removing the grounds for setting aside the arbitral award. The arbitration tribunal must notify the court when it has rectified errors in the arbitration proceedings. If the arbitration tribunal does not rectify errors in the proceedings, then the council of judges shall

continue to hear the petition to set aside the award".

The Belgian reform of 2013 also adopted this direction; therefore, it allows the referral of the award arbitral to arbitral tribunal²².

The referral of the arbitral award on the request of a party constitutes a major obstacle to the life-saving mechanism of the imperfect award. indeed, in many cases, the annulment judges were unable to re-send the arbitral award to the arbitrator because no party had requested it, even though the arbitrator's error could easily be repaired. Such a solution is questionable because the repair of the defect to avoid the annulment of the award depends on the will of the parties.

Saving the award from annulment is not only important for the parties. In fact, when the award is annulled, the interest of the arbitrators is also important, because they their liability possibly incurred²³.

The imperfect award should be saved whenever possible and its annulment should be considered as the ultimate solution. consequently, the sole will of the parties is not like a condition of the referral of the arbitral award.

Netherlands reformed its arbitration law in 2015 with an important innovation by adding the possibility of annulment judges to automatically refer the arbitral award to the arbitrators to eliminate the reasons of annulment.

Also, according to article 1065-a, paragraph 1 of the Dutch code of civil procedure, "the court of appeal may, at the request of a party or of its own motion, suspend the setting aside proceedings for a period of time to be determined by the court of appeal to put the

arbitral tribunal in a position to reverse the ground for setting aside by reopening the arbitral proceedings or by taking other measures as the arbitral tribunal considers appropriate. No appeal is open against a decision of the court appeal"²⁴.

The Dutch solution is better than that adopted in the model law, because the initiative for the referral of award may be by the parties, or by the judges of the annulment.

Civil law countries adopt referral of arbitral award provided by English law, because the English arbitration law of 1996 goes further by providing in its article 68, paragraph 3 that if the arbitral award has a serious irregularity affecting the tribunal, the procedure or the award, the court may return the award to the tribunal, in part or in whole, for reconsideration. Here, litigant can request to return the arbitral award to arbitral tribunal.

6-The scope of the referral of the award

In reality, there are irregularities which the arbitrator cannot repair and, in these cases, the referral of the award becomes unnecessary. There is no reason or benefit to refer the award to the arbitrators while arbitration agreement is not valid, the dispute is not arbitrable, Or the arbitral tribunal issued its award on a matter not included in the arbitration agreement. in these cases, the defects are irreparable, and the return of award should not be applied²⁵.

However, there are often reparable defects such as cases of "violation of public order", "a party was not present in the case", and the judge dose not annul the award for lack of reasoning, but he could send the award to the arbitral tribunal to complete reasons this award.

Vietnamese law still distinguishes between procedural defects and other defects. According

article 71, paragraph 7, the referral of the award applies just to procedural defects.

According to section 68(3) of the English Arbitration Act 1996,"(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may -
(a) remit the award to the tribunal, in whole or in part, for reconsideration,
(b) set the award aside in whole or in part, or
(c) declare the award to be of no effect, in whole or in part. The court shall not exercise, its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration".

In order to develop the referral, it is also possible to follow the Dutch solution which does not list the cases of application: there is no limit to the cases in which the referral of the award can apply²⁶.

The referral of the award to the arbitrator is not an obligation of the annulment judge, but is an option. The model law uses the expression "the court may, if necessary" (article 34, al. 4), therefore it leaves this choice to the "discretion" of the annulment judge. The same is true for English law, Belgian law, Dutch law and Vietnamese law where the state judge has the possibility, and not the obligation, to suspend the legal proceedings.

When does the annulment judge exercise this option? on this question, article 68, paragraph 3 of English law decides "(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may (a) remit the award to the tribunal, in whole or in part, for reconsideration,". Article 68, paragraph 4 adds "The leave of the court is required for any appeal from a decision of the court under this section"²⁷.

English law recognizes a faculty for annulment judges but it is a faculty oriented to save the award from annulment. Here, English law leaves the choice to the judge between annulment and referral to the arbitrator: the latter solution appears to be preferred.

The annulment judges return the award to the arbitral tribunal and do not give them the solution. The arbitrators have a great freedom of work, so they can eliminate the causes of annulment. Also, the model law gives the arbitral tribunal the possibility of resuming the arbitral proceedings or taking any other measure to eliminate the reasons of annulment" art. 34, par.4²⁸.

The model law does not specify the time of revision of arbitral award, and leaves it to the annulment judge to determine it. Thus, according to article 34, paragraph 4 of the model law, the annulment judge may "suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings".

Such a solution is taken up in various systems such as the Dutch code of procedure "article 1065-a" and the Belgian judicial code. In practice, the period is not exceeding 60 days is to allow the arbitrators to remedy the defects.

Conclusion:

The referring the award to the arbitrator to avoid annulment is a useful mechanism. Saving the award from annulment is not only important for the parties. In fact, when the award is annulled, the interest of the arbitrators is also important, because they their liability possibly incurred

The referral of the arbitral award on the request of a party constitutes a major obstacle to the

life-saving mechanism of the imperfect award. indeed, in many cases, the annulment judges were unable to re-send the arbitral award to the arbitrator because no party had requested it, even though the arbitrator's error could easily be repaired.

In reality, there are irregularities which the arbitrator cannot repair and, in these cases, the referral of the award becomes unnecessary. There is no reason or benefit to refer the award to the arbitrators while arbitration agreement is not valid, the dispute is not arbitrable.

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