



*Update, Thoughts and Perspectives
on Iran's International Arbitration Regime,
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Hamid G. Gharavi
Salans
9, rue Boissy d'Anglas
75008 Paris
France
Tel: 33.1.42.68.48.00
Fax: 33.1.42.68.15.45/46/47
E-mail: hgharavi@salans.com

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Update, Thoughts and Perspectives on Iran's International Arbitration Regime

Hamid G. GHARAVI*

The Government of the Islamic Republic of Iran («Iran») acceded to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Award (the «New York Convention») on October 15, 2001¹ with the commercial and reciprocity reservations², and subject to Article 139 of the Constitution of Iran the Iranian Government had cautiously received prior authorization from competent Iranian legislative authorities for so doing. Indeed, the Iranian Government had previously submitted Bill No. 21378/40077 dated December 4, 2000 requesting authorization to accede to the New York Convention. This Bill was approved by the Islamic Consultative Assembly (the Iranian parliament) on April 10, 2001 and ratified by the Guardians Council³ on April 18, 2001.⁴ All the legal formalities for the enforceability of the New York Convention in Iran have thus been fulfilled.

Iran's accession to the New York Convention, four decades after the elaboration thereof, silences foreign observers who often accuse Iranians of lacking patience.

In all fairness, however, Iran had more important issues on its agenda during the last several decades than the New York Convention. A bill concerning Iran's accession to the Convention was initially introduced before the Iranian Parliament just prior to the 1979 revolution. The project, however, fell apart naturally in the wake of the revolutionary events, the exile of the financial and intellectual elite, the shutdown of foreign companies, and the eight-year war against Iraq.

The scenario has today changed. The Iranian regime has stabilized, and has taken a new direction. Whatever their political tendencies, all those who have traveled to Iran during recent years are unanimous about the positive changes that have occurred. The

* Hamid Gharavi is a member of the Paris and of the New York bar, practicing international litigation and arbitration in the Paris office of Salans Hertzfeld & Heilbronn. He holds a Ph. D from the University of Paris II Panthéon-Assas and graduate legal degrees from New York University School of Law (Hauser Scholar) and the University of Paris I Panthéon-Sorbonne.

¹ The New York Convention will enter into force on January 13, 2002

² See Article 1(3) of the New York Convention, which provides: «When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships whether contractual or not, which are considered as commercial under the national law of the State making such declaration.»

³ The Guardians Council was constituted in accordance with Article 91 of the Constitution of Iran with a view toward safeguarding the Islamic ordinances and the Constitution and examining the compatibility of legislation passed by the Islamic Consultative Assembly with Islam.

⁴ See Official Gazette of the Islamic Republic of Iran of May 19, 2001, p5, issue No.16374

revolutionary fever is progressively receding and making way, with moderate success, for concern over civil liberties, the return of the exiled, economic growth, development of the tourism industry, encouragement of foreign investment, and the improvement of relations with all foreign countries. This, combined with the recent reshuffling of international alliances in the region, the independence of former Central Asian Soviet Republics, and the natural resources found in Central Asia and in the Caspian Sea, has facilitated Iran's return to the international scene and improves possibilities of economic and political regional leadership.

Iran was thus right to restore international arbitration, which is deeply rooted in the Iranian culture and legal system,⁵ back to its agenda. In so doing, it not only encourages foreign investment in Iran and international trade with Iranian companies but also facilitates Iran's possible progressive emergence as a significant regional arbitration forum.

1997 Iranian Law on International Commercial Arbitration

The first step in this connection was Iran's adoption in 1997 of legislation on international arbitration entitled «Law on International Commercial Arbitration» (LICA).⁶ The LICA applies to international arbitrations, narrowly defined as existing when «one party is not, at the time of the conclusion of the arbitration agreement, an Iranian national under Iranian law.»⁷ Domestic arbitrations, which include arbitrations between an Iranian national or company and a foreign-owned company registered in Iran,⁸ remain governed by the arbitration provisions of the Iranian Code of Civil Procedure of September 17, 1939, minor amendments to which were made in 1983.⁹

The LICA is to a large extent based on the UNCITRAL Model Law. The LICA recognizes the validity of both (i) the arbitration clause and the submission agreement and ad hoc and institutional arbitration, and (ii) incorporates internationally accepted arbitration principles contained in the Model Law such as the (i) autonomy of the parties to organize the arbitral proceedings and select the rules governing the substance of the

⁵ On the history of arbitration in Iran, see, e.g., D. Suratgar, "Arbitration in the Iranian Legal System," 1965 *Arbitration Journal*, p. 144.

⁶ The LICA was approved by the Islamic Consultative Assembly on September 17 1997, and ratified by the Guardians Council on October 1, 1997. It entered into force on November 5, 1997, i.e., 15 days after its publication in the Iranian official Gazette. For commentaries on the LICA, see, e.g.; S. Entezari, "Iranian Arbitration Proceedings," 1997, 14 *J. Int. Arb.* 4, p. 53; S. Entezari, "Iran Adopts International Commercial Arbitration Law," 1998 13 *Int. Arb. Rep.* 15; J. Seiti, "The New International Commercial Arbitration Act of Iran - Towards Harmony with the UNCITRAL Model Law," 15 *J. Int. Arb.*, 1998, p. 5; M. Jafarian and M. Rezaeian, "The New Law on International Commercial Arbitration in Iran," 15 *J. Int. Arb.*, 1998, p. 31; H.G. Gharavi, «The 1997 International Commercial Arbitration Law: The UNCITRAL Model Law à L'iranienne,» 1999, *Arb. Int.*, Vol. 15, No. 1, p. 85; H. Gharavi, "Le nouveau droit iranien de l'arbitrage commercial international," 1999 *Rev. Arb.*, p. 35.

⁷ Article 1(b).

⁸ Under Iranian law a foreign-owned company in Iran is considered as an Iranian company, and thus as an "Iranian national."

⁹ At the time, the arbitration provisions of the Iranian Code of Civil Procedure were some of the most advanced worldwide. The provisions include adequate enforcement and annulment grounds and principles such as the separability of the arbitration clause and the impossibility to appeal the award on the merits of the case. The Iranian Code even addresses the problem of truncated tribunals, which remains unsettled in most modern international arbitration statutes.

dispute; (ii) separability of the arbitration clause; (iii) competence of the arbitral tribunal to rule on its jurisdiction; (iv) power of the arbitral tribunal to order interim measures; (v) assistance of local courts in the arbitral process (e.g. for the constitution of the arbitral tribunal); (vi) equal treatment of the parties; and (vii) exclusivity of the setting aside recourse against the award.

The LICA goes even a step further than the Model Law by providing modern and comprehensive provisions on multiparty arbitrations¹⁰ and joinder of third parties."

The LICA, however, contains a number of shortcomings, the most important one being its inapplicability to arbitrations held outside Iran or to foreign arbitral awards. Awards rendered outside Iran therefore had to be enforced in Iran as foreign judgments under the burdensome and extensive control imposed by Article 169 of the Civil Judgments Act of 1977.¹²

Iran's Accession to the New York Convention

This major shortcoming of the LICA was underlined, and a call made for Iran's accession to the New York Convention.¹³ In order to block any possible objections, assurances were made that Iran will not incur any risk, as the New York Convention does not provide for the automatic enforcement of foreign arbitral awards. In fact, the New York Convention's often vague and ambiguous grounds may make its proper application solely contingent on the goodwill of the enforcing authorities, which perhaps explains in part why over hundred countries have ratified the Convention.

Iran had therefore everything to gain and nothing to lose by acceding to the New York Convention. Awards rendered outside Iran are now enforceable in Iran pursuant to the Convention. Similarly, awards rendered in Iran are now enforceable in all New York Convention countries that have ratified the Convention with the reciprocity reservation.

Iran, however, should now move a step further, and adopt measures to ensure a proper application of the LICA and the New York Convention. Adopting a law is one thing, but applying it correctly is another. One needs only to turn to the misadventures of the New York Convention in some countries to appreciate this reality. South Africa seems to hold the record in this field by requiring, notwithstanding its adhesion to the New York Convention, the permission of its Minister of Economic Affairs for granting enforcement of foreign awards relating to «the production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature, whether within, outside, into or from the Republic, by, on behalf of or of producers of such matter or material.»¹⁴ One could also cite the April 10, 1987 Chinese Supreme People's Court Notice on the Implementation of China's Accession to the New York Convention, which construes the commercial reservation under the Convention as excluding awards relating to disputes between foreign investors and

¹⁰ Article 11(6).

¹² See J. Abdoh, «Iran», in (1979) 4 YB Comm. Arb., p. 102.

¹³ H. Gharavi, "The 1997 International Commercial Arbitration Law: The UNCITRAL Model Law à L'iranienne," 1999, Arb. Int., Vol. 15, No. 1, p. 95.

¹⁴ See the 1978 Protection of Business Act, South Africa, Kluwer, Intl. Handbook on Comm. Arb., Suppl. May 1994, Annex: III-1.

governments of host States.¹⁵

At some point, Iran will inevitably face the problem of proper application of the LICA and the New York Convention, not necessarily because of its possible unwillingness to apply these norms according to the international practice but due to the fact that most judges in Iran today are, to say the very least, unfamiliar with international arbitration, let alone its proper interaction with the judiciary. Moreover, Iranian courts are overwhelmed with their caseloads and improperly staffed. As is the case in many other countries, a present-day litigant in Iran might, if deprived of support, have to wait more than a decade to obtain a judgment, sometimes questionable, from an Iranian court. Iran could thus perhaps heed the call previously made for the creation of a court composed exclusively of judges specialized in international arbitration to hear international arbitration matters in order to reduce the possibility of erroneous and inconsistent decisions often reached in complex arbitration cases by national courts, including those of industrialized nations. There is today a handful of Iranian legal experts that would easily qualify (given their vast experience in international arbitrations involving Iranian interests during the last two decades) and be honored, if offered an appropriate compensation, to sit on such a court. It is not through the creation of additional arbitration centers -- which seems to be the trend today in Iran -but through the timely and proper application of existing norms that Iran will further reassure foreign investors.

As for the commerciality and reciprocity reservations made by Iran pursuant to Article 1(3) of the New York Convention, foreign investors should have no fear. The term "commercial" is broadly defined to include "the sale and purchase of goods and services, transportation, insurance, financial matters, consulting services, investment, technical cooperation, representation, agency, contractual and similar activities."¹⁶ As for the reciprocity reservation, it has been rendered more or less ineffective by the large number of ratifications to the New York Convention.

Capacity of the Iranian State to Enter into Arbitration Agreements

More troubling, however, for investors is the Islamic Consultative Assembly's express reservation made to Article 139 of the Iranian Constitution, which states:

The settlement of claims relating to public and state property or the referral thereof to arbitration is in every case dependent on the approval of the Council of Ministers, and the Assembly must be informed of these matters. In cases where one party to the dispute is a foreigner, as well as in important cases that are purely domestic, the approval of the Assembly must also be obtained. Law will specify the important cases intended here.

Investors wishing to settle disputes arising out of contracts entered into with the Iranian State by arbitration must therefore obtain the Iranian Parliament's approval. Yet such

¹⁵ See Wang Shen Shang, «Enforcement of Foreign Arbitral Awards in the People's Republic of China,» in *Improving the Efficiency of Arbitration Agreements: 40 years of Application of the New York Convention*, Kluwer Law International, 1999, p. 469.

¹⁶ The LICA, Article 2(1).

approval has often been sought and obtained in the past. Further, this is not a peculiarity of the Iranian system but a policy followed, under various forms, by a number of other countries.¹⁷

Another possible avenue for foreign investors would be to qualify as an «investor» under one of the bilateral investment treaties entered into by Iran providing for the settlement of investment disputes between a contracting party and an investor of the other contracting party by arbitration. Indeed, Iran has recently entered into a number of these treaties with, *inter-alia*, Armenia, Belarus, Kazakstan, Kyrgystan, Switzerland, Pakistan, and Poland. It has done so despite the often dangerously broad and ambiguous provisions of bilateral investment treaties, which have allowed some investors to initiate questionable arbitrations in the last few years in connection with disputes or in situations that were undoubtedly outside the intention of the contracting states.¹⁸

A final possibility, albeit risky, would be for investors to enter into an arbitration agreement with the Iranian State notwithstanding the Iranian constitutional requirement. This option might be considered in situations in which Iranian courts are unlikely to interfere in the arbitral process, such as when the venue of arbitration is outside Iran and enforcement of the resulting award is unlikely to be sought in Iran. A number of international arbitration tribunals and national courts have held that a State cannot rely on its internal law (including on Article 139 of the Constitution of Iran) to invalidate an arbitration agreement into which it has entered.¹⁹ Article 177 of the 1987 Swiss Private International Law Statute has adopted a similar approach. This jurisprudence, however, does not seem to be unanimously followed and may not apply in all situations.²⁰

The Need for Further Reform

The time has come perhaps for Iran to consider further measures, previously identified,²¹ in order to enhance its international arbitration regime, including (i) the creation of a court composed of judges specialized in international arbitration to hear international arbitration matters; (ii) accession to the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed by 149

¹⁷ See, e.g., Article 2060 of the French Civil Code, which provides: «*On ne peut compromettre sur les questions d'état et de capacité des personnes sur celles relatives au divorce et à la séparation de corps ou sur les contestations intéressant les collectivités publiques et les établissements publics et plus généralement dans toutes les matières qui intéressent l'ordre public;*» and Article 9 of the French Law of August 19, 1986, which provides : «*Par dérogation à l'article 2060 du Code Civil, l'Etat, les collectivités territoriales et les établissements publics sont autorisés, dans les contrats qu'ils concluent conjointement avec des sociétés étrangères pour la réalisation d'opérations d'intérêt national, à souscrire des clauses compromissoires en vue du règlement, le cas échéant définitif de litiges liés à l'application et l'interprétation de ces contrats.*»

¹⁸ One should invite States to closely scrutinize recent published and unpublished awards on jurisdiction, notably those of ICSID arbitral tribunals, under bilateral investment treaties.

¹⁹ See, e.g., ICC case No. 3481 of 1986, 1986-1990 *Collection of ICC Awards*, p. 263; *Fouchard. Gaillard and Goldman on International Commercial Arbitration* (Kluwer Law International, Edited by J. Savage, 1999), No. 534 et seq.

²⁰ One of the purposes, for example, behind legislation such as Article 139 of the Constitution of Iran, is obviously to protect the country from foreign corruption of government officials, and it would be regrettable if such jurisprudence could defeat this legitimate purpose and apply even in the event of proven or likelihood of corruption.

²¹ H. Gharavi, "The 1997 International Commercial Arbitration Law: The UNCITRAL Model Law à L'iranienne," 1999, *Arb. Int.*, Vol. 15, No. I, p. 96; H. Gharavi, "Le nouveau droit iranien de l'arbitrage commercial international," 1999 *Rev. Arb.*, p. 43.

states; (iii) reduction of the grounds for setting aside arbitral awards under the LICA; (iv) broadening of definition of international arbitration under the LICA; and (v) identification of the mandatory provisions of the LICA.

But more important than law for foreign investors is the growing positive and constructive spirit present in Iran today. Iranians are determined to move forward in the right direction. What remains to be accomplished is the lifting of the U.S. embargoes and the progressive reestablishment of diplomatic ties and contacts between the two countries. All of this, of course, may already be in the pipeline if one looks at ongoing courtship between the two countries, the lobbying by major U.S. companies for the lifting of sanctions, the removal of «Down with the U.S.» banners in Teheran, and the reshuffling of international alliances in the region.