When is an arbitral award final?

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Francesca Richmond (Baker & McKenzie)

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(AND WHY A RECENT ENGLISH HIGH COURT DECISION REMINDS US THAT A FINAL, BINDING AND CONCLUSIVE AWARD IS NOT NECESSARILY IMMUNE FROM CHALLENGE)

Finality is a fundamental characteristic of arbitration and a key factor that attracts many parties to choose arbitration when providing for a contractual dispute resolution mechanism. This is because the ability to enforce an arbitral award before a national court, and minimise the risk of a challenge or appeal of that arbitral award before national courts, is valuable to any claimant – both in terms of cost and time.
However, the question of the ability of national courts to adopt primary or secondary jurisdiction following an arbitral award being made either on enforcement or via direct appeal has arisen in a number of cases this year – reminding arbitrators of the need for clear and tailored drafting of arbitration agreements, and particularly if seeking to exclude any right to appeal that parties might have under applicable national law.

Most recently, the English High Court affirmed its strict approach to attempts to exclude or waive statutory rights under the applicable law of the arbitration in Shell Egypt West Manzala GmbH and Shell Egypt West Qantara GmbH v Dana Gas Egypt Limited (formerly Centurion Petroleum Corporation) [2009] EWHC 2097 (Comm). The parties had agreed to UNCITRAL arbitration, under a clause that provided that any decision of the arbitrators shall be final, conclusive and binding on the parties. On the arbitral tribunal determining in favour of Dana Gas, Shell sought to appeal the arbitral award before the English courts relying on section 69(1) of the English Arbitration Act 1996 (the Arbitration Act), which provides that

"Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings."

Dana Gas challenged the English court's jurisdiction to hear such an appeal on the basis that the parties had agreed that the arbitral award would be final, conclusive and binding, thereby waiving any right under English law to challenge the award.

The English High Court had already established in Essex County Council v Premier Recycling Ltd [2006] EWHC 3594 that the words "final and binding" in an arbitration clause were insufficient by themselves to amount to an exclusion of the right of appeal under the Arbitration Act (being taken to refer to the status of the arbitral award rather than the parties' right to appeal). Dana Gas argued that the addition of the word "conclusive" to the drafting could only sensibly be construed as restricting all rights of appeal or review so far as the parties were contractually able to do so. The English High

Court disagreed, finding that sufficiently clear wording is necessary in order to exclude statutory rights under national law. Whilst it accepted that no express reference to the right of appeal provided under the Arbitration Act is required in order to create an exclusion, the English High Court found that the words “final, conclusive and binding” are apt to describe the effect of a valid arbitral award on the parties and should not necessarily be construed as an agreement to exclude rights of appeal.

Shell v Dana Gas is instructive for those drafting arbitration agreements or clauses, particularly where the parties truly wish to dislocate themselves from oversight by national courts. Another case in this vein has recently been reported elsewhere (although the author has not yet had sight of the underlying judgments in the matter). It has been said in respect of an ICC arbitration between US firm Dyncorp and Qatari firm International Industrial Trading and Investment Company (”IITIC”) that Dyncorp is resisting US enforcement on the basis that, following an attempt by IITIC to enforce in Qatar, the Qatari courts effectively set aside the award (as opposed to simply refusing to enforce). Interestingly, IITIC apparently argues that the Qatari court was not entitled to review the merits of the award and, even if the Qatari court asserted such jurisdiction, Article 28 of the ICC Rules (which provides that awards are binding) amounts to a waiver of any right of recourse. IITC also relies on the New York Convention 1958, which provides that an award can only be set aside in the national courts where the award was made (in this case, France). It will be interesting to see how the US courts approach this matter – and whether they agree that the Qatari decision can be deemed as setting aside the arbitral award (which seems unlikely). Further, although the US courts may not have to consider the question depending on their findings on the other points raised, the view that they adopt on whether Article 28 of the ICC Rules can be interpreted as excluding any right of recourse will be particularly interesting in light of the strict position on construction of arbitration agreements taken by the English courts to date.

Ultimately, whilst the outcome in *Shell v Dana Gas* may seem to overly constrain the autonomy of the arbitration process, the approach taken by the English court does serve to ensure that procedural safeguards are in place to protect those participating in arbitration. Provided that such safeguards are appropriately limited, they may in fact operate so as to raise confidence in arbitration – particularly for those who are not experienced in participating in arbitration as a method of dispute resolution. Those who are more experienced or who are particularly motivated to ensure finality and certainty of an arbitral award would be well advised to carefully consider the drafting of their arbitration clause or agreement and not rely on provisions on the finality of an arbitral award (whether drawn from an institutional clause or otherwise) to be interpreted as a waiver of any right to appeal or other form or recourse.