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A v R: Enforcement at any Cost(s)?

Aloke Ray (White & Case LLP) · Wednesday, November 11th, 2009 · White & Case

Earlier this year, the Hong Kong Court of First Instance ruled that, in future, when it hears unsuccessful attempts to resist enforcement of arbitral awards under the New York Convention, it will "normally consider" awarding costs on an indemnity basis (i.e., in full, regardless whether they were reasonably incurred). This was a bold pro-enforcement statement by the Court, explicitly designed to remove any incentive for losing parties to "have a go" at avoiding enforcement. This posting considers whether the ruling goes too far in discouraging challenges to enforcement.

In A v R, the applicant obtained an award for US$3 million plus interest and costs in arbitral proceedings in Denmark. It sought to enforce the award against the respondent, a Hong Kong company. The respondent's argument was that the award involved payment under contractual penalty clauses, invalid under both Danish and Hong Kong law, and that it would be contrary to Hong Kong public policy for the award to be enforced.

The Court rejected the argument. Referring both to English and Hong Kong authorities, it reaffirmed the pro-enforcement rationale underlying the New York Convention, and the wider importance of keeping the public policy exception within narrow limits.

So far, so familiar — courts in developed arbitration centres have good track records in rejecting unwarranted attempts to prevent enforcement of foreign arbitral awards.

The Hong Kong Court, however, went further than many of its pro-arbitration counterparts. While the traditional approach has been for the loser to pay approximately two thirds of the winner's costs, the Court decided that the respondent should pay the applicant's costs on an indemnity basis, essentially to punish the respondent for asserting a spurious challenge.

The Court could have stopped there and confined its ruling to the facts at issue, but continued in general terms that:

"Where a party unsuccessfully makes an application [to set aside a New York Convention award], he should in principle expect to have to pay costs on a higher basis. This is because a party seeking to enforce an award should not have had to contend with such type of challenge."

It added:

"If the losing party is only made to pay costs on a conventional party-and-party basis, the winning party would in effect be subsidizing the losing party's abortive attempt to frustrate enforcement of

a valid award… Such a state of affairs would only encourage the bringing of unmeritorious challenges to an award. It would turn what should be an exceptional and high-risk strategy into something which was potentially 'worth a go'."

The Court then signaled its future intent:

"Accordingly, in the absence of special circumstances, when an award is unsuccessfully challenged, the Court will henceforth normally consider awarding costs against a losing party on an indemnity basis."

In other words, A v R turns on its head the long-standing principle in Hong Kong that indemnity costs are restricted to cases with "special or unusual features", and seeks instead to make such costs orders the norm for enforcement challenges.

It is suggested that the ruling may go too far, and should not be followed elsewhere without careful consideration of its implications. (Note for example that in England, by contrast, the Court of Appeal has emphatically rejected the opportunity to give guidance as to when indemnity costs should be ordered (see Excelsior Commercial and Industrial Holdings Ltd v Salisbury Ham Johnson [2002] EWCA Civ 879).)

Indemnity costs orders are generally made to censure unusual conduct of which a court disapproves, which can include bringing or defending hopeless or near-hopeless cases. That was the position before A v R and it remains so afterwards for all non-enforcement scenarios. A v R was cited in Lau Pik Ngai Ada v To Chun Fung Albert, a District Court judgment given in August 2009. Although, in theory, the A v R ruling was binding on the District Court, A v R was distinguished, with the District Court confining its effect to the enforcement of foreign arbitral awards.

Hopeless challenges to enforcement, designed only to delay or frustrate valid awards, should be, of course, firmly discouraged, and, in appropriate circumstances, should be subject to indemnity costs orders. However, the imposition of a general rule on all enforcement challenges in response to specious arguments advanced in a particular case appears an unnecessarily robust response, and is likely to be counter-productive. There is surely no reason to treat credible enforcement challenges differently from other credible claims.

The obvious counter in support of A v R is that, by referring disputes to arbitration, parties have an expectation that they will be finally settled by a binding arbitration award, and that any costs measures, heavy-handed or otherwise, that make challenges less likely are to be welcomed, not criticized.

The weakness in the argument is that it assumes that any and all challenges to finality are, in and of themselves, anti-arbitration. Regrettably, the reverse, in some cases, is true; the exceptions to enforcement permitted by the New York Convention are serious and substantial, and, importantly, exist for a reason.

Arbitration remains an essentially private method of dispute resolution. Although the vast majority of arbitral tribunals comprise experienced, highly-qualified professionals, many national laws impose no eligibility requirements on arbitrators. The risk remains that something can go horribly wrong.

All arbitration practitioners have horror stories about the problems of enforcing awards in particular jurisdictions. But the injustice of a tainted award, enforced without proper consideration of the New York Convention exceptions, is equally compelling. Enforcing courts must remain mindful of their duty to hear challenges to the bare minimum standards of the award. This new rule from the Hong Kong Courts appears to go unnecessarily far — effectively discouraging reasonable challenges to enforcement — and risks throwing the baby out with the bathwater.

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