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Refusing the enforcement of awards – where discretion ‘may’ be exercised

Phillip Capper (White & Case LLP) · Thursday, July 23rd, 2009 · White & Case

Given the fundamental nature of the exceptions to the recognition and enforcement under the New York Convention (the “Convention”) it should not be forgotten that their application is in fact discretionary: Article V.1 of the Convention states that “Recognition and enforcement of the award may be refused at the request of the party against whom it is invoked...”

In some jurisdictions the “may” has been interpreted as “shall” (e.g. Germany); however, in most jurisdictions, including England, the discretionary language is retained.

The exercise of this discretion was revisited by the English Court of Appeal in *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755 where the Court upheld a first instance decision to refuse enforcement under the English Arbitration Act 1996 (the “Act”) of an ICC award against Pakistan on the basis that the arbitration agreement was ‘not valid’ for the purposes of Section 103(2)(b) of the Act, the provision analogous to Article V.1(a) of the Convention.

Dallah had submitted *inter alia* that even if Pakistan were to establish that the arbitration agreement was not valid, the Court should still exercise its discretion to allow enforcement of the award. While the Court rejected this ground of appeal, the judges adopted differing approaches to construing the discretionary language in the Act.

Moore-Bick LJ accepted the existence of a very restrictive notion of discretion, expressing his agreement with comments made in previous cases, including the fact that the grounds for refusing enforcement under the Act are concerned with the ‘fundamental structural integrity of the arbitration proceedings’ and therefore the court is unlikely to allow enforcement of an award if it is satisfied that its integrity is fundamentally unsound.

Rix LJ on the other hand regarded the discretionary language of the Act as expressing a limitation on the court’s power to refuse enforcement rather than granting a discretion to enforce despite the existence of a proven defence. For instance, a defence under the Act may no longer be available “because of an estoppel, or that a minor and prejudicially irrelevant error, albeit within the Convention or statutory language, might not succeed as a defence”.

The approaches taken by both judges leave open the possibility for ‘shades of discretion’ depending on which defence is invoked. Given the fundamental nature of consent in arbitration, it

would appear unlikely that enforcement may be allowed notwithstanding the invalidity of the arbitration agreement. However the application of some of the other defences, for instance the defence that the conduct of the arbitration not in accordance with the agreement of the parties, may be more vulnerable where one of the parties only suffered minor prejudice.

Moore-Bick LJ's judgment also dismissed Dallah's argument that there is a material distinction between the supervisory court and the enforcement court in that "the supervisory court is intended to have primacy in the sense that enforcing courts are expected, much less required, to treat the award as valid and binding unless and until successfully challenged in the supervisory court."

This led the judge to reject the proposition that where a party has unsuccessfully contested the issue of jurisdiction before the arbitral tribunal and has not sought to challenge its decision before the supervisory court, that should mean enforcement follows. Rather, a person against whom an award is made may choose only to challenge its enforcement, and is not obliged first to challenge the award before the supervisory court.

Finally, it also allowed the judge to come to the conclusion that where the enforcement of a Convention award is opposed in England under Section 103(2), the court is required to consider all relevant factual evidence relied on by the party opposing enforcement. To the extent that such evidence has already been considered by the arbitral tribunal during the arbitration, the court's task will be to conduct a rehearing, rather than a review.

By Phillip Capper, Morris Schonberg, Clare Connellan

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