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Enforcement of International Arbitral Awards in England and the New York Convention

Gary B. Born (Wilmer Cutler Pickering Hale and Dorr LLP) · Friday, August 21st, 2009 · WilmerHale

The English Court of Appeal recently upheld a first instance decision to refuse enforcement of a US$20m New York Convention award in *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755, on the basis that the arbitration agreement was 'not valid' for the purposes of section 103(2)(b) of the English Arbitration Act 1996 ("the Act"), which reflects Article V.1(a) of the New York Convention.

The decision raises issues as to the English courts' discretion to refuse recognition of a New York Convention arbitral award, and this has been previously discussed on this blog on 23 July 2009 by Phillip Capper, Morris Schonberg and Clare Connellan. This blog considers the scope of enquiry to be undertaken by an English court determining the enforceability of a Convention award under section 103(2)(b) of the Act, and how the approach of the English Court of Appeal raises wider issues for England as a pro-enforcement jurisdiction.

Background

A Saudi Arabian company, Dallah, and a trust approved by the Pakistani cabinet and established by the Pakistani Ministry of Religious Affairs, "Awami Hajj Trust" ("the Trust"), entered into an agreement to accept deposits from Hajj pilgrims and invest them in Sharia-compliant schemes to help meet the costs of the pilgrimage. The agreement was signed in September 2006. This was shortly before an Ordinance of the Pakistani President lapsed in December of that year, meaning the Trust ceased to exist as a legal entity in early December 2006. A dispute arose under the agreement, with the Trust (notwithstanding it had ceased to exist) issuing civil proceedings in Pakistan. 16 months later Dallah initiated an ICC claim against the Government. The Government refused to participate in the arbitration proceedings or sign the Terms of Reference on the basis that it was not a party to a valid arbitration agreement.

Tribunal's decision as to its jurisdiction

The ICC tribunal was composed of eminent and experienced international lawyers and arbitrators: former English Law Lord Lord Mustill, former Chief Justice of Pakistan Mr. Justice Dr. Nassim Shah and prominent Lebanese international lawyer Dr. Ghaleb Mahmassani.[1]

The tribunal's First Partial Award dealt solely with the issue of jurisdiction, with the tribunal unanimously finding that the Ministry of Religious Affairs, Government of Pakistan, was bound by the arbitration

agreement (although in some aspects applying different reasoning). In its Final Award the tribunal went on to award Dallah over US$18m in damages for breach of contract.

English Courts' Application of the Arbitration Act 1996

Dallah sought to enforce the award in England, which the Government of Pakistan opposed. The main argument before the High Court concerned section 103(2)(b) of the Act, which provides that recognition or enforcement of a Convention award may be refused if the person against whom it is invoked proves that "…*the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made*."

Before it could consider the substance of section 103(2)(b), the High Court was required to determine a question that has important ramifications for the attractiveness of England as a jurisdiction favoured by parties seeking to enforce international arbitral awards. This question was the scope of an English court's enquiry when a party challenges the recognition and enforcement of a Convention award under section 103(2)(b). Was it in the nature of a full hearing of all the relevant evidence, or is it more in the nature of a review of the decision of the arbitrators on the issue of jurisdiction?

Aikens reasoned that the language of section 103(2) of the Act "reflects faithfully that of the [New York] Convention." He then rejected argument that international comity and the general "pro – enforcement" approach of both the New York Convention and Part III of the Act favoured deference to an international arbitral tribunal's decision on its own jurisdiction and that section 103(2)(b) should permit only limited review by a court of a tribunal's findings. Without reviewing the Convention any further, and without reference to authority, in four paragraphs Justice Aikens justified a reopening of the tribunal's award on the basis of the statutory construction of section 103(2)(b). This was despite the Government's French law expert accepting in the High Court that, in general, the arbitrators had generally applied the correct test as would be enunciated by a French court.

Feeling itself bound by section 103(2)(b) to reopen the tribunal's decision, the High Court reached the opposite conclusion to the tribunal – finding that the Government of Pakistan had proved pursuant to section 103(2)(b) of the Act that under French law the arbitration agreement was not valid as between it and Dallah. Accordingly, the High Court refused enforcement of the tribunal's award in England.

The Court of Appeal confirmed Aiken J's interpretation of section 103(2)(b) and agreed that it required a full rehearing as to the validity of the arbitration agreement, not just a review of an arbitral tribunal's decision. In reaching this conclusion, the Court of Appeal rejected the suggestion that section 103(2)(b) only permitted the court to conduct a rehearing in circumstances where an arbitral tribunal's decision was "clearly wrong."

Implications

To the international arbitration practitioner the issues raised in *Dallah* are of both practical and philosophical significance, particularly as regards the functions of the New York Convention.

On a practical level *Dallah* confirms that parties, when seeking to enforce international arbitral awards, should consider the deference national courts of the enforcement country show to an arbitral tribunal's determination of its own jurisdiction (this includes considering not only the potential enforcement jurisdiction's legislative equivalent of Article V(1)(a) of the New York Convention, but the manner in which that legislation is applied by the local courts). As *Dallah* shows, English courts apply section 103(2)(b) of the Act to conduct a full rehearing of the evidence when confronted with a challenge to the

validity of an arbitration agreement as a defence to enforcement proceedings.

This decision also invites discussion about the attitude and deference of the English courts to the jurisdiction of arbitral tribunals to determine questions of their own jurisdiction, and the sanctity of international arbitral awards themselves. That the English High Court and Court of Appeal were compelled to disturb a finding of an arbitral tribunal composed of respected, highly experienced international arbitrators applying French law – where it was recognized by the High Court and Court of Appeal that the tribunal had correctly applied the correct legal test under French law – raises concerns about the finality and enforceability of arbitral awards. *Dallah* again highlights a divergence between England's pro-arbitration attitude and the realities of practice before the English courts, with *Dallah* seemingly a reassurance to recalcitrant parties that they can challenge arbitral decisions before English courts.

On a more fundamental level the *Dallah* decision raises the question whether the New York Convention is fulfilling its objectives if national courts ruling on enforcement of Convention awards interpret Article V as permitting them to reopen and completely rehear challenges to a tribunal's finding on the validity of the arbitration agreement, and hence its own jurisdiction. In this regard, some authorities have proposed amendments to the New York Convention, among them an amendment to Article V that would permit enforcement to be refused in "manifest cases only." On a proper reading of the existing text of the Convention, read in light of its history and purposes, there is much to recommend the conclusion – not seriously pursued in *Dallah* – that Article V(1)(a) does not contemplate such de novo review of arbitrators' jurisdictional decisions.

Conclusion

The question of whether section 103(2)(b) of the Act permitted the High Court to pay the tribunal's decision greater deference warrants further consideration. At the least, however, *Dallah* highlights a possible divergence between the apparent pro-arbitration and pro-enforcement attitude of English law to arbitration, and the reality of practice before the English courts.

It is yet to be seen whether the Court of Appeal's decision will be appealed to the House of Lords. It is to be hoped, however, that there will be an appeal and that there will be an opportunity for the House to review and consider the important policy issues raised above, for the intervention of the English courts in this instance may be a harbinger of future disregard to the principles of judicial non-interference in arbitral proceedings and competence-competence.

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[1] The English High Court recognized that this was a "distinguished tribunal."

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