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The Impact of Dallah

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The recent Commercial Court decision of A v B [2010] EWHC 3302 (Comm) (16 December 2010) is notable for two reasons. Firstly, the Commercial Court provided clarification of the requirements for pursuing an application for security under section 70(7) of the Arbitration Act 1996. Secondly, the decision is an indication of how the Supreme Court judgment in Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46 is already influencing judicial attitudes towards the enforcement of arbitration awards in England and Wales.

Facts

A v B concerned an underlying dispute regarding the non-delivery of two parcels of Kazakh rapeseed. B alleged breach of contract due to A's failure to deliver the rapeseed and claimed damages for non-delivery. B commenced two arbitrations against A under the Federation of Oils, Seeds and Fats Associations ("FOSFA") Rules of Arbitration and Appeal. A challenged the substantive jurisdiction of the tribunal, but the Board of Appeal of FOSFA ultimately issued awards concluding that the arbitrators did have substantive jurisdiction, and that B's claims for damages succeeded.

A then issued an application under section 67 of the Arbitration Act 1996, challenging the arbitral awards on the grounds of lack of substantive jurisdiction. B made an application under section 70(7) for security of sums awarded to B by the Board of Appeal of FOSFA, pending the determination of A's application. B's section 70(7) application was dismissed by Flaux J at the end of a hearing on 10 December 2010, and he subsequently published a more lengthy judgment on 16 December 2010 explaining his reasons for the decision.

Section 70(7) Threshold Requirement

Flaux J acknowledged in A v B that the Commercial Court had taken conflicting approaches to section 70(7) in the past, particularly in the cases of Peterson Farms v C&M Farming Limited [2004] 1 Lloyd's Rep 614 and Tajik Aluminium Plant v Hydro Aluminium AS [2006] EWHC 1135 (Comm.).

In Peterson, Tomlinson J (as he then was) held that it would be a "threshold requirement" for a consideration by the court of whether to order security under section 70(7) in a section 67 case that the party resisting the jurisdictional challenge demonstrates that "the challenge is flimsy or

otherwise lacks substance." However in Tajik, Morrison J. held that "the statute contains an unfettered discretion. There is no threshold requirement." Flaux J confirmed in A v B that the approach in Peterson was the correct one, and concluded that:

"in most cases, there will be a threshold requirement that the party making the section 70(7) application demonstrates that the challenge to the jurisdiction is flimsy or otherwise lacks substance."

Flaux J's judgment has troubling implications regarding the finality and enforceability of arbitral awards under English law. In particular, A v B has curtailed the courts' discretion to exercise a powerful pro-enforcement weapon in their armory.

Influence of Dallah

In distinguishing the judgment in Tajik and approving the approach of Peterson, Flaux J was clearly influenced by the Dallah judgment, handed down by the Supreme Court only one month prior to A v B. Flaux J commented that the Tajik judgment was "largely influenced by [Morrison J's] dislike for the conclusion…that a challenge under section 67 is a complete rehearing and not a review", but went on to note that "the Supreme Court has recently determined conclusively that a challenge such as is made under section 67 is indeed a complete rehearing [rather than some limited review suitable for an appellate process]."

But why is the nature of a section 67 review linked to the requirements for a section 70(7) application? In the wake of Dallah, the English courts will not assume that the defendant to a section 67 challenge is in an advantageous position, simply because an arbitral tribunal (however eminent) has already determined it has jurisdiction and issued an award in the defendant's favour. In the words of Lord Mance, the party seeking to enforce the award "starts with the advantage of service, it does not also start fifteen or thirty love up." On this theory, ordering the section 67 applicant to pay into court the sums awarded under the arbitration would supposedly be akin to asking Roger Federer to hand over the Wimbledon trophy to Rafa Nadal before the match had started.

Dallah has met with cautious approval in the international arbitration community, and it is certainly a comprehensive judgment. But the decision accords scant deference to the arbitral process and the considered conclusions of arbitral tribunals. It is too early to conclude that – together with decisions like Peterson – Dallah will not have any detrimental impact on England's only recently-reclaimed reputation as a pro-enforcement jurisdiction. A v B demonstrates how Dallah can be interpreted to restrict the discretion of the courts to exercise pro-enforcement tools at their disposal (such as section 70(7)). It remains to be seen how Dallah will shape and influence judicial attitudes towards the enforcement of arbitral awards in the months and years to come.

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