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Cargill – Another Chapter in the Legacy of Dallah

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As we approach the first anniversary of the UK Supreme Court's landmark decision in the case of *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan,* it is only fitting that we would encounter a case which would cause us to revisit the issue of the proper standard of review for international arbitration awards and that such case would involve a non-English court looking to *Dallah* for instructive value. Earlier this month in the case of *The United Mexican States v Cargill Incorporated,* the Ontario Court of Appeal considered *Dallah* in determining whether to grant Mexico's application to set aside an ICSID arbitration award granting an American high fructose corn syrup (HFCS) producer $77 million in damages.

As you may recall, the *Dallah* court – which was comprised of international law heavyweights Lords Collins and Mance, among others – found that on the jurisdictional issue of whether a valid arbitration agreement exists, an enforcing court may review an award *de novo*. The wisdom of this judgment has been discussed and debated at length by the international arbitration community (including here on this blog). Regardless of what side of the debate you may fall, it is important to be aware of how domestic courts are drawing from and applying *Dallah* to international arbitration award enforcement/challenges in their own jurisdictions. The *Cargill* case is a useful example.

The events leading to the *Cargill* dispute first started in the early 1990s when Cargill Incorporated (Cargill), an American producer of HFCS, together with its Mexican subsidiary distributor, Cargill de Mexica SA de CV (CdM), began positioning its HFCS business to expand in the Mexican market. HFCS is a low cost sugar alternative that is used to sweeten various products, including soft drinks. Per capita, Mexico consumes the second greatest amount of soft drinks in the world. In advance of the NAFTA coming into force in January 1994 and keen to capitalise on Mexico's demand for soft drinks (and therefore HFCS), Cargill established a division of CdM in the Mexican city of Tula in order to sell HFCS in Mexico. Along these same lines, Cargill also built a new production plant in Nebraska, expanded its HFCS plants in Iowa and Tennessee, and built a new distribution centre in McAllen, Texas at the Mexican border. Cargill planned to manufacture HFCS in the US and then import it into Mexico through its facility at the border, and then distribute it to the Mexican market through CdM's centre in Tula.

As a result of Cargill's Mexican efforts, Mexico's soft drink industry began using HFCS rather than Mexican sugar, thereby negatively affecting Mexico's domestic sugar industry. Mexico sought to protect its sugar industry by enacting numerous trade barriers which adversely affected the import of HFCS and therefore Cargill and CdM's business. Mexico's actions in this regard were the impetus for Cargill initiating arbitration proceedings under the ICSID Additional Facility

in 2005; the tribunal found that Mexico's actions constituted breaches of various provisions of Chapter 11 of the NAFTA.

The tribunal awarded Cargill over $77 million for both damages suffered by CdM in Mexico ("down-stream losses") and Cargill's damages in relation to lost sales it would have made to CdM in the US ("up-stream losses"). Mexico challenged the tribunal's jurisdiction in relation to this latter category of damages because it considered such losses to have occurred outside of Mexico and therefore that they did not relate to an investment in Mexico as required by Chapter 11 of the NAFTA. The tribunal rejected Mexico's challenge, reasoning that Cargill's situation had to be viewed 'holistically' and that Cargill's inability to export product to its investment, CdM, was just 'the other side of the coin' of the inability of the investment to operate.

Unhappy with this outcome and maintaining its position that the tribunal erred in awarding damages for Cargill's up-stream losses, Mexico sought to set aside the portion of the award in relation to the up-stream damages (unlike standard ICSID arbitration which is insulated from national law, an award rendered under the ICSID Additional Facility – such as the award here – is subject to any review or appeal provided by the law of the place of the arbitration). Given that Toronto was the seat of the arbitration, Mexico applied to the Ontario Superior Court of Justice pursuant to Article 34(2) of the UNCITRAL Model Law on International Commercial Arbitration (1985) (the "Model Law"). In particular, Mexico relied on Article 34(2)(a)(iii) to argue that the tribunal exceeded its jurisdiction by deciding an issue that was not within the submission of the parties under the provisions of Chapter 11 of the NAFTA.

In considering Mexico's application, the Superior Court judge first addressed the issue of the standard of review to be applied when reviewing a decision of an expert NAFTA international arbitration tribunal. The Superior Court judge determined, based on Canadian legal authorities, that the relevant standard of review to be applied to issues of jurisdiction is 'reasonableness'. In any event, the Superior Court judge determined that Mexico's objection did not go to the jurisdiction of the tribunal but was rather an attack on the merits of the decision. Accordingly, the Superior Court said that investigating the merits of the tribunal's decision was beyond the scope of its review. The Superior Court judge also rejected Mexico's argument that the award was not within the range of reasonable outcomes. For these reasons, the Superior Court dismissed Mexico's application to set aside the award.

Mexico in turn appealed this judgment, thereby raising two issues for the Ontario Court of Appeal to consider: (1) the standard of review to be applied in reviewing a decision of a Chapter 11 NAFTA arbitral panel under Article 34(2)(a)(iii) of the Model Law, and (2) whether the Superior Court judge erred in applying such standard of review.

On appeal, Mexico argued that the Superior Court erred in applying the reasonableness standard to a decision on jurisdiction and that the appropriate standard of review should have been the more onerous 'correctness standard.' Canada intervened on appeal and supported Mexico's position. Cargill agreed with the Superior Court judge that the standard was reasonableness. Additionally, ADR Chambers Canada, the Canadian branch of the larger organisation ADR Chambers International, intervened to submit that domestic administrative law tests do not apply to the review of an international arbitral award, that the test was more nuanced and the grounds for appeal more limited, and that the court could not use the jurisdiction inquiry to effectively review the merits of the arbitral decision.

The Court of Appeal started its analysis by acknowledging that importing and directly applying domestic standards may not be helpful to the process of reviewing international arbitration awards. It then went on to define its objective as determining the appropriate standard of review to apply when considering whether a tribunal exceeded its jurisdiction by deciding on an issue that was not within the submission of the parties as per Chapter 11 of the NAFTA.

Next, the Court looked to *Dallah* for instruction. First, the Court mentioned the view in *Dallah* that the tribunal's finding of jurisdiction had no legal or evidential value and that the court's role was to reassess the issue itself (citing Lord Mance's conclusion at paras 30-31). Second, the Court distinguished the *Dallah* decision by highlighting the fact that in that case the jurisdiction issue did not challenge the content of the award but rather *the ability of the tribunal to adjudicate in the first place* (thus allowing the court to decide the issue *de novo*). The Court acknowledged that the instant jurisdictional issue was different in that it concerned whether the award itself complied with the submission to arbitration or contained decisions on issues falling outside of the submission to arbitration.

The Court of Appeal, similar to Judge Collins in *Dallah*, noted that there was nothing in Article 34(2)(a)(iii) limiting the Court in its task of reviewing the award. The Court then cited Canadian administrative case law providing that administrative bodies must be 'correct' in determining questions of jurisdiction. Accordingly, the Court found that the tribunal had to be correct in that its award had to be within the scope of the submission to arbitration and the relevant provisions of the NAFTA. Thus, the Court found that the standard of review was 'correctness' – that the tribunal had to be correct in its determination that it had the ability to make the decision it made. That is, a decision which was reasonable was not enough – the tribunal's decision also had to be correct.

The Court cautioned that in applying the correctness standard, a court should only intervene in cases of true jurisdictional errors (that while there is "powerful presumption" that a tribunal is correct in the context of non-jurisdictional issues, the presumption does not apply to issues of jurisdiction because it would nullify the very purpose of the review authority). Once a court concludes that the tribunal made no error in assuming jurisdiction, there is no further review of the merits of the decision.

Despite applying the correctness standard as suggested by Mexico, the Court of Appeal nonetheless found that the tribunal had acted within its jurisdiction in rendering an award for both Cargill's up- and down-stream damages. There was therefore no reason to take the analysis any further by looking at the merits of the case, and thus Mexico's appeal was dismissed.

This case and the Court of Appeal's reasoning are interesting from a number of perspectives. First and most simply, this is another example of a non-English court (in this case an appellate court) which has looked to *Dallah* for guidance as to the correct standard to apply when reviewing an international arbitration award. It may well be a testament to the respectability of English Court judgments in the sphere of international law. In any event it is likely indicative of the broad reach of English Court judgments, especially in relation to jurisdictions with Commonwealth ties.

The *Cargill* case also sheds light on the standard of review to be applied to challenge proceedings pursuant to the Model Law and NAFTA (as opposed to the 1996 Arbitration Act as in *Dallah*). Of course, it is worth noting that the court in the instant case was, as the national court at the seat of arbitration, the court seised in respect of the challenge proceeding, whereas the English court in *Dallah* was merely an enforcing court who was passing judgment as to whether the arbitral tribunal

seated in another jurisdiction (and governed by a foreign domestic law) had stepped outside its jurisdiction.

Regardless of which side of the *Dallah* fence you stand, it is and will continue to be interesting to watch how the *Dallah* legacy unfolds, both at the English and international jurisprudential levels.

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