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Enforcement of an Award Set Aside: the So-Called "Preferred Approach" and its Application under English Law

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The Main Approaches Regarding Enforcement of Annulled Foreign Awards

The ongoing issue of whether an award that was set aside in the country of origin should be enforced has recently arisen in England and Wales. This issue has divided jurisdictions in two camps: the first camp is comprised of jurisdictions that are ready to enforce an award notwithstanding the fate of that award in the country of origin, while in the second are jurisdictions in which the courts deny the enforcement of an annulled award. The former jurisdictions are adopting **the delocalized approach** which emphasizes the transnational nature of an award and their courts are therefore more likely to disregard the annulment of an award. The latter jurisdictions adopt **the territorial approach** under which once the courts find that the award is set aside, there is no longer an award which can be enforced. Without going into further details of these two approaches, it should be mentioned that the English jurisdiction has to date generally followed the territorial approach (For a detailed analysis of the approaches see: Michael Dunmore, *Enforcement of Awards Set Aside in their Jurisdiction of Origin*, Austrian Yearbook on International Arbitration 2014, p. 285-292). It remains to be seen whether a recent decision in this matter of the High Court in *Malicorp Limited v Government of the Arab Republic of Egypt, Egyptian Holding Company for Aviation, Egyptian Airports Company* [2015] EWHC 361 (Comm) ("Decision") brings anything new in this regard.

The Facts in Malicorp v Egypt

The case before the Court concerned an arbitration brought by Malicorp Ltd ("Malicorp"), a company registered in England and Wales, against the Government of the Arab Republic of Egypt, the Egyptian Holding Company for Aviation, and the Egyptian Airports Company ("Egypt"). The case was commenced in Cairo and related to claims which arose under a concession contract that was concluded on 4 November 2000. On 7 March 2006, the Arbitral Tribunal rendered an award ("Award") in favour of Malicorp and ordered Egypt to pay damages in amount of $US14,773,497. Egypt, however, successfully challenged the award before the Cairo Court of Appeal on 5 December 2012, and the Court of Appeal's decision was appealed to the Egyptian Court of Cassation and was still being considered at the time the Decision was rendered ("Cairo Court's Decision"). On 29 February 2012, the order allowing the enforcement of the Award in England and Wales ("Enforcement Order") under section 101(2) of the Arbitration Act was rendered. The proceedings before the Court raised the issue of whether the Enforcement Order should be upheld or set aside and the effect of the Cairo Court's Decision on the enforcement of the Award.

“The Preferred Approach” as a Legal Test and the Court’s Decision

When dealing with the issue of the effect of the Cairo Court’s Decision, the Court proceeded on two assumptions, which were later in the Decision addressed as “the preferred approach”:

> “(1) that the word “may” in s 103(2) of the 1996 Act confers a discretion on this court to enforce an award even though the award has been set aside by a decision (“the set aside decision”) of a court constituting a competent authority within s 103(2)(f) ; and
>
> (2) it would not be right to exercise that discretion if, applying general principles of English private international law, the set aside decision was one which this court would give effect to.” (Decision, para. 21)

Section 103(2)(f) reflects Article V(1)(e) of the New York Convention (“NY Convention”) which provides that recognition and enforcement of the award **may** be refused if the party proves “*[…]that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.*” As mentioned above, the English courts generally followed the territorial approach when deciding on this ground. The Court in this case followed the same approach, but applied a test adopted by the Court in one of its earlier decisions stated the following:

> “The preferred approach which I have described above applies, in the present context, well established principles as to the recognition of foreign judgments. It does not seem to me that they leave room, as a matter of discretion, to give effect to the Cairo award once it is established, as here, that a set aside decision of the supervisory court meets the tests for recognition.” (Decision, para. 28)

This rule of giving effect to the decision of a foreign court has, however, an exception: “*[…]it would be both unsatisfactory and contrary to principle if the Court were bound to recognise a decision of a foreign court* ***which offended against basic principles of honesty, natural justice and domestic concepts of public policy.***” (emphasis added) (Decision, para. 22; *Yukos Capital S.a.r.L v OJSC Oil Company Rosneft* [2014] EWHC 2188 (Comm), para. 20). Therefore, it would appear that if a decision of a foreign court does not violate these principles, it should be given effect.

This legal test, i.e. the so-called “preferred approach”, resembles the comity approach “*under which a judgment vacating an award should be recognized on grounds of comity – i.e., the vacated award not enforced – unless the vacating judgment is* ***‘procedurally unfair or contrary to fundamental notions of justice’***” (emphasis added)(Michael Dunmore, *Enforcement of Awards Set Aside in their Jurisdiction of Origin*, Austrian Yearbook on International Arbitration 2014, p. 294). When the Court applied the test, it decided that none of the grounds invoked by Malicorp were sufficient to make a valid complaint and it, therefore, treated the Cairo Court’s Decision as a final decision and set aside the Enforcement Order on 19 February 2015 (Decision, para. 44).

Conclusion

It is clear that the Court continued the tradition of adopting and developing the territorial approach regarding the enforcement of annulled foreign arbitral awards. It also applied a legal test in this matter, which it called “the preferred approach”. The test involved a principle of comity as the second tier. On one hand, the creation of such a legal test under Article V(1)(e) of the NY Convention is welcome in order to achieve greater legal certainty for the parties and such creation is within the court’s discretion provided under the NY Convention. However, at the same time, by making the exercise of the discretion practically non-enforceable when the foreign judgement on setting aside is recognisable in England and Wales, “the preferred approach” brings the “*principles as to the recognition of foreign judgments*” to the spotlight rather than the principles as to recognition of foreign arbitral awards.

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