Kluwer Arbitration Blog

Avoiding Re-litigation of Identical Issues at the Enforcement Stage: A Deferential Approach

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Five years after the UK Supreme Court handed down its infamous decision in *Dallah v. Pakistan*, UK Supreme Court Justice Lorde Mance has shed new light on the 'pathological' case. To recall, the arbitral tribunal in the *Dallah* case faced a jurisdictional challenge which questioned whether the Government of Pakistan was a party to an arbitration agreement, even though it was not a signatory to that agreement. In Paris-seated ICC proceedings, the tribunal upheld its jurisdiction by determining that the Government of Pakistan was in fact a 'true party' to the arbitration agreement, and subsequently awarded damages to Saudi-Arabian company Dallah. At the enforcement stage, the UK Supreme Court and the Paris Court of Appeal applied the same principles of French law to reach opposite conclusions on this same jurisdictional issue: while the decision was refused enforcement in the UK for lack of a valid arbitration agreement, it was shortly thereafter confirmed in France as the Paris Court of Appeal rejected this argument in annulment proceedings.

Speaking at the latest Freshfield's lecture, Lord Mance reflected that the conflicting views of the English and French courts in *Dallah* were the result of the late timing of the French proceedings, explaining that the English court 'would have been very interested' in the French court's analysis of its own law if the decision had been issued sooner. He further noted that 'whether [the French decision] would necessarily have bound [the English court] is a different question'. Lord Mance went on to echo arguments in favor of recognition of foreign judgments. In his view, the world needs 'greater coordination and coherence between different legal systems – that is to say, more, rather than less, mutual recognition and enforcement of each other's decisions'.

While Lorde Mance's recent remarks were made in the context of challenging the 'transnational' theory (whereby enforcement courts need not pay attention to annulment decisions rendered at the seat), his comments are also compelling for national courts which, like the eminent courts in *Dallah*, are faced with identical issues post-issuance of an award. Preventing parties from re-litigating identical issues in different fora would not only increase efficiency and lower the costs of court proceedings at the enforcement stage; it would also strengthen the finality of awards and ensure their uniform treatment.

Difficulties with issue preclusion

In the common law world, some national courts have already deferred to prior decisions on enforcement of foreign courts by way of the legal doctrine of issue estoppel. For example, in 2014,

an English court in *Diag Human SE v Czech Republic* [2014] EWHC 1639 (Comm) refused enforcement of a Czech award on the basis that the Austrian courts had previously decided that the award was not binding under the parties' arbitration agreement (as this provided for a review process of the award, which was still pending) and was therefore unenforceable. Similarly, in 2015, a Hong Kong court in *Astro Nusantara International B.V. v PT First Media TBK* HCCT 45/2010 concluded that Astro was bound to the Singapore enforcement courts' prior finding that three Astro companies had been improperly joined to the underlying SIAC arbitrations, causing the resulting awards to be unenforceable with respect to the companies at issue (although eventually allowing enforcement to take place because the period for resisting enforcement had expired).

Singapore Chief Justice Sundaresh Menon, for one, has supported the use of issue estoppel in such contexts, calling it 'eminently sensible, both from the perspective of harmonizing the treatment of awards and perhaps even more importantly, the overarching public policy of finality'. However, he has correctly noted that the domestic application of the legal concept of issue preclusion is not consistent across jurisdictions. This concept is therefore unsuitable to address the problem of costly and unnecessary re-litigation at the enforcement stage. Moreover, the argument remains that issue estoppel has no place in the enforcement sphere since it is not part of the exhaustive list of exceptions that allow a local court to refuse enforcement under Article V of the New York Convention.

Acknowledging the various difficulties with the doctrine of issue estoppel, in 2013, the Australian courts in *Gujarat NRE Coke Limited v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109 declined to determine whether issue estoppel operated in the context of an English annulment court's prior rejection of an applicant's due process objection being raised again in enforcement proceedings. Even without applying issue estoppel, however, the Australian courts deferred to the English court's earlier decision, reasoning that it would 'generally be inappropriate' to reach a different conclusion on the same question as that reached by the court of the seat of arbitration.

Merits of a deferential approach

Regardless of the means, the aforementioned decisions exhibit sound policy. Prior decisions on annulment or enforcement can, and should, be treated with deference, at least to the extent that they involve identical issues or arguments. This perspective is in line with the New York Convention and users' expectations when choosing arbitration as an efficient means to resolve their disputes in a final and binding manner.

Annulment and enforcement proceedings typically involve one or more of the same arguments because there are limited grounds for non-enforcement under the New York Convention (which mirror the grounds on which an award may be set aside listed in the UNCITRAL Model Law). Given the complexities of present-day international arbitrations, which often involve multiple contracts and parties, it is not efficient for parties to re-litigate the same issues from scratch in any number of national court systems. Such inefficiencies could be avoided if national courts were cognizant of each other's decisions on identical issues.

Moreover, challenges to arbitral awards in national courts tend to fail. When this happens, there is no reason for an aggrieved party to be entitled to as many rematches as there are places where it has assets. A deferential approach has the potential to respect the finality of awards as well as facilitate their recognition and enforcement. Finally, deferring to prior decisions on identical issues would prevent inconsistencies such as those seen in the *Dallah* case, which are contrary to the New

York Convention's further aim of ensuring the uniform treatment of arbitral agreements and awards.

When to give deference

One might offer as a counterargument that, under the New York Convention, each State has its own independent obligation to recognize and enforce international arbitral decisions. Similarly, Article VII of the New York Convention provides that a party may not be deprived of a more favorable treatment of an award under local laws. Repeat litigation before different fora is therefore a natural consequence of the Convention's predisposition towards enforcement, so as to enable national courts to recognize an award even if a foreign court has refused to do so. Deferring to a foreign court's decision may further raise considerations of sovereignty, especially in view of the fact that the system of enforcement through the New York Convention is premised on national courts retaining carefully delineated supervisory powers.

However, such considerations should not preclude a national court from taking a deferential approach, at least as a starting point. Similar to Lorde Mance's suggestion in his recent lecture (relying on the permissive language of Article V of the New York Convention) that an award which has been set aside at the seat should still be enforced in exceptional circumstances, there may also be exceptions to the proposed deferential approach. For example, if the prior decision has been tainted by a lack of independence or impartiality (after all, not all judicial systems are equally administered), or even if the first decision is clearly wrong. Such exceptions are inherent to the discretion of enforcement courts under Article V of the New York Convention and, with respect to annulment of awards, of the courts of the seat under their domestic law. They may also address potential undesirable effects of forum shopping. However, the basic presumption of annulment and enforcement courts deciding on identical issues can, and should be, deference.

Deference should moreover only be given to determinations on 'international exceptions' of enforcement, such as invalidity of the arbitration agreement, due process violations, wrongful constitution of the arbitral tribunal, or breaches of transnational public policy. Forum specific exceptions of domestic public policy and inarbitrability would naturally be excluded due to their variations among different countries.

Although we note that there is no consensus on the legal significance of the seat of arbitration in spite of Lorde Mance's plea for a territorial approach, it would be sensible for a national court to be particularly deferential with respect to decisions made by the courts of the seat, as these courts are often best-placed to determine issues concerning the validity of awards. Similarly, enforcement courts may also be best-placed to the extent that the issues are to be determined under their own laws. For example, if an English enforcement court rejects an argument that the arbitral tribunal lacked jurisdiction because, under the applicable English law, there was no valid agreement to arbitrate, it would be particularly appropriate for any subsequent enforcement court to defer to the English court's decision.

Conclusion

As was recently confirmed by the latest Queen Mary International Arbitration Survey, the expense and longevity of arbitration proceedings are among the least attractive characteristics of international arbitration. Compounding the problem, winning the arbitration is often only half the battle, as it is now common to see identical arguments re-litigated before multiple courts after an

award has been issued. A deferential approach to prior annulment and enforcement decisions on identical issues would help reduce time and expenditure at the enforcement stage, and is in line with the New York Convention's principal objective of facilitating the enforcement of awards by improving finality, efficiency, and uniform treatment across jurisdictions. Yet, attempts to reduce the multiplicity of litigation should not deprive parties of their right to be heard by a court of competent jurisdiction. A starting position of deference achieves both judicial efficiency and integrity by weeding out the opportunists while preserving the rights of parties who—for the reasons warranting exceptions to deference highlighted above—have not yet gotten a fair opportunity to be heard.

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