Kluwer Arbitration Blog

SpaceCom v Wateen Telecom: Riding Against the Pro-Enforcement Tide in the Lahore High Court

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In *SpaceCom v Wateen Telecom*, SpaceCom applied to the Lahore High Court (the "LHC") for recognition and enforcement of awards rendered by a DIFC-LCIA tribunal (the "Tribunal") under the Recognition and Enforcement (Arbitral Agreements and Foreign Arbitral Awards) Act, 2011 (the "Act"), which implements the New York Convention (the "NYC"). The awards were rendered in respect of a dispute which arose between the claimant, SpaceCom, and the respondent, Wateen Telecom, under a contract entered into between them in 2014. SpaceCom referred the dispute to the Tribunal by invoking the contract's dispute resolution clause, which provided that all disputes thereunder were to be "resolved through arbitration in Dubai, UAE" (the "Arbitration Agreement"). In the proceedings that followed, the Tribunal rendered three awards: (i) an award confirming its jurisdiction in respect of the dispute on 29 November 2018 (the "Partial Award"); (ii) an award regarding the merits of the underlying dispute on 15 April 2020; and (iii) an award as to the costs of the arbitration on 8 November 2020.

However, through its judgment of 4 December 2024, the LHC dismissed SpaceCom's application under Section 6 of the Act for recognition and enforcement of those awards, on the basis that they violated Article V(1)(d) of the NYC. The judge who rendered the decision, Mr. Justice Shahid Karim, reasoned that under Section 6, the court is bound to refuse recognition and enforcement of an award to which any of the grounds stipulated in Article V of the NYC apply.

This post discusses the implications of this LHC judgment on the pro-enforcement approach mandated by the Supreme Court of Pakistan (the "SC") with respect to foreign arbitral awards, including by way of its recent landmark ruling in *Taisei v AM Construction*. This LHC judgment is not only at odds with the principles laid down by the SC but also with a series of pro-enforcement judgments recently rendered by Pakistan's superior courts.

The Proceedings

- **Before the Tribunal**

A principal issue in this case was that the underlying Arbitration Agreement omitted crucial operative details. For instance, there was no express provision for the seat of arbitration; rather, just a vague reference to the arbitration's *location* was made as "Dubai, UAE".

This uncertainty caused serious issues. SpaceCom contended that the seat of arbitration was the Dubai International Financial Centre, an economic zone in the city of Dubai, UAE (hereafter, "DIFC"). On the other hand, Wateen Telecom argued that the seat was onshore Dubai, and also contested the Tribunal's jurisdiction.

To settle this controversy, the Tribunal bifurcated the arbitration to deal with questions pertaining to jurisdiction and procedural matters first. Upon completion of the parties' submissions, the Tribunal rendered its Partial Award, whereby the DIFC was held to be the arbitration's seat; and the DIFC-LCIA Rules, 2008 as its applicable rules.

Following this determination, the Tribunal proceeded to the next phase of the arbitral proceedings and considered the merits of the underlying dispute. Nearly two years from the date of the Partial Award, the Tribunal rendered separate awards on the merits of the dispute in favour of SpaceCom as well as for the costs of the arbitration.

- **Before the Lahore High Court**

SpaceCom applied to the LHC under Section 6 of the Act for enforcement of the three awards in Pakistan.

However, the LHC held that the Partial Award – rendered nearly six years earlier – wrongly designated DIFC as the seat of the arbitration. Instead, it was onshore Dubai; not DIFC, which had separate laws as a special offshore economic zone. The Tribunal's erroneous designation of DIFC as the seat was a defect which was "essential to the award", since the law of the seat also determines an arbitration's curial law. This violation of the parties' express choice of onshore Dubai law as the arbitration's procedural law amounted to a breach of Article V(1)(d) of the NYC.

Thus, the Tribunal's awards were refused recognition and enforcement under Section 6 of the Act.

The Lahore High Court's Last Word

More significant than the remarkable outcome of this application by SpaceCom for enforcement of its awards, which had been rendered years earlier and not been challenged before the courts of the seat (be it onshore or offshore Dubai), is the reasoning employed by the court to arrive at its conclusion.

Under the settled principle of competence-competence, an arbitral tribunal determines its jurisdiction in the first instance. Although such determination can be challenged before courts (typically those located at the seat of the arbitration, e.g., refer to Article 16 of the Model Law), an arbitral tribunal's initial determination is treated with a degree of deference.

- **Endorsing *Dallah***

In stark contrast to the above, the LHC endorsed the approach adopted by the UK Supreme Court

judgment in *Dallah v Pakistan* (2010) quoting it at length. *Dallah* held that the court is to have the "last word" on the question of jurisdiction, without regard to the tribunal's determination.

Dallah is widely regarded as propounding the most extreme form of *de novo* review of an arbitral tribunal's jurisdiction, since it envisages a "complete rehearing" by the court on both facts and law; rather than a simple review.

Nevertheless, Karim J was strongly persuaded by Wateen's argument (based on *Dallah*) that the Partial Award could not be treated as a starting point for settling the question of its jurisdiction – since this suffered from "an inherent circularity of logic". Unsurprisingly, therefore, he disregarded the Tribunal's determination and reframed the matter afresh. Chief among his reconsideration of the Tribunal's jurisdiction was to look at the question of seat determination from the perspective of the UAE's constitutional framework. The UAE's Constitution and federal decrees were considered at length, following which it was held that it was impossible to treat onshore Dubai and the DIFC as interchangeable because the two had separate sets of laws.

The Tribunal's failure to appreciate the above and its imposition of DIFC as the seat contrary to the parties' choice – apparently borne out by (among others) their past conduct – was held to violate Article V(1)(d) of the NYC. Notably, the Tribunal's seat determination was based on a judgment rendered by a DIFC court – which, too, was disregarded by the LHC for travelling beyond its mandate.

- **But at What Cost?**

The LHC's reliance on *Dallah* comes at a time when there is a pending Arbitration Bill before the UK legislature (the **"UK Bill"**), under which the said judgment is being statutorily reconsidered. The UK Law Commission (**"UKLC"**) in its report on the UK Bill had stressed that a rehearing allows the losing party a chance to reconsider not just its arguments but also evidence, which, in turn, reduces the arbitral proceedings to a mere "dress rehearsal". Therefore, the UK Bill proposes reforms to Section 67 of the English Arbitration Act, 1996 (the "EAA"), under which English courts are empowered to review domestic-seated tribunal awards on jurisdiction. The reforms place restrictions on a party's right to introduce new evidence and arguments in a challenge before court. That said, the UK Bill only seeks to reform Section 67, which deals with jurisdictional challenges to domestic-seated awards. This leaves the English courts' power to refuse recognition and enforcement of foreign-seated awards under Section 103 of the EAA as-is.

Notwithstanding the UKLC's motivation for creating an asymmetrical regime, it cannot be invoked in the Pakistani context – since a concerted effort has been made by the SC to adopt a uniform pro-enforcement approach, irrespective of the arbitration seat.

In *Taisei*, the SC held that courts must be mindful of the NYC's underlying pro-enforcement bias and interpret the grounds provided under Article V thereof in such manner. Mr Justice Mansoor Ali Shah, who authored the judgment on behalf of the three-member SC bench, dedicated an entire section to this matter alone – stretching over eight paragraphs. In sharp distinction to *SpaceCom*, where Karim J stressed that he was "bound to" refuse recognition under Article V, Shah J laid much emphasis on the language of Article V of the NYC, holding that it is "permissive and not mandatory". Thus, courts are not bound to refuse enforcement; instead, an award can be enforced even if certain exceptions under Article V apply.

In fact, as noted above, most national courts take a deferential approach to an arbitrator's jurisdiction, especially where parties have chosen arbitration rules which stipulate that it is the tribunal which is to determine the question of jurisdiction (with US courts labelling it "clear and unmistakeable" evidence of the parties' intention). Although much has been said in *SpaceCom* about party autonomy, this fact was overlooked – even though the chosen arbitration rules under Article 23 thereof provide that the question of jurisdiction is to be exclusively determined by the tribunal.

Further, most recently, in yet another SC judgment authored by Shah J, *Kasuar Rana Resources v Qatar Lubricants Company*, the importance of adopting a pro-enforcement approach has been highlighted in another context: efficiency. The SC directed courts "to embrace this ethos" of pro-enforcement bias to ensure swift dispute resolution. A *de novo* review, premised on the outdated principles of *Dallah*, obviously runs counter to this objective. Crucially, the inefficiency created under a complete rehearing was cited as a reason for reforming Section 67 of the EAA.

Thus, the LHC's last word on the issue, based on a judgment undergoing legislative review while ignoring the SC's guidelines, came at the heavy cost of sacrificing the efficiency of the parties' chosen dispute resolution process.

Conclusion

SpaceCom brings to the fore the troubles of relying on piecemeal development of the law through judicial precedent. As mentioned in a previous post, authored by a member of the Law and Justice Commission's Committee responsible for drafting the new arbitration legislation in Pakistan, much faith was placed in a line of pro-arbitration judgments rendered under the Act for excluding the legislation from its scope. In the absence of legislative mandate, it is hoped that Pakistani courts would not disregard the SC's pro-enforcement jurisprudence in the future.

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