COMBAR VIENNA 2018 – ARBITRATION PANEL

ENFORCEMENT OF AWARDS: SOME RECENT CASES[1]

Challenges to the Tribunal's jurisdiction: the extent of judicial review

1. The starting point: a full rehearing unconstrained by the Tribunal's findings.

2. Foreign awards: *Dallah Real Estate v Pakistan* [2011] 1 AC 763, [26] (Lord Mance) [96] (Lord Collins) [160] (Lord Saville):

> "26 An arbitral tribunal's decision as to the existence of its own jurisdiction cannot therefore bind a party who has not submitted the question of arbitrability to the tribunal. This leaves for consideration the nature of the exercise which a court should undertake where there has been no such submission and the court is asked to enforce an award. Domestically, there is no doubt that, whether or not a party's challenge to the jurisdiction has been raised, argued and decided before the arbitrator, a party who has not submitted to the arbitrator's jurisdiction is entitled to a full judicial determination on evidence of an issue of jurisdiction before the English court, on an application made in time for that purpose under s.67 of the Arbitration Act 1996 , just as he would be entitled under s.72 if he had taken no part before the arbitrator: see e.g. Azov Shipping Co. v Baltic Shipping Co. [1999] 1 Lloyd's Rep 68 . The English and French legal positions thus coincide: see the Pyramids case (para 20 above).
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> 96 The consistent practice of the courts in England has been that they will examine or re-examine for themselves the jurisdiction of arbitrators. This can arise in a variety of contexts, including a challenge to the tribunal's jurisdiction under section 67 of the 1996 Act, or in an application to stay judicial proceedings on the ground that the parties have agreed to arbitrate. Thus in Azov Shipping Co v Baltic Shipping Co [1999] 1 Lloyd's Rep 68 Rix J decided that where there was a substantial issue of fact as to whether a party had entered into an arbitration agreement, then even if there had already been a full hearing before the arbitrator the court, on a challenge under section 67 , should not be in a worse position than the arbitrator for the purpose of determining the challenge. This decision has been consistently applied at first instance (see, eg, Peterson Farms Inc v C&M Farming Ltd [2004] EWHC 121 (Comm), [2004] 1 Lloyd's Rep 603) and is plainly right.
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> …

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160 In my judgment therefore, the starting point cannot be a review of the decision of the arbitrators that there was an arbitration agreement between the parties. Indeed no question of a review arises at any stage. The starting point in this case must be an independent investigation by the court of the question whether the person challenging the enforcement of the award can prove that he was not a party to the arbitration agreement under which the award was made. The findings of fact made by the arbitrators and their view of the law can in no sense bind the court, though of course the court may find it useful to see how the arbitrators dealt with the question. Whether the arbitrators had jurisdiction is a matter that in enforcement proceedings the court must consider for itself."

3. Domestic awards: *GPF GP S.à.r.l. v The Republic of Poland* [2018] EWHC 409 (Comm), per Bryan J at [63]-[70]:

68 The Respondent submits, however, that, "The Claimant having already lost its case on jurisdiction before the Tribunal is effectively now having a second bite at the same cherry. In these circumstances there are no grounds for a 'complete rehearing' as the Claimant has suggested is required." In this regard the Respondent says that Azov Shipping Co v Baltic Shipping Co was a case which involved a question of jurisdiction ratione personae , i.e., a fundamental issue concerning a claimant who claimed not to be party to the arbitration agreement. Here, in contrast, the issue arising is one of jurisdiction ratione materiae, the scope of disputes referred to arbitration. The Respondent also referred to the decision of Toulson J in Ranko Group v Antarctic Maritime SA [1998] ADRLN 35 (shortly after Azov) in which the learned judge held that on a challenge under s 67 , it would be wrong for the courts to rely on new evidence which "could perfectly well have been put before the arbitrator, but was not placed before him, and with no adequate explanation why it was not". Toulson J based his decision, in part, on the reduced role of the courts under the Arbitration Act 1996 (see pages 14-15 of the transcript). The Respondent also relies upon the observations of Hobhouse J under the previous arbitration regime in Dallal v Bank Mellat [1986] 1 QB 441 at 463, and the spirited attack on the re-hearing approach undertaken by the editors of Arbitration Law 5th edn at pp 296 to 297, who nevertheless recognise that the principle applies to all cases.

70 I am satisfied that on the current state of the authorities (including not only a wealth of first instance decisions but also dicta at appellate level, including in Dallah) a hearing under section 67 is a re-hearing, and that is so whether the case involves a question of jurisdiction ratione personae or ratione materiae (for a recent example of the latter see the judgment of Carr J in C v D [2015] EWHC 2126 (Comm)). In each case, where it is said the tribunal has no jurisdiction, it is on the basis that either there is no arbitration agreement between the particular parties, or that there is no arbitration agreement that confers jurisdiction in respect of the claim made. In each case if the submission is proved, the Tribunal has no jurisdiction as no jurisdiction has been conferred upon it by the parties in an arbitration agreement. In such circumstances it is for the Court under section 67 to consider whether jurisdiction does or does not exist, unfettered by

> the reasoning of the arbitrators or indeed the precise manner in which arguments were advanced before the arbitrators. Ultimately jurisdiction either is, or is not, conferred on the true construction of the arbitration agreement, and that ought not to be fettered by how arguments were advanced below, subject always to the discretion of the court as to the admission of evidence before it. Indeed, experience shows that the arguments on challenge can be, and are, often presented in fresh and different ways (see the observations of Carr J in C v D , supra at [72]).”

See also: *Uttam Galva Steels Limited v Gunvor Singapore Pte Limited* [2018] EWHC 1098 (Comm), per Picken J at [39].

4. The Court nonetheless has the power to control evidence adduced in support of a challenge to an award: *GPF GP S.à.r.l.*, supra:

> “71 However, the fact that a section 67 application is a re-hearing does not mean that the court cannot control the evidence adduced on a section 67 application – it clearly can – see the comments of Gross J in Electrosteel v Scantrans [2002] EWHC 1993 (Comm) , in particular at paragraphs 22-23 and what was said by Aikens J in The Ythan [2006] 1 Lloyd's Rep. 457 at paragraphs 59 to 63 (in the context of the scope of objections under section 73 of the 1996 Act).”

5. The Court may also draw adverse inferences from the timing and circumstances in which evidence is adduced in support of a challenge to the award: *A v B* [2015] EWHC 1944 (Comm), per Teare J at [17]:

> “17 Mr. A chose not to give evidence before the arbitral tribunal. His explanation for making that choice is that Mr. B had brought a criminal complaint against him in Russia and he feared that Mr. B would not have complied with his duty of confidentiality and that any evidence given by him on the merits of the claims against him would have been transmitted to the Russian criminal investigators (some of whom were alleged themselves to have been complicit in a criminal fraud and in the death of the Russian lawyer Sergei Magnitsky who uncovered that fraud). Mr. A did not explain why he thought that Mr. B would break his duty of confidentiality in this way and he did not suggest that he had raised this fear at the arbitration or with those representing Mr. B at the arbitration. It is also to be noted that he gave evidence in another arbitration concerning the Hotel Project notwithstanding parallel criminal proceedings in Russia. His explanation therefore lacks cogency and is a further reason for viewing his evidence with scepticism; cf the observations of Gross J. in Electrosteel v Scan-Trans [2003] 1 Lloyd's Rep. 190 at paragraph 23.”

6. The Court also has the power to stay or adjourn enforcement proceedings pending determination of issues in enforcement proceedings elsewhere: e.g. *Stati v The Republic of Kazakhstan* [2015] EWHC 2542 (Comm), per Popplewell J at [3]:

> "… there is a high degree of overlap between the issues which arise on this application and those which are to be considered by the Svea Court of Appeal. This court may very well be assisted by what the Swedish court has to say on those issues, particularly in relation to the SCC Rules and the appointment of Professor Lebedev, and may treat what is said as of persuasive effect. It is clear that an adjournment in this case will reduce the risk of inconsistent judgments and is in the interests of comity.

No guarantee that the foreign enforcement proceedings will be dispositive or of even persuasive value, however:. *Stati v Republic of Kazakhstan* [2017] EWHC 1348 (Comm), [2018] EWHC 1130 (Comm).

Security for the award pending determination of enforcement proceedings

Domestic awards

7. The Court has a general power under s. 70(7) of the Arbitration Act 1996 to order security in any case where a domestic award is challenged under ss. 67, 68, or 69 of the Act:

> "(7) The court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with."

8. In practice, the power is only exercised where challenge is "filmsy or otherwise lacks substance": see e.g. *Y v S* [2015] 2 All ER (Comm) 85 per Eder J at [33].

Foreign awards

9. As regards foreign awards, the Court has a limited power under s. 103(5) of the Arbitration Act 1996 to order security where an application to set aside/suspend the award has been made in the seat, pending determination of which enforcement of the award in England is adjourned.

10. The relevant provisions of the Arbitration Act 1996 (which reflect Arts. V and VI of the New York Convention) are as follows:

> "**103 Refusal of recognition or enforcement**
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> "(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.
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> "(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves—
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> (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;
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> (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;
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> (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
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> (d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4));
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> (e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;
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> (f) 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.
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> (3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.
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> (4) An award which contains decisions on matters not submitted to arbitration may be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.
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> **(5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or**

> **enforcement of the award. It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security."**
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> (emphasis added)

11. Section 103(2) and (3) of the 1996 Act give effect to Article V of the New York Convention. Article V(1) specifies as a ground on which recognition and enforcement "may be refused" that:

> "(e) 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, that award was made."

Section 103(5) of the 1996 Act gives effect to Article VI of the New York Convention, which provides that:

> "If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security."

12. In *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corpn* [2017] 1 WLR 970, the Supreme Court held that there is no power to make a challenge under s. 103(2) or (3) of the 1996 Act subject to a condition for payment of security for the award. Lord Mance (with whom each other member of the Supreme Court agreed) explained at [28] that:

> "Security pending the outcome of foreign proceedings is, in effect, the price of an adjournment which an award debtor is seeking, not to be imposed on an award debtor who is resisting enforcement on properly arguable grounds."

At [41] Lord Mance emphasised in this regard the nature of the statutory provisions as a "code" as follows:

> 41 In my opinion, the conditions for recognition and enforcement set out in articles V and VI of the Convention do constitute a code. Just as article V codifies the grounds of challenge (see Dicey, Morris & Collins , The Conflict of Laws , 15th ed (2012), para 16-137), so the combination of articles V and VI

must have been intended to establish a common international approach, within the field which they cover. They contemplate that a challenge under article V may only be made conditional upon the provision of security in one situation falling within their scope. Had it been contemplated that the right to have a decision of a properly arguable challenge, on a ground mentioned in article V (domestically, section 103(2) and (3)), might be made conditional upon provision of security in the amount of the award, that could and would have been said. The Convention reflects a balancing of interests, with a prima facie right to enforce being countered by rights of challenge. Apart from the second paragraph of article V, its provisions were not aimed at improving award creditors' prospects of laying hands on assets to satisfy awards. Courts have, as noted in Dardana v Yukos [2002] 1 All ER (Comm) 819 other means of assisting award creditors, which do not impinge on award debtors' rights of challenge, eg disclosure and freezing orders."

At [43], Lord Mance rejected an argument based on Art. III of the New York Convention[2] and the approach in relation to domestic awards as follows:

"43 In any event, I do not regard the argument based on article III and section 70(7) as having any force. First, article III may serve as a caution against interpreting or applying English procedural provisions in a sense which discriminates against Convention awards by imposing substantially more onerous rules of procedure. But this is only so long as "the conditions laid down in" the following articles of the Convention do not otherwise provide. As I have indicated, I consider that articles V and VI constitute a code relating to security for an award when the issue is enforcement or adjournment; and that the code excludes requiring security for an award in the face of a properly arguable challenge under article V , except in so far as article VI provides. Second, even if that were not so, I would have some doubt whether an inability to order security on a challenge to an overseas award could constitute a "substantially more onerous" rule of procedure in relation to recognition or enforcement than a rule allowing such security in the case of an English award. Third, be that as it may, the fact is that the 1996 Act contains in relation to Convention awards no equivalent to section 70(7) in relation to English awards. Whatever article III might require in that respect (if anything), it is not found in the 1996 Act, and no amount of consistent interpretation can alter the Act in that respect. Fourth, there is first instance authority, which in my opinion accurately reflects what would be expected as a matter of principle in relation to the provision of security for the amount of an award in issue, that the power under section 70(7) will only be exercised if the challenge appears "flimsy or otherwise lacks substance": A v B (Arbitration: Security) [2011] Bus LR 1020 , para 32, per

[2] Which provides that:

"Each contracting state shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

> Flaux J and Y v S [2015] 2 All ER (Comm) 85 , para 33, per Eder J. That cannot by any stretch be said of NNPC's fraud challenge in the light of the evidential material set out in the Court of Appeal's judgment."

At [44]-[45], Lord Mance explained that the Court's general power to attach conditions to orders under CPR r. 3.1(3) has no application where an award debtor is raising – as it is entitled to – objections envisaged by Article V of the New York Convention and s. 103(2) and (3) of the 1996 Act:

> "44 Finally, I turn to CPR r 3.1(3) . In my opinion, this takes IPCO nowhere. It is a power, expressed in general terms, to impose conditions on orders. It cannot authorise the imposition, on a person exercising its right to raise a properly arguable challenge to recognition or enforcement, of a condition requiring security for all or any part of the amount of the award in issue. Its obvious subject matter is the imposition of a condition as the price *987 of relief sought as a matter of discretion or concession, not the imposition of a fetter on a person exercising an entirely properly arguable right. The Court of Appeal was right to underline in Huscroft v P & O Ferries Ltd (Practice Note) [2011] 1 WLR 939 , paras 18–19 that " rule 3.1(3) does not give the court a general power to impose conditions on one or other party whenever it happens to be making an order", and that its purpose is "to enable the court to grant relief on terms" and that the court should "focus attention on whether the condition (and any supporting sanction) is a proper price for the party to pay for the relief being granted", satisfying itself also that "the condition it has in mind represents a proportionate and effective means of achieving that purpose".CPR r 3.1(3) may be relevant where the court only permits the pursuit on terms of a claim or defence which in some respect is problematic: see Deutsche Bank AG v Unitech Global Ltd (No 3) [2016] 1 WLR 3598 , paras 72–81 (to which the defendant's solicitors very properly drew the Supreme Court's attention after the handing down in draft of this judgment). But it is entirely clear that CPR r 3.1(3) has no relevance on this appeal.
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> 45 That is not to say that CPR r 3.1(3) or the court's other general procedural powers may never become relevant in the context of an issue being decided under section 103(2) or (3) . I have noted that the court's power to make disclosure and freezing orders is one means by which an award may indirectly be secured, without impinging on a defendant's right to raise challenges under section 103 . The court may in the course of such a challenge make all sorts of other procedural orders, and back them where necessary with sanctions. But none of this has anything to do with this appeal. NNPC here had not misconducted themselves or given any sort of cause for the exercise of any procedural discretion to make an order against them or to condition it in any way. Some of the factors to which the Court of Appeal alluded in paras 19 to 23 of its supplementary judgment might have had some possible relevance had NNPC in some way defaulted in the pursuit of a challenge under section 103 . As it is, paras 19–21 amount to no more than concern that the award might be difficult to enforce in practice, while para 23 links this to a perception that the

previously ordered security now appears insufficient. These were not admissible bases for attaching a condition to the future exercise in this jurisdiction of a right of challenge under section 103(3) . The wish in para 22 to provide a "goad to progress" was also an inadmissible basis for securing the award, particularly in the absence of any finding of any relevant prior default by NNPC from which it needed relief, and is (one might add, if it had had any potential relevance) difficult to understand as a matter of fact in circumstances where the fraud issue will from now be case-managed by the Commercial Court."