

The Problem with Enforcing Arbitration Awards that have been Annulled

Written by Andrew Tweeddale

The purpose of the 1958 New York Convention is to facilitate so far as possible the international recognition and enforcement of foreign arbitral awards. Nevertheless it provides that a court may refuse to do that if such an award has already been set aside or suspended at its “seat”. The English courts have interpreted this word ‘may’ as giving themselves a wide discretion. But it is one that in practice is likely to result in a refusal to enforce.

When an award has been set aside at the seat of the arbitration, the enforcing court will first have to consider the status of the award. From an international perspective one finds different views on that status:

- On the one hand it has been argued that an award already set aside at its seat has no legal status at all and therefore there is nothing to enforce.
- The opposing view is that the annulment of the award does not necessarily affect its validity before the enforcing court.

The English courts pragmatic view

The English courts have been pragmatic in this matter. They have rejected any absolutist approach based on legal theory and instead applied a test to determine whether such an award should or should not be enforced.

In the case of *Dowans and another v Tanzania Electric Supply Co Ltd*.¹ Burton J. held that there was no question of an automatic refusal to enforce the award simply because one of the grounds for setting it aside had been satisfied. He held that “the English courts still retain a discretion to enforce the award, though that jurisdiction will be exercised sparingly.”

The more recent case of *IPCO (Nigeria) Ltd v Nigerian National Petroleum Ltd*² is consistent

with this. Gross J. held that there was no doubt that s.103 of the Arbitration Act 1996 is pre-disposed to the enforcement of New York Convention awards, reflecting the underlying purpose of the New York Convention itself. Therefore, even when a ground for refusing enforcement is established, the court will still retain a discretion to enforce.

Gross J. then went on to look at how the discretion would be used. He referred to Lord Mance’s opinion in *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan*³. Paraphrasing that review, Gross J concluded that:

- The enforcing court could if necessary consider the circumstances in which both the original arbitration award was made and the circumstances in which it had later been annulled.
- The enforcing court would not be prevented from forming its own view on whether the foreign entities involved had complied with the appropriate legal rules.

In *Yukos Capital SARL v OJSC Rosneft Oil Company*⁴ both the English and Dutch courts had to address the question of whether they could enforce an award that had been set aside at the seat of the arbitration. Four awards were made in favour of Yukos Capital on 19 September 2006. The seat of the arbitration was Russia. On 23 May 2007, the Moscow *Arbitrazh* Court (which was the relevant supervisory court) annulled each of the awards in judgments which were later upheld on appeal. Despite being set aside at the seat of the arbitration, Yukos Capital tried to enforce the awards in the Netherlands. In a decision dated 28 April 2009, the Court of Appeal in Amsterdam enforced the awards and held that:⁵

“[S]ince it is very likely that the judgments by the Russian civil judge setting aside the

arbitration decisions are the result of a dispensing of justice that must be qualified as partial and dependent, said judgment cannot be recognized in the Netherlands. This means that in considering the application by Yukos Capital for enforcement of the arbitration decisions, the setting aside of the decision by the Russian court must be disregarded.”

The importance of an enforcing court’s views

An enforcing court’s views on the soundness of the judicial system at the seat of the arbitration are therefore highly relevant to the exercise of a discretion to enforce, as far as the Court of Appeal in Amsterdam is concerned. It is a judgment that has been criticised by AJ van den Berg⁶ from a theoretical perspective. He has asserted that, if the award is invalid under the law of the seat of the arbitration, it cannot have any validity in any other jurisdiction.⁷ The English courts would however later side with the Amsterdam Court of Appeal.

OJSC Rosneft Oil then failed to pay Yukos Capital despite the decision of the Court of Appeal in Amsterdam. Yukos Capital therefore commenced proceedings in the High Court in England in March 2010. As a preliminary question the court was asked to decide whether the common law prevents enforcement of arbitral awards that have been set aside by the courts at the seat. Simon J. held that the answer was to be found in a “test” asking whether the court can in the circumstances treat the award as having legal effect. He stated⁸:

“In applying this test 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.”

Summary

- **Under principles of comity, an English enforcing court should not normally enforce a foreign award that has already**

been set aside at the seat of the arbitration.

- **English common law nevertheless accepts that such an award may survive and be enforced if the court at the seat of the arbitration, when setting aside the award, can be shown to have offended basic principles of honesty, natural justice and domestic concepts of public policy.**
- **Adducing evidence and convincing the English court of those transgressions in a foreign jurisdiction is of course possible. But it must represent a substantial hurdle to a party seeking to enforce such an award in England.**

¹ [2011] EWHC 1957 (Comm)

² [2014] EWHC 576 (Comm); [2008] EWCA Civ 1157; [2008] EWHC 797 (Comm); [2005] EWHC 726 (Comm)

³ [2010] UKSC 46 at [67-68]

⁴ [2014] EWHC 2188 (Comm)

⁵ Cited by AJ van den Berg, Enforcement of Arbitral Awards Annulled in Russia Case Comment on Court of Appeal Amsterdam, April 28, 2009 JIA 27(2): at 187, 2010

⁶ *ibid*

⁷ In the recent case of Maximov v OJSC Novolipetsky Metallurgichesky Kombinat (2011) 491569/KGRK 11-1722 the district court of Amsterdam refused to enforce an award which had been set aside by the Moscow Arbitrazh Court because there was no proof of any violation of the principle of proper judicial procedure. The Amsterdam Court of Appeal has affirmed this decision (2012) 200.100.508/01

⁸ Yukos Capital SARL v OJSC Rosneft Oil Company [2014] EWHC 2188 (Comm) (03 July 2014) para 20



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