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**The Journal**

# SUPPORTIVE ATTITUDE OF ENGLISH COURTS TOWARDS INTERNATIONAL COMMERCIAL ARBITRATION

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## Introduction

This short paper was originally presented at the 2018 Sharm El Sheikh flagship conference of the Cairo Regional Centre for International Commercial Arbitration on the *Role of State Courts in International Arbitration*.(2) This paper answers the question of how a national court can be determined as being supportive of arbitration. It briefly explores the attitude of English courts on the enforcement of international commercial arbitration agreements and awards through some recent and important decisions. These recent international commercial arbitration related decisions of the English courts evidence the supportive role of the English courts in the application of the New York Convention or similar provisions. This paper is written in the context of the celebration of the 60th anniversary of the New York Convention as a stable and innovative pro-enforcement instrument for foreign arbitral awards and arbitration agreements.(3)

This paper briefly introduces the New York Convention and its ratification by the United Kingdom. To answer its defined question on how to demonstrate the supportive position of a state towards arbitration, this paper explores some decisions from the English courts on the principle of competence-competence, challenge of

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(2) The conference presentation was titled, 'Some decisions of English Courts on the Enforcement of International Commercial Arbitration'.

(3) Culled from the title of the Sharm El Sheikh 2018 conference.

the arbitrator, anti-suit injunctions, challenge of awards and the enforcement of awards annulled at the seat of arbitration.

**The New York Convention and the United Kingdom**

The New York Convention refers to the United National Convention for the Recognition and Enforcement of Foreign Arbitral Awards of 1958.(4) The objective of the New York Convention is to facilitate the recognition and enforcement of arbitral award and arbitration agreements made in writing.(5) The Convention is commonly referred to as the most successful arbitration related international convention. As at 3 September 2019, the Convention has been ratified by 160 states including all the major trading states and economies of the world.(6) The United Kingdom (UK) ratified the New York Convention on 24 September 1975 with the territorial reservation: to the effect that the UK will only apply the Convention to the recognition and enforcement of awards made in another contracting state. The Geneva Convention on the Execution of Foreign Arbitral Awards of 1923 also applies in the UK (by virtue of section 99 of the English Arbitration Act 1996 (1996 Act) which refers to Part II of the Arbitration Act 1950 and applies to non-New York Convention awards).

The provisions of the New York Convention are given effect by virtue of section 100 of the 1996 Act which provides that, "New York Convention award" means an award made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention."

Under section 101 of the 1996 Act, a New York Convention award is recognised as binding on the parties thereto and on which

(4) The New York Convention was agreed in 1958 and its text is available on the UNCITRAL website:

(5) See for example, Emmanuel Gaillard, "The Present – Commercial Arbitration as a Transnational System of Justice: International Arbitration as a Transnational System of Justice" in Albert Van den Berg (gen. ed.) Arbitration – the Next Fifty Years, ICCA Congress Series No. 16, Kluwer Law International, p. 66 at p. 71.

(6) Maldives signed the New York Convention on 17 September 2019 as its 161st member state. The convention will come into force in Maldives in December 2019.

they can rely by way of "defence, set-off, or otherwise in any legal proceedings" in England, Wales, Northern Ireland. The New York Convention award can be enforced by leave of the court as a judgment or order of the court.

Under section 102 of the 1996 Act, the evidence to be produced for the recognition or enforcement of a New York Convention award is: a duly authenticated original award or a certified true copy of it; and the original arbitration agreement or a certified true copy of it; and if these documents are in a foreign language, translations into English will need to be produced. These are the same provisions under article IV of the New York Convention.(7)

Under section 103 of the 1996 Act, the grounds on which the recognition or enforcement of a New York Convention award may be refused also mirror those grounds set out under article V of the New York Convention. It will be useful to quote section 103 of the 1996 Act in full.

Section 103 of the 1996 Act provides:

1. Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.

2. Recognition and enforcement of the award may be refused if the person against whom it is invoked proves –

    (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;

    (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;

(7) See for example, Emilia Onyema, "Formalities of the Enforcement Procedure (Articles III and IV), in Emmanuel Gaillard and Domenico Di Pietro (eds) *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, Cameron and May (2008) pp 597-612.

(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;

(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));

(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;

(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.

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.

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.

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 and enforcement of the award.

6. It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security.

In IPCO (Nig) Ltd v NNPC,[8] the court noted that this section 103 of the 1996 Act is predisposed to the enforcement of New York Convention awards.

The judiciary in England recognises the seat theory by which the courts at the seat of arbitration have overriding supervisory jurisdiction over arbitral awards rendered at such seat.[9] However, it is also widely acknowledged and recognised as being very supportive of arbitration.

**Some English Cases on the Supportive Nature of English Courts towards Arbitration**

**On competence-competence**: which is the principle that the arbitrators have the powers to determine their own jurisdiction in the first instance as enshrined in section 7 of the 1996 Act.

In Premium Nafta Products Ltd and Others v Fili Shipping Company Ltd and Others (also known as Fiona Trust v Privalov);[10] applied recently in Dreymoor Fertilisers Overseas PTE Ltd v Eurochem Trading GmbH;[11] the House of Lords held that "The arbitration agreement must be treated as a "distinct agreement" and can be void or voidable only on grounds which relate directly to the arbitration agreement."[12]

(8) IPCO (Nig.) Ltd v NNPC [2014] EWHC 576 (Comm)

(9) See for a robust debate on the various theories and the competing interests of the courts at the seat of arbitration and the courts at the place of enforcement, Luca G. Radicati Di Brazolo, "The control system of arbitral awards: a pro-arbitration critique of Michael Reisman's "Architecture of International Commercial Arbitration"" in Albert Van den Berg (gen. ed.) Arbitration – the Next Fifty Years, ICCA Congress Series No. 16, Kluwer Law International, po. 74-102.

(10) Premium Nafta Products Ltd (20th Defendant) and Others v Fili Shipping Company Ltd (14th Claimant) and Others [2007] UKHL 40

(11) Dreymoor Fertilisers Overseas PTE Ltd v Eurochem Trading GmbH [2018] EWHC 909 (Comm)

(12) Ibid, at para. 17

**On challenge of arbitrator**: Halliburton Co v Chubb Bermuda Insurance Ltd and Others(13) the Court of Appeal held that "an arbitrator could accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias". This dispute arose from the explosion and fire on Deepwater Horizon oil rig in the Gulf of Mexico on 20 April 2010: BP was the lessee of the rig, Transocean owned the rig, Halliburton provided cementing and well-monitoring services; and Chubb provided liability insurance to both Transocean and Halliburton. This case is on appeal to the UK Supreme Court.

**On anti-suit injunctions**: Atlas Power Ltd & Others v National Transmission and Despatch Co Ltd,(14) the court granted anti-suit injunction to restrain National Transmission and Despatch Co Ltd from challenging in Pakistan a LCIA partial final award issued in London. The court held that as the court of the seat of arbitration, it had exclusive supervisory jurisdiction and had the power to issue the injunction.

**Successful challenge under section 68 EAA**: Though not a challenge under the New York Convention, in RJ v HB(15) the sole arbitrator in an ICC-London arbitration based his award on an issue which the parties did not address or request. In the final award the arbitrator decided that RJ breached the share transfer agreement and was the beneficial owner of the shares purchased by HB. None of the parties sought this relief. The Commercial Court in London held that this was a breach of due process and remitted the award back to the arbitrator.

(13) Halliburton Co v Chubb Bermuda Insurance Ltd and Others [2018] EWCA Civ 817; [2018] 1 Lloyd's Law Rep 638.

(14) Atlas Power Ltd & Others v National Transmission and Despatch Co Ltd [2018] EWHC 1052

(15) RJ v HB [2018] EWHC 2833 (Comm)

**On the enforcement of awards annulled at the seat of arbitration:** In Nikolay Viktorovich Maximov v OJSC Novolipetsky Metallurgichesky Kombinat,[16] the Court held that a party that requests it to enforce an annulled award need to "establish not only that the foreign court's decisions were wrong or manifestly wrong but that they are so perverse as for it to be concluded that they could not have been arrived at in good faith or otherwise than by bias."[17]

**Conclusion**: From this very brief analysis and with Brexit looming, the London arbitration market remains positive and optimistic. English judges fully understand their supportive role for arbitration, not necessarily because they all love arbitration (see for example, comments by Lord Chief Justice Thomas in 2016 (Bailii Lecture of 9 March 2016 and his view on arbitration undermining the development of the common law) but, more importantly, the judges all understand the importance of arbitration to the growth of the UK economy. This understanding has led to the excellent interplay between the judiciary and arbitration that we see in arbitration in London and this is what African judiciaries need to emulate. Stavros Brekoulakis in his CIArb Roebuck Lecture[18] after exploring the beginnings of the recognition of arbitration under English legal system, argued that English law and legal system has always pursued a pro-arbitration policy, having strong roots in maritime, construction and insurance disputes. That trend continues to grow stronger and there is no reason for London's position as one of the most attractive seats of arbitration to dim, not even with the advent of Brexit.

(16) Nikolay Viktorovich Maximov v OJSC Novolipetsky Metallurgichesky Kombinat [2017] EWHC 1911 (Comm) at para. 53.

(17) Ibdi, at para. 53.

(18) CIArb Roebuck Lecture series is in honour of Prof Derek Roebuck, MCIArb. Prof Brekoulakis 2019 Roebuck lecture titled 'Has Arbitration Always been Favoured in England?' was delivered on 13 June 2019.