Early impact of *Dallah* on the English courts

Could a Supreme Court decision damage the UK's standing for enforcing foreign arbitral awards? *Charlie Caher* of WilmerHale explains.

The UK Supreme Court's ruling in the case of *Dallah Real Estate v The Government of Pakistan* [2010][1] is the most significant arbitration-related judgment issued by the English courts since the landmark *Fiona Trust* case in 2007.[2]

In *Dallah*, the UK Supreme Court clarified the extent of the review to be undertaken by the English courts when faced with a jurisdictional challenge to an arbitral award. Following *Dallah*, a limited review of the arbitrators' award by the court is not sufficient, rather a full investigation of the issue of jurisdiction is required.[3] A full investigation by the court is necessary even when the arbitral award had been issued at a foreign seat.[4]

Despite the fact that *Dallah* resulted in the non-enforcement in the UK of an ICC arbitral award issued by an eminent tribunal, the judgment has met with a largely positive reaction in the arbitration community.[5] But the recent Commercial Court decision of *A v B* [2010] (where the Commercial Court provided clarification of the requirements for pursuing an application for security under section 70(7) of the English Arbitration Act 1996) suggests that *Dallah* is already influencing English judicial attitudes towards enforcement in a way that may have implications for England's reputation as a pro-enforcement jurisdiction.

Section 70(7) of the English Arbitration Act 1996

Section 70(7) of the English Arbitration Act 1996 relates to challenges to an arbitral award made under Sections 67 to 69 of the Arbitration Act, and grants the court the following power:

"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."[6]

Section 70(7) gives the English courts the power to ensure that arbitral awards are properly enforced, because it obliges a challenging party to secure the award sum pending the outcome of the challenge. While many challenges to an award are clearly genuine, Section 70(7) protects against a scenario where a tactical challenge is used to buy a recalcitrant party enough time to dissipate their assets.

In the words of Lord Saville, it is "a tool of great value, since it helps to avoid the risk that, while the appeal is pending, the ability of the losing party to honour the award may, by design or otherwise, be diminished".[7]

The wording of Section 70(7) "The Court ***may*** order" suggests that the intention of the legislation was to afford wide discretion to the courts in determining whether or not to exercise their power under section 70(7), but the recent decision of *A v B* suggests that this discretion is significantly curtailed by the obligation to apply certain requirements to any Section 70(7) application relating to a Section 67 challenge.[8]

Facts of *A v B*

A v B concerned an underlying dispute regarding the non-delivery of two parcels of Kazakh rapeseed. B alleged breach of contract due to A's failure to deliver the rapeseed and claimed damages for non-delivery. B commenced two arbitrations against A under the Federation of Oils, Seeds and Fats Associations (FOSFA) Rules of Arbitration and Appeal. A challenged the substantive jurisdiction of the tribunal, but the Board of Appeal of FOSFA ultimately issued awards concluding that the arbitrators did have substantive jurisdiction, and that B's claims for damages succeeded.

A then issued an application under Section 67, challenging the arbitral awards on the grounds of lack of substantive jurisdiction. B made an application under Section 70(7) for security of sums awarded to B by the Board of Appeal of FOSFA, pending the determination of A's application. B's Section 70(7) application was dismissed by Flaux J at the end of a hearing on 10 December 2010, and he subsequently published a more lengthy judgment on 16 December 2010 explaining his reasons for the decision, which included clarification on the requirements for a successful Section 70(7) application.

Section 70(7) threshold requirement

Flaux J acknowledged in *A v B* that the Commercial Court had taken conflicting approaches to Section 70(7) in the past, particularly in the cases of *Peterson Farms v C&M Farming Limited* [2003][9] and *Tajik Aluminium Plant v Hydro Aluminium AS* [2006].[10]

In *Peterson*, Tomlinson J (as he then was) held that it would be a "threshold requirement" for consideration by the court whether to order security under Section 70(7) in a Section 67 case that the party resisting the jurisdictional challenge demonstrates that "the challenge is flimsy or otherwise lacks substance".[11] However in *Tajik*, Morrison J held that "the statute contains an unfettered discretion. There is no threshold requirement".[12] Flaux J confirmed in *A v B* that the approach in *Peterson* was the correct one.

Section 70(7) risk of dissipation of assets

Even if a party resisting the jurisdictional challenge was able to prove that the challenge was flimsy or lacking in substance, Flaux J held that this was necessary, but not sufficient, to grant security. Although he cautioned that it would not be "advisable or appropriate to lay down hard and fast rules as to the circumstances in which it would be appropriate to order security under section 70(7)", Flaux J held that as a "general principle the Court should not order security unless the applicant can demonstrate that the challenge to the award…will prejudice its ability to enforce the award".[13] Flaux J confirmed that this will often entail the applicant demonstrating some risk of dissipation of assets, although there may be other ways in which enforcement could be prejudiced.[14]

Effect of *A v B* on enforcement

In light of *A v B*, there is now a clear two-stage test for a successful Section 70(7) application in relation to Section 67. First, the applicant must prove that the Section 67 challenge is flimsy or otherwise lacking in substance. If he is successful, he must then demonstrate that the Section 67 challenge will prejudice the applicant's ability to enforce the award.

This is an onerous test, especially given the relative ease with which a party can bring a Section 67 challenge.[15] *A v B* has curtailed the courts' discretion to exercise a powerful pro-enforcement weapon in their armoury, to the extent that the court is now obliged to apply the two-stage test before making a Section 70(7) order.

Influence of *Dallah*

In distinguishing the judgment in *Tajik* and approving the approach of *Peterson*, Flaux J was clearly influenced by the *Dallah* judgment, handed down by the UK Supreme Court only one month prior to *A v B*. Flaux J commented that the *Tajik* judgment was "largely influenced by [Morrison J's] dislike for the conclusion... that a challenge under section 67 is a complete rehearing and not a review",[16] but went on to note that "the Supreme Court has recently determined conclusively that a challenge such as is made under section 67 is indeed a complete rehearing [rather than some limited review suitable for an appellate process]".[17]

But why is the nature of a Section 67 review linked to the requirements for a Section 70(7) application? In the wake of *Dallah*, the English courts will not assume that the defendant to a Section 67 challenge is in an advantageous position, simply because an arbitral tribunal (however eminent) has already determined it has jurisdiction and issued an award in the defendant's favour. In the words of Lord Mance, the party seeking to enforce the award "starts with the advantage of service, it does not also start fifteen or thirty love up". Ordering the Section 67 applicant to pay into court is akin to recognising that he is already at some immediate disadvantage because of the award against him, and is clearly undesirable, unless the application is demonstrably "flimsy or otherwise lacking in substance".

A v B demonstrates how *Dallah* can be interpreted to restrict the discretion of the courts to exercise pro-enforcement tools at their disposal (such as Section 70(7)). It remains to be seen how *Dallah* will shape and influence judicial attitudes towards the enforcement of arbitral awards in the months and years to come but it is certainly too early to conclude that – together with decisions like *Peterson* – *Dallah* will not have any detrimental impact on England's only recently reclaimed reputation as a pro-enforcement jurisdiction.

It also remains to be seen whether *Dallah* can still be regarded as a pro-arbitration decision in the wake of the French Court of Appeal's judgment on 17 February 2011, which found that the *Dallah* tribunal had been right to assume jurisdiction over Dallah's claim against the Government of Pakistan.[18] The French Court of Appeal's judgment contradicts the finding of the UK Supreme Court, which concluded that the *Dallah* tribunal had no such jurisdiction over the Government of Pakistan.[19] It has already been suggested that the French court's different approach to reviewing the arbitrators' jurisdiction may have been a significant factor in its decision to uphold the jurisdiction of the *Dallah* tribunal.[20] If this is correct, then this may cast the UK Supreme Court's decision in a less favourable light within arbitration circles. CDR

Endnotes

1. *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.
2. *Premium Nafta Products Limited and others v. Fili Shipping Company Limited and others ("Fiona Trust")*, [2007] UKHL 40.
3. *Dallah v Pakistan* [2010], at para. 160 ("The starting point…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.")
4. *Ibid*. at paras. 27-29.
5. Some commentators have remarked that the UK Supreme Court's decision simply confirmed the prevailing orthodoxy in relation to appeals on jurisdiction, and offered welcome clarification that the doctrine of Kompetenz-Kompetenz is a rule of priority in favour of arbitrators, rather than a rule that the arbitrators' decisions on jurisdictional issues should escape any form of review.
6. Section 70(7) Arbitration Act 1996.
7. Report on the Arbitration Bill of the Departmental Advisory Committee on Arbitration Law ("DAC"), at para. 380.
8. Under section 67 of the English Arbitration Act 1996, an arbitral award can be challenged on the grounds that the tribunal lacked "substantive jurisdiction." If the challenge is successful, the court may declare the arbitral award to be of no effect (in whole or in part) or the court may order the arbitral award to be set aside (in whole or in part).
9. *Peterson Farms v C&M Farming Limited* [2003] EWHC 2298 (Comm).
10. *Tajik Aluminium Plant v Hydro Aluminium AS* [2006] EWHC 1135 (Comm).
11. *Peterson Farms v C&M Farming Limited* [2003], at para. 35.
12. *Tajik Aluminium Plant v Hydro Aluminium AS* [2006], at para. 55.
13. *A v B* [2010] EWHC 3302 (Comm), at para. 50.
14. *Ibid*.
15. Unlike section 67, a section 69 application can only be brought if the court gives leave to appeal , and the right to appeal is severely restricted by section 69(3), which requires the fulfillment of certain criteria. The increasing popularity of a section 67 application over a section 69 application was documented by Morison J in Tajik ("Anecdotally, it appears that there is an increase in [section 67] appeals whilst at the same time a decrease in appeals under section 69, where the gateway is narrow.") *Tajik Aluminium Plant v Hydro Aluminium AS* [2006], at para. 60.
16. *A v B* [2010] EWHC 3302 (Comm), at para. 23.
17. *A v B* [2010] EWHC 3302 (Comm), at para. 25.
18. *Judgment of 17 February 2011, Gouvernement du Pakistan – Ministère des affaires religieuses v. Société Dallah Real Estate and Tourism Holding Company* (Paris Cour d'appel)
19. In the UK Supreme Court judgment on Dallah, Lord Mance suggested that "an English judgment holding that an award is not valid could prove significant" in relation to the French Court of Appeal's considerations on jurisdiction, but obviously the French Court of Appeal thought otherwise. *See Dallah v Pakistan* [2010], at para. 29.
20. Dallah's counsel in the French proceedings, Mr. Laurence Kiffer was quoted thus: "I was amazed that the UK courts at all levels wanted to put themselves in the same position as the tribunal and retry the issue of jurisdiction, which required hearing fresh evidence and calling new witnesses. The court in Paris only looked at the content of the award for the purpose of assessing whether the arbitrators complied with the criteria under French law for determining jurisdiction." *See* Global Arbitration Review, *French and UK courts at odds over Dallah*, 18 February 2011.