Enforcement Of Arbitration Awards And Stays Of Enforcement Due To Challenges To The Award In The Seat Of The Arbitration: Approaches Taken By The Courts Of Bermuda And The UK

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I. Introduction

The necessary reliance on local courts for enforcement of foreign arbitral awards can lead to significant delays in finalising a dispute. Obtaining a favorable arbitration award is often only half the battle, as subsequent annulment and enforcement proceedings can last years. A particularly common problem is the staying of an enforcement award pending determination of annulment proceedings in the seat of the arbitration. The years it takes for a final determination of these post-award proceedings renders nugatory any favorable award, and places in jeopardy the value and competence of international arbitration in resolving commercial disputes.

Until recently, courts have shown considerable reluctance to enforce arbitral awards that are subject to annulment proceedings. Such reluctance is understandable, especially in light of the principles underpinning the New York Convention on the Reciprocal Enforcement of Arbitration Awards 1958 (Convention) and the comity between courts of signatory parties. The Bermuda Court of Appeal considered these principles recently in the decision of LAEP Investments Ltd v Emerging Markets Special Situations 3 Ltd, [2015] CA (BDA) 10 Civ, 9 (LAEP case). Whilst sympathetic to the enforcing party’s situation, the court ultimately found that even a potential delay of 10 or more years occasioned by the annulment proceedings in Brazilian courts to be insufficient to allow prior enforcement.

A recent UK Court of Appeal signals a move towards the English court balancing the right of a losing party to pursue an annulment or other challenge against the right of a victorious party to obtain the fruits of a successful award. In IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation [2015] EWCA Civ 1144 (IPCO case), the English Court of Appeal allowed, at least in principle, partial execution of an arbitral award on the basis of the “absurd” delay expected for determination of set-aside proceedings in Nigeria.

This development in the application of the Convention principles in the UK to facilitate enforcement may result in the strengthening of confidence in international arbitrations as a certain and reliable dispute resolution process.

II. Bermuda Court of Appeal Decision of LAEP Investments Ltd v Emerging Markets Special Situations 3 Ltd

The dispute giving rise to the appeal goes back to a reference to arbitration submitted by LAEP Investments...
Ldn (LAEP) in Brazil in October 2010, concerning the existence and/or extent of obligations owed by LAEP to the Emerging Markets Special Situations 3 Limited (EMSS). An arbitral award (Award) was made in Brazil, a party to the Convention.

Two principal challenges to the Award were brought before the Brazilian courts. The first, the Annulment Application, was filed by LAEP in June 2013. This sought to annul the Award under Article 32 of the Brazilian Arbitration Law on the basis that the Award was inconsistent with and rendered in violation of Brazilian public policy. The second, the Suspension Application, was filed ex parte by LAEP and its parent company in the 43rd State Lower Civil Court in Brazil. This application was denied the following day, but on appeal the Sao Paulo State Court of Appeals made an interim order on 19 December 2013 staying the effect of the Award pending the Annulment Application (Stay Order).

Enforcement of the Award was sought in Bermuda, also a contract party to the Convention. Section 40(1) of the Bermuda International Conciliation and Arbitration Act 1993 (1993 Act), provides that a Convention award shall 

"be enforceable in Bermuda either by action or may by leave of the Court, be enforced in the same manner as a judgment or order to the same effect and, where leave is so given, judgment may be entered in terms of the award."

In Bermuda, LAEP applied for a stay of execution of a court order granting leave to EMSS to enforce the Award in Brazil (Enforcement Order). LAEP brought the application pursuant to Rule 11 of the Rules of the Supreme Court 1985 Order 451, which provides for a stay of execution on the ground of "matters which have occurred since the date of the judgment or order". The Court may grant such relief on such terms as it deems just. Reliance on this ground requires the presentation of new facts, which would or might have prevented the judgment or order being made, or would or might have led to a stay of execution if they had already occurred at the date of the judgment or order.2

LAEP submitted that the Stay Order, which had the effect of suspending the operation of the Award, amounted to a material change of circumstances since the Enforcement Order. LAEP submitted that had the Stay Order been in place at the date of the enforcement hearing, the court might well have refused leave to enforce the Award. EMSS, represented by Appleby, adduced evidence that the judicial process in Brazil could take two to ten years. EMSS submitted that if the Award was set aside, LAEP would still be liable to EMSS under debentures US$4 million more than the amount of the Award. EMSS also submitted that LAEP would incur the additional cost of US$2.5 million to put itself in this position.

In the Bermuda Supreme Court, Hellman J dismissed the argument that the Stay Order itself represented a material change. Hellman J held that there was no material before him to outweigh the bias towards enforcement inherent in the 1993 Act, and that he was not satisfied that there was any real prospect that the Stay Order of the Brazilian courts would have led the Bermuda Court’s refusal to make the Enforcement Order.

Further, with regard to the merits of the application to stay, Hellman J concluded that the balance of convenience did not favour interfering with EMSS’ right to enforce the Award. In applying the test, Hellman J placed weight on EMSS’ submission that the judicial process in Brazil could take two to ten years to conclude and that a stay of execution of the Award for this length of time would result in severe financial prejudice to EMSS. The application for the stay of the Enforcement Order was dismissed.

However, on appeal, the Bermuda Court of Appeal held that Hellman J insufficiently appreciated the effect of the Stay Order, being an order of a competent authority, on the ability of the Bermuda courts to enforce Award. Specifically, Section 42(2)(f) of the 1993 Act allows for the refusal of enforcement if 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. The application of a balance of convenience test was only applicable prior to the Stay Order, and had no relevance once the Stay Order had been issued.

III. English Court of Appeal Decision of IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation

The dispute concerned a 2004 Nigerian arbitral award of approximately US$152 million in favour of the claimant IPCO. The respondent in the arbitration, Nigerian National Petroleum Corporation (NNPC), commenced proceedings in Nigeria to have the award set aside, originally on the bases of lack of jurisdiction and misconduct by the tribunal.

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IPCO brought enforcement proceedings in the English courts. As Nigeria is a party to the Convention, an English court made an ex parte order, pursuant to Section 101(2) and (3) of the Arbitration Act 1996 (1996 Act) for payment of the sterling equivalent of the total sum due under the award. NNPC sought to have that order set aside, alternatively, to stay enforcement proceedings pending the outcome of the proceedings in Nigeria. Ultimately, the UK enforcement proceedings were stayed, on condition that NNPC made a part-payment to IPCO and provided security for the award.

Some two years later, in 2008, IPCO again pursued enforcement proceedings in England. The proceedings suffered a myriad of significant delays, including the introduction of new allegations of fraud against IPCO. By mid-2009, the parties had entered into a consent order adjourning enforcement proceedings pending the outcome of a fraud investigation in Nigeria. In July 2012, IPCO again commenced enforcement proceedings in England. Field J dismissed IPCO’s application to enforce the award on the basis that there were insufficient grounds to establish a change in circumstances warranting reconsideration of the stay of proceedings.

IPCO submitted on appeal that, inter alia, the introduction of the fraud allegations, and the consequent delay relating to the Nigerian investigation, amounted to a significant change that was not present or known at the time of the previous stay of enforcement proceedings.

The Court of Appeal found that Field J attached insufficient weight to the character and extent of the delay occasioned by the fraud investigation, which had and would continue to result in such an extended delay in enforcement, as to make a mockery of the underlying principles of the Convention. Although resolution of issues of validity of awards should usually be determined prior to enforcement, it is also necessary to take account of the principles underlying the Convention of efficient and expedient dispute resolution. However, principles of expediency and efficiency could not override concerns of public policy in enforcing an award that was potentially obtained through fraud.

As such, the Court of Appeal held in principle that the award should be enforced but such enforcement be subject to a determination by the Commercial Court pursuant to Section 103 (3) of the Act as to whether enforcement, in part or in full, is contrary to English public policy due to fraud. However, if the Commercial Court finds enforcement to be consistent with English public policy, the award will be enforceable in England notwithstanding the challenges in Nigeria.

The Court of Appeal also attached a number of other conditions to the award regarding security to be provided by NNPC. In a supplementary judgment, the Court of Appeal held that a court asked to exercise its general discretion to adjourn enforcement proceedings had an accompanying inherent power to impose conditions on the adjournment. The Court of Appeal confirmed that where there is a very large award, delay without security is inherently likely to prejudice the award creditor and certainly risked doing so. In the light of the enormous delay, past and anticipated, it was right to impose conditions of security.

IV. Conclusion
The recent IPCO case signals that the English courts will not defer enforcement indefinitely where there are unreasonable delays in annulment or other challenge proceedings in the court of the arbitral seat. The facts of the IPCO case however do not set a precedent that enforcement proceedings will be granted irrespective of such challenges. Rather, it provides courts with precedent to take into account the principles underlying the Convention regarding expedient and efficient dispute resolution, against the bona fide right of a party to challenge an arbitral award and considerations of comity between the courts of contracting parties.

Parties to international arbitrations voluntarily, and often with some relief, submit to the expedited and expedient processes. It seems fair and just that a court should consider these principles in the enforcement of awards. A failure to do so will continue to undermine international arbitration as a successful and robust dispute resolution process.

Endnotes
2. See EI Du Pont de Nemours & Co v Enka BV (No 2) [1988] RPC 497, Patents Court, per Falconer J at 509 line 11 - 510 line 14.