

Bilateral investment treaties and justiciability

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A recent decision of the Court of Appeal in *Occidental Exploration and Production Company v Republic of Ecuador* [2005] EWCA Civ 1116 determined that in certain contexts the English court will not be precluded from interpreting or having regard to the provisions of a Bilateral Investment Treaty by the principle of non-justiciability.

Facts

A Bilateral Investment Treaty signed on 27th August 1993 between the US and Ecuador contained provisions concerning “encouragement and reciprocal protection of investment” in each country by the nationals and companies of the other. The Treaty also contained provisions whereby such nationals and companies were granted direct dispute resolution rights against the other country. One of the dispute resolution options provided for arbitration under UNCITRAL rules. Occidental Exploration and Production Company (“Occidental”), invoking that right, brought arbitration proceedings against Ecuador. In the absence of agreement of the parties as to the place of arbitration, the arbitrators determined that it should be London. The tribunal made its award on 1st July 2004, determining the dispute in favour of Occidental save in relation to one element of the claim.

Ecuador sought to have the award set aside under both sections 67 and 68 of the Arbitration Act 1996¹. Occidental contested Ecuador’s challenge on the grounds that it would require the English court to interpret provisions of the Bilateral Investment Treaty, in contravention of the rule of English law which makes such issues “non-justiciable”. The objection was abandoned in so far as it related to the points raised under section 68, and Aikens J, at first instance, decided against Occidental as regards its objection to section 67. The decision at first instance and the appeal related to the applicability of Occidental’s objection; neither Court was concerned with the merits of Ecuador’s challenge under either of section 67 or 68.

Arguments

Occidental submitted that Ecuador’s challenge under section 67 of the Arbitration Act 1996 raised issues

upon which the English court cannot and should not adjudicate. It would require the court to enforce or interpret the terms of the Bilateral Investment Treaty, contrary to the principle stated in the *Tin Council case*² which precludes English courts from interpreting unincorporated international treaties. Further, it would require the court to “adjudicate upon the transactions of foreign sovereign states” contrary to the wider principle of “judicial restraint or abstention” stated by Lord Wilberforce in *Buttes Gas and Oil Co. v Hammer*³.

Ecuador responded that the court was concerned with an agreement to arbitrate, arising in a manner contemplated by the Bilateral Investment Treaty but nonetheless separate from the Treaty and made between different parties, only one of whom was party to the Treaty.

Decision of the Court of Appeal

The Court of Appeal distinguished the decision made in *Buttes Gas*⁴ on the basis that that decision did not concern a situation where the interpretation of a treaty might be relevant to the construction of an agreement with a private party, or with any investment treaty. In addition, Mance LJ referred to the statement made by Lord Steyn in *Kuwait Airways Corporation v Iraqi Airways Company* (nos. 4 and 5)⁵ that the proposition that *Buttes Gas* established an “absolute rule...that courts in England will not adjudicate upon acts done abroad by virtue of sovereign authority” was “too austere and unworkable an interpretation”.

In relation to the narrower principle established in the *Tin Council case* that the English courts “have no jurisdiction to interpret or apply”⁶ unincorporated international treaties, the court made reference to a number of recent authorities in which the English courts have been assisted in one context or another in deciding the correct approach under English law by having regard to treaties or principles of international law⁷. In particular, the court made reference to *Phillipson v Imperial Airways Limited*⁸ where it was held that where parties have entered into a domestic contract in which they have chosen to incorporate the terms of a treaty, the court may interpret the treaty for the purposes of



determining the parties' rights and duties under their contract. The court cited with approval the explanation of the *Tin Council* principle given by Simon Brown LJ (as was) as a principle whereby: "the court has no jurisdiction to declare the true interpretation of an international instrument which has not been incorporated into English domestic law and which it is unnecessary to interpret for the purposes of determining a person's rights and duties under domestic law"⁹, and determined that the question it needed to answer was whether, in the present case, it was necessary to interpret the Bilateral Investment Treaty between the US and Ecuador to determine the parties' rights and duties under domestic law.

The Court of Appeal determined that the answer to that question was to be found upon examination of two factors:

- the special character of a Bilateral Investment Treaty; and
- the agreement to arbitrate.

Regarding (a), the court was firmly of the view that the Treaty involved "a deliberate attempt to ensure for private investors the benefits and protection of consensual arbitration; and that this [was] an aim to which national courts should, in an internationalist spirit and because it has been agreed between States at an international level, aspire to give effect"¹⁰. With regard to (b), the Court commented that the agreement to arbitrate was recognised under English private international law rules and, since England was the place of arbitration, was subject to the Arbitration Act 1996. The court added that the agreement to arbitrate, although resulting from the Treaty provision, was not of itself a treaty.

The court reasoned that "[t]his case [was] not concerned with an attempt to invoke at national level a Treaty which operates only at international level. It [concerned] a Treaty intended by its signatories to give rise to rights in favour of private investors, capable of enforcement, to an extent specified by the Treaty wording, in consensual arbitration against one or other of its signatory States. For the English court to treat the extent of such rights as non-justiciable would appear to us to involve an extension, rather than an application, of existing doctrines developed in different contexts."¹¹ The court agreed with *Occidental* that it was probable that the court would not exercise jurisdiction over inter-State arbitration brought under the Treaty, but considered that this argument had no bearing on whether it should exercise jurisdiction over investor-State arbitration. Since issues of jurisdiction were justiciable before the arbitrators in the arbitration, and no objection had been

raised as to justiciability in the arbitration, the court could see no reason why such reasons would not be justiciable before it.

As to the argument in relation to "judicial restraint", the court was firmly of the view that there were no issues in the present case which were remotely comparable in terms of difficulty or complexity to those raised in *Buttes Gas* (that case included arguments regarding claims to sovereignty and military intervention). The court also noted, with some amusement, that *Occidental*, a private investor, was raising concerns as to comity in circumstances where Ecuador, a State, saw no such issue.

Ultimately the court determined that it was being asked to interpret the effect and scope of an arbitration agreement, recognised under English law principles of private international law, in order to give effect to the rights and duties arising therein. In the court's view this satisfied the criterion for jurisdiction laid down by Brown LJ in the *CND* case and the principles established in the *Phillipson* case. Finally, the court recognised the nature of Bilateral Investment Treaties, and in particular that examined in the present case, stating "we consider that the fact that States party to the Treaty deliberately chose to provide a mechanism for dispute resolution which invokes consensual arbitration with its domestic legal connotations, is a factor which should make the English court hesitate long about subjecting such arbitration proceedings to special principles of judicial restraint developed in relation to international transactions or treaties lacking in any foundation or incorporation in domestic law."¹²

Conclusion

The decision of the Court of Appeal in *Occidental* represents a recognition of the hybrid nature of Bilateral Investment Treaties. Private investors who agree to submit their dispute to arbitration should not, in the court's view, be precluded from recourse to all of the procedures and remedies that their chosen form of arbitration entails by reason of their investment arising under a treaty which was designed to protect their interests. However, this decision will not be relevant to all arbitrations taking place in England and involving private parties arising from Bilateral Investment Treaties since not all such treaties fall within the auspices of the Arbitration Act 1996. In particular, arbitrations under the International Centre for the Settlement of Investment Disputes (ICSID), a system intended to provide for dispute resolution unfettered by any domestic law, are expressly excluded from the Arbitration Act 1996.

footnotes

1. Sections 67 and 68 provide a mechanism to challenge arbitral awards on grounds of substantive jurisdiction or serious irregularity respectively.
2. *J H Rayner (Mincing Lane) Ltd. v DTI* ("the Tin Council case") [1990] 2 AC 418
3. [1982] AC 888, 931G
4. [1982] AC 888, 931G
5. [2002] 2 AC 883 at p1101E
6. per Lord Hoffmann in *R v Lyons* [2003] 1 AC 976
7. See *A v Secretary of State for the Home Department* [2004] UKHL 55; *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55.
8. [1939] AC 332
9. *The Campaign for Nuclear Disarmament v The Prime Minister* ("the CND case") [2002] EWHC 2759 QB
10. per Mance LJ at 32
11. per Mance LJ at 37
12. per Mance LJ at 47

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