gar
The international journal of commercial and treaty arbitration
NEWS

PARIS: A Caribbean adventure

7 August 2014

A lecture by Lord Goldsmith QC looked at the relationship between arbitration and national courts with reference to a set of litigations concerning anti-arbitration measures implemented by the government of Belize. Bart Wasiak of Arnold & Porter reports.

Since 2009, the central American state of Belize has sought to prevent the enforcement of unfavourable arbitral awards, passed legislation imposing heavy penalties on anyone acting in breach of worldwide anti-arbitration injunctions issued by the country's courts, and even attempted to amend the constitution to place certain matters beyond judicial scrutiny.

Goldsmith, a former UK Attorney General and chair of European and Asian litigation at Debevoise & Plimpton, has represented claimants in court proceedings challenging the validity of the government's anti-arbitration measures. At a lecture in Paris on 21 July he described the litigations to date.

The saga – which is still unfinished – has seen rulings on the commencement of arbitrations under bilateral investment treaties, the enforcement of awards, the role of public policy and of national courts, not to mention the first ever judgment of a senior common law court on anti-arbitration injunctions.

It is also a vivid example of how politics cannot be ignored in international arbitration, although Goldsmith was confident that "we have come too far for such challenges to hold back further development of the international order".

From gunboat diplomacy to international order

Goldsmith began his lecture by outlining the history of the contemporary system of international investment protection.

The origins of the system can be traced back to the 18th century, when the notion of state responsibility for injuries to aliens was born, and the doctrine of legal protection of investments started to emerge. While in some cases diplomatic protection took the form of state-to-state negotiations, in others states resorted to "gunboat diplomacy".

One such example was France's "Pastry War" against Mexico, which had its origin in a French pastry cook's claim over damage caused by drunken Mexican soldiers to his shop in Mexico City. He appealed to the king of France, who demanded that Mexico pay 600,000 pesos in damages, an enormous sum at the time. When Mexico failed to comply, France seized the Mexican port of Veracruz and a war began.

Over time, arbitration emerged as a way of resolving claims by foreign nationals against states. The Alabama Claims arbitration, in which the US government claimed compensation from Britain for damage inflicted during the American Civil War by Confederate forces using ships built in England "popularised" this form of dispute settlement as a reliable method of resolving disputes.

This article was first published in the Global Arbitration Review online news, 7 August 2014
www.globalarbitrationreview.com

According to Goldsmith, the complex contemporary system of international arbitration that has evolved represents a triumph of "international order": "a state of affairs in which the behaviour of all relevant actors is governed by clear and predictable rules, and in which the rules regulating behaviour are observed, and authority is obeyed". Discretion has been replaced with procedure and political pressure with the rule of law.

But the system could not work without the cooperation of national courts. Until the middle of the 19th century, courts regularly refused to yield their jurisdiction to ad hoc arbitral tribunals. English judges, for example, would only stay their hands in favour of arbitration where they considered that doing so was equitable. The prevailing principle was that courts' jurisdiction could not be ousted by private agreement.

One possible reason for this judge-made doctrine was revealed by Lord Campbell in the seminal 19th century case of Scott v Avery. He noted that judges were not paid a fixed salary but remunerated on a case-by-case basis, and therefore "had great jealousy of arbitrations".

The change in judicial attitude since that time can be attributed in large part to the UNCITRAL Model Law. National courts have consistently upheld Article 5 of the Model Law (*"In matters governed by this law, no court shall intervene except where so provided in this law"*) as setting out the basic rule for determining whether court intervention is permissible. At the same time, the Model Law sets the proper boundaries of judicial intervention to support arbitration.

Against this background, Goldsmith asked how the relationship between national courts and arbitrators should properly be described. Is it, as Lord Mustill has suggested, similar to a relay race, in which the different participants are working together to produce a winning result? Or is it more like a boxing match, in which courts and arbitrators trade punches, as first one, then the other, gains the upper hand?

"As God is my witness, I will never pay that award"

Following a change of government in Belize in 2008, the newly- elected prime minister, Dean Barrow, declared that the state would not be bound by a number of commercial agreements entered by the previous administration, which he thought gave an unnecessary advantage to foreign investors.

One such agreement provided guarantees in favour of Belize's predominantly British-owned national telecoms operator, Belize Telemedia Limited (BTL). BTL commenced LCIA arbitration against the state pursuant to the dispute settlement clause of the agreement and was awarded 38 million Belize dollars, but the government took steps to prevent the enforcement of the award. "As God is my witness, I will never pay that award," Barrow is reported to have declared.

A year later, the government nationalised BTL and took over a loan owed by the telecoms company to British Caribbean Bank (BCB). A group of former BTL shareholders and BCB commenced arbitration against the state pursuant to a dispute-resolution clause in the UK-Belize bilateral investment treaty. The government, relying on what Goldsmith described as "some existing common-law jurisprudence of doubtful ambit" sought injunctions to prevent the arbitrations from proceeding.

This article was first published in the Global Arbitration Review online news, 7 August 2014
www.globalarbitrationreview.com

"A piece of legislation unprecedented in its efforts to stymie the international arbitrations"

The extent of the Belizean government's anti-arbitration stance became apparent soon after, when the parliament passed what Goldsmith described as "a piece of legislation unprecedented in its efforts to stymie the international arbitrations". The law empowered Belizean courts to enjoin arbitrators and parties from proceeding with an international arbitration, or enforcement of an award, anywhere in the world.

A new offence of knowingly failing to comply with such injunctions carried heavy penalties, including a minimum imprisonment term of five to 10 years and significant fines. Remarkably, the legislation gave Belize's Attorney General the discretion to select the arbitrations with respect to which its provisions would apply.

The new law had a dramatic effect: local counsel who had advised claimants in arbitration cases against Belize came under threat of personal sanctions and certain foreign lawyers refused to travel there. The constitutionality of the law was challenged, and the case ultimately proceeded to the Caribbean Court of Justice, the appeal court of last resort for Barbados, Belize and Guyana.

While a minority of the judges would have struck down the entire piece of legislation, the majority upheld some of its provisions and, interestingly, found that the provision enabling anti-arbitration injunctions merely codified the common law. The court did, however, strike down the penalty provisions in the legislation.

Fight over the nationalisation continues

Meanwhile, former domestic shareholders of BTL had commenced separate court proceedings challenging the constitutionality of the nationalisation legislation. In June 2011, the Court of Appeal of Belize declared the compulsory acquisition unlawful, and struck it down. But the government was undeterred and immediately passed another piece of legislation, compulsorily acquiring exactly the same property.

This time, perhaps fearing another constitutional challenge, the government took the further step of proposing an amendment to Belize's constitution that sought to put the nationalisation of public utilities beyond judicial scrutiny. The bill, the passing of which required a special constitutional procedure, met with strong opposition. There were even calls for a referendum.

Fearing that the bill nevertheless would become law, a number of individuals brought court proceedings challenging its legality. Relying on a loophole to the separation of powers doctrine in English law, the claimants also sought an injunction to stop the legislation from being passed at all.

The Belizean Senate was due to vote on the amendment on 24 October 2011, a Monday. The preceding Friday, the country's Chief Justice declined to grant an injunction.

Goldsmith and his legal team, who represented the applicants, filed an appeal with a request for an urgent hearing, little expecting that one would be granted. To their surprise, a single member of the Court of Appeal agreed to hear the case the following Saturday. However, on the Saturday morning, Belize's lawyers protested over the lack of time to prepare their case

This article was first published in the Global Arbitration Review online news, 7 August 2014
www.globalarbitrationreview.com

and the judge postponed the hearing until the following morning. The matter was not heard on that day either, as the government took the view that hearing court cases on a Sunday was... unconstitutional. While the basis for this assertion was doubtful, the judge agreed to postpone the hearing once more, until 6 am the following day.

Early on Monday morning, the lawyers and the judge turned up at the courthouse. But one person was missing: the court official with the keys. "Pictures appeared the following day in the Belize newspapers showing disconsolate-looking advocates in their court robes pacing by the water's edge next to the court as dawn began to break," said Goldsmith.

The keys were found and some two hours later the judge announced his decision. Although he found against the applicants, he acknowledged their right to have a hearing before the full Court of Appeal and granted a temporary injunction stopping any further legislative progress until then. The full court heard the appeal later that day. It refused to grant an injunction and, by the time the lawyers left the courthouse, the Belizean Senate had already met and passed the legislation. "But we had made our point", said Goldsmith.

Constitutional challenges to the second nationalisation are continuing.

Belize tries to enjoin arbitrations, but loses

In seeking to obtain anti-arbitration injunctions, the Belizean government raised a number of arguments. It argued that proceedings concerning the nationalisation of public utilities should be heard in Belize as "the proper forum", despite the dispute resolution clause of the UK-Belize BIT. Government lawyers also claimed that the BIT was not part of the law of Belize as it had not been brought into effect by domestic enabling legislation. It was even claimed that the BIT was not binding on Belize at all — the basis for which argument was obscure, said Goldsmith.

Finally, the lawyers argued that the arbitration was oppressive, vexatious, inequitable and an abuse of process.

A first instance court held that there was a "serious issue to be tried" and granted an interlocutory injunction. The appeal then proceeded to the Caribbean Court of Justice, which delivered its judgment in June 2013.

The court held that, while BCB did not have an "unqualified and indefeasible" right to arbitrate, as the applicants had argued, Belize was bound by the dispute-resolution clause in the BIT and private investors' right to international arbitration was not contingent on any preconditions or prior approval.

Relying on dicta in the ICSID arbitration *Occidental Exploration and Production Company v Ecuador*, the court held that the dispute-resolution clause in the treaty constituted a standing offer to arbitrate, which BCB accepted by sending its notice to arbitrate. As such, BCB did not have to rely on the bilateral investment treaty itself, but on the contractual right derived from the treaty. Ultimately, the court upheld BCB's appeal and discharged the interlocutory injunction. In doing so, the court held that interlocutory injunctions should only be granted in "exceptional circumstances".

This article was first published in the Global Arbitration Review online news, 7 August 2014
www.globalarbitrationreview.com

The court's pro-arbitration ruling — probably the first judgment of a senior common-law court on the availability of anti-arbitration injunctions — was a welcome outcome for the arbitration claimants, whose case could proceed.

Caribbean Court of Justice sets aside an unrelated award

However, just a month later, the Caribbean Court of Justice rendered a less arbitration-friendly opinion (in proceedings in which Goldsmith did not appear as counsel). In a July 2013 judgment, the court set aside an unrelated LCIA award on the basis that its enforcement would be against public policy.

The court found that because Belize's parliament had not consented to the tax concessions under consideration in the arbitration, the agreement entered by the Belizean government had no legal force.

While recognising the importance of restrictively considering public policy objections, the court held that to uphold the award would be contrary to the separation of powers and the sovereignty of parliament.

***

Goldsmith's speech was part of a lecture series devoted to historic arbitrations in honour of French lawyer **Berthold Goldman** (1913-1993), which forms part of the annual summer course organised by the Paris-based International Academy for Arbitration Law. This was the fourth lecture of the series; previous lectures have been delivered by **VV Veeder QC**, **Jan Paulsson** and **Yves Derains** (videos are available on the Academy's website).

The Academy was established in 2011. In January this year, **Pierre Mayer** of Dechert took over as the Academy's president, a position previously held by **Emmanuel Gaillard**, head of international arbitration at Sherman & Sterling. The current secretaries general are **Eduardo Silva Romero**, global head of arbitration at Dechert, and **Jean-Baptiste Racine**, professor at the University of Nice.

This year's summer course featured a general course taught by **Gabrielle Kaufmann-Kohler** and six special courses delivered by **Luca Radicati di Brozolo, Phillip Capper, Zachary Douglas, João Bosco Lee, Alan Rau** and **Christophe Seraglini.**

In addition, students attended a seminar on damage valuation in arbitration presented by **Anton de Feuardent** of Fair Links, as well as workshops delivered by representatives of four arbitral institutions: the secretary general of the ICC International Court of Arbitration **Andrea Carlevaris**, deputy secretary-general and principal legal counsel at the PCA **Brooks Daly**, secretary general of the **Francesca Mazza** and **Mairée Uran Bidegain**, legal counsel at ICSID.

An inaugural lecture on conflicts of interests in international arbitration was presented by **Bernard Hanotiou**.

Eighty-three students and young practitioners from thirty-seven countries attended the course.

This article was first published in the Global Arbitration Review online news, 7 August 2014
www.globalarbitrationreview.com