NOTES

Does the New York Arbitration Convention of 1958 apply retroactively?: decision of the House of Lords in *Government of Kuwait v. Sir Frederic Snow*

This important decision of the House of Lords[1] has a long history. On 15 July 1958, the Government of Kuwait (Minister of Public Works) and the consulting civil engineers, Sir Frederic Snow and Partners, entered into a contract concerning the construction of an international airport in Kuwait. A dispute rose in 1964 which resulted in an arbitration in Kuwait no less than eight years later. In accordance with the arbitration clause in the contract, Dr Yassin was appointed as arbitrator by the Kuwaiti National Court on 22 May 1972. Dr Yassin made his award in Kuwait on 18 September 1973, whereby he ordered the Partnership to pay to the Kuwaiti Government a sum of Kuwaiti Dinars equivalent to almost sterling £3.5 million.

It was only on 23 March 1979, that the Kuwaiti Government applied to the Commercial Court in London for leave to enforce the award against the Partnership. In the meantime on 24 September 1975, the United Kingdom acceded to the New York Convention on the Recognition and Enforcement of Foreign Awards of 10 June 1958. The New York Convention was implemented in the United Kingdom by the Arbitration Act 1975. Kuwait acceded to the New York Convention on 28 April 1978.

At this point it should be noted that the United Kingdom used the first reservation under article I(3) of the New York Convention. According to this reservation, a state (when becoming party to the Convention) can limit the Convention's field of application to awards made in other contracting states only. Section 7(2) of the Arbitration Act 1975 specifies that if Her Majesty by Order in Council declares that any state specified in the Order is a party to the New York Convention, the Order shall be conclusive evidence that that state is a party to that Convention. The Order in Council declaring Kuwait to be a Party to the Convention was made on 14 April 1979.

These facts gave rise to a situation where at the time the award was made, Kuwait (the country where the award was made) was not a party to the New York Convention, whereas at the time its enforcement was sought in the United Kingdom it was a party. Does the Convention apply to the enforcement of such an award?

The text of the New York Convention is silent as to the question of its applicability in time.[2] The text of the Arbitration Act 1975 is equally silent. The question before the English courts centered upon the interpretation of Section 7(1) of the 1975 Act, the relevant part of which reads:

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1 Published in (1984) A.C. 426; (1984) 2 W.L.R. 340; (1984) I All E.R. 733; (1984) 1 Lloyd's Rep. 458.

2 The New York Convention's predecessor, the Geneva Convention for the Execution of Foreign Arbitral Awards of 26 September 1927, provided in article 6:

'The present Convention applies to arbitral awards made after coming-into-force of Protocol on Arbitration Clauses, opened at Geneva on 24 September 1923.'

'In this act . . . 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 . . '

The Commercial Court[3] (per Mocatta, J) reached the conclusion that 'Convention award' (as defined in Section 7(1) of the 1975 Act) referred only to awards made in a state after that state had become a party to the New York Convention. Furthermore, reasoned the learned judge, no retrospective effect can be given in the sense that an award which was indubitably not a Convention award when made, could become a Convention award some five years thereafter and 'thereby alter the rights of the parties as to the enforcement of the award'.

The Court of Appeal[4] (per Kerr, LJ with whom Fox and Stephenson LJJ agreed) reversed the decision of the Commercial Court, holding that the Arbitration Act 1975 applies to an award rendered in a contracting state whenever made in that state. The Court of Appeal reasoned that the phrase 'an award made' in the definition of 'convention award' is to be construed geographically in the sense that the award is made in the territory of a contracting state. It does not have a chronological meaning, ie, made after the date when a particular state became party to the Convention. The phrase 'which is a Party to the . . . Convention' qualifies, according to the court, 'state' and not 'award made'. The court concluded that 'the omission of any reference to any date, directly or indirectly, and the use of the present tense (''is a Party to the Convention'') are deliberate and significant'.

The Court of Appeal further considered that 'awards can, and will ''change their character'', in the sense of a change in the basis for their enforcement, by reason of the accession to the New York Convention of the state in which enforcement is sought or of the state in whose territory the award was made'. However, before the enactment of the 1975 Act, foreign awards could still be enforced in the United Kingdom, albeit on a different basis.

The Court of Appeal finally observed that the presumption against a retrospective construction does not apply to statutes which are procedural in nature: '[I]n relation to procedural statutes the presumption is the other way. . . [A] statute dealing merely with the recognition or enforcement of the prior rights would be classified as procedural under our rules of private international law.'[5]

The House of Lords[6] affirmed the decision of the Court of Appeal. The House of Lords reasoned that 'the word ''is'' in the phrase ''which is a party to the New York Convention'' must, as a matter of the ordinary and natural interpretation of the words used, mean that the phrase relates to the time of enforcement and not to any other time'. A different intention as to the time should have been expressed by the legislator in the text of the 1975 Act.

In respect of the presumption against interpreting a statute as having retrospective effect, the House of Lords reasoned that this principle is based on the assumption that

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3 (1981)1 Lloyd's Rep. 656; *Yearbook Commercial Arbitration* volume VII (1982) pp. 267-371, with comment by Professor Clive Schmitthoff.

4 (1983) 1 W.L.R. 818; (1983) 2 All E.R. 754; *Yearbook Commercial Arbitration* volume IX (1984) pp. 451-458.

5 The Court of Appeal referred to *Dicey and Morris on Conflict of Laws*, 10th edition, volume 2 at pp. 1117-1178.

6 *Supra* n. 1.

if retrospective effect were to be given to it, the result would be to deprive persons of accrued rights or defences. The House of Lords pointed out that this was not the case since without the 1975 Arbitration Act a foreign award could be enforced by means of an action brought upon it at common law. The right to that action is expressly preserved by Section 6 of the 1975 Act.[7] The House of Lords added that 'the statutory defences contained in Section 5(2) and (3) of the Act of 1975 [which correspond to the grounds for refusal of enforcement listed in article V of the New York Convention] cover the whole field of defences which would be available in a common law action'.

This author had expressed doubts as to the correctness of the Commercial Court's decision on an earlier occasion.[8] It was therefore reassuring to note that the Court of Appeal[9] and the House of Lords shared these doubts. Two issues played a dominant role in the three instances: first, does Section 7(1) of the Arbitration Act 1975 say anything about retrospective applicability? and second, does the Arbitration Act 1975 alter the rights of the parties?

As far as the first question is concerned, the Commercial Court considered that Section 7(1) refers only to awards made in a state that had become a party to the Convention at the time of the award's rendition. The Court of Appeal did not see any reference to a chronological field of application. The House of Lords in turn construed Section 7(1) by referring to time, but (unlike the Commercial Court) considered that Section 7(1) was applicable if at the time of enforcement of the award the state where the award was made was a party to the Convention. Although it does not alter the final outcome of this case, I think that the view expressed by the Court of Appeal is the correct one since Section 7(1) is an implementation of the first reservation of Article I(3) of the New York Convention. As mentioned, according to that reservation a state may limit the applicability of the Convention to awards made in other *contracting* states only. The reservation does not indicate, in any manner, at which moment the other state should have become a contracting state.

Regarding the second question, the Commercial Court was of the opinion that the Arbitration Act 1975 altered rights of the parties and could therefore not be applied retroactively. The Court of Appeal pointed out (correctly in my opinion) that the Arbitration Act 1975 is procedural in nature and that therefore it can be applied retroactively. The House of Lords did not rely upon the procedural nature of the 1975 Act. It based its reasoning on the consideration that there was no change of rights because the award could be enforced before the Act of 1975, and can still be enforced on another basis. This consideration was also mentioned by the Court of Appeal. Unlike the Court of Appeal, however, the House of Lords dwelled upon the action at common law as the different basis for enforcement. In this respect the House of Lords

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7 Section 6 provides:
'Nothing in this Act shall prejudice any right to enforce . . . an award otherwise than under this Act or Part II of the Arbitration Act 1950.'
This provision corresponds with Article VII (1) of the New York Convention, reading:
'The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreement concerning the recognition and enforcement of arbitral awards entered into by the contracting states nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.'

8 'Commentary Volume VII', in *Yearbook Commercial Arbitration* volume VII (1982) p. 290 at p. 295.

9 'Commentary Volume IX', in *Yearbook Commercial Arbitration* volume IX (1984) p. 329 at p. 343.

tread on dangerous grounds by stating that the defences available under the 1975 Act are substantially the same as under an action at common law. This may be so,[10] yet a major difference between the 1975 Act and the action at common law is the burden of proof: under the 1975 Act the petitioner need only submit the arbitration agreement and award; the respondent has the burden of proving the existence of one or more of the grounds for refusal of enforcement listed in Section 5(2) of the Act. Under the action at common law this is quite different. Here, the plaintiff has to prove, *inter alia*, that the dispute was within the terms of the submission and that the arbitrator was duly appointed. The reasoning of the Court of Appeal in respect of the question of (non-) 'change of rights' therefore seems to be preferred.

The United Kingdom has a so-called 'dual system' in respect of international conventions. It seems that a convention can be effective by means of implementing legislation only and in principle courts may rely solely on the implementing legislation. Other states, such as the Netherlands, have a so-called 'mono-system', which means that the Convention is directly applicable. It was because of the dual system that the present case centered upon an interpretation of the Arbitration Act 1975. However, a United Kingdom court is entitled to refer to the text of a convention if a provision in domestic legislation giving effect to the adherence by the United Kingdom to an international convention is ambiguous.

The House of Lords resorted to the latter exception in the event that it was wrong in interpreting the 1975 Act. Under this heading it arrived at an interesting interpretation of the text of the New York Convention itself. The House of Lords pointed to Article VII(2) of the New York Convention which provides that the Geneva Protocol of 1923 and the Geneva Convention of 1927 (the New York Convention's predecessors) shall cease to have effect between the states upon their becoming bound by the New York Convention.

The House of Lords reasoned that if the New York Convention were to apply retroactively, a serious lacuna could arise. For example, states A and B are both parties to the Geneva Treaties. An award is made in state A in 1970. In that case, the award could be enforced in state B under the Geneva Convention of 1927. After 1970, both states adhere to the New York Convention. If the New York Convention did not apply retroactively, the award could not be enforced under either Convention because the adherence to the New York Convention will mean that the Geneva Convention of 1927 has ceased to have effect between these states. Such a gap cannot have been the intention of the drafters of the New York Convention (and the Arbitration Act 1975), from which the House of Lords inferred that the New York Convention does apply retroactively.[11]

As mentioned before, the New York Convention does not contain an express provision on the question of retroactive applicability, unlike the Geneva Convention of 1927.[12] The question was discussed at some length at the conference held in New York in May-June 1958 where the Convention was established. These discussions do

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[10] See the author's book *The New York Arbitration Convention of 1958* (The Hague/Deventer 1981) pp. 269-273; see for the action at common law, Mustill and Boyd, *Commercial Arbitration* (London 1983) pp. 374-375 and pp. 369-370.

[11] The author defended the same interpretation in *The New York Arbitration Convention of 1958, supra* n. 10, pp. 78-80.

[12] See *supra* n. 2.

not clarify the question very much.[13] Some implementing Acts deny retroactive applicability (India, Botswana and Ghana). The Australian Arbitration Act of 1974, on the other hand, declares that it applies to agreements and awards made before the Convention's entry into force in Australia. The courts in the various contracting states are divided on the question, although a majority favours retroactive applicability. However, when the courts do consider the Convention as retroactively applicable, they differ with respect to the moment at which the retroactivity is to be taken into account. For the enforcement of the award, it appears that a great variety of moments are possible (date of agreement, date of arbitral award, date of commencement of enforcement proceedings, date of coming into force of Convention, date of entry into force in state of rendition, and permutations of these dates).[14] These permutations may lead to hopelessly complicated calculations, which, I submit, are unnecessary. The procedural nature of the New York Convention and Article VII(2) permit the interpretation of the Convention as applying to any arbitration agreement and award whenever made. It is to the credit of the Court of Appeal and the House of Lords that they have subscribed to this simple rule and thereby support the effectiveness of international commercial arbitration. It is to be hoped that courts in the other countries will follow this interpretation, which should foster the much needed international unification of the judicial interpretations of the New York Convention of 1958.

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Where is an Award 'made'?

Part II of the English Arbitration Act 1950 deals with the enforcement of certain foreign awards. According to Section 35, Part II applies to any award 'made' in certain defined territories and conditions. The Arbitration Act 1975 renders Convention awards enforceable in the United Kingdom and by Section 7 defines them as awards 'made . . . in the territory of a state, other than the United Kingdom, which is a party to the New York Convention'. This definition corresponds to article 1 (1) sentence 1 of the New York Convention. Article V (1) (a) and (e) of the Convention also refers to awards 'made' in a certain country, while article V (1) (d) refers to 'the law of the country where the arbitration took place'. Finally by Article 1 of the Geneva Convention of 1927 an arbitral award 'made' in accordance with an agreement covered by the Protocol of 1923 shall be recognised as binding and enforceable.

This terminology is by no means confined to the law of the United Kingdom or to international Conventions. The recent version of article 1472 of the French Code of Civil Procedure speaks of a 'sentence rendue'; and in article 1504 there is a reference to a 'sentence rendue en France'.

There is very little learning on the question where an award is made. As far as can be seen only Dr A. J. van den Berg, *The New York Convention of 1958* (1981) pp. 294, 295,

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13 See *The New York Arbitration Convention of 1958, supra* n. 10, pp. 72-73.

14 See *id.* pp. 74-78. See also the author's 'Commentary Volume IX', in *Yearbook Commercial Arbitration* volume IX (1984) p. 329 at p. 343 containing a cumulative index on all reported court decisions in which the question of retroactivity is addressed.