Whereto now, the Italian Torpedo?

Kluwer Arbitration Blog
May 16, 2011

Kate Davies (Allen & Overy LLP)

Please refer to this post as: Kate Davies, 'Whereto now, the Italian Torpedo?', Kluwer Arbitration Blog, May 16 2011,
http://arbitrationblog.kluwerarbitration.com/2011/05/16/whereto-now-the-italian-torpedo/

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Just when you thought the English arbitral scene could deliver no more surprises (the decision of the ECJ in West Tankers; the pending decision of the UK Supreme Court in Jivraj v. Hashwani; the famed and controversial decision of the UK Supreme Court in Dallah), there comes what shall here be termed the first installment in West Tankers 2011.

On 6 April 2011, the English High Court upheld a lower court decision to (a) grant the claimant in the now-infamous West Tankers case leave to enforce the third final award of the London seated arbitral tribunal as a judgment of the English court (under s. 66(1) of the English Arbitration Act 1996 (the "Act")), and (b) enter judgment against the defendants in the terms of the award (pursuant to s. 66(2) of the Act). The intended and important effect of this decision is to seek to "trump" any future judgment of the Italian court where the defendants continue to pursue their competing claims which formed the background to the reference to the ECJ.

One of the many thorny questions that the ECJ decision in West Tankers exposed is – in the absence of an anti-suit injunction – how do parties who have agreed to submit disputes to arbitration prevent their opponents engaging in satellite litigation (whether in an attempt to find a more favourable forum, simply to delay matters and invoke maximum pressure on settlement or otherwise). You may recall in this regard the post-West Tankers decision of the English High Court in National Navigation Co v. Endesa ("The Wadi Sadr"). There, a Spanish court had declared an agreement to arbitrate invalid in a merits hearing (a decision that was therefore binding on the English court pursuant to the Regulation 44/2001 (the "Regulation"). Gloster J. in the English High Court nonetheless upheld that same arbitration agreement as valid on the premise that the English proceedings seeking the declaration fell outside the Regulation and the English court was therefore not bound by the decision of the Spanish court. (The alternative ground for the decision was that it would be contrary to public policy not to uphold the arbitration agreement.) Unfortunately, the Court of Appeal disagreed and parties who had entered into what the English court regarded as a valid and binding arbitration agreement nonetheless found themselves subject to the jurisdiction and decision of a Spanish court. A most unwelcome result, at least for the unlucky claimant in this action, and an end to that line of reasoning as a way to prevent the so-called "Italian Torpedo".

Preventing the effects of satellite litigation still looms large in the West Tankers case, where the proceedings in the Italian court – commenced after the valid constitution of the arbitral tribunal in London – are ongoing. It is obviously a question to which the claimant, West Tankers Inc, has continued to devote much time and attention; is there any way that West Tankers could enforce a decision of the arbitral tribunal in the face of an Italian court decision? It seems the answer might be yes, at least according to the English High Court; has West Tankers finally struck gold?

On 12 November 2008, the tribunal in the London seated arbitration issued its third, final award. This came after the referral by the then House of Lords to the ECJ on the question whether an anti-suit injunction was compatible with the Regulation but before the answer of the ECJ. The tribunal held, inter alia, that the claimant owners were under no liability to the defendant insurers in respect of the collision which was the subject of the dispute. On 15 November 2010, the claimant obtained an order of the English court whereby (i) leave was granted to enforce the arbitration award (s.66(1)), and (ii) judgment was entered against the defendants in the same terms as the award (s. 66(2)). In seeking to have the third final award enforced as a judgment the English court, the claimant then proposed to resist enforcement of any subsequent Italian court judgment pursuant to Article 34(3) of the Regulation (dealing with irreconcilable judgments between the same parties) or Article 34(1) (as being contrary to public policy). The defendants applied to the English High Court to have that order set aside.

Preliminarily, the defendants argued that any attempt to rely on Articles 34(1) or 34(3) in seeking to resist any future judgment of the Italian court would be doomed to failure. This argument was based on English case law in which the view has been expressed that conversion of a foreign arbitration award into a judgment does not turn that judgment into a Regulation judgment, rendering futile any reliance on Article 34(3). (The defendants also relied on The Wadi Sadr in relation to the public policy argument.) However, the central issue before the English court was whether an award in the form of declaratory relief could be "enforced" as a judgment. Relying on earlier decisions of the English Court of Appeal (Margulies Brothers Ltd v. Dafnis Thomaiedes & Co (UK) Ltd) and High Court (Tongyuan (USA) International Trading Group v. Uni-Clan Limited (2001, unreported)), the defendants argued that the 12 November 2008 award was not capable of being enforced since it was "no more than a declaration of the parties' rights".

The English High Court disagreed. In so doing, Field J. accepted as legitimate the main thrust of the claimant's case, which was its concern that the defendants might obtain judgment in the Italian court and then seek to have that recognised and enforced in England. In reliance on an earlier decision of the English High Court and a decision of the New South Wales Court of Appeal, the English High Court considered that the purpose of s. 66 of the Act was to "provide a means by which the victorious party in an arbitration can obtain the material benefit of the award in his favour…". On this basis, the Court went on to hold that "where, as here, … the victorious party's objective in obtaining an order under [s. 66] is to establish the primacy of a declaratory award over an inconsistent judgment, the court will have jurisdiction to make a s. 66 order because to do so will be to make a positive contribution to the securing of the material benefit of the award." The English Court did not address the defendants' argument that any attempt to rely on Article 34 of the Regulation was doomed.

On its face, West Tankers 2011 has prevailed where the former House of Lords and the fated anti-suit injunction have not; the Italian proceedings might be ongoing, but any judgment that the defendants obtain and seek to enforce in the court of an EU Member State will now be subject to the Article 34 objections referred to above. The search for gold is not yet over, however, and it remains to be seen whether the first installment in West Tankers 2011 meets with the same unhappy end as that of The Wadi Sadr. On past form, it seems reasonable to suppose that the defendants in West Tankers might appeal the finding that a judgment in the form of declaratory relief can be "enforced". In addition and perhaps more importantly, this decision might on its face offer an answer to the Italian Torpedo problem – but in so doing, it raises yet further questions. In particular, can a judgment that falls within the arbitration exception under the Brussels Regulation (such as that pursuant to section 66 of the Act) be enforced as a judgment under the Regulation? The answers to this issue remains to be seen so watch this space for the next chapters of the West Tankers 2011 story…