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Declaratory award held enforceable by English court: a healthy move for arbitration?

Phillip Capper (White & Case LLP) · Friday, January 27th, 2012 · White & Case

Following the path of the hotly debated *West Tankers* decision, in *African Fertilizers v BD Shipsnavo*, the English Commercial Court held that a declaratory award is enforceable, allowing judgment to be entered on the same terms as the arbitral award. Such an order enables a party to obtain the material benefit of the award and indicates the continuing trend of the English courts in favour of arbitration and the enforcement of arbitral awards. However, this approach does raise questions for the health of the inter-twining co-existence of the arbitration and court systems.

The declaratory award (on the tribunal's jurisdiction) was made pursuant to an arbitration agreement contained in a bill of lading for the carriage of African Fertilizer's cargo from Romania to Nigeria. The English court had given the claimant, Shipsnavo, leave to enforce the arbitration award and to enter judgment again the defendant, African Fertilizers.

The English court had previously issued an injunction restraining African Fertilizer from continuing an arbitration in Romania, as well an interim declaration that such arbitration proceedings, together with court proceedings commenced in Romania, were both in breach of the arbitration agreement.

Shipsnavo had sought an order for enforcement under s66 of the Arbitration Act 1996 because it was concerned that, should African Fertilizer be successful in its Romanian court proceedings, then it would seek to enforce that judgment under Article 34 of the Brussels Regulation 44/2001, notwithstanding the arbitration award. If Shipsnavo had already obtained an English judgment, then it could seek to resist the recognition of an irreconcilable judgment of the Romanian court.

African Fertilizers resisted the application on the ground that the English court had no jurisdiction to make such an order because the material terms of the award were in purely declaratory terms.

First, it argued that enforcement of an award of a purely declaratory nature is not possible (notwithstanding the ruling – albeit on appeal – in *West Tankers*). Second, it argued that a judgment entered under s66 of the 1996 Act does not constitute a judgment within the meaning of Article 34 of the Brussels Convention, relying on the

ECJ case *Solo Kleinmotoren v Boch*.

The first limb raised questions of the distinction between "recognition" and "enforcement" in the context of New York Convention awards. African Fertilizers argued that the *West Tankers* decision was incorrect, that Shipsnavo really intended simply "recognition" of their award in order to defend any adverse Romanian court judgment, and enforcement was not appropriate. The court disagreed, aligning itself with the *West Tankers* decision and giving primacy to the party's right to the benefit of the award. The court preferred the plain meaning of "enforce" in s66 of the Act, and cited both textbooks and case law in support of its jurisdiction to enforce a declaratory award.

The second limb was also rejected. The court distinguished the *Solo Kleinmotoren* decision as being a case about a court approved settlement, in which the ECJ held that a settlement agreement recorded in a court order is not a judgment for the purposes of Article 34(3). Beatson J commented that a settlement is essentially contractual, and while the "submission to arbitration is consensual, the outcome of the arbitration and contents of the award are not". Further, there were public policy considerations. Citing Briggs on Civil Jurisdiction, Beatson J noted that an English court could not give "leave to enforce an arbitral award and then be required to recognise and enforce a foreign judgment which undermined or contradicted that arbitral award".

However, there are public policy considerations not considered by the court. Shipsnavo's objective in seeking to enforce the declaratory award was to pre-empt the enforcement of any irreconcilable judgment that may be given by the Romanian court. What happens if the Romanian courts do find in favour of African Fertilizers? The parties could each have irreconcilable judgments from England and Romania, arising from the same agreement.

While the pro-arbitration stance of the English courts is welcome, this approach can result in inconsistent judgments within Europe. It may be that the current proposals to reform the Brussels Regulation will go some way to temper this risk. The European Parliament's Legal Affairs Committee (LAC) has proposed maintaining the arbitration exception to the Regulation, but with clarifications for the interface between arbitration and the courts. The first reading of the LAC's report is reported to take place on 18 April 2012 and the process can take several years to pass through the European parliament. Are those reforms appropriate? And meanwhile, are there risks for the health of the inter-twining systems of justice that are arbitration and litigation?

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