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Route 66: Diverting the Italian Torpedo

Gary B. Born (Wilmer Cutler Pickering Hale and Dorr LLP) · Monday, March 5th, 2012 · WilmerHale

West Tankers Inc v Allianz SpA v Generali Assicurazione Generali SpA [2012] EWCA Civ 27

On 24 January 2012, London's status as a pro-arbitration forum was given a major boost when the Court of Appeal handed down judgment on the latest chapter of the West Tankers dispute. Upholding an earlier Commercial Court decision of 6 April 2011, the Court of Appeal agreed that a declaratory arbitral award could be enforced as a judgment of the English Court under section 66 of the Arbitration Act 1996 (the "**Arbitration Act**"). The intended effect was to allow West Tankers to establish the primacy of the declaratory award over any subsequent inconsistent judgement of the Italian Courts thereby potentially mitigating the effects of the European Court of Justice's ("ECJ") controversial 2009 decision in *Allianz Spa v West Tankers Inc*, Case C-185/07 [2009] 1 AC 1138 in which the ECJ decided that, after applying Article 34 of the Brussels Regulation, the English Court was not permitted to grant an anti-suit injunction to restrain parallel proceedings in the Italian Court.

The English Court of Appeal was asked to consider whether a negative declaratory award — which found that West Tankers Inc ("**West Tankers**") had no liability to Allianz SpA and Generali Assicurazione Generali SpA ("**Allianz**") — could be enforced under the Arbitration Act in the same manner as an action on the award and leave be granted for judgment to be entered in the terms of the award. Lord Justice Toulson was quick to describe this as "a pure question of construction of a domestic statute" and "not a question with a distinctively European flavour." However, West Tankers and Allianz were fully aware that if the declaration of non-liability was enforced as a judgment, West Tankers could be shielded from any conflicting judgment issued by the Italian Courts pursuant to Article 34.3 of the Brussels Regulation: "[a] judgment shall not be recognised: … if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought."

Lord Justice Toulson waved the flag for arbitration by commenting that: "Ultimately the efficacy of any award by an arbitral body depends on the assistance of the judicial system" and that "he [could not] see why in an appropriate case the court may not give leave for an arbitral award to be enforced in the same manner as might be achieved by an action on the award and so give leave for judgment to be entered in

the terms of the award."

Resisting this approach, the appellant Allianz repeated its reliance on earlier decisions of the English Court of Appeal (*Margulies Brothers Ltd v Dafnis Thomiades and Co (UK) Ltd* [1958] Lloyd's Rep 205) and High Court (*Tongyuan (USA) International Trading Group v Uni-Clan Limited* unreported 19 January 2001) arguing that it was "a well recognised characteristic of a declaratory judgment that it is not one that can be enforced." Lord Justice Toulson disagreed, concluding: "The argument that in such cases the court is not enforcing an award but only the rights determined by an award is an over subtle and unconvincing distinction and sits on a shaky foundation."

The Court of Appeal decision in West Tankers reinforces the recent English Commercial Court case of *African Fertilizers and Chemicals NIG Ltd (Nigeria) v BD Shipsnavo GmbH & Co Reederikg KG* [2011] EWHC 2452 (Comm) in which a declaratory award was also held to be enforceable as a judgment.

Whilst this trend provides welcome relief to parties in the European Union seeking to rely on and enforce arbitral awards, it has given rise to a curious situation where conflicting judgments may appear more readily before the English Courts. The Courts of Appeal have inadvertently added another weapon to the tactical arsenal used by parties seeking to slow down dispute resolution. The intention of the Brussels Regulation was precisely to avoid this type of conflict and delay, and although proposals to reform the Brussels Regulation will go some way to reduce this issue, any amendments may take several years to pass through the European parliament.

It remains to be seen whether Allianz will take this case to the Supreme Court. In the meantime, parties based in the European Union should consider the advantages of choosing an arbitral seat in London, including the readiness of the English Courts to circumvent the ECJ's decision in *Allianz Spa v West Tankers Inc*, Case C-185/07, [2009] 1 AC 1138 and, of course, the wonderful weather.

By Gary Born and Sarah Wheeler

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