

# Kluwer Arbitration Blog

## Declaratory award held enforceable by English Court of Appeal: further support for reform of the Brussels Regulation

Phillip Capper (White & Case LLP) · Thursday, February 2nd, 2012 · White & Case

This is an update on the post of [27 January 2012](#) dealing with the *African Fertilisers* decision. Last week, the English Court of Appeal handed down its **judgment** in the latest episode of the *West Tankers* dispute, upholding the first instance decision and approving the decision of the Commercial Court in *African Fertilisers*. The decision affirms the continued pro-arbitration stance of the English courts, the Court of Appeal emphasising that “*the efficacy of any award by an arbitral body depends on the assistance of the judicial system*”.

The factual background to *West Tankers* has been widely discussed (and is summarised in paragraphs 1 to 14 of the judgment) and there is no need to do so again here. Before the Court of Appeal, *West Tankers* submitted that judgment be entered under s. 66(2) of the English Arbitration Act 1996 (the “Act”) against the insurers on the terms of a declaratory arbitral award. This was on the basis that such a judgment would allow *West Tankers* to establish the primacy of the award over any judgment by Italian courts in ongoing proceedings of the same dispute. The High Court held that “[t]he purpose of s. 66 (1) and (2) [of the Act] is to provide a means by which the victorious party in an arbitration can obtain the material benefit of the award in his favour other than by suing on it” and that “[w]here ... the victorious party’s objective in obtaining an order under s. 66 (1) and (2) 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 insurers appealed, arguing that Field J had erred in his construction of s. 66 of the Act, specifically in the meaning of the word “enforced”, and that a declaratory judgment (and in particular a negative declaratory judgment) is incapable of being “enforced” under the meaning of the section. Lord Justice Toulson, in the leading judgment, however agreed with *West Tankers* that a broader interpretation of the phrase ‘enforced in the same manner as a judgment to the same effect’ in s. 66 is “closer to the purpose of the Act and makes better sense in the context of the way in which arbitration works”. He rejected the insurers’ argument that in the present case the court would not be enforcing an award but only the rights determined by an award as being “an over subtle and unconvincing distinction [that] sits on shaky foundations”, emphasising that “the enforcement of any judgment or award is the enforcement of the rights which the judgment or award has established”. However, Toulson LJ emphasised that the language of s. 66 is permissive and requires the court to determine whether it is appropriate in the situation before it to enter judgment – it is not “an administrative rubber stamping exercise”.

Although Toulson LJ emphasised that the issue before the Court of Appeal “*is not a question with a distinctively European flavour*”, the consequences of the judgment, and more generally of the approach of the English courts, clearly are (as illustrated earlier in *African Fertilisers*). It remains uncertain whether the judgment falls under the arbitration exception to the Brussels Regulation 44/2001, thereby underlining the need for reform of the Regulation. As any such reform is likely to take time, there remains the real possibility that the English courts may, before any such reform, be faced with enforcement proceedings under the Regulation of an (inconsistent) judgment of the Italian courts. The questions presented by *African Fertilisers* remain unanswered for the time being.

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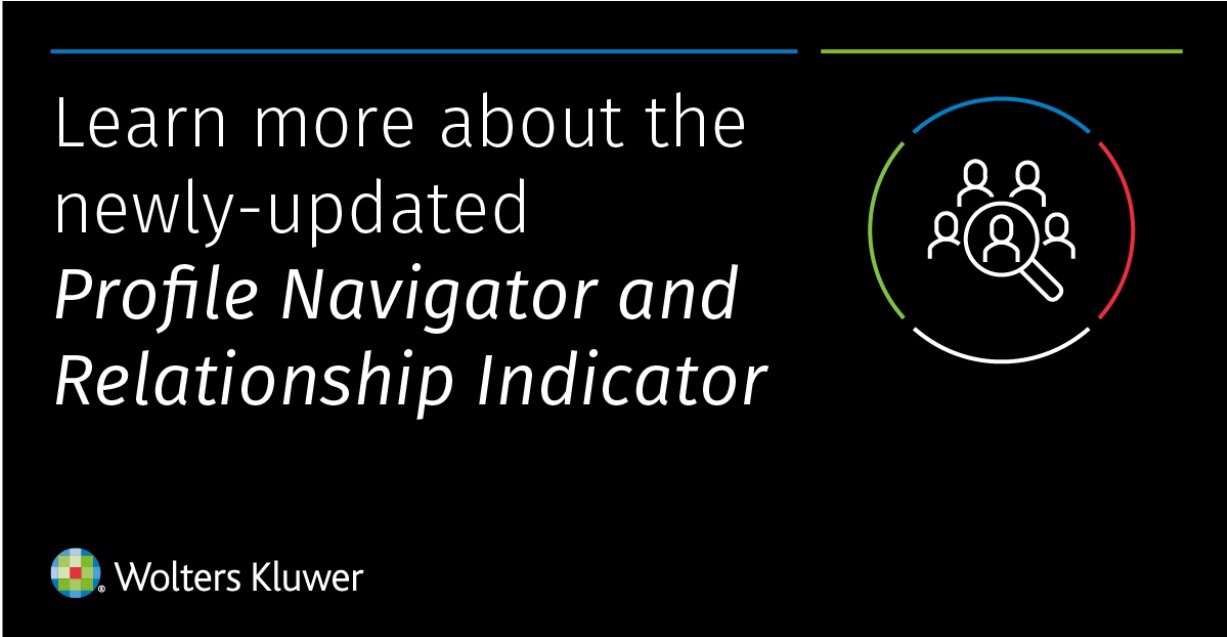
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