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A certifiable point? Enforcement of arbitral awards under Article IV of the New York Convention and section 102 of the Arbitration Act 1996

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The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**") is given effect in England and Wales through sections 100 to 103 of the Arbitration Act 1996 (the "**1996 Act**"). As is well known, the beneficiary of an award promulgated by an arbitral tribunal in a state-party to the New York Convention is broadly entitled to enforce the award in any other state-party, in the same manner as a judgment or order.

To enforce a New York Convention award in England and Wales, the party relying on it must satisfy certain basic procedural norms, which are themselves prescribed by Article IV of the Convention. Section 102 of the 1996 Act gives effect to, and replicates the language of, Article IV. It requires that the party relying on the New York Convention award must produce "*the duly authenticated original award or a duly certified copy of it*" and "*the original arbitration agreement or a duly certified copy of it*". What constitutes "*certification*" for these purposes both in the context of the 1996 Act and the New York Convention is therefore of practical significance. The question has recently received useful attention from the Court of Appeal of England and Wales in *Lombard-Knight (and another) v Rainstorm Pictures Inc* [2014] EWCA Civ 356.

Background

Pursuant to arbitration clauses in agreements dated 3 and 23 December 2010 (the "**Agreements**"), Rainstorm Pictures Inc ("**Rainstorm**") had brought arbitral proceedings against Anthony Lombard-Knight and Jakob Kinde (the "**Defendants**") before the Judicial Arbitration and Mediation Service of Los Angeles, California (the "**JAMS**"). Rainstorm was successful in those proceeding. On 26 March 2012, the arbitral tribunal promulgated its award, the terms of which required the Defendants to pay Rainstorm in excess of $28 million (the "**Award**").

By a Claim Form dated 29 August 2012, Rainstorm applied to the Commercial Court in London for permission to enforce the Award in the same manner as a judgment or order. Photocopies of the Agreements were attached to the Claim Form, which contained brief particulars describing the Agreements and was accompanied by a Statement of Truth in the conventional form. Also attached was a copy of the Award, and a separate document, entitled "Certification of Award", in which an officer of the JAMS certified that the copy was a true and correct one.

On 4 September 2012, Eder J made an order granting Rainstorm permission to enforce the Award

(the "**Eder J Order**").

The Defendants applied to the court to have the Eder J Order set aside. The Defendants' grounds at the oral hearing included, *inter alia*, that the Eder J Order was defective. The Defendants submitted that Rainstorm had failed to produce either the original agreements or a certified copy of the same, and so had not complied with section 102(1) of the 1996 Act. The Judge hearing the Defendants' application, Cooke J, agreed. He held as follows:

"*[I]t is not sufficient merely to produce a copy of the award with an accompanying Statement of Truth in a Claim Form. Certification means what it says. The importance of that provision appears from the reference to the need for production either of an original Arbitration Agreement or a duly certified copy of it. This, of course, is important in the context of the New York Convention and the international dimension which is involved in enforcement of it. A court must be astute to ensure that the appropriate formalities are complied with so that there can be no doubt whatsoever about the validity of an award or the validity of the Arbitration Agreements which underlie it. Along with the Arbitration Agreement there must be independent certification of the authenticity of the copy produced as compared with an original*".

That notwithstanding, Cooke J continued to consider the Defendants' substantive grounds of challenge to the enforcement of the Award, which he rejected. Both Rainstorm and the Defendants cross-appealed (Rainstorm against Cooke J's finding that it had failed to comply with section 102, and the Defendants against the Judge's rejection of their substantive challenge).

The Judgment of the Court of Appeal

The Court of Appeal disagreed with Cooke J (albeit noting that the Judge had not had the benefit of full argument and had been referred to no authorities on the point). In the Court of Appeal's judgment, the Agreements had been properly certified in compliance with section 102 of the 1996 Act. In particular:

• In the Court's judgment, Cooke J had elided issues of certification of the Agreements with their validity. In the Court of Appeal's view, where applicable, issues as to validity were properly dealt with by reference to the exhaustive list of grounds under which a New York Convention award could be challenged listed in section 103 of the 1996 Act (specifically sub-sections 103(2)(a) and (b)).

• The Judge had allowed an additional requirement of "*authenticity*" to creep in, which was not contemplated in section 102.

• In addition, Cooke J had, wrongly, looked for "*independent certification*" of the Agreements. It was, in the Court of Appeal's view, not necessary for the deponent giving certification either to be an independent person or, as the Defendants had alluded, to give certification by some express reference to a comparison undertaken by the deponent between the original document and the certified copy. That would introduce "*an unnecessary element of formalism to require the deponent to be able to say he has compared the copy with the original*".

The Court of Appeal held that for the purpose of certification under section 102 it was sufficient to say that to the maker of the statement's knowledge and belief it was a true copy. This was particularly so given that in modern business conditions, an agreement to arbitrate would often be in email form or equivalent and "*it would be absurd to suggest that the certifier must have actually*

seen the written record of an electronic transmission as it was first perceived by either the sender or the receiver".

The Defendants' further grounds of appeal in relation to their substantive challenge to the grant of permission to enforce the Award either fell away as a consequence, or were otherwise rejected by the Court of Appeal.

Comment

It is unsurprising to see the Court of Appeal, in its interpretation of that section (and, by extension, Article IV of the New York Convention, which it replicates almost exactly) take an expansive and purposive approach. Courts in the UK have long adopted a decidedly pro-arbitration stance. As the Court of Appeal noted "*[t]he process is intended to promote enforcement, not to put meaningless and purposeless hurdles in the way*".

This approach accords with the prevailing view amongst the courts of states-parties to the New York Convention. Although, as the Court of Appeal accepted, the interpretation of Article IV in other states-parties to the New York Convention has not been uniform, it has been recognised that courts in states-parties "*appear to be quite liberal in accepting that an original award is authenticated or a copy of an award or agreement is certified*" (Albert Jan Van den Berg, *The New York Arbitration Convention of 1958* (1981), page 255).

The Court of Appeal's judgment gives further succour to a purposive interpretation of the New York Convention generally, and Article IV specifically. In this jurisdiction, the judgment's practical effect means business as usual for English and Welsh practitioners applying for permission to enforce New York Convention awards.

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