Enforcement of declarations and conflicting decisions: *West Tankers* still afloat

UNITED KINGDOM

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The case of *West Tankers Inc v Allianz SpA and Generali Assicurazione Generali SpA*[1] has once again come before the courts on the issue of enforcement. In 2009 the *West Tankers* case went before the European Court of Justice (ECJ) who held[2] that an anti-suit injunction, issued by an English court to prevent court proceedings progressing in another Member State, was contrary to EC Regulation 44/2001 (the 'Brussels I Regulation'). The consequence of that ruling is that West Tankers Inc now has an award in its favour in London but risks having a conflicting judgment in the Italian courts. This recent decision of the English High Court in *West Tankers* addresses how an arbitrator's award can be protected in the absence of an anti-suit injunction.

In this article we set out the facts relating to the *West Tankers* dispute and the court's recent decision that, in certain circumstances, it will recognise an arbitrator's award in declaratory terms. The court has taken a pragmatic rather than logical approach to the problem of conflicting decisions. However, the thorny question of 'what happens when enforcement is sought of a conflicting regulation judgment where there is already an arbitration award?' was side-stepped. The issue has been considered by the European Commission in a recent Proposal[3] and by the European Scrutiny Committee of the UK Parliament, in which it expressed reservations regarding the approach proposed by the European Commission.[4]

Anti-suit injunctions are prohibited by the ECJ

The *West Tankers* case arose following the collision of a ship, the 'Front Comer'. A dispute arose between the charterer and the owner, West Tankers Inc. The charterer claimed against West Tankers Inc in relation to the accident. The charter party agreement provided for arbitration in London with English law to apply. During the course of the arbitration the charterer's insurers, Allianz/Generali Assicurazione, commenced court proceedings in Italy in respect of the same matter. West Tankers Inc applied for an anti-suit injunction in London to prevent the Italian proceedings progressing, which was granted. The question whether the anti-suit injunction infringed the Brussels I Regulation went up to the House of Lords, who referred the question to the ECJ. The House of Lords were firmly of the opinion that an anti-suit injunction, to prevent a party commencing arbitration proceedings in breach of an arbitration agreement in another Member State, did not breach the Brussels I Regulation. The ECJ disagreed and held that an anti-suit injunction enforcing an arbitration agreement was incompatible with the Brussels I Regulation.[5]

The potential for inconsistent awards and foreign judgments

The arbitration in London progressed and in November 2008, the arbitral tribunal published its third final award in which it declared that West Tankers Inc was under no liability to Allianz/Generali Assicurazione in respect of the collision. The Italian court has also now held that the arbitration agreement is invalid under Italian law and is proceeding to rule on the substantive dispute.

West Tankers Inc became concerned, following the decisions of the ECJ and the Italian court, that Allianz/Generali Assicurazione might obtain a judgment in their favour and thereafter seek to have the judgment recognised and enforced in England.[6] In order to prevent this, West Tankers Inc applied to have the arbitrator's award, which was declaratory only, turned into a judgment, thereby preventing any possible Italian decision being converted into a judgment in England on the basis of irreconcilability with an existing judgment.[7] Simon J granted West Tankers Inc's application on 15 November 2010. The order stated 'that the Claimant [West Tankers Inc] is under no liability (whether in contract

or tort or otherwise howsoever) to the Defendants in respect of the collision between the vessel "Front Comor" and the pier... on 8 August 2000.' Allianz/Generali Assicurazione thereafter applied to have this order set aside and the matter came before Field J on 11 March 2011.

Can a declaratory award be enforced?

The issue turned on whether section 66 (1) and (2) of the English Arbitration Act 1996 could be used to enforce a declaration. Section 66 of the Arbitration Act 1996 provides:

> **'66 Enforcement of the award.**
> (1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.
> (2) Where leave is so given, judgment may be entered in terms of the award.
> [...]
> (4) Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the Arbitration Act 1950 (enforcement of awards under Geneva Convention) or the provisions of Part III of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award.'

Allianz/Generali Assicurazione argued that Section 66(1) and (2) could only be used if there was a judgment which was capable of being enforced. It argued that a mere declaration that one party was not liable to another was not capable of enforcement by any means available to the court. Allianz/Generali Assicurazione referred to the cases of *Margulies Brothers Ltd v Dafnis Thomaiedes & Co (UK) Ltd* [1958] 1 Lloyd's Rep 205 and *Tongyuan (USA) International Trading Group v Uni-Clan Ltd* (19 January 2001, unreported). In the *Margulies Brothers* case, the Court of Appeal stated that an award, which by declaration states that certain contracts should be set off against other contracts and one of the parties should pay the difference, was not capable of enforcement. In the *Tongyuan* case, Moore-Bick J stated:

> 'That case [referring to *Margulies Brothers*] is authority for the proposition than an award which is effectively couched in purely declaratory terms cannot be enforced as a judgment, and for the wider proposition that, in order to be enforceable as a judgment under Section 66 of the Arbitration Act (as it now is), the award must be framed in terms which make sense if those are translated straight into the body of a judgment.'

West Tankers Inc, on the other hand, argued that section 66(1) was enacted to assist the successful party and the term 'enforced' should be construed accordingly. It also sought to distinguish the cases relied upon by Allianz/Generali Assicurazione.

Field J agreed with West Tankers Inc and held that section 66(1) and (2) had been enacted to provide a means by which the victorious party could obtain the benefit of an award.[8] He stated:

> 'Where the award is in the nature of a declaration and there is no appreciable risk of the losing party obtaining an inconsistent judgment in a member state which he might try to enforce within the jurisdiction, leave will not generally stand to be granted because the victorious party will not thereby obtain any benefit which he does not already have by virtue of the award *per se*. In short, in such a case, the grant of leave will not facilitate the realisation of the benefit of the award. Where, however, as here, the victorious party's objective in obtaining an order under Section 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 Section 66 order because to do so will be to make a positive contribution to the securing of the material benefit of the award.'[9]

Field J distinguished *Margulies Brothers* by stating that in this case, a judgment, in terms of the declaratory award, would not have assisted the party.

An arbitrator's award versus a regulation judgment – which one will have precedence?

Field J's decision to distinguish previous case law, including the Court of Appeal's decision in *Margulies Brothers* and *Tongyuan*, provides an equitable solution at this point in time. However, the decision does not resolve the problem of a conflicting decision that is likely to arise in the future.[10] If Allianz/Generali Assicurazione obtain a judgment from the Italian courts in their favour, it is probable that they will want to enforce that judgment in England. The courts will then

have to re-examine the question of which takes precedence – a regulation judgment or a judgment of the High Court in the same terms as an arbitrator's award.

West Tankers Inc has already indicated that it will rely on Article 34(1) and (3) of the Brussels I Regulation. Article 34(1) of the Brussels I Regulation permits West Tankers Inc to resist enforcement of a regulation judgment if recognition of such a judgment is manifestly contrary to public policy in England and Wales. Article 34(3) of the Brussels I Regulation states that a judgment will 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.

Allianz/Generali Assicurazione will likely argue that the enforcement of a regulation judgment, which finds that a dispute is not within an arbitration agreement, is not contrary to public policy: *The Wadr Sudr.*[11] Furthermore, it will likely argue that to be a 'judgment' for the purposes of the Brussels I Regulation, the decision must emanate from a judicial body of a Member State deciding on its own authority on the issues between the parties; accordingly, a settlement, or by analogy an Award of an Arbitrator, recorded in an order of a court is not a judgment for the purposes of the Brussels I Regulation: *Solo Kleinmotoren GmbH v Emilio Bloch.*[12] Finally, it may rely upon *Arab Business Consortium International Finance and Investment Co v Banque Franco-Tunisienne*[13] and *E D & F Man Sugar Ltd v Lendoudis,*[14] which states that the conversion of a foreign arbitration award into a judgment in the state of origin does not make that 'judgment' a regulation judgment.

This conflict between orders which seek to enforce arbitration awards and regulation judgments was highlighted at para 7.22 of Briggs and Rees, *Civil Jurisdiction and Judgments* (5th ed, 2009), who stated that: 'once an English court has given leave to enforce an arbitral award, it would be gravely damaging to legal certainty for it to be required to recognise and enforce a foreign judgment which undermined or contradicted that arbitral award.' The authors also expressed the view that 'the least bad solution is to hold that it is contrary to English public policy to recognise a foreign judgment which is irreconcilable with an arbitral award which the court has given leave to enforce, despite the case law and legislative difficulties which stand in the path of the argument.'

The European Commission approach versus the UK Parliament approach – a conflict still exists

The question of conflict between arbitration and the Brussels I Regulation has been the subject of much debate. Arbitration was excluded from the Brussels I Regulation but proceedings in support of arbitral proceedings were subject to this Regulation. In 2004 the Heidelberg Report, and subsequently the Green Paper on the revision of Regulation 44/2001, proposed to include arbitration in the scope of this Regulation and to fix some uniform rules in this field. This approach was rejected by the European Parliament, who adopted a resolution on 7 September 2010, which stated that it 'strongly opposes the (even partial) abolition of the exclusion of arbitration from the scope'.

On 16 December 2010 the European Commission issued its Proposal to amend the Brussels I Regulation. Its approach was to require a court seized of a dispute to stay proceedings if its jurisdiction is contested on the basis of an arbitration agreement, once an arbitral tribunal has been seized of the case or court proceedings relating to the arbitration agreement have been commenced in the Member State of the seat of the arbitration. Where the existence, validity or effects of the arbitration agreement are established, the court seized shall decline jurisdiction. The proposed amendment does not apply, however, to contracts of insurance, consumer contracts or employment contracts.

The approach of the UK Government was that there should be a complete exclusion of arbitration from the scope of the Brussels I Regulation. Therefore, not only would arbitrations be excluded from the Regulation but also court rulings as to the validity or extent of arbitral competence. The rationale for this approach was to reverse the ECJ Decision in *West Tankers*, which would in effect again permit the courts to issue anti-suit injunctions. There are two potential difficulties with the proposal suggested by the European Commission. First, it is not always evident in an arbitration agreement where the seat of the arbitration is to be sited. An arbitration agreement which stated: 'Arbitration under ICC rules' would result in the Court of the ICC fixing the place of the arbitration. However, this could take a number of months to happen and during that period the court proceedings in the Member State might progress with all their

consequential wasted costs. Secondly, it may result in parties side-stepping mandatory laws in their own countries by subjecting their contracts to foreign laws with a foreign seat of arbitration. Once again the lawyers are looking intently at what happens next.

Notes

1 [2011] EWHC 829.
2 [2009] 1 AC 1138.
3 Proposal for the Regulation of the European Parliament and of the Council on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (16 December 2010) 2010/0383
4 See **www.publications.parliament.uk** (see Commons Select Committees publication – Parliamentary Business).
5 [2009] 1 AC 1138.
6 The concerns would have arisen following the case of *The Wadr Sudr* [2010] 1 Lloyd's Rep 193 where the Court of Appeal held that a decision by a court of a Member State that a dispute was not within an arbitration agreement was a Regulation judgment and it was not open to argue in an English court that the recognition of that judgment was contrary to public policy.
7 See Article 34(3) of EC Regulation 44/2001 which states that a judgment will 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'.
8 [2011] EWHC 829 (Comm) at para 28.
9 *Ibid.*
10 The issue has also arisen before the Skane and Blekinge Court of Appeal in *Silver Lining Finance v Perstorp Waspik BV* (17 June 2010) Case No T1689-09.
11 [2010] 1 Lloyd's Rep 193.
12 [1994] ECR 1-2237.
13 [1996] 1 Lloyd's Rep 485, at pp 488-489.
14 [2007] 2 Lloyd's Rep 579 at para 34.