

West Tankers - Once an Arbitration Award now an English Judgment

West Tankers Inc v Allianz SpA & another [2012] EWCA Civ 27

In the latest instalment of the West Tankers proceedings the Court of Appeal has affirmed the Commercial Court's decision and upheld that it was right to grant permission to enforce the Arbitration Award as an English Judgment.

In May 2011 the Commercial Court ruled that an Arbitration Award that was purely declaratory in nature could be enforced and it gave permission to enter Judgment on the same terms as the Arbitration Award (under s66 of the Arbitration Act 1996, the "Act") [1]. The practical effect of the Commercial Court's decision was that the English Judgment could be used to prevent enforcement of an irreconcilable Italian Judgment (under Article 34(3) of the Brussels Regulation (EC Regulation 44/2001)). This was particularly important in this case as the owner of the vessel (having already obtained an Arbitration Award in their favour) had had its anti-suit injunction restraining parallel proceedings in the Italian Court set aside [2]. The risk to the owner was that although it had obtained an Arbitration Award stating that it had no liability to the charterers, if the Italian Court found that it did have such a liability it would be unable to prevent enforcement of the Italian Judgment. If the English Court permitted the enforcement of the Arbitration Award as an English Judgment this would prevent the enforcement of any irreconcilable Italian Judgment.

The historical position has always been that the Court will not grant permission to enter Judgment in respect of a purely declaratory award (in other words one that simply rules on liability) under s66 of the Act. The Commercial Court distinguished that long-standing principle and found that where entering Judgment would "make a positive contribution to the securing of the material benefit of the Award" an Arbitration Award could be entered as a Judgment by the Court. Here the material benefit was established as the prevention of the enforcement of an

irreconcilable Italian Court Order.

The Court of Appeal was asked to consider (1) whether permission could be given by the Court to enforce a purely declaratory Arbitration Award as an English Judgment and (2) whether the fact that the Arbitration Award was a "negative award" (i.e. that the owners were "not liable" rather than that they were "liable") would affect whether it could be enforced as a Judgment. A suggestion was also raised that any Judgment entered in respect of an Arbitration Award would not fall within the definition of a Judgment in Article 34(3) of the Brussels Regulation but this point was not explored further.

Several arguments were advanced as to why the Commercial Court had been wrong in its decision. These were that (1) the natural meaning of "enforcement" in s66 of the Act required coercion which was impossible where the Arbitration Award was a negative declaration; (2) the Commercial Court had failed to distinguish between "enforcement" and "recognition" and only recognition was possible in respect of a negative declaratory award; and (3) s66 of the Act only permits an Arbitration Award to be enforced in the "same manner" as a Judgment - a similar negative declaratory Court Judgment could not be enforced so an Arbitration Award should not be either.

The Court of Appeal rejected all of these arguments and concluded that in an "appropriate case" the Court could give permission for an Arbitration Award to be enforced in the same manner as might be achieved by an action on the Award. Clearly, the phrase "appropriate case" leaves the Court with a wide discretion and it is possible that in future this will include permission being granted without the requirement to show that to do so would make a positive contribution to the securing of the material benefit of the Award. Each case will need to be examined carefully by the Court to determine whether it is "appropriate" to grant permission.

Points to Note

1. The English Courts' continued support of Arbitration and the enforcement of arbitral awards extends to enforcing a declaratory Award where the Court determines it is "appropriate";
2. Tactically, there remains some benefit in commencing arbitration proceedings as early as

- possible to frustrate any legal "torpedo" from an opponent, or launching a "torpedo" in a foreign court before arbitration is commenced;
3. We are likely to hear further on the scope of Article 34(3) of the Brussels Regulation in the event that the Italian Courts issue an irreconcilable Judgment; and
 4. This case is significant in the context of the current reform of the Brussels Regulation (Council Regulation 44/2001), where work is being done to ensure the new European rules will support better the effectiveness of arbitration agreements.

¹ [1] *West Tankers Inc v Allianz SpA and another* [2011] EWHC 829 (Comm).
² [2] *West Tankers Inc v RAS Reunione di Sicurita Spa* [2007] UKHL 4, [2007] 1 Lloyd's Rep 391) and *Allianz Spa v West Tankers Inc*, Case C-185/07, [2009] 1 AC 1138.

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