EU - Enforcement of Judgements v Arbitration Proceedings

West Tankers Inc v (1) Allianz Spa and (2) Generali Assicurazione Generalia Spa [2012] EWCA Civ 27 highlights the use of arbitral proceedings in Member States as potential “shields” to enforcement of judgments from other Member States.

Readers may recall this case and the issue of anti-suit injunctions from earlier articles - “Clash of the Titans” - House of Lords v European Court of Justice and “Anti-Suit Injunctions Contrary to EU Law” in Sea Venture Issue 12.

The original dispute arose after the “Front Comor” collided with a jetty owned by the charterers. The charter was subject to English law and London arbitration. Charterers recovered under their insurance and commenced London arbitration proceedings against the owners for the excess. However insurers, using their rights of subrogation, brought proceedings in Italy. Owners sought to restrain the insurers from taking further steps save by way of arbitration and required them to discontinue the proceedings in Italy. Those proceedings concluded with a ruling from the European Court of Justice that no discontinuance could be so ordered. Accordingly both sets of proceedings ran on in tandem.

In due course, the arbitral tribunal published an award holding that the owners were under no liability to the charterers’ subrogated insurers in respect of the collision. The owners then applied to have the declaratory award entered as a judgment under section 66 of the Arbitration Act 1996, which the Commercial Court granted. Section 96 of the Arbitration Act 1996 gives the court power to enforce an award published by an arbitral tribunal in the same manner as a judgment or order of the court.

The court’s decision was that a negative declaratory arbitration award (i.e. an award declaring the negative liability of a party as opposed to a positive award for sums due) may be enforced in circumstances where the party seeking to enforce the award can “show that he has a real prospect of establishing the primacy of the award over an inconsistent judgment” as per Field J.

Proceedings remained afoot in the Italian courts (which remained unrestrained as a result of the ECJ ruling) and the owners were therefore seeking to enforce the award prior to any enforcement by the insurers of a judgment obtained in the Italian courts on the basis that under Article 34(3) of the Brussels Regulation, 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”. The owners had to apply to have the award registered as a judgment as the Regulation would not apply to an arbitration award but only to a judgment of the English courts.

The insurers felt their chances in Italy would be somewhat better and wished to avoid the ramifications of a decision considered to be contrary to its interests. On appeal therefore, the insurers sought to set aside the order of the Commercial Court.

The appeal has a number of important implications where judgments of different Member States conflict with each other and a court is faced with determining which judgment should take preference.

In the present case, the question was whether the Italian or English courts had primacy over the other. The Court of Appeal held that the purpose of Sections 66(1) and (2) 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 in circumstances where the victorious party’s objective in obtaining an order 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”.

The court concluded that all that was required was for the party seeking to enforce the award to show that there was a real prospect of establishing that the arbitration award should be preferred over an inconsistent judgment of another court. The appeal was dismissed.

Whilst the defendant does not have a judgment in its favour in Italy (which is likely to be a number of years away), the question remains as to how, if a conflicting judgment is issued in the Italian court, it will be reconciled with the English judgment for the purposes of Article 34(3) of the Brussels Regulation.

A similar issue was also before the Commercial Court in “The Christian D” (African Fertilizers and Chemicals NIG Ltd (Nigeria) v BD Shipowners Gmbh & Co Reederei KG [2011] 2 Lloyd’s Rep. 531). Proceedings were brought in Romania in breach of an arbitration clause incorporated into a bill of lading. The claimant in this case sought to enforce a declaratory arbitration award that the arbitration clause was incorporated into the bill of lading and binding on the defendant. The defendant argued that a purely declaratory award did not constitute a “judgment” for the purposes of Article 34(3). Beaconsfield J disagreed and held that the English court had jurisdiction under Section 66 of the Arbitration Act 1996 to enter judgment in terms of a declaratory award, a judgment entirely consistent with the “Front Comor” decision above.

The same question arises from both decisions: how will conflicting judgments of courts of Member States be reconciled with English judgments for the purposes of Article 34(3)? This question is particularly relevant when viewed in the context of ancillary agreements, i.e. the provision of security in the form of an escrow agreement or P&I club letters of undertaking. When faced with conflicting judgments (i.e. a High Court judgment issued confirming an arbitration award and a judgment of the Italian court), a party which is successful in arbitration, in the form of a declaratory award, could potentially prevent enforcement of an adverse judgment of “another” competent court against security which is subject to English law.

Club and owners’ worries are not lessened by the latest developments in this case. And it is of manifest importance in relation to injunctive relief and on a more practical level, the effect of the “competent court” provision in many Club letters of undertaking.

For instance, a party which obtains judgment in its favour from a court in a Member State in breach of an arbitration clause would ordinarily proceed directly to the High Court to enforce that judgment against security, either in the form of an escrow agreement or a letter of undertaking governed by English law and High Court jurisdiction. The High Court would then be faced with the difficult question of whether to prefer its own judgment in the terms of the declaratory award or the adverse judgment of another European Member State court.

It is too early to say whether this particular problem will arise in either of these matters discussed above but it is indeed only a matter of time before...
...the wording of the order and the personal problem referred to above in some of these matters because it seems to be a matter of interpretation. A similar question will need to be determined by the High Court.

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