Neutral Citation Number: [2011] EWHC 829 (Comm)

Claim No 2010 Folio 1265

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
IN AN ARBITRATION CLAIM

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/04/2011

Before :

MR JUSTICE FIELD

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Between :

West Tankers Inc	**Claimant**
- and -	
(1) Allianz SpA	
(2) Generali Assicurazione Generali SpA	**Defendants**

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Mr David Bailey QC (instructed by **Ince & Co**) for the **Claimant**
Mr Stephen Males QC and Ms Sara Masters (instructed by **MFB Solicitors**) for the **Defendants**

Hearing date: 11 March 2011

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Judgment

Mr Justice Field :

1. This is an application by the Defendants to set aside the order of Simon J dated 15 November 2010 whereby: (i) leave was granted to the Claimant pursuant to s. 66 (1) of the Arbitration Act 1996 ("the 1996 Act") to enforce an arbitration award dated 12 November 2008; and (ii) judgment was entered against the Defendants pursuant to s. 66 (2) of the 1996 Act in the terms of the award.

2. The award was made pursuant to an arbitration agreement contained in a charterparty on an amended Asbatankvoy form between Erg Petroli SpA ("Erg") as Charterer and the Claimant as Owner, under which the vessel "Front Comor" was chartered to carry a cargo of crude oil to Erg's refinery in Italy. The Charterparty provided, as did the ISAB/ERG Petroli Clauses incorporated therein, that all disputes arising out of the charter were to be referred to arbitration in London with English law to apply.

3. Following a collision between the "Front Comor" and a pier at Erg's refinery, claims were asserted by Erg against the Claimant which were referred to arbitration in accordance with the arbitration agreement. As the reference was progressing, the Defendants, who are Erg's subrogated insurers, brought a claim against the Claimant in the Tribunale di Siracusa, in Italy, in respect of the same incident. On 21 March 2005, Colman J granted an anti-suit injunction restraining the Defendants from taking

any steps to prosecute their claims except by way of London arbitration. On an appeal direct to the House of Lords, their Lordships referred to the ECJ the question whether it was consistent with EC Regulation 44/2001 ("the Regulation") for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement.[1] At the same time, their Lordships made it very clear that they thought that this question should be answered in the affirmative.

4. In the reference the Claimant denied liability and counterclaimed for a declaration against Erg and the Defendants that it was under no liability arising out of the collision with the pier; and on 7 May 2008 Andrew Smith J ordered and directed that the Defendants were bound by the arbitration agreement and that the dispute between Erg, the Claimant and the Defendants was to be determined as a single reference by the arbitral tribunal that had already been appointed.

5. Although Erg continued to participate fully in the reference, the Defendants declined to take any part in the London arbitration.

6. On 12 November 2008, the arbitral tribunal[2] published its third final award in which, inter alia, it held and declared that the Owners (the Claimant) were under no liability to the Insurers (the Defendants) in respect of the collision.[3]

7. It is this award that Simon J gave leave to enforce as a judgment.

8. On 10 February 2009, the ECJ answered the question referred to it by the House of Lords in the negative, holding that an anti-suit injunction enforcing an arbitration agreement was incompatible with the Regulation.[4]

9. Following the subsequent discharge of the anti-suit injunction, the Defendants have continued to prosecute the proceedings brought in the Tribunale di Siracusa despite the arbitral tribunal's third final award. In these proceedings, in which the issues at stake are the same as those in the reference, the Claimant has denied liability and has denied that the court has jurisdiction.

10. The Claimant is concerned that the Defendants may obtain a judgment in their favour from the Tribunale di Siracusa and then seek to have that judgment recognised and enforced in England pursuant to Chapter III of the Regulation. The Claimant apprehends that on the back of such a judgment, the Defendants will seek to enforce in England a Club Letter of Undertaking subject to English law and to the exclusive jurisdiction of the English Courts which, by a side letter agreement, has been made applicable to the Claimant's liabilities (if any) to the Defendants. It is these concerns that are behind the Claimant's application to have the award enforced as a judgment, the thinking being that once the award has been converted into a judgment, any subsequent Italian judgment in favour of the Defendants would not be recognised in England pursuant to Article 34 (3) of the Regulation which provides:

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[1] [2007] UKHL 4.
[2] Sir Brian Neill, Mr Michael Baker-Harber and Mr David Johnson QC.
[3] Earlier, on 7 October 2008, the arbitral tribunal published its second final award, declaring that the Claimant was under no liability to Erg, and that Erg's claim was dismissed.
[4] [2009] 1 Lloyd's Rep 413.

> A judgment will not be recognised:
>
> …..
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> 3. if it is irreconciliable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought.

11. The Claimant also intends to resist enforcement of any judgment against it given by the Tribunale di Siracusa by relying on Art 34 (1) of the Regulation on the ground that recognition of such a judgment is manifestly contrary to public policy in England and Wales.

12. Section 66 (1) and (2) of the 1996 Act provide:

> (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 given, judgment may be entered in terms of the award.

13. When making the order giving leave to enforce the award, Simon J said:

> So far as the s. 66 application is concerned, I am satisfied that this is an appropriate case and the Tribunal had jurisdiction to make the award, as indeed appears from the order of the House of Lords, to which I have been referred. I am also satisfied that there is utility in making the order to protect the integrity of the arbitral process and the award, and there is no real ground for doubting the validity of the order, at least at this stage.

14. The relevant part of the judgment ordered to be entered by Simon J was a declaration "that the Claimant 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 (and mooring dolphins) at Erg Petroli's installation at Santa Panagia, Sicily on 8 August 2000."

15. Mr Males QC for the Defendants argued that leave can only be given under s. 66 (1) & (2) if a judgment in terms of the award would be capable of being "enforced" by use of one or more of the available means of execution, such as a writ of fi.fa. or a charging order or a third party debt order. Since a declaratory judgment is no more than a declaration of the parties' rights, it is not susceptible, argued Mr Males, to being enforced through the established execution process, except in highly exceptional circumstances such as obtained in *Webster v Southwark London Borough Council* [1983] QB 698 (see below). No such exceptional circumstances exist in the instant case. It follows that the court had no power to make the order it did under s. 66 (1) & (2) of the 1996 Act.

16. Mr Males relied on the decision of the Court of Appeal in *Margulies Brothers, Ltd v Dafnis Thomaiedes & Co (UK) Ltd* [1958] 1 Lloyd's Rep 205. Here, a dispute concerning cocoa deals had been referred to an arbitrator and the victorious party had obtained leave to enforce the resulting award, as amended by the London Cocoa Association Appeal Board, under s.26 of the Arbitration Act 1950[5]. The award provided that certain identified contracts should be applied against certain other identified contracts and the resulting differences plus interest should be paid by the appellants to the respondents. The Court of Appeal set aside the order made under s. 26. Lord Evershed MR (with whom Sellers and Parker LJJ agreed) held that an award that merely says by of declaration (in effect) that certain contracts should be set against certain other contracts and that one of the parties should pay the difference was not capable of enforcement within the section.

17. Mr Males also referred me to *Tongyuan (USA) International Trading Group v Uni-Clan Limited* (19 January 2001, unreported), where Moore-Bick J said in reference to *Margulies*:

> That case is authority for the proposition that 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 s. 66 of the Arbitration Act 1996 (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.

18. Mr Males further submitted that any attempt to rely on Art 34 (1) or Art 34 (3) of the Regulation was in any event doomed to failure in light of *The Wadr Sudr* [2010] 1 Lloyd's Rep 193 and *Solo Kleinmotoren GmbH v Emilio Bloch* [1994] ECR 1-2237. In the *The Wadr Sadr* 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 recognition of the judgment was contrary to public policy within Art 34 (1) of the Regulation. In *Solo Kleinmotoren*, the ECJ held that to be a "judgment" for the purposes of the Convention, the decision must emanate from a judicial body of a Contracting State deciding on its own authority on the issues between the parties; accordingly, a settlement recorded in an order of a court was not a judgment of the purposes of the Convention.

19. Mr Males also referred to *Arab Business Consortium International Finance and Investment Co v Banque Franco-Tunisienne* [1996] 1 Lloyd's Rep 485, at 488-489 and *E D & F Man Sugar Ltd v Lendoudis* [2007] 2 Lloyd's Rep 579 at para 34 where the view was expressed at first instance that the conversion of a foreign arbitration award into a judgment in the state of origin does not make any subsequent "judgment" a Regulation judgment.

20. Mr Bailey QC for the Claimant contended that the purpose of s. 66 (1) and (2) is to assist the successful party in obtaining the benefit of an award and that the word "enforced" in s. 66 (1) should be construed accordingly. It follows, he submitted, that where a party's object is to convert an award into a judgment to utilise Art 34 (3) of

[5] Section 26 was in substantially the same terms as s. 66 (1) & (2) of the 1996 Act.

the Regulation to trump a later judgment given in breach of an arbitration agreement, the court would be enforcing the award if it made an order under s. 66 (1) and (2).

21. Mr Bailey QC further submitted that any previous rule or convention that a declaratory judgment could not be enforced in the traditional sense was displaced by the decision of Forbes J in *Webster v Southwark London Borough Council* [1983] QB 698, where it was held that in an appropriate case a declaratory judgment could be enforced by the issue of a writ of sequestration pursuant to an inherent power to ensure that the court's orders were carried out in the interests of justice.

22. Mr Bailey also relied on the decision of the NSW Court of Appeal in *Tridon Australia Pty Ltd v ACD Tridon Inc (Incorporated in Ontario)* [2004] NSWCA 146. This was an application for leave to appeal the refusal by Smart AJ to grant leave under s. 33 of the Commercial Arbitration Act 1984[6] to enforce an award and for judgment to be entered in the terms thereof. The award in question took the form of a number of declarations made by an arbitrator who had decided five issues going to the question whether certain conduct had been in breach of an agreement made between the parties. Having heard full argument, the NSW Court of Appeal refused leave to appeal. The purpose of the applicant was to have the award turned into a judgment that would "speak to the world". Giles JA held that that did not constitute enforcement of the award.

> 11. …...Enforcement is a plain word, and means something quite different from a restatement of the effect of the award in the form of a judgment. The summary procedure provided by s. 33 of the Act is a procedure with a purpose, the purpose of enabling a victorious party in an arbitration to obtain the material benefit of the award in its favour in an easier manner than having to sue on the award. There has been nothing put forward in this case to suggest any occasion for enforcement of the declarations made in the interim award. They are binding on the parties, and bind them for the balance of the arbitration and beyond that.
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> 12. I agree with Smart JA's view that there is no utility in making the order sought, but for the perhaps more fundamental reason that there is just no question of enforcement yet arising. In the absence of any question of enforcement arising, it would not be appropriate to grant leave to enforce the award.

23. On the question whether the Claimant could establish the primacy of an arbitral award and/or a judgment made under s. 66 (1) and (2) of the 1996 Act pursuant to Arts 34 (1) and 34 (3) of the Regulation, Mr Bailey argued that the public policy issue whether a foreign judgment inconsistent with an arbitral award should be enforced was fundamentally different from the public policy issue featured in *The Wadi Sadr*. In the former case, the public policy engaged was the giving of force and effect to

[6] S. 33 (1) provides: An award made under 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, and where leave is so given, judgment may be entered in terms of the award.

awards in accordance with the New York Convention, whereas in the latter case the public policy contended for was the enforcement of arbitration agreements.

24. Mr Bailey also submitted that *Solo Kleinmotoren GmbH v Emilio Bloch* was distinguishable on the basis that it concerned the status of a settlement agreement recorded in an order of the court, which is very different from a judgment given in terms of an arbitration award.

25. Mr Bailey relied on certain dicta of Waller LJ contained in paragraph 63 of the judgment in *The Wadi Sadr*.

> 63. Might it make any difference if the English court had already granted a declaration that an arbitration clause was incorporated before the court of a member state considers whether to grant a stay? If in such circumstances a stay were refused by the court of a member state then the question might arise as to whether the English court should recognise the judgment but I doubt whether public policy would need to be invoked or indeed could be invoked. *In such a case the claimant in England could proceed with the arbitration in England so as to obtain a judgment in England; if that were inconsistent with the judgment obtained in the member state than that would provide an answer on its own [see article 34(3)]*.[Emphasis supplied]

26. My attention was also drawn to para 7.22 in Briggs, *Civil Jurisdiction and Judgments* (5th ed. 2009), where the authors, having expressed the view that it cannot be right either that a foreign judgment may be enforced notwithstanding that it contradicts the local law of arbitration, or that the issue is outside the domain of the Regulation on the ground that it involves arbitration, submit:

> [T]hat 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. Alternatively, it could be held that the word "judgment" in Article 34 (3) is used in two distinct senses, and that the "judgment given in a dispute between the same parties in the Member State in which recognition is sought" includes local judgments which give leave to enforce the award of an arbitral tribunal. This would not be inconsistent with the view that foreign judicial orders which give leave to enforce awards are not required to be recognised under the Brussels I Convention, while accepting 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.

27. Presciently, the learned editors observe in a footnote at the end of this passage that the issue may well arise at a later stage in the dispute between Allianz SpA and West Tankers Inc.

28. In my opinion, s. 66 (1) stands to be construed in the same manner as that adopted by the NSW Court of Appeal in *Tridon* in respect to s. 33 of the Commercial Arbitration Act 1984. The purpose of s. 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. 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 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.

29. In my view, this approach is not inconsistent with *Margulies Brothers, Ltd v Dafnis Thomaiedes & Co (UK) Ltd*. There, a judgment in terms of the award would not have assisted in giving the successful party the fruits of his victory because a judicial declaration would have merely repeated the declaration contained in the award and because the award did not order on its face the payment of a specified sum.

30. On an application under s. 66 or to set aside a s. 66 order, it is enough, in my view, in a case such as this, for the party seeking to enforce the award to show that he has a real prospect of establishing the primacy of the award over an inconsistent judgment. It is not necessary, nor is it appropriate, for the court finally to decide this hypothetical question – hypothetical because the unsuccessful party to the arbitration will not have obtained an inconsistent judgment in a member state at the time the court is dealing with the s. 66 application.

31. In my judgment, the Claimant comfortably satisfies this threshold requirement.

32. Accordingly, for the reasons I have given, I conclude that Simon J had jurisdiction to make the s. 66 order he made. It follows that this application is dismissed.