Neutral Citation Number: [2011] EWHC 2452 (Comm)
Case No: CLAIM NO. 2011 FOLIO 900

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/09/2011

Before :

THE HONOURABLE MR JUSTICE BEATSON

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Between :

African Fertilizers and Chemicals NIG Ltd (Nigeria)	**Applicant/Defendant**
- and -	
BD Shipsnavo GmbH & Co Reederei KG	**Respondent/Claimant**

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- -

Dominic Happé (instructed by **MFB**) for the **Applicant**
Nichola Warrender (instructed by **Winter Scott**) for the **Respondent**

Hearing date: 12 September 2011

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Judgment

Mr Justice Beatson:

1. In an Order made on 4 August 2011 (and varied on 15 August) Teare J gave the claimant ship-owner, BD Shipsnavo GmbH & Co Reederei KG, leave pursuant to section 66 of the Arbitration Act 1996 ("the 1996 Act") to enforce an arbitration award made on 18 July 2011 by Mr Baker-Harber and Mr Hamsher, and to enter judgment against the defendant, African Fertilizers and Chemicals NIG Ltd (Nigeria), in the terms of the award.

2. The defendant applied for Teare J's order to be set aside on the ground that, as the material parts of the arbitration award were in purely declaratory terms, there was no jurisdiction to make it. Its application notice states (paragraph 3) that "permission can only be given under section 66(1) and (2) Arbitration Act 1996 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 and the judgment is not so capable, being only declaratory". At the end of the hearing I refused the defendant's application. I now give my reasons for doing so.

3. The award was made pursuant to an arbitration agreement contained in a bill of lading on the CONGENBILL 1994 form for the carriage of the defendant's cargo on board the claimant's vessel, the *MV Christian D*, from Constanta in Romania to Lagos in Nigeria. The bill of lading, dated 4 October 2010, incorporated the terms and

conditions of the underlying voyage charter, dated 21 September 2009, which was on a GENCON 1994 form and included an English law and arbitration clause. The dispute between the parties arises out of the grounding of the vessel off Kythria Island when General Average was declared.

4. Prior to the London arbitration, the defendant commenced arbitration proceedings in Romania. On 18 March 2011 I granted the claimant an injunction restraining the defendant from continuing the Romanian arbitration. The defendant also commenced proceedings in the Maritime and River Division of the Constanta Court. On 14 April 2011 Field J granted the claimant an interim declaration that the London arbitration clause in the GENCON charter-party was validly incorporated into the bill of lading and was binding on the defendant, and that the Romanian arbitration and court proceedings were in breach of the agreement to arbitrate in London. No application has been made to set aside those orders and the *inter partes* hearing was adjourned to permit the London arbitration to take place.

5. The material part of Mr Baker-Harber and Mr Hamsher's award is:

> "B WE FIND, HOLD AND DECLARE that:-
>
> (1) The London arbitration clause from the Charterparty dated 21 September 2010 was validly incorporated into the Bill of Lading dated 4 October 2010.
>
> (2) The London arbitration clause is binding on the Defendants.
>
> (3) The Tribunal has jurisdiction over all and any disputes arising out of the Bill of Lading and/or the Charterparty, including:-
>
> (a) The Claimants' claim for a declaration of entitlement to a contribution in General Average and/or a contribution in General Average and/or all claims for damages for breach by the Defendants of the London arbitration clause; and
>
> (b) The Defendants' claims for a declaration or order of non-liability to contribute to General Average and/or common average expenses and/or any claims for loss and/or damage against the Claimants arising from the Defendants' provision of any General Average and/or salvage guarantees whether such claims are pursued in contract and/or tort (and for the avoidance of doubt all claims being pursued by the Receivers in the River and Maritime Division in the Court of Constanta in File No 4983/118/2011); because theses claims are within the scope of the London arbitration clause and the Tribunal has jurisdiction in respect of the same."

The award, which was a final award, also awarded the claimant its costs.

6. Section 66 is in the section of the 1996 Act containing the powers of the court in relation to an award. It 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.
>
> (3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award.
>
> The right to raise such an objection may have been lost (see section 73).
>
> (4) Nothing in this section affects the recognition or enforcement of an award under any other enactment of 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."

7. The other legislative provision relevant to this application is Article 34 of Regulation 44/2001 ("the Brussels Regulation"). The claimant sought an order under section 66 because of its concern that, notwithstanding the arbitration award, the defendant will obtain judgment in its favour in the Romanian Court and will then seek to have that judgment recognised and enforced in England under the Brussels Regulation: see paragraphs 24-25 of Mr Scott's statement. If, however, an English judgment is first obtained, the claimant would rely on Article 34(3) of the Regulation to resist the recognition of an irreconcilable subsequent judgment of the Romanian court.

8. Article 34 provides in material part:

> "A judgment shall not be recognised:
>
> 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought
>
> .....
>
> 3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought."

9. There are two limbs to the submissions made on behalf of the defendant by Mr Happé. The first is that enforcement of a purely declaratory arbitration award is not possible. Mr Happé recognised that the recent decision of Field J in *West Tanker Inc v Allianz SpA & Another ("The Front Comor")* [2011] 2 Lloyds Rep 117, which is under appeal, is inconsistent with this submission, but submits that it is wrong and should not be followed. The second limb, which he described as not free-standing, is that in the light of the decision of the ECJ in Case C-414/92 *Solo Kleinmotoren v Boch* [1994] ECR I-2237, a judgment entered under section 66 in the terms of an arbitration award does not constitute a judgment within the meaning of the term in Article 34(3) of the Brussels Regulation. This, he argued, is because it does not involve any consideration by the Court of the issues between the parties but is simply a mechanism for summary enforcement. Accordingly, he submitted that entering judgment in terms of the award pursuant to section 66 would not give the claimant what it wants and there is therefore no purpose in doing so.

10. The first limb relies on the distinction between enforcement and recognition which is drawn in the 1996 Act, for instance in section 101, in the context of New York

Convention awards. Invoking the support of *Redfern & Hunter on International Arbitration*, (2009) §§ 11-20 – 11-24, Mr Happé submitted that enforcement consists not merely of recognising the legal force and effect of an award, but ensuring that it is carried out by using legal sanctions, whereas recognition is purely a defensive process. He contended that the claimant wishes to use a judgment entered in the terms of the award to defend any future proceedings to enforce a Romanian judgment, and that use is purely recognition and not enforcement.

11. Mr Happé relied on *Margulies Brothers Ltd v Dafnis Thomaides & Co (UK) Limited* [1958] 1 Lloyd's Rep. 205, and 207 *per* Lord Evershed MR, and *Tongyuan (USA) International Trading Group v Uni-Clan Ltd.* 19 January 2001. He submitted that the *Margulies Brothers* case both binds this court and reflects sound principle because (see *Dalmia Cement Ltd v National Bank of Pakistan* [1974] 2 Lloyd's Rep. 98, at 107-109) leave can only be given to enforce an award "in the same manner as a judgment" to the same effect, and a declaration is not a coercive order and cannot be enforced by any normal means of execution: see *St George's Healthcare NHS Trust v S* [1999] Fam 26 at 60C-D and Zamir & Woolf, *The Declaratory Judgment* (3rd ed) §1-02. He also relied on *Haji-Ioannou v Frangos* [2009] EWHC 2310 (QB) at [84].

12. What of *"The Front Comor"*? In that case Field J stated (at [28]) that the purpose of section 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 where there is an appreciable risk of the losing party obtaining an inconsistent judgment in a member state which it might try to enforce within this jurisdiction, and "the victorious party's objective … is to establish the primacy of a declaratory order 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".

Mr Happé submitted that *"The Front Comor"* is wrong and should not be followed. He maintained that Field J: (a) failed to distinguish between the purpose of the section and the meaning of the word "enforced", (b) attributed to the word "enforced" an unnaturally wide meaning, and (c) ignored the distinction that is present in the 1996 Act between "recognition" and "enforcement", leaving no room for a concept of recognition distinct from enforcement.

13. At the outset it is important to note that the procedure in section 66 of the 1996 Act (like its predecessor, section 23 of the 1950 Act and provisions in earlier legislation) is one of two ways of enforcing an arbitration award. It is, as Thomas LJ stated in *The Amazon Reefer* [2010] 1 Lloyd's Rep 222 at [7], a summary form of proceeding which is intended to dispense with the full formalities of the other way of enforcing an award, by an ordinary action in the High Court. These legislatively sanctioned procedures were, as Miss Warrender submitted, "clearly intended to make it easier rather than more difficult to enforce an award" than by the alternative route of an ordinary action on the award.

14. I accept Miss Warrender's submission that the terms "enforcement" and "enforced" in section 66 are to be given their plain meaning, which is to be ascertained in part by

what is possible in an ordinary action at common law. It is important to remember that the 1996 report of the Departmental Committee on Arbitration which led to the 1996 Act stated (paragraph 1) that the language of 1996 Act was intended to be "sufficiently clear and free from technicalities and readily comprehensible to the layman" and that in *The Amazon Reefer* at [20] Thomas LJ referred to this and stated the Act should be construed bearing this in mind. As to the second, the cases show that one of the common law contractual remedies open to the Court on an action to "enforce" an arbitral award is a declaration.

15. For the reasons I shall give, I also accept Miss Warrender's submission that the mere fact that the award is declaratory in nature need not offend the requirement that, for the purposes of section 66 of the 1996 Act, a judgment in the form of the award entered by the leave of the Court must be capable of enforcement by one of the available methods of execution.

16. The starting point is the position at common law. Mustill and Boyd, *Commercial Arbitration*, 2nd ed., 417, state that the common law contractual remedies in an action to enforce the award include a declaration that an award is valid or as to its construction or effect. *Merkin on Arbitration* (para 19.6 and footnote 32) gives an award on jurisdiction as an example of a case in which the Court may grant a declaration as to the validity of the award on an action on the award as one of the "usual range of remedies available to it, as in any action for breach of contract".

17. Mustill and Boyd cite three cases, the most recent of which is *Birtley District Co-Operative Society v Windy Nook and District Industrial Co-operative Society (No. 2)* [1960] 2 QB 1.[1] That case concerned an award made in a dispute between two members of the Co-operative Union Ltd. Before the final award was made, the defendant terminated its membership of the union. The plaintiff prevailed in the arbitration, and successfully brought an action claiming a declaration that the award was binding on the defendant. The plaintiff also obtained an injunction in that case but it appears that Streatfield J considered the two remedies separately and it does not appear that, had the defendant's submission that the terms of the award were too vague to be enforced by injunction prevailed, declaratory relief would not have been given. Such a declaration was thus one of the common law contractual remedies open to the Court on an action to "enforce" the award.

18. There is also jurisdiction for the enforcement of a declaratory judgment by the issue of a writ of sequestration pursuant to the inherent power of the Court to see that its orders are carried out: see *Webster v Southwark LBC* [1983] QB 698. It is clear that it is only appropriate to do this in "exceptional" circumstances: see [1983] QB at 710E-F and *St George's Healthcare NHS Trust v S* [1999] Fam 26 at 60C-D. In *Webster's* case the exceptional circumstances were the contumacious conduct of the defendant. In the present case the claimant has already had to seek the assistance of the Court on two occasions. It has been successful in so doing, but, notwithstanding Field J's declaration, the defendant is continuing to pursue the proceedings in the Romanian court. I reject Mr Happé's submission that *Webster v Southwark LBC* only applies in public law contexts.

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[1] The others are *Merrifield Ziegler Co. v Liverpool Cotton Association Ltd.* (1911) 105 LT 97 and *Selby v Whitbread* [1917] 1 KB 736.

19. For these reasons based on the common law, I also do not consider that the distinction between "enforcement" and "recognition" assists Mr Happé. As to his reliance on section 101 of the 1996 Act, I do not consider it appropriate to read into Part I of that Act the Part III regime for the recognition and enforcement of "certain foreign arbitration awards". Nor do I consider that he is assisted by *Haji-Ioannou v Frangos* [2009] EWHC 2310 (QB). That case was concerned with the registration and recognition of a Greek judgment. Slade J stated (at [84]) that "it is only judgments or parts of judgments which have been declared enforceable in the Member State in which the judgment was given which can be registered". As to the parts of the Greek judgment which were declaratory, she stated "the declarations may be used in further proceedings to obtain judgment for the sums of money but they are not enforceable". Miss Warrender submitted that it is not clear whether "they are not enforceable" refers to enforceability in Greece or in England. The context, and in particular the first of the sentences I have quoted, however, suggests Slade J was referring to Greece,[2] in which case what is said about the enforceability of Greek declaratory judgments is not relevant in considering the position of English declaratory judgments. If, however, Slade J was referring to enforceability in England, the statement does not appear to take account of the cases, particularly *Birtley District Co-Operative Society v Windy Nook and District Industrial Co-operative Society (No. 2)* [1960] 2 QB 1 which was not before the court.

20. I turn to the statutory procedure. Here the starting point is the decision in *Margulies Brothers Ltd v Dafnis Thomaides & Co (UK) Limited* [1958] 1 Lloyd's Rep. 205. The Court of Appeal held that an award declaring that certain contracts be set-off against certain other contracts was not capable of enforcement under section 26 of the Arbitration Act 1950. Mr Happé understandably relied on the statement of Lord Evershed MR (at 207) that:

> "you cannot enforce a document which merely says by way of declaration (in effect) that certain contracts with three numbers should be set against certain other contracts with three other numbers and that [the defendant] ought to pay the differences between them."

He also relied on one of Moore-Bick J's references to the *Margulies Brothers* case in *Tongyuan (USA) International Trading Group v Uni-Clan Ltd.*. At p. 8, ll. 19-20, his Lordship stated that the *Margulies Brothers* case is:

> "authority for the proposition that an award which is effectively couched in purely declaratory terms cannot be enforced as a judgment".

21. Both these statements appear to provide strong support for Mr Happé's submissions. But it is important to note that, in the *Margulies Brothers Ltd* case, the award was not an award of "a sum certain", and to consider what else Moore-Bick J said about that case. He also stated:-

> "The Court of Appeal [in the *Margulies Brothers Ltd* case] concluded that the award was not an award for a sum certain, **nor was it an award which could be enforced as a judgment because it did not make its effect sufficiently clear.**

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[2] Since Slade J's decision the ECJ has confirmed that what is relevant to registration and recognition of a judgment is its enforceability in the Member State of origin: Case C-430/07 *Orams v Apostolides* [2011] QB 519, at [66] and [70].

> It was impossible to ascertain what had to be paid without indulging in a certain amount of arithmetic." (p. 8, ll. 3-7, emphasis added)

He also stated that that the *Margulies Brothers Ltd* case is authority for the proposition that for an award to be enforceable as a judgement under section 66 of the 1996 Act it:-

> "must be framed in terms which would make sense if those were translated straight into the body of a judgment." (p 8, ll. 21-25)

22. Notwithstanding the words used by Lord Evershed and the statement by Moore-Bick J relied on by Mr Happé, it is the uncertainty or ambiguity that resulted from the fact that the award was not an award of "a sum certain" which has been regarded by the commentators as rendering the award in that case incapable of enforcement: see Mustill & Boyd, *Commercial Arbitration,* 2nd ed 419; *Russell on Arbitration,* 23rd ed., 2007, §8-012; *Merkin on Arbitration* (looseleaf ed, updated to July 2011, §19.11. The 2003 edition of *Russell on Arbitration* stated (§8-006 n. 61) stated that in the light of Moore-Bick J's observation it was "doubtful" whether an award couched in purely declaratory terms can be enforced under section 66 but also doubted that the observation "has general application". But the current, 23rd edition "suggests" (§8-012) that "previously expressed doubts" are "no longer applicable" and that "provided the terms of the award are sufficiently clear there is now no reason why a declaratory award cannot be enforced under section 66".

23. Miss Warrender also relied on *Kohn v Wagshal* as an example of a declaratory award being enforced by the Court using the statutory summary procedure. In that case Colman J made an Order enforcing an award of the Beth Din and entered judgment including three declarations. Morison J ([2007] 1 Lloyd's Law Rep Plus 63 at [7]) rejected an application to set aside the order because the Court would be enforcing an illegal contract. He stated (at [11]) that the applicant was doing no more than seeking to enforce his "statutory rights" under section 66 of the 1996 Act to have his arbitration award to be enforced, and (at [7]) that Colman J's order had been made "in accordance with the normal practice". The case may indicate what two experienced Commercial judges assume is possible under section 66. But it is of limited assistance. It was primarily concerned with the illegality issue (and the Court of Appeal was solely concerned with that: see [2007] EWCA Civ. 1022). Importantly, it does not appear that there was argument as to whether, and if so when, the court has jurisdiction to enforce a declaratory award. Moreover, the Beth Din's award and Colman J's order also (see [7]) required the defendant to account for monies received, so that it is not a case where the section was used for purely declaratory relief.

24. The same cannot, however, be said about the recent decision in *"The Front Comor"* [2011] 2 Lloyds Rep 117. Field J considered the relevant authorities, including the decision of the New South Wales Court of Appeal in *Tridon Australia Pty Ltd v ACD Tridon Inc (Incorporated in Ontario)* [2004] NSWCA 146. He distinguished (at [29]) the *Margulies Brothers Ltd* case on the ground that in that case:

> "a judgment in the terms of the [declaratory] 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"

In other words, judgment in the terms of the declaratory award would not have assisted the successful party because it did not award a sum certain which was the objective of the party seeking leave to enforce the award.

25. In *"The Front Comor"*, by contrast, judgment in the terms of the declaratory award would (see [30]) give "the claimant a real prospect of establishing the primacy of the award over an inconsistent judgment". Field J distinguished such a situation from one in which no material benefit can be obtained from judgment in the terms of a declaratory award. Apart from the position in the *Margulies Brothers Ltd* case, the examples given are (see [28]) a case in which there is no appreciable risk of the losing party obtaining an inconsistent judgment in another EU member state which it might try to enforce in this jurisdiction, and, more broadly (see the extract from Giles JA's judgment in *Tridon Australia Pty Ltd* at [22]), one in which nothing has been put forward to suggest any occasion for enforcement of the declarations in an award.

26. I have (see [12]) set out Field J's statement of the purpose of section 66. I accept Miss Warrender's submission that his approach to the construction of the 1996 Act is consistent with the observations of Thomas LJ in *The Amazon Reefer* [2010] 1 Lloyds Rep 222 at [20] as to the appropriate way in which the language of 1996 Act should be construed. I respectfully agree with Field J's approach to the *Margulies Brothers Ltd* case, which (see [22] above) is also the approach of the commentators to that case. It follows that, subject to the second limb of Mr Happé's submissions, in the present case the order made by Teare J does facilitate the claimant in realising the benefit of the award because there is a real prospect that having judgment entered in the terms of the award will establish the primacy of the award over any inconsistent judgment by the Romanian Court.

27. I turn to the second limb of Mr Happé's submissions. This principally relied on the decision in Case C-414/92 *Solo Kleinmotoren v Boch* [1994] ECR I-2237, a case which concerned a settlement reached by the parties recorded in an order of the court and which brought proceedings to an end. The ECJ stated:

> "in order 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**" (at [17], emphasis added),
>
> and,
>
> "settlements in court are essentially contractual in that their terms depend first and foremost on the parties' intention" (at [18]).

The Court also stated (at [20]) that Article 27 of the Brussels Convention, the equivalent of Article 30 of the Brussels Regulation, was an obstacle to the free movement of judgments by a simple and rapid enforcement procedure, and "must therefore be interpreted strictly, which precludes treating a court settlement as a judgment given by a court or tribunal". Mr Happé relied, in particular, on the emphasised words in paragraph [17].

28. My reasons for rejecting Mr Happé's submissions are as follows:-

(a) *Solo Kleinmotoren v Boch* is a case about a court approved settlement. As the ECJ recognised (at [18]) "settlements in court are essentially contractual". While

submission to arbitration is consensual, the outcome of the arbitration and the contents of the award are not.

(b) Mr Happé's submissions on this issue are inconsistent with the *obiter* statement of Waller LJ in *National Navigation Co v Endea Generacion SA (The Wadi Sudr)* [2010] 1 Lloyds Rep 193 at [63]. Waller LJ stated that, where the English court had granted a declaration that an arbitration clause was incorporated into a contract (in that case a bill of lading) and a court in another member state subsequently refused to stay proceedings in that state, "…the claimant in England could proceed with the arbitration in England; if that were inconsistent with the judgment obtained in the member state then that would provide an answer on its own [see article 34(3)]".

(c) The submissions do not advance and are indeed inimical to the underlying policy considerations in this area. Briggs, *Civil Jurisdiction and Judgments* 5th ed., 7.22, observes 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".

These considerations were also part of the submissions made to Field J on behalf of the claimant in "*The Front Comor*": see [2011] 2 Lloyds Rep 117 at [24] – [26]. Although he does not in terms accept them, since he did not regard the decision of the ECJ in *Solo Kleinmotoren v Boch* as precluding the making of a section 66 order, he must have done so.

29. Accordingly, for the reasons I have given, I conclude that Teare J had jurisdiction to make the section 66 order in these proceedings and dismiss the defendant's application.

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