

“The Front Comor”

EU – Enforcement of Judgments v. Arbitration Proceedings

West Tankers Inc –v- (1) Allianz Spa and (2) Generali Assicurazione Generalia Spa [2012] EWCA Civ 27 highlights the issues raised by potential conflicting judgments handed down by Courts in Member States.

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 an anti-suit injunction from the English Court to stop the Italian proceedings is incompatible with the Brussels Regulation. Accordingly both sets of proceedings ran on in tandem with the risk of conflicting decisions.

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 66 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 before the insurers could obtain and subsequently seek to enforce judgment obtained in the Italian courts in light of Article 34(3) of the Brussels Regulation which provides 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”. It is presently not clear whether under Article 34 the English Court can refuse to recognise an adverse judgment obtained in a different Member State.

The insurers appealed to the Court of Appeal to set aside the order of the Commercial Court.

The decision of the Court of Appeal gives rise to a number of important implications in circumstances 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 a declaratory arbitration award can be enforced as an English Court judgment. 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 insurers do not yet have a judgment in their favour in Italy the question remains as to whether, if a conflicting judgment is issued in the Italian Court, the English Court can refuse to recognise it under 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 Shipsnavo 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). Beatson 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: whether the English Court can refuse to recognise conflicting judgments of courts of Member States under 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 (e.g. 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.

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 a similar question will need to be determined by the High Court.

For further details, please contact Edward Gray egray@m-f-b.co.uk or Joanna Bruce jbruce@m-f-b.co.uk