



## LEGAL BRIEFING

### *West Tankers Inc v (1) Allianz Spa (2) Generali Assicurazione Generali Spa* [2012] EWCA Civ 27

The court's power under section 66 of the Arbitration Act 1996 to order that judgment be entered in the terms of an arbitral award granting a negative declaration, i.e. a declaration that the successful party has no legal liability to the other party in respect of the subject matter of the arbitration.

#### *The Facts*

The dispute was between the insurers of voyage charterers of the vessel *Front Comor* and the vessel's owners about responsibility for a collision during the voyage charter. An arbitral tribunal found that the owners had contractual immunity, under the terms of the charterparty, from responsibility to the charterers for the damage and made an award declaring that the owners were under no liability to the charterers' insurers in respect of the collision.

Section 66 of the Arbitration Act 1996 ("the Act") provides for the enforcement of an arbitration award as follows:

*"(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. . . ."*

On 15 November 2010, on a without notice application by the owners, Simon J ordered that the owners should be permitted pursuant to section 66(1) of the Act to enforce the declaratory award in their favour and that:

*"Pursuant to section 66(2) of the Arbitration Act 1996, judgment be entered against the defendants in terms of the said award, namely a declaration that the [owners] are under no liability (whether in contract or in tort or otherwise howsoever) to the [charterers and their insurers] 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."*

An application by the insurers to set aside the order of Simon J was dismissed in a judgment by Field J dated 6 April 2011 but the insurers were given leave to appeal. In this appeal, the insurers argued that the Judge had erred in law in his construction of section 66 and in holding that the Court had jurisdiction to order that judgment be entered in the terms of the award.

The judgment sets out the parties' submissions as follows. The insurers submitted that the Judge had erred in the following respects:

- (i) He failed to distinguish between the general purpose of section 66 and the meaning of the word "enforced" in section 66(1), and in doing so misinterpreted the word "enforced";
- (ii) He gave to the word "enforced" an unnaturally wide meaning, whereas he should have held that a declaratory judgment especially a negative declaratory judgment (which does not require anybody to do anything), is incapable of being "enforced";

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- (iii) He lost sight of the fact that section 66 is concerned only with the enforcement of an award “in the same manner” as a judgment; and.
  - (iv) He ignored the well established distinction between the recognition of an award and the enforcement of an award.

The owners submitted that the purpose of section 66 is to support the arbitral process and to provide a simpler procedure ensuring compliance with the award than having to bring an action on it. There are, the owners submitted, various ways in which a declaratory judgment can be enforced in the ordinary sense of the word and it would be contrary to the purpose of the Act to give the word the narrow meaning contended for by the insurers. A declaratory judgment can be enforced, for example, by the victorious party setting up the award as to support a plea of *res judicata* (i.e. a matter already decided in court cannot be raised again) and a court may, in an appropriate case, enforce it by an injunction.

The owners submitted that the distinction between “recognition” and “enforcement” is immaterial in the context of an English arbitral award because section 58 of the Act makes it automatically binding. In the case of foreign arbitrations there are conflict of law rules which govern the question whether an English court will recognise a foreign award, and the sections of the Act to which the insurers referred (sections 101 and 102) relate specifically to New York Convention awards. In the owners’ submission they are irrelevant to the construction of section 66.

#### ***The Issues***

- (i) Whether the Judge had jurisdiction under section 66 to direct that judgment be entered in the terms of the negative declaratory award; and
- (ii) Whether the phrase “enforced in the same manner as a judgment to the same effect” in section 66(1) is confined to enforcement by one of the normal forms of execution of a judgment which are provided for under the Civil Procedure Rules or whether it may include other means of giving judicial force to the award on the same footing as a judgment.

#### ***The Decision***

The Court of Appeal observed that a declaratory judgment or award decides some question as to the respective rights and obligations of the parties. It is not “executory” in form in that it does not formally order either party to do or to refrain from doing anything. At common law a party to an arbitration who has obtained a declaratory award in his favour could bring an action on the award. The purpose of section 66 is to provide a simpler alternative route to bringing an action on the award. The Court of Appeal could not see why in an appropriate case, the Court may not give leave for an arbitral award to be enforced in the same manner as might be achieved by an action on the award and so dismissed the appeal and gave leave for judgment to be entered in the terms of the award.

In making this decision, the Court of Appeal held that the broader interpretation of section 66 is closer to the purpose of the Act and makes better sense in the context of the way in which arbitration works. Ultimately the efficacy of any award by an arbitral body depends on the assistance of the judicial system. Judges may give force to an arbitral award by a number of means, including by applying the doctrine of issue estoppel (*res judicata*). The argument that in such cases the court is not enforcing an award but only the rights determined by an award is an over subtle and unconvincing distinction, for the enforcement of any judgment or award is the enforcement of the rights which the judgment or award has established (i.e. a right to payment in the case of a monetary judgment or award). In this case the owners wanted to enforce the award through *res judicata*, and for that purpose they sought to have the award entered as a judgment.

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### *Comment*

As referred to in the judgment, although the likely outcome of this appeal appeared to be obvious, this issue was important to the insurers given the long history of the dispute in relation to which the House of Lords and the European Court of Justice had been involved in setting aside an anti-suit injunction restraining the insurers from continuing a claim against the owners in the Italian Courts. If the Italian proceedings were to continue, the owners considered that there may be an advantage (which the insurers wanted to prevent) in having the award in the form of a judgment so as to provide them with a shield against enforcement if the Italian proceedings resulted in a conflicting judgment that the owners were to blame for the collision.

It is common for construction contracts, especially in relation to international projects, to provide for disputes to be resolved in arbitration rather than litigation. Two main reasons for this are that arbitration is a private and confidential process and there are limited grounds for appeal, albeit the element of privacy is diminished where disputes concerning jurisdiction or enforcement of the award are pursued in Court, as in this case.

This decision upholds the purpose of section 66 in providing an easier procedure to ensure compliance with the award than having to bring an action on it. In a building and construction context, this decision will be relevant to a party in receipt of a declaratory arbitral award seeking to enter it as a judgment. An example of such an award would be one that declares that a party has no legal liability for making good certain defects under a contract.

**Andrew Hales**  
March 2012