

Route 66: enforcing arbitral awards

Masood Ahmed reports on leave to enforce under s 66 of the Arbitration Act 1996



IN BRIEF

► Section 66 of the Arbitration Act 1996: enforcing arbitral awards.

► *West Tankers Inc v Allianz SpA (The Front Comor)*: enforcing the rights which the award has established.

► *A v B*: a helpful reminder of the approach the courts will adopt when considering an application to enforce under s 66.

Section 66 of the Arbitration Act 1996 (the 1996 Act) provides that an arbitral award may, with the permission of the court, be enforced in the same manner as a judgment or order of the court. However, for the award to be validly enforced, it must, as confirmed in *West Tankers Inc v Allianz SpA (The Front Comor)* [2012] EWCA Civ 27, [2012] All ER (D) 127 (Jan), seek to *enforce rights* which the award has established (ie, be a declaratory award). Recently, the High Court in *A v B* [2020] EWHC 952 (Comm) set aside an earlier order enforcing an arbitral award on the grounds that the full award debt was not outstanding and therefore it did not constitute a declaratory award for the purposes of s 66 of the 1996 Act.

The facts

The claimant and defendant referred their dispute in relation to an earlier settlement agreement to arbitration. That arbitration was compromised by consent through a settlement agreement. With the consent of the parties, an arbitration award was made which required the defendant to pay \$34.6m plus interest of \$10.2m (cl 2.1). The award also provided that no interest was payable if the principal sum was paid in accordance with the payment schedule set out in the award, namely an initial payment of \$2m and then further payments of \$1.25 million each quarter until payment of the total principal sum had been made (cl 3.2). If any of the instalments were not paid by the requisite dates, the full amount plus the interest would become payable

immediately (cl 3.3).

The defendant failed to make the October 2019 payment and claimed that cl 2.3 of the award required the claimant to provide it with payment instructions ten business days prior to payment which the claimant had failed to do. The defendant further argued that at a meeting in October 2019, the claimant had orally agreed not to enforce the award until the parties had agreed on new payment terms. The award was therefore superseded by the oral agreement or, in the alternative, the claimant was estopped from relying on the award.

On 14 October 2019, the claimant issued a claim form seeking leave to enforce the award. The defendant subsequently made two payments on 16 and 17 October 2019. On 17 October, Mr Justice Teare made an order on the papers giving permission under ss 101(2) and 66(1) of the 1996 Act to enforce the operative part of the award. The order stated that 'the Defendant shall pay to the Claimant the sum currently outstanding of \$39,111,604.18'.

The defendant subsequently made an application to set aside Teare J's order on the grounds that (i) although the application for leave to enforce the award was made in the alternative under s 101(2) and s 66(1) it was an award which had been made in the UK and therefore was not within the definition of a 'New York Convention Award' under s 100 of the 1996 Act; (ii) there was no power under s 66(1) to order judgment in the terms made; and (iii) in any event, the court should exercise its discretion under s 66 and refuse leave to enforce the award.

Parties' submissions

The defendant submitted that (i) although the claimant now accepted that it was not within the scope of s 101 of the 1996 Act because the award was made in the UK, the claimant could not merely excise the reference in the October order to s 101 and the October order should be set aside; (ii) following the decision in *West Tankers Inc*

v Allianz Spa, an order pursuant to s 66(1) could only be to enforce rights which the judgment or award has established and the circumstances (ie, the acceleration of the debt pursuant to the award) were not established in the award; (iii) the court must determine whether to exercise its discretion under s 66 and make a judicial determination whether it is appropriate to enter judgment (*West Tankers*).

The claimant submitted that (i) the application for leave to enforce was properly made pursuant to s 66 and there was no need to refer to s 101 in the claim form; (ii) there was no need for a determination by the court as to whether the circumstances under the award had arisen; it was common ground that the defendant had failed to pay; (iii) there was no basis to refuse enforcement of the award: no agreement had been reached at the October meeting and any alleged oral agreement was uncertain and lacked consideration, there was no intention to create legal relations and estoppel did not arise.

The decision

Mrs Justice Moulder first dealt with the claimant's application to enforce under s 101 of the 1996 Act. Dismissing the claimant's argument that Teare J would have been aware that the seat of arbitration was London, Moulder J held that it was incumbent upon the claimant making an *ex parte* application on the papers to ensure that all relevant points are drawn to the attention of the judge; to assume that the judge will scrutinise the papers to identify any mistakes was a misunderstanding of the process. Further, although the application was made in the alternative, the claim form clearly relied on s 101 and arguably placed greater reliance on that section and therefore the judge may have been led to make an order which he might not otherwise have done.

Moulder J also held that it was not open to the court to make an order under s 66 where the circumstances require a further

adjudication, namely that there had been a failure to pay an instalment and the payment had become due under cl 3.3 of the award. The Court of Appeal in *West Tankers* addressed the question of whether there was power under s 66 to order a judgment to be entered in the terms of an arbitral award in a case where the award was declaratory in form. Although the decision was not on point, the following comments of Lord Justice Toulson in *West Tankers* were relevant: 'For the enforcement of any judgment or award is the enforcement of the rights which the judgment or award has established. As with any judgment or award, so in the case of a monetary judgment or award its enforcement is the enforcement of the right (a right to payment) which the award has established.'

Following *West Tankers*, Moulder J concluded that the award did not establish the 'right to payment' of the accelerated sum; there was no statement or finding in the award that the entire principal sum was due pursuant to cl 3.3 but rather there was only provision in the award for the sum to become due if certain conditions were satisfied. Furthermore, the arbitrator had not decided whether cl 3.3 has been triggered and the principal sum accelerated. Accordingly, it was not open to the claimant to obtain the

October order to enforce the accelerated sum and on that basis the order was set aside.

Judicial attention then turned to the issue of whether the claimant's application for leave to enforce the award under s 66 should be set aside. Moulder J explained that the approach to be taken where there are disputed questions of fact in relation to an application under s 66 was addressed by Mr Justice Hamblen (as he then was) in *Sovarex SA v Romero Alvarez SA* [2011] EWHC 1661 (Comm), [2011] All ER (D) 225 (Jun): 'Given that the court has the power under CPR Part 62 to give appropriate directions to enable issues of fact to be determined, there is no obvious reason why the enforcing party should be compelled to start proceedings all over again by commencing an action on the award, thereby potentially wasting both time and costs. Section 66 is meant to deal with enforcement generally and there is nothing in s.66 itself or in the CPR which requires an alternative mode of procedure to be adopted in the event of the application being challenged on the facts. Consistent with the Overriding Objective the priority must be to progress matters sensibly and cost effectively rather than to waste time and costs for formalistic reasons.'

It was noted that s 66 is a summary procedure and thus the court has discretion

whether to grant leave. In this case, the defendant had shown, on the evidence, a realistic prospect of establishing a defence to enforcement for a number of reasons including the need for the issues in contention to be fully investigated and argued in the light of the evidence before the court could grant leave to enforce.

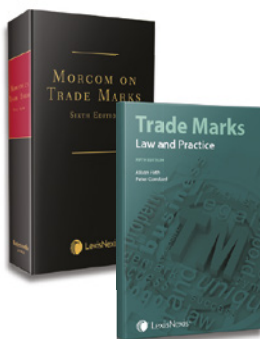
Comment

The decision in *A v B* serves as a helpful reminder of the approach the courts will adopt when considering an application to enforce under s 66(1). The courts will carefully scrutinise an award within the context of the circumstances of the particular case and will only grant an order to enforce where the award has established rights. A further obvious but important point is the need for parties seeking to make *ex parte* applications to ensure that their applications are not only carefully drafted but also make reference to all necessary legal authorities; a failure to do this will result in any orders that are granted being successfully challenged and set aside which will, in turn, cause delays and increase costs.

NLJ

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