

Commercial Court considers contested enforcement of declaratory arbitral award (Sodzawiczny v McNally)

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Arbitration analysis: This case involved an application to set aside part of an order granting permission to enforce an arbitral award in the English courts. The application was granted in part and the High Court refused enforcement of one of the declarations made in a London Court of International Arbitration (LCIA) arbitration award. In his judgment, Mr Justice Foxton helpfully set out the criteria employed by the court when exercising its discretion to grant an order under section 66 of the Arbitration Act 1996 (AA 1996) to enforce an award in the same manner as a judgment or order of the court. The court held that it always has discretion whether or not to grant such relief. When the terms of an award are unclear, without utility or would adversely impact third parties (*inter alia*), the court can decline to grant the order, either in whole or in part. Foxton J also found that the application was not barred due to the applicant's decision not to challenge the award for 'serious irregularity affecting the tribunal, the proceedings or the award' under AA 1996, s 68. Written by Robert Price, partner at Latham & Watkins.

Sodzawiczny v McNally [\[2021\] EWHC 3384 \(Comm\)](#)

The author thanks Esha Marwaha, a trainee solicitor at Latham & Watkins for her assistance.

What are the practical implications of this case?

The case provides important guidance on the criteria that the court will consider when exercising its discretion to permit enforcement of an award under [AA 1996, s 66](#), and the particular considerations that apply to declaratory awards. It demonstrates that the English courts, consistent with their typical pro-arbitration approach, will always strive to uphold an award and give effect to its terms. Objections to enforcement, such as those based on public policy grounds, or the right to be heard under the European Convention of Human Rights (ECHR), are unlikely to succeed, in large part because the court will not go behind the terms of the award and examine the substance of the arbitrators' reasoning.

However, the corollary of the court's light-touch approach to reviewing awards at the enforcement stage is that when a defect in the terms of the award renders it unclear, the court is unlikely to step in to correct the arbitrators' reasoning, unless the defect is an obvious slip (eg a typographical error or another obvious mistake such as the award referring to the wrong party). The most appropriate forum for more substantive corrections beyond these types of slips is before the arbitrators, either under [AA 1996, s 57](#), or the equivalent rule in arbitration rules. Practitioners should therefore be alive to the importance of a clear and unambiguous award and deal with any deficiencies soon after the award is rendered, rather than at the enforcement stage. Similarly, where a declaratory award, or particular declarations within an award, provide the intended relief, the court may refuse enforcement if it would serve no useful purpose in improving the applicant's position. The court has the power to choose the declarations in an award to which it will give effect, and it will not go beyond what is strictly necessary. If enforcement of a particular declaration will not improve the applicant's position (eg because enforcement of other declarations achieves the same result or the declaration in the is itself sufficient), enforcement of that declaration may be refused.

Finally, the case includes an interesting discussion of the interplay between [AA 1996, s 66](#) (enforcement) and [AA 1996, s 68](#) (challenge on the grounds of serious irregularity). Some controversy exists as to whether a party resisting enforcement on grounds that there are irregularities in the award, should be precluded from doing so if it has failed to raise those arguments in an [AA 1996, s 68](#) challenge. Foxton J distinguished between those two sections of the [AA 1996](#), observing that they relate to conceptually different applications, and therefore that the application to resist

enforcement was not precluded. The case therefore provides a useful contribution to the ongoing debate in this area of arbitration law.

What was the background?

The case arises out of an award rendered in a London-seated LCIA arbitration in December 2020. The award that was the subject of challenge was the third partial award in those proceedings, brought by the claimant (Mr Sodzawiczny), against the defendant (Mr McNally), relating to a property in Mallorca (the Property) that both parties had agreed would be acquired for the claimant's benefit by a Spanish entity, the shares of which were indirectly held by the defendant through an Isle of Man entity.

The claimant made several serious allegations against the defendant, including that he had used trusts and other nominee arrangements in such a way as to conceal their true beneficial ownership. These allegations were largely upheld by the arbitrator, who made the following declarations in relation to the Property: (i) that the claimant was, and is, the ultimate beneficial owner of the property (the First Declaration); (ii) that the defendant held and holds any powers or interests which he had or has, directly or indirectly, in relation to the property on trust for the claimant (the Second Declaration); and (iii) an order that the defendant transfer, or do whatever is necessary, to effect the transfer of the property (or its indirect ownership) to the claimant (the Transfer Order).

In April 2021, Mrs Justice Cockerill granted the claimant permission to enforce the award in the same manner as a judgment or order of the court under [AA 1996, s 66\(1\)](#). The defendant sought to set aside that enforcement order in so far as the award related to the Property, raising the following threshold arguments.

First, the claimant bears the burden to prove that the award was made 'pursuant to an arbitration agreement', as required by [AA 1996, s 66\(1\)](#), and that the arbitrator had jurisdiction to grant orders in respect of the Property. Second, relying on the principle derived from the case of *British South Africa Company v The Companhia de Mocambique* [1893] AC 602, the defendant submitted that the disputes to which the Property related were not arbitrable since the court had no jurisdiction to determine the title to, or possession of, foreign land. Third, the order should be set aside for public policy reasons. These included that the order would deprive the Spanish entity of its right to be heard on the issue under Article 16(1) ECHR, given its interest in the Property. Fourth, the defendant submitted that the Declarations and the Transfer Order were insufficiently precise to be given effect and that making an order under [AA 1996, s 66\(1\)](#) provided no utility.

The claimant raised an initial threshold argument of its own that the defendant's criticisms of the award should instead have been raised by way of challenge under [AA 1996, s 68](#) on the basis that they gave rise to 'serious irregularity'. The claimant argued that because the defendant had failed to pursue this avenue of challenge within the permitted 28-day period, on that basis alone the application should fail.

What did the court decide?

The court's decision to permit enforcement of an award is a discretionary one, and Foxton J first summarised the relevant principles applicable to the exercise of that discretion:

- the court may always refuse to grant an order for enforcement in respect of relief ordered by the arbitrator that is unclear, or that would not make sense if incorporated into a judgment
- where the award contains declaratory relief, the court may refuse enforcement under [AA 1996, s 66](#) if that relief is not required and serves no useful purpose, because the award represents sufficient relief in itself
- the terms of the relief granted by the arbitrators should not normally be open to reargument at the enforcement stage
- however, the court can refuse enforcement if discretionary relief impacts third parties that are not bound by the award
- similarly, the court may reach its own conclusion that enforcement is not appropriate if the relief granted would engage the independent interests of the court. These interests include difficulty for the court to police ongoing compliance with the award or questions as to the appropriateness of using the court's coercive powers)

In light of the applicable principles summarised above, Foxton J held that where a challenge to an order permitting enforcement of an award is that the arbitrators lacked jurisdiction, the burden of proof lies with the party seeking to resist the enforcement order, contrary to the defendant's position. The terms of [AA 1996, s 66\(3\)](#) made this plain, and [AA 1996, s 5\(1\)](#) explains that the converse is only true where the arbitration agreement is oral rather than written, and the party seeking enforcement therefore needed to establish jurisdiction. The principle therefore had no application in the present case.

Foxton J similarly rejected the defendant's application of the *Moçambique* rule to the facts of the case. Although the application of the principle in the context of proceedings to enforce an award was not the subject of previous authority, and even assuming that the defendant's articulation of the principle was correct, Foxton J noted that the English court still retains the power to order in personam relief binding only the parties to the arbitration agreement. On that basis the relief granted would only apply as between the parties.

For the same reason it was also wrong to say that the dispute regarding the Property was not arbitrable, because the relief bound the parties and their privies, including the Spanish entity that was the defendant's privy, and which could therefore participate in the arbitration through the defendant. Accordingly, the defendant's argument that the Spanish entity's right to be heard under Article 16(1) ECHR, also failed.

Turning to the substance of the Declarations and the Transfer Order, Foxton J concluded that the relief sought was neither vague nor unworkable. However, while he accepted that the First Declaration was 'clear enough' overall and clear as between the parties to the arbitration, he held that its terms dealing with beneficial ownership of the Property might not always be clear to third parties, and that enforcement of the First Declaration would not materially improve the claimant's position. This was particularly so where the claimant gained the same benefit from the enforcement of the Second Declaration and the Transfer Order, which Foxton J accepted should be enforced by the court. Accordingly, Foxton J held that it was within the court's discretion to grant a s.66 order in respect of some, but not all of the relief ordered by the arbitrator, provided that the provisions were not interdependent, which he held was not the case here. The defendant's argument to the contrary was rejected.

Regarding the claimant's argument that the failure to use the [AA 1996, s 68](#) route precluded the application to challenge enforcement under [AA 1996, s 66](#), Foxton J acknowledged that there was some debate in the academic literature about the proper interplay between these two sections of [AA 1996](#). However, he observed that a distinction must be made between challenging the award (and seeking to have it set aside and declared of no effect) on the one hand (under [AA 1996, s 68](#)) and seeking to prevent the English courts from using their powers of enforcement (under [AA 1996, s 66](#)) on the other. On that basis he rejected the claimant's argument that the challenge to the [AA 1996, s 66](#) order was precluded.

Case details

- Court: Business and Property Courts of England and Wales, Queen's Bench Division, Commercial Court, High Court of Justice
- Judge: Mr Justice Foxton
- Date of judgment: 15 December 2021

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