

London arbitration under threat

Peter Stevenson looks at the practical implications of The Wadi Sudr for London arbitration

National Navigation Co v Endesa Generacion SA (The Wadi Sudr) [2009] EWCA Civ 1397

For all the undoubted improvement it has brought to the free movement of judgments throughout the European Union, the EC Judgments Regulation creates significant barriers to efficient and cost-effective commercial litigation. By emphasising the priority to be given to the court first seised of proceedings, it forces parties to engage in an expensive and unseemly scramble to commence proceedings in their favoured jurisdictions so as to avoid the threat of an Italian Torpedo.

That arbitration is excluded from the scope of the regulation has, therefore, been a significant incentive for the incorporation of London arbitration clauses in commercial contracts: parties to such contracts have been able to ignore proceedings brought in breach of arbitration clauses safe in the knowledge that the English courts would use their inherent jurisdiction to injunct such proceedings, or, at the least, refuse to recognise judgments made in breach of such agreements.

The Court of Appeal's decision in *The Wadi Sudr* shows that this is no longer the case. Coming close on the heels of the decision of the European Court of Justice in *The Front Comor* [2009] 1 AC 1138, in which it was held that the exclusivity of arbitration can no longer be protected by anti-suit injunctions, *The Wadi Sudr* makes it clear that a judgment obtained in breach of an arbitration clause will be recognised if it was made in proceedings within the scope of the Judgments Regulation, and that such a judgment will bind the English court.

The upshot of this is that parties seeking to rely on an arbitration clause must either contest foreign proceedings brought in breach of the agreement or apply quickly to the High Court (under s 32 of the Arbitration Act 1996) for a declaration that the appointed

arbitral tribunal has jurisdiction before a judgment can be delivered by a foreign court. Both of these options will significantly increase the costs of conducting arbitration and, therefore, reduce the appeal of London arbitration to commercial parties.

The decision

The Wadi Sudr was a jurisdictional battle between the National Navigational Company (NNC) and Endesa Generacion SA (a Spanish energy company) as to whether a dispute between them concerning a claim for delivery of goods other than to the contractual point of discharge under a bill of lading, should be litigated by way of arbitration in London, as NNC contended, or before the Almeria Mercantile Court in Spain, as Endesa contended.

Endesa commenced proceedings in Spain while NNC appointed an arbitral tribunal in London. At a preliminary stage in the Spanish proceedings, the Almeria court issued a judgment providing that the bill of lading did not incorporate an arbitration clause. In making this decision, the court applied Spanish law on the incorporation of terms.

In light of the ECJ decision in *The Front Comor*, it was clear that, despite dealing with a matter clearly relating to arbitration (i.e. the incorporation of an arbitration clause), the Spanish proceedings were proceedings within the scope of the Judgments Regulation. What was not clear was whether this meant that the judgment emanating from those proceedings needed to be recognised and given effect by the English court.

This issue arose when the question of jurisdiction came before the High Court by way of an application under s 32 of the Arbitration Act 1996, with Endesa arguing that the English court was issue estopped from confirming the arbitral tribunal's jurisdiction.

Mrs Justice Gloster accepted that, in light of *The Front Comor*, the Spanish



judgment was a judgment within the scope of the regulation, but nonetheless held that she was not required to recognise and give effect to it. She held that she was not bound to do so because the application before her was concerned with arbitration and was therefore outside the scope of the Judgments Regulation. Further, she held that, if she was wrong on that point, she was not bound to recognise the Spanish judgment because to do so would be contrary to public policy.

This decision was welcomed by academics and practitioners alike as representing a sensible approach to the poorly reasoned judgment of the ECJ in *The Front Comor*, which served to protect the efficacy of arbitration (see Briggs & Rees, *Civil Jurisdiction and Judgments*, 5th ed at p 7.08 and also Professor Brigg's contribution to the *British Yearbook of International Law*, Vol 80 (2009)).

However, and, it is submitted, unfortunately, it was comprehensively overturned on appeal. A tribunal consisting of Lord Justices Waller, Moore-Bick and Carnwath upheld Mrs Justice Gloster's finding that the judgment of the Spanish court was a judgment within the scope of the Judgments Regulation, but held that she had been wrong to refuse to recognise the judgment on the basis that the proceedings in which she was asked to do so were outside the scope of the regulation. They found that if a judgment emanates from proceedings which fall within the scope of the regulation, it must be recognised in all English proceedings, irrespective of the subject matter of those proceedings.

Their Lordships also rejected the submission that the judgment should be refused recognition on public policy grounds, Lord Justice Waller stating that "once one reaches the position that the English court is bound by the decision that no arbitration clause was incorporated into the bill of lading, that precludes any re-examination of that

question and precludes any argument on the grounds of public policy.”

The upshot of these findings is that parties seeking to rely on arbitration clauses are, in fact, put in a worse position than those relying on an exclusive jurisdiction clause in favour of the English courts. This is because a court of a foreign member state is entitled to ignore a judgment from an arbitral tribunal to the effect that an arbitration clause was incorporated because such a judgment clearly does not fall within the regulation, but, conversely, a judgment from the foreign court must be recognised by the arbitral tribunal.

Criticism of the judgment

Although their Lordships appeared to recognise that the result of their findings was not entirely satisfactory, they found that, in light of *The Front Comor*, there was no alternative interpretation that could be given to the Judgments Regulation. With respect, I think that this conclusion is wrong. A full critique of the judgment would require more space than is available here, however I note that the following two arguments were rejected by the court, in my view, without good reason.

First, it was argued that a judgment may fall outside the scope of the regulation despite emanating from proceedings that fall within it. This view is supported by art 48 of the regulation which provides that “where a foreign judgment has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them”. This suggests that a judgment may be severed into parts which are within the scope of the regulation and parts which are not.

Further support for this argument is found in the very structure of the regulation. The regulation is divided into three chapters. Chapter I deals with the scope of the regulation (and includes the arbitration exclusion) and is of general application. Chapter II deals with jurisdiction and proceedings and Chapter III deals with judgments and the enforcement thereof. This indicates that when considering whether a judgment is enforceable, one should not look to see whether the proceedings were within the regulation, that being relevant to jurisdiction, but rather one should look at what is being enforced under the judgment.

Despite the persuasiveness of these submissions, the Court of Appeal rejected this argument on the basis that it was inconsistent with *The Front Comor*. Lord Justice Waller stated: “I would suggest that, at least by implication if not expressly, one can say that it was the Advocate General’s opinion that... (iii) a judgment in a member state in proceedings within the regulation on the incorporation of an arbitration clause would be a regulation judgment.”

With respect, this is not satisfactory. *The Front Comor* was concerned exclusively with the classification of proceedings under the regulation and not judgments. There was no discussion in that case of the severability of judgments. Accordingly it is absolutely clear that the case did not expressly provide that a judgment emanating from proceedings within the scope fell to be recognised automatically.

While it was clearly open to the Court of Appeal to extend the reasoning of the ECJ in *The Front Comor* to cover the classification of judgments, given that they were not required to do so, such a result is surprising given the trenchant criticism to which *The Front Comor* has been subject.

Second, it was argued by NNC that Mrs Justice Gloster was correct to look at the nature of the proceedings before her when deciding whether to recognise and enforce the judgment. The Court of Appeal rejected this argument by reference to the broad wording of art 33 of the regulation and the general purpose of the regulation. Lord Justice Moore-Bick said “against that background the notion that the court is obliged to recognise a foreign judgment in one set of proceedings but not another strikes me as surprising, if not anomalous”.

While this finding is understandable given the language used in art 33 of the regulation, it is submitted that it runs contrary to the decision of the ECJ in *Hoffman v Krieg* [1988] ECR 645. In that case the ECJ determined that a Dutch court charged with determining a question relating to the marriage status of one of the parties (status being a subject matter excluded from the operation of the regulation by art 1), would not be required to recognise a judgment from a foreign court which purported to determine that issue. At para 18 of that judgment, the ECJ held that “the answer to be given to the national court is that a foreign judgment whose enforcement has been ordered

in a contracting state pursuant to art 31 of the Convention and which remains enforceable in the state in which it was given must not continue to be enforced in the state where enforcement is sought when, under the law of the latter state, it ceases to be enforceable for reasons which lie outside the scope of the Convention.”

It is true that *Hoffman v Krieg* is not a particularly clear authority, however, it is submitted that the Court of Appeal failed to engage with it properly.

In light of these criticisms it would be very interesting to see what would happen if the case was appealed to the Supreme Court (and referred to the ECJ). Criticism of *The Front Comor* has already begun to transfer from academic debate to the corridors of power in Brussels. In the recent green paper on the review of Council Regulation (EC) No 44/2001, the rapporteur to the Committee to Legal Affairs took the view that “the arbitration exclusion should be clarified so as to make it clear that judgments brought in breach of arbitration clauses and judgments holding that arbitration clauses are invalid fall outside of the scope of the regulation. They would therefore not be enforceable in other Member States under the regulation.”

Comment

While it is realistic to expect an amendment to the regulation in the near future, in the absence of an appeal to the Supreme Court in *The Wadi Sudr*, certain steps will need to be taken by parties seeking to protect their arbitration proceedings. It is now imperative to commence arbitration promptly on becoming aware of a potential dispute involving parties in different jurisdictions. Further, having commenced arbitration, an application should be made pursuant to s 32 of the Arbitration Act 1996 for a declaration from the English court that the arbitration tribunal has jurisdiction.

These steps should serve adequately to secure the arbitration in this jurisdiction (although they will not prevent the court of another member state from continuing to judgment). However, there can be little doubt that their necessity further undermines the efficacy of London arbitration in general.

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