

IN SUPPORT OF MARITIME ARBITRATION: THE ENGLISH COURTS' ROLE IN ENFORCING PEREMPTORY ORDERS AND AWARDS

26 SEPTEMBER 2023 • ARTICLE



"English courts can assist the arbitral process by making the tribunal's peremptory orders an order of the court."

We have previously discussed the English courts' supportive powers in LMAA arbitrations through the use of anti-suit injunctions to enforce arbitration agreements and its powers to preserve evidence and property and order the attendance of witnesses. In this article, we consider the courts' powers under the Arbitration Act 1996 ("AA 1996") to enforce peremptory orders and awards issued by a tribunal.

The tribunal in an LMAA arbitration seated in London has limited powers to enforce orders under section 41 of the AA 1996 and the LMAA Terms 2021 ("LMAA Rules"), and no power to enforce awards. The English courts can assist the arbitral process by making the tribunal's peremptory orders an order of the court and recognising and enforcing awards issued by the tribunal. This assistance can extend to enforcement of foreign arbitration awards, such as those issued under the rules of the Nordic Offshore and Maritime Arbitration Association ("NOMA") or by the Singapore International Arbitration Centre ("SIAC").

Whether the court is asked to enforce an order or award concerning an arbitration seated in London or an award of a foreign tribunal, it will refrain from reviewing the tribunal's decision except in the limited circumstances permitted under the AA 1996.

"The tribunal may make an award dismissing the claim."

ENFORCEMENT OF PEREMPTORY ORDERS ISSUED UNDER THE LMAA RULES

Under section 40 of the AA 1996, the parties are under a duty to comply "*without delay*" with any order or directions issued by the tribunal. Those familiar with LMAA arbitrations will know that parties often fail to comply with orders within the deadlines imposed by the tribunal. An extension may be granted but if the party

continues to fail to comply with the order, then the tribunal is likely to make a 'final order' before proceeding to make a peremptory order (although it is not required to).

If a party fails to comply with the peremptory order, the consequences vary according to the subject matter of the order. If the peremptory order is for the claimant to provide security for costs and the claimant fails to comply, the tribunal may make an award dismissing the claim under section 41(6) of the AA 1996. In addition, under paragraph 17(c) of the LMAA Rules *“the tribunal shall have power to stay that party’s claim or such part of it as the tribunal thinks fit in its sole discretion”*.

For non-compliance with other peremptory orders, the tribunal has a range of options set out in section 41(7).

"The courts’ role was to support the arbitral process and not review the tribunal’s decision."

It may:

- direct that the party in default shall not be entitled to rely upon any allegation or material which was the subject matter of the order;
- draw such adverse inferences from the act of non-compliance as the circumstances justify;
- proceed to an award based on such materials as have been properly provided to the

tribunal; or

- make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance.

The tribunal or one of the parties to the proceedings may also in certain circumstances apply to the court to enforce the peremptory order under section 42 of the AA 1996. However, the court will not intervene unless it is satisfied that the applicant has exhausted any available arbitral process to ensure compliance with the order (section 42(3)) and will not make an order unless it is satisfied that the respondent has failed to comply with the order within the deadline (section 42(4)).

When considering an application for enforcement of a peremptory order, the English court will be guided by the general principles set out in section 1, which provides that the parties are free to agree how their disputes are to be resolved and the court should not intervene except as permitted by the AA 1996. Mr Justice Teare in *John Forster Emmott v Michael Wilson and Partners Limited* [2009] EWHC 1 (Comm) considered that the courts’ role was to support the arbitral process and not review the tribunal’s decision except when an award is challenged under section 67 (substantive jurisdiction), section 68 (serious irregularity) or appealed on a point of law under section 69 of the AA 1996. However, he also accepted that the courts’ powers under section 42 are discretionary and the court may decide not to make an order for compliance with a peremptory order *“where such an order is not required in the interests of justice to assist the proper functioning of the arbitral process”* (at paragraph 62). He gave the following examples of when an order may not be required:

- there has been a material change in circumstances since the peremptory order was issued; or
- the tribunal failed to act fairly and impartially in breach of its duty; or
- the tribunal did not have the power to make such an order.

If the court does make an order under section 42, the respondent will be held in contempt of court if they fail to comply.

Therefore, section 42 provides a useful tool for ensuring compliance with the tribunal’s orders and before agreeing to exclude its application, the parties should carefully consider whether the sanctions available to the tribunal under section 41 and the LMAA Rules are likely to be sufficient.

ENFORCEMENT OF AN AWARD

"The defaulting party will also be in contempt of court if they fail to abide by the terms of the award."

Arbitration seated in England, Wales, or Northern Ireland

If the award was issued in respect of an arbitration seated in England, Wales, or Northern Ireland, a party can make a 'without notice' application to the court under section 66(1) of the AA 1996 for leave for the award to be enforced in the same manner as a judgment or order of the court. Where leave is granted, judgment may then be entered in the terms of the award under section 66(2). Whilst this second stage is not necessary for enforcement, it does mean that the defaulting party will

also be in contempt of court if they fail to abide by the terms of the award.

To satisfy section 66, the award must:

- be final (not an interim order); and
- relate to an arbitration agreement (defined by section 6 as "*an agreement to submit to arbitration present or future disputes (whether they are contractual or not)*"), which must be in writing pursuant to section 5).

If one of those requirements is not satisfied, the party seeking to enforce the award must bring an action on the award. In such a case, the action will be based on the other party's breach of an implied obligation to honour an award of the tribunal.

Provided that the arbitration agreement complies with sections 5 and 6, the court will usually give leave to enforce the award unless the respondent can show that the tribunal lacked substantive jurisdiction. The court may also refuse to grant leave to enforce the award on grounds of public policy, non-arbitrability, expiry of the limitation period for enforcement or because of issue estoppel.

Once the court has granted leave to enforce the award, the same options for enforcing a judgment will be available to the applicant. However, as an application under section 66 may be made without notice, the court may stay the execution of the order (thereby suspending enforcement) pending the outcome of an application by the respondent to set aside the order. Enforcement would also be suspended by an application to challenge the award under sections 67-69.

Arbitration seated outside of England, Wales, or Northern Ireland

If the award was issued in a contracting state of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), the applicant would likely be better placed by applying for enforcement under sections 101-103 of the AA 1996 (which transposes the New York Convention into English law). Under section 103(1), an application for enforcement "*shall not be refused*" unless one of the circumstances listed in section 103(2) or (3) applies, whereas, under section 66, the court "*may*" grant leave to enforce an award.

"The court may also refuse to recognise or enforce an award if it would be contrary to public policy."

Section 103(2) sets out the grounds on which the court may refuse leave to enforce or recognise the award (such as breach of natural justice and the award not yet being binding) and where established, the courts' discretion to enforce an award is limited (*Dardana Ltd v Yukos Oil Co (No.1)* [2002] 1 All ER (Comm) 819). One of those grounds is if the party resisting enforcement proves that "*the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made*" (section 103(2)(b)). In *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious*

Affairs, Government of Pakistan [2010] UKSC 46, Lord Collins considered that "*there is no doubt that it also covers the case where a party claims that the agreement is not binding on it because that party was never a party to the arbitration agreement*" (at paragraph 77).

In *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, the defendant challenged the enforcement of an award issued by a Paris tribunal on the basis that they were not a party to the arbitration agreement ([see our article here](#)). The Supreme Court held that, under private international law, it would be for the law that would govern the arbitration agreement (should it exist) to determine whether there is a valid arbitration agreement. Applying the principles set out in their earlier decision in *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb"* [2020] UKSC 38, the court held that the law governing the arbitration agreement was English law as this was the governing law of the contract that included the arbitration agreement.

Under section 102(3), the court may also refuse to recognise or enforce an award if it would be contrary to public policy. Two recent decisions of the Commercial Court considered challenges to applications for recognition and enforcement on the basis that the foreign awards were contrary to the respondents' rights under the Consumer Rights Act 2015 ("CRA"). The differing outcomes highlight that any considerations of public policy will depend heavily on the facts. In *Payward Inc v Maxim Chechetkin* [2023] EWHC 1780 (Comm), Mr Justice Bright held that the protection of rights under the CRA was a matter of public policy and declined to recognise and enforce a Californian award dismissing a UK resident's claim against a UK company for losses arising under a contract for the use of a crypto trading platform in the UK. The arbitrator had failed to take into account the CRA, or English law at all, and had upheld the choice of law clause which would have been contrary to section 74 of the CRA (had it been applied). In *Eternity Sky Investments Ltd v Mrs Xiaomin Zhang* [2023] EWHC 1964 (Comm), handed down two weeks later, Mr Justice Bright agreed to enforce a Hong Kong award upholding a personal guarantee issued by a UK resident in favour of a Hong Kong-based company on the grounds that there was insufficient connection to the UK for the CRA to apply.

While it may seem obvious, the court will only allow enforcement in the terms of the award. In *Norsk Hydro ASA v State Property Fund of Ukraine & Ors* [2002] EWHC 2120 (Comm), the respondent appealed an order for enforcement issued against both the Republic of Ukraine and the State Property Fund of Ukraine on the basis that the award issued by a tribunal of the Stockholm Chamber of Commerce was against "*The Republic of Ukraine, through the State Property Fund of Ukraine.*" In overturning the order for enforcement, the court held that it "*has no jurisdiction to 'iron out' the ambiguity by purporting to enforce the award in different terms*" but rather "*the task of the enforcing court should be as 'mechanistic' as possible*" (see paragraphs 20 and 17 respectively). Although the court may allow partial enforcement of an award if the award also contains decisions on matters not submitted to arbitration, the High Court has confirmed that it will not allow the respondent to introduce a counterclaim and stay the enforcement proceedings pending determination of the counterclaim (*Selevision Saudi Company v Bein Media Group* [2021] EWHC 2802 (Comm)).

CONCLUSION

The enforcement of peremptory orders and awards is not a ‘rubber-stamping’ exercise for the English courts and the AA 1996 does allow for some discretion to be exercised. However, the courts will bear in mind the principles of party autonomy and minimal judicial interference and so take a restrained approach to reviewing the reasons for an award or peremptory order. This approach is further supported by the need for consistency when recognising or enforcing foreign awards under the New York Convention. This ensures that the courts’ role is one of assisting the tribunal and safeguarding against serious irregularity or injustice in the arbitral process.

KEY CONTACT



MIKE PHILLIPS

PARTNER • LONDON

T: +44 20 7814 8170

mphillips@wfw.com

DISCLAIMER

Watson Farley & Williams is a sector specialist international law firm with a focus on the energy, infrastructure and transport sectors. With offices in Athens, Bangkok, Dubai, Dusseldorf, Frankfurt, Hamburg, Hanoi, Hong Kong, London, Madrid, Milan, Munich, New York, Paris, Rome, Seoul, Singapore, Sydney and Tokyo our 700+ lawyers work as integrated teams to provide practical, commercially focussed advice to our clients around the world.

All references to ‘Watson Farley & Williams’, ‘WFW’ and ‘the firm’ in this document mean Watson Farley & Williams LLP and/or its affiliated entities. Any reference to a ‘partner’ means a member of Watson Farley & Williams LLP, or a member, partner, employee or consultant with equivalent standing and qualification in WFW Affiliated Entities. A list of members of Watson Farley & Williams LLP and their professional qualifications is open to inspection on request.

Watson Farley & Williams LLP is a limited liability partnership registered in England and Wales with registered number OC312252. It is authorised and regulated by the Solicitors Regulation Authority and its members are solicitors or registered foreign lawyers.

The information provided in this publication (the “Information”) is for general and illustrative purposes only and it is not intended to provide advice whether that advice is financial, legal, accounting, tax or any other type of advice, and should not be relied upon in that regard. While every reasonable effort is made to ensure that the Information provided is accurate at the time of publication, no representation or warranty, express or implied, is made as to the accuracy, timeliness, completeness, validity or currency of the Information and WFW assume no responsibility to you or any third party for the consequences of any errors or omissions. To the maximum extent permitted by law, WFW shall not be liable for indirect or consequential loss or damage, including without limitation any loss or damage whatsoever arising from any use of this publication or the Information.

This publication constitutes attorney advertising.