



In The Supreme Court of Bermuda

**CIVIL JURISDICTION
(COMMERCIAL COURT)**

2013 No. 84

**IN THE MATTER OF THE BERMUDA INTERNATIONAL CONCILIATION AND
ARBITRATION ACT 1993**

**AND IN THE MATTER OF AN APPLICATION TO ENFORCE AN ARBITRATION
AWARD**

**EX TEMPORE RULING
(In Chambers)**

Date of Hearing: June 21, 2013

Mr. John Wasty and Mr. Henry Tucker, Appleby (Bermuda) Limited, for the Applicant
Mr. Paul Smith, Conyers Dill & Pearman Limited, for the Respondent

Introductory

1. In this matter the Respondent has applied to set aside the Ex Parte Order made on March 22, 2013 granting leave to enforce an arbitration award granted on and an Ex Parte Mareva injunction granted on March 26, 2013. The matter came on for hearing yesterday afternoon and counsel for the Respondent indicated that an application to suspend the award had been made to the Curial Court and that a decision was expected yesterday. The matter was adjourned to await the decision.
2. This morning, Mr. Smith conceded that the application to challenge the award together with the application to suspend the award pending that challenge had both been dismissed by the Curial Court. And those circumstances he was bound to concede that he could not credibly pursue his applications to set aside the Mareva injunction and the Order granting leave to enter judgment in terms of the Award.

3. That concession was made subject to one “long stop”¹ argument. That was the concession that the Award could not be enforced and the March 22, 2013 Order ought not to have been made because the Applicant had failed to comply with the requirements of section 41 of Bermuda International Conciliation and Arbitration Act 1993.

Section 41 of the 1993 Act

4. Section 41 provides as follows:

“Evidence

41 The party seeking to enforce a Convention award must produce—

- (a) the duly authenticated original award or a duly certified copy of it;*
 - (b) the original arbitration agreement or a duly certified copy of it; and*
 - (c) where the award or agreement is in a foreign language, a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.”*
5. The statute is silent, while it is expressed in mandatory terms, about the precise time when the relevant evidence must be produced in the context of a procedural framework where an ex parte application for leave to enter judgment is made giving the respondent an opportunity to apply inter partes to set it aside. So there are two areas of ambiguity:
 - (1) what consequences flow from non-compliance with the strict provisions of the statute; and
 - (2) what does the statute actually mean in terms of time when it says that a “*duly authenticated original award or a duly certified copy of it must be produced*” and that “*the original arbitration agreement or a duly certified copy of it*” must be produced. Does that obligation have to be fulfilled at the beginning of the application or can it be satisfactorily met later?
 6. The provisions of section 41, it has to be said, undeniably appear in the context of a statute that is designed to facilitate the enforcement of international arbitration awards and to restrict the ability of the person against whom the award has been made to resist enforcement. This is clear from section 42 of the statute and various authorities which have been referred to by the Applicant in its Skeleton Argument in support of the substantive relief which it seeks in this action².

¹ I.e. last ditch.

² Such authorities included: *Dowans Holdings SA-v-Tanzania Electric Supply Co. Ltd* [2011] EWHC 1957(Comm); *LV Finance Group Ltd.-v-IPOC International Growth Fund Ltd* [2006] Bda LR 67; *IPCO (Nigeria) Ltd.-v- Nigerian National Petroleum Corp* [2005] 2 Lloyd’s Rep 326.

Findings: general principles for ascertaining the legal consequences of non-compliance with statutory requirements expressed in mandatory terms

7. The starting point, in my view, for analysing the question of what consequences flow from non-compliance with the statute, putting aside the facts of the present case, is to consider how one categorises the provisions of section 41 and what approach generally do the courts of this jurisdiction and similar jurisdictions take to interpreting provisions which contain mandatory procedural requirements.
8. Firstly, in my view, it is clear beyond serious argument that section 41 is a procedural provision in mandating the production of a “duly authenticated award or a duly certified copy of it” as opposed to mandating that an original award must exist. So I find that section 41, insofar as it speaks to the formalities of proof of the existence of an award and an arbitration agreement is a procedural provision. It may be viewed as a substantive provision insofar as it requires a party seeking to enforce an arbitration award to prove that they actually obtained an award and that the award was actually based on an arbitration agreement which exists.
9. The Bermuda courts have considered the question of the effects of non-compliance with procedural provisions in two cases. The first instance decision was my own decision in *DPP-v-Roberts* [2006] Bda LR 19 where I considered the question “[w]hen does the failure to comply strictly with statutory procedural requirements invalidate the proceedings?” at paragraphs 61 to 73. It must be said that in that case the focus was very much on time limits. Be that as it may, the conclusion that I reached was:

“74. For the above reasons, I found that the failure of this Court to strictly comply with the requirements of section 11(6), by proceeding with the application after the three months period prescribed had expired without having postponed the application within the time limit on the grounds of exceptional circumstances, did not of itself deprive the Court of jurisdiction to proceed and make a confiscation order.”

10. Mr. Roberts appealed to the Court of Appeal and that Court’s decision is reported at [2008] Bda LR 37. Stuart-Smith JA gave the judgment of the Court and at paragraph 18 he noted as follows:

“Mr. Phipps does not submit that the time limits set by section 11 are mandatory in the sense that non-compliance deprives the Court of jurisdiction. He could not do so in the light of the decision of the House of Lords in R-v-Soneji [2005] 4 All ER 321.”

11. So it was implicitly decided by the Court of Appeal that the House of Lords decision in *Soneji* actually represented the Bermuda law position on how one interprets procedural requirements and determines what consequences flow from their breach. The case of *Soneji* is instructive, in my judgment, in laying out the correct analytical approach to considering the question of statutory non-compliance with procedural provisions generally, beyond the narrow scope of quasi-criminal context.

12. Because the question in *Soneji* was considered in the quasi-criminal context it seems to me that the reasoning has even greater force in the civil context. Because the criminal law is generally much more inclined to benefit accused persons by holding the Prosecution to very strict compliance with statutory formalities. And so if the courts in the criminal or quasi-criminal context have been willing to construe procedural provisions expressed in mandatory terms flexibly, then it seems to me that the civil courts, particularly in the context of a statute which is seeking to amplify the scope for enforcing arbitral awards, should be even more ready to adopt a flexible approach.
13. The leading judgment in *Soneji* was delivered by Lord Steyn and the crucial portions of his judgment are set at paragraphs 14 to 23 of the transcript which in its neutral citation is [2005]UKHL 49. It is helpful to read a few extracts from the judgment. First of all at paragraph 14 under the heading the “*The Core Problem*”, Lord Steyn said this:

“14. A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply. It has been the source of a great deal of litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement is mandatory, a failure to comply with it invalidates the act in question. Where it is merely directory, a failure to comply does not invalidate what follows. There were refinements. For example, a distinction was made between two types of directory requirements, namely (1) requirements of a purely regulatory character where a failure to comply would never invalidate the act, and (2) requirements where a failure to comply would not invalidate an act provided that there was substantial compliance. A brief review of the earlier case law is to be found in Wang v Commissioner of Inland Revenue [1994] 1 WLR 1286, 1294D-1295H.”

14. He then goes on to discuss “*A New Perspective*” and quotes the judgment of Lord Hailsham in *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 at 189E-190C. He describes this judgment in this way (at paragraph 15):

“This was an important and influential dictum. It led to the adoption of a more flexible approach of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity. In framing the question in this way it is necessary to have regard to the fact that Parliament ex hypothesi did not consider the point of the ultimate outcome. Inevitably one must be considering objectively what intention should be imputed to Parliament.”

15. Lord Steyn then goes on to consider *Wang-v- Commissioner of Inland Revenue* [1994] 1 WLR 1286, a Privy Council decision, which is of course binding on this Court, and which applied the *dictum* of Lord Hailsham in *London & Clydeside Estates Ltd*. He then goes on to consider the case of *Charles-v-Judicial Legal service Commission* [2003] 1 LRC 422, which was another Privy Council decision dealing with time limits. He notes (*Soneji*, at paragraph 17): “*The reasoning in Charles is*

along the same lines as Lord Hailsham's observations in the Wang case." He then refers (at paragraph 18) to "subsequent House of Lords authority to similar effect": *Attorney-General's Reference (No 3 of 1999)* [2001] 2 AC 91. He then (Soneji, at paragraph 21) cites an Australian case, *Project Blue Sky Inc-v- Australian Broadcasting Authority* (1998) 194 CLR 355, where the Australian High Court dealt with similar questions and the joint judgment of McHugh, Gummow, Kirby and Hayne JJ concluded at paragraph 93 as follows:

"In our opinion, the Court of Appeal of New South Wales was correct in Tasker v Fullwood in criticising the continued use of the 'elusive distinction between directory and mandatory requirements' and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning. That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute.'"

16. Lord Steyn then notes: *"This reasoning contains an improved analytical framework for examining such questions. In the evolution of this corner of the law in the common law world the decision in Project Blue Sky is most valuable."* Lord Steyn then goes on in paragraph 22 to note that: *"In Canada there have been developments along similar lines."* And he concludes: *"I regard the developments in Canada as very similar to those in New Zealand and Australia"*. In paragraph 23 he says this:

"Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in Attorney General's Reference (No 3 of 1999), the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction. In my view it follows that the approach of the Court of Appeal was incorrect."

17. So applying those principles to the present case in my judgment, and without going much further, it is clear that Parliament cannot have intended that non-compliance with the purely procedural requirements of proof set out in section 41 should deprive an applicant of the ability to enforce a Convention award at any stage of the application process.

Submissions of counsel as to the proper meaning of section 41 of the Act

18. I was assisted by counsel who referred me to various authorities. Mr. Wasty for the Applicant firstly referred me to the ‘*UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*’. That text first of all sets out Article 35 of the Model Law, which is in fact incorporated into Bermuda law by the 1993 Act. And Article 35(2) speaks to the issue of procedural requirements in slightly different language to that of section 41 which Mr. Smith (I think rightly) indicated was actually derived from the wording of the New York Convention. Article 35 (2) provides:

“(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.”³

19. At page 171 of the Digest two paragraphs were drawn to my attention, paragraphs 22 and 25 which read as follows:

“22. Certain courts have consistently qualified those requirements as mere rules of evidence but not as requirements for the admissibility of an application to have foreign awards declared enforceable. Consequently, non-compliance with them only becomes an issue if the other party challenges the existence or authenticity of the award or the arbitration agreement⁴ ...

25. Concerning the arbitration agreement to be submitted, certain courts held that the submission of a facsimile or any other record of the agreement is sufficient.”⁵

20. Mr. Wasty next made reference to Mustill and Boyd, ‘*The Law and Practice of Commercial Arbitration in England*’, Second Edition and the 2001 Companion Volume to the Second Edition. At page 425 of the Second Edition, after referring to the requirements which are reflected in section 41 of the 1993 Bermuda Act, the learned authors say this:

³ In fact the differences between Article IV of the New York Convention, Article 35(2) of the Model Law and section 41 appear to be purely presentational and grammatical rather than substantive.

⁴ The footnote cites a German decision, Oberlandesgericht Munchen, Germany, 34 Sch 04/08, 19 January 2009.

⁵ The footnote cites *Denmark Skibstekniske Konsulenter A/S I Likvidation* [2010] SG HC 108 at paragraph 22.

“The references to documents being ‘duly authenticated’ or ‘duly certified’ are unfamiliar in an English context, but probably add nothing to the ordinary rules of evidence concerning proof of documents: the most convenient method of proof will generally be by exhibiting the document to an affidavit deposing to its authenticity, accuracy as a copy, or truth as a translation, as the case may be.”⁶

21. That very practical account in my judgment reflects the practical spirit of the common law.
22. Finally, Mr. Wasty referred to a Hong Kong authority the facts of which were very similar to those of the present case but which he relied upon as indicating the correct legal approach: *Medison Co. Ltd.-v- Victor (Far East) Limited*, HCCT4/2000, Judgment dated June 24, 1999, Burrell J (unreported). Hong Kong of course is another Model Law jurisdiction and the Bermuda Act, I believe, was to some extent based on the Hong Kong legislation which preceded it. At page 2 of the transcript the judge sets out section 43 of the Hong Kong Arbitration Ordinance which is, if not identical to section 41, is in substantially the same terms as section 41 of our own Act. The judge then quoted the following passage from *Guandong New Technology Import and Export Corp. Jiangmen Branch-v- Chiu Shing* [1991] 2HKC 460 where Barnes J said:

“Section 43(a) is enacted in the form adopted by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. About that wording, Mustill and Boyd’s the Law and Practice of Commercial Arbitration in England (2nd Ed) p 425, has this to say:

‘The references to documents being ‘duly authenticated’ or ‘duly certified’ are unfamiliar in an English context, but probably add nothing to the ordinary rules of evidence concerning proof of documents: the most convenient method of proof will generally be by exhibiting the document to an affidavit deposing to its authenticity, accuracy as a copy, or truth as a translation, as the case may be.’

During the course of the hearing, Mr Jat, for the plaintiff, produced what purported to be the original award and submitted that ‘duly authenticated’ is satisfied by producing the original to the court.

I do not think that s 43(a) requires the strict proof suggested by Mr. Chung. There is, before me, prima facie proof that the document produced by Mr Jat is the duly authenticated award. On that evidence, I find that s 43(a) has been complied with.”

23. And at page 4 of the transcript, Justice Burrell said this:

⁶ A reference is made to Order 73 rule 10 (3) of the Rules, the Bermudian version of which provides as follows: “(3) An application for leave must be supported by affidavit — (a) exhibiting the arbitration agreement and the original award or, in either case, a copy thereof...”

“In my judgment, bearing in mind the comments in Mustill and Boyd’s (above), the affirmation evidence together with the offer of an undertaking [that was an undertaking to produce a certified copy of the original agreement] is sufficient for this court to be satisfied that s.43(b) has been complied with. The undertaking is not strictly necessary in the circumstances of this case where the defendant has never challenged the existence of the agreement, only its application, and where the argument that s.43 has not been complied with has only been raised for the first time in this inter partes hearing without notice to the plaintiff.”

24. So this case is of considerable assistance in illustrating how a common law court has approached the question of interpreting a statutory provision similar to section 41 of the Bermuda Act. The Hong Kong Court clearly took the view that it was a procedural provision the breach of which was not intended to have the consequence that the enforcement of the award was rendered impossible either absolutely or until the strict formalities of the section had been complied with.
25. In reply, Mr. Smith referred the Court to a text Gary B. Born, ‘*International Commercial Arbitration*’, Volume II. He fairly conceded that the extract was somewhat equivocal in terms of supporting his contention that section 41 ought to be strictly construed. The first extract to which counsel referred at page 2702 says this:

“The New York Convention sets forth, in Article IV, requirements of formal proof that must be satisfied in order to obtain the advantage of the Convention’s provisions concerning recognition of arbitral awards. These provisions are designed to provide internationally-uniform and transparent standards of proof, and to inhibit parochial resistance to the recognition of foreign arbitral awards in the guise of formal requirements of proof. (In contrast neither the European nor Inter-American Convention contains provisions regarding proof of an arbitral award.)”

26. He then emphasised this passage on page 2703: *“Under the Convention, it is clear that national arbitration legislation is not permitted to impose more demanding requirements of proof of the existence of an award than those contained in Article IV. It is also clear that the award-creditor bears the burden of proving the existence of an award under Article V.”* Mr. Smith also properly referred the Court to the following sentence which clearly undermines his strict interpretation argument:

“Consistent with this objective, national courts have generally rejected efforts to complicate the proof requirements under Article IV, taking a practical and relatively flexible approach to its proof requirements.”

Findings: merits of application to set aside for alleged non-compliance with section 41 of the 1993 Act

27. So no authority has been placed before the Court which supports the proposition that a common law court has ever construed a provision similar to section 41, which specifies a mode of formal proof of an arbitration award and an arbitration agreement

for the purposes of an enforcement application, in a way which regards the provision as one that necessarily requires strict compliance. On the contrary, and more consistently with the House of Lords approach in *Soneji* and the whole spirit of common law litigation practice generally, it appears that common law courts have regarded this provision as one of procedural form. And, in particular in a statutory framework which is designed to give effect to an international convention making it easier to enforce arbitration awards, the courts and practitioners in the common law arbitration world have properly looked at the requirements in section 41 as requirements which may take on greater or lesser significance depending on the facts of a particular case.

28. So, for instance, where a genuine dispute exists as to the terms of an award or, indeed, where a dispute exists as to whether the document said by one party to be an arbitration agreement is or is not a genuine agreement, the facts of such a case might make stricter proof necessary. As a matter of general statutory interpretation, it is impossible to fairly construe section 41 as intended to require parties seeking to enforce an award to produce strict proof of the existence of the award or indeed the arbitration agreement upon which it is based as a mandatory statutory requirement the breach of which would invalidate any order which has been any order which has been obtained at the *ex parte* stage.
29. And so for those reasons, and having regard to the facts of the present case in which (a) there is no dispute about the authenticity of the award and arbitration agreement placed before the Court as exhibits to the affidavit sworn in support of the application and authenticated in that practical way, and (b) in the context of an application in relation to an award obtained in arbitration proceedings which were actually commenced by the Respondent, I reject the submission that the Order of March 22, 2013 should be set aside on the grounds that section 41 of the Bermuda International Conciliation and Arbitration Act 1993 was not complied with.
30. It follows that to the extent that the grant of the Mareva injunction on March 26, 2013 was challenged on the basis that the March 22, 2013 Order was invalidly made, that challenge also falls away.

[After hearing counsel, the Applicant was granted its costs in relation to both the *ex parte* and *inter partes* hearings].

Dated this 21st day of June, _____
IAN R.C. KAWALEY