

# RECOGNITION AND ENFORCEMENT OF DECLARATORY AWARDS UNDER ENGLISH LAW AS AN EFFECTIVE METHOD TO PROTECT THE ARBITRATION AGREEMENT

## RECONOCIMIENTO Y EJECUCIÓN DEL LAUDO DECLARATIVO EN EL DERECHO INGLÉS COMO MÉTODO EFECTIVO PARA PROTEGER EL CONVENIO ARBITRAL

JAVIER PÉREZ FONT

*LLB (University Carlos III of Madrid), LLM (Distinction) in International Commercial and Maritime Law (Swansea University), PhD candidate at Public University of Navarre*

ORCID ID:0000-0002-1554-5420

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**Abstract:** Where a party to an English arbitration clause commences proceedings before the courts of a state member of the EU other than the United Kingdom, the counterparty can: either claim for the stay of the proceedings before that Court, or start arbitral proceedings in England in order to obtain a declaratory ruling on the validity of the agreement which could subsequently be converted into a judgment under section 66 of the Arbitration Act 1996. In accordance with Article 45(1)(c) of Brussels I Bis Regulation, this judgment entered in the terms of the award would entitle the complying party to resist within the United Kingdom the enforcement of a later inconsistent Regulation judgment rendered in another state member.

**Keywords:** declaratory awards, torpedo actions, s.66 Arbitration Act 1996, Article 45(1)(c) Brussels I Bis Regulation, enforcement of arbitral awards.

**Resumen:** Cuando la parte de un convenio arbitral sometido a Derecho Inglés comienza procedimientos judiciales ante los tribunales de un estado miembro de la UE diferente del Reino Unido, la contraparte puede: plantear una declinatoria internacional o iniciar el procedimiento arbitral con la intención de obtener un laudo declarativo concerniente a la validez del convenio que posteriormente podrá ser convertido en sentencia a través de la sección 66 de la Arbitration Act 1996. De acuerdo con el Artículo 45(1)(c) del Reglamento Bruselas I Bis, esta sentencia habilitaría a la parte que ha cumplido el convenio a oponerse al reconocimiento y ejecución de la sentencia contradictoria que pudiera dictarse posteriormente por el tribunal de otro estado miembro.

**Palabras clave:** laudos declarativos, acciones torpedo, s.66 Arbitration Act 1996, Art.45(1)(c) del Reglamento Bruselas Bis I, ejecución del laudo arbitral.

**Summary:** I. Introduction. II. Enforcement of the arbitral award under s.66 AA96: 1. Introduction; 2. Scope of application: the award; 3. Enforcement under s.66(1) AA96; 4. Enforcement under s.66(2) AA96; 5. Defences and the right to raise an objection. III. Use of s.66 AA96 against Torpedo Actions: 1. A shield against a Torpedo Action; 2. Enforcement of declaratory awards under English Law; 3. Discretion to enforce the declaratory award; 4. Judgment shield vs Regulation Judgment. IV. Conclusions.

## I. Introduction

1. The object of arbitration<sup>1</sup> is the obtention of the fair resolution of disputes by an impartial tribunal<sup>2</sup> occasionally assisted by Courts<sup>3</sup>. Contrary to what it ordinary occurs with Courts, the jurisdiction of arbitral tribunals is not based upon a statutory provision, but on the existence of an agreement according to which the parties, not only decide to grant jurisdictional powers to the arbitrators but also to waive their right to litigate the disputes between them.

2. Thus, as it is well-known, the arbitration agreement is said to have a twofold effect: on one hand, it empowers the tribunal to resolve the disputes with a binding decision (the positive effect); and, on the other, it deprives the parties to the agreement of their right to bring in the disputes before a court (negative effect).

3. Under English Law, the negative effect of the arbitration agreement is protected by two legal instruments regarded as “opposed and complementary sides of a coin”<sup>4</sup>: the stay of the proceedings<sup>5</sup> and the anti-suit injunctions.

4. Anti-suit injunctions are orders not addressed to a court, but to the person over whom they have “jurisdiction from continuing with or commencing proceedings in a foreign court if is inequitable

<sup>1</sup> Since the definition of Arbitration posed difficulties, the lawmakers opted for setting out the object of arbitration [‘Departmental Advisory Committee Report on Arbitration Law 1996’ para 18]. Apart from fairness and impartiality, s.1(a) AA96 establishes as object of arbitration the avoidance of unnecessary delay or expense. These all were regarded by the DAC Report as aspects of justice or requirements of an heterocompositive dispute resolution system.

<sup>2</sup> Amongst the general duties of the tribunal, s.33(1)(a) AA96 remarks that it must “act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent”. The existence of circumstances that give rise to justifiable doubts as to the want of impartiality enables any party to apply to the court to remove the partial arbitrator or arbitrators [s.24(1)(a) AA96]. Unlike Art.12 Model Law, the Act does not provide for a full disclosure by the arbitrator of any circumstance which might give rise to justifiable doubts as to his impartiality or independence. Besides, the Act does not enlist potential bias which would make the arbitrator resign or get removed either. Therefore, the existence of a potential ground for reasonable suspicion regarding the lack of impartiality or independence of the arbitrator is not something which can be deemed as objective; but, on the contrary, it must be proved by the claimant.

Regarding the disclosure of potential conflicts of interests in international commercial arbitration and investment arbitration, the International Bar Association has developed a traffic light system intended to assist parties, practitioners, arbitrators, institutions and courts. [Introduction International Bar Association, ‘IBA Guidelines on Conflicts of Interest in International Arbitration’ paras 5–6]. In summary, the guidelines distinguish red [List 1 and 2 – Part II], orange [List 3 – Part II] and green situations [List 4 – Part II]. The first ones indicate matters which must always be disclosed [Part II – Para. 3]; the second reflect situations which should be disclosed by arbitrators [Part II – Para. 3]; and finally, the green are situations where there is no conflict of interest and consequently arbitrators have no duty to disclose [Part II – Para. 7]. Though these guidelines are not legal provisions and do not override any applicable national law or arbitrable rules chosen by the parties, they are gaining greater recognition internationally [R.M MERKIN & L. FLANNERY, *Arbitration Act 1996* (4th edn, Informa Law 2008) p. 88.], having been referred in *ASM Shipping Co Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm) and in *A & Others v B & X* [2011] EWHC 2345 (Comm).

<sup>3</sup> The principle of minimal court interference enshrined in s.1(c) AA96 intends to implement in English Law the approach according to which the courts generally only intervene in order to support the arbitral process, not take it over. (See ‘Departmental Advisory...’ op. cit. para 22). Apart from the enforcement of the award, under the Arbitration Act 1996, the main interventions of Courts during the arbitral proceedings are: Extension of the time the parties might have agreed to begin the proceedings (s.12 AA96); Determining how the limitation period must be computed in cases that the award has been set aside or declared to be of no effect. (s.13 AA96); Appointment of arbitrators (s.17 and 18 AA96); Removal of arbitrators; (s.24 AA96); Protection of the arbitration agreement through Anti-Suit Injunctions; Urgent preservation of evidences or assets (s.44(3) AA96); Determination of a preliminary point of jurisdiction (s.32 AA96); Enforcement of peremptory orders (s.42 AA96); Securing the attendance of witnesses (s.43 AA96); List of Court powers exercisable if support of arbitral proceedings (s.44 AA96); Challenge the award on the ground of lack of substantive jurisdiction (s.67 AA96); Challenge the award on the ground of serious irregularities which have caused substantial injustice (s.68 AA96); and the challenge on a point of law (s.69 AA96).

<sup>4</sup> *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35 [60]. See also paragraphs [21] – [28] of the same case.

<sup>5</sup> s.9 AA96. As to the stay in international disputes see: A.L. CALVO CARAVACA/ J. CARRASCOSA GONZÁLEZ/C. CAAMIÑA DOMÍNGUEZ, *Litigación Internacional En La Unión Europea. I, Competencia Judicial y Validez de Resoluciones En Materia Civil y Mercantil En La Unión Europea: Comentario al Reglamento Bruselas I Bis* (1st edn, Aranzadi 2017) 507–510.

for such person so to act”<sup>6</sup>. This procedural device is used in most common law countries and its existence can be traced back to the fifteenth-century conflicts of jurisdiction between the Courts of Equity and the Courts of Common Law<sup>7</sup>. Nowadays granted under section 37 of the Senior Courts Act 1981<sup>8</sup>, for their adoption, the Claimant is required to demonstrate:

- a) That there is a valid arbitration agreement.
- b) That the claim brought in before the foreign court is made by a party to the arbitration agreement and that the claim falls within the scope of the agreement<sup>9</sup>.
- c) That the application is made without delay<sup>10</sup>.
- d) That the claimant has not submitted to the jurisdiction of the foreign court<sup>11</sup>.
- e) That it is convenient to make the order.

5. Either anti-suit injunctions granted to protect a jurisdiction agreement, or the ones granted to protect the arbitration agreement are held to be against the European Regulation<sup>12</sup>. In consequence, English Courts cannot grant them in relation to disputes which fall within the scope of the European Regulation<sup>13</sup>. Thus, where a party to an English arbitration clause commences proceedings on civil and commercial matters before the courts of another state member, the options of the counterparty to protect the negative effect of the agreement seem to be restricted to the stay. However, as it is to be examined in this project, there could be an alternative option for the complying party based upon the combination of the arbitration agreement, the Arbitration Act 1996 and the Brussels I Bis Regulation<sup>14</sup>. As it will be demonstrated, a declaratory award ruling on the validity of the arbitration agreement can subsequently be converted in a judgment under section 66 of the Arbitration Act and thus become a judgment which

<sup>6</sup> *Halsbury's Laws of England* 524.

<sup>7</sup> C. OJIEGBE, ‘From West Tankers to Gazprom: Anti-Suit Injunctions, Arbitral Anti-Suit Orders and the Brussels I Recast’ (2015) 11 *Journal of Private International Law* 267, 271; A.L. CALVO CARAVACA, J. CARRASCOSA GONZÁLEZ & C. CAAMIÑA DOMÍNGUEZ, *Litigación Internacional...* op. cit. p. 176.

<sup>8</sup> Historically, it was doubtful whether they had to be granted under s.37 of the Senior Courts Act 1981 or under s.44 AA96. The situation was clarified in *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35. In this case MANCE concluded that “Where an injunction is sought to restrain foreign proceedings in breach of an arbitration agreement - whether on an interim or a final basis and whether at a time when arbitral proceedings are or are not on foot or proposed - the source of the power to grant such an injunction is to be found not in section 44 of the 1996 Act, but in section 37 of the 1981 Act. Such an injunction is not “for the purposes of and in relation to arbitral proceedings”, but for the purposes of and in relation to the negative promise contained in the arbitration agreement not to bring foreign proceedings, which applies and is enforceable regardless of whether or not arbitral proceedings are on foot or proposed” (*ibidem* [48]).

<sup>9</sup> In *JSC AMC Ingosstrakh Investments v BNP Paribas SA* [2012] 1 Lloyd’s Rep 649 the Court of Appeal held that anti-suit injunctions can also be addressed to a third party seeking to assist the party to the arbitration agreement in bringing the wrongful foreign proceedings by way of collusion.

<sup>10</sup> The anti-suit injunctions will not be granted where the foreign proceedings are at an advanced stage. In *The Angelic Grace* [1995] 1 Lloyd’s Rep 87 it was held that a decision of the Court of Appeal must be deemed as the deadline to grant an anti-suit injunction.

<sup>11</sup> According to Article 26 of Brussels I Bis Regulation – with similar verbatim to Article 24 Regulation Brussels I and Article 18 of the Brussels Convention - submission by the claimant takes place when he registers the claim against the defendant. On the other hand, the defendant’s submission takes place when he enters an appearance, unless he does so to contest the jurisdiction of the court, or where another court has exclusive jurisdiction on the matter by virtue of Article 24 of the Regulation.

<sup>12</sup> Firstly, in *Turner v Grovit* [2004] ECJ C-159/02 the European Court of Justice held that anti-suit injunctions granted in case of breach of a jurisdiction agreement was not consistent with the Brussels Convention 1968. The ECJ concluded that the Convention had to be interpreted “as precluding the grant of an injunction whereby a court of a contracting state prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another contracting state, even where the party is acting in bad faith with a view to frustrate the existing proceedings.” (*ibidem* [31]) Following this approach, in *West Tankers Inc v Allianz SpA & Generali Assicurazione Generali SpA* [2009] ECJ - C-185/07. the Court held that anti-suit injunctions granted in breach of an arbitration agreement indirectly interferes with the competence of the court exercising or resolving the dispute jurisdiction. See also: D. JOSEPH, *Jurisdiction and Arbitration Agreements and Their Enforcements* (2nd edn, Sweet & Maxwell 2010) p. 402; A.L. CALVO CARAVACA, J. CARRASCOSA GONZÁLEZ & C. CAAMIÑA DOMÍNGUEZ, *Litigación Internacional...* op. cit. p. 176–178; C. OJIEGBE, ‘From West...’ p. 273–277.

<sup>13</sup> A.L. CALVO CARAVACA/J. CARRASCOSA GONZÁLEZ/C. CAAMIÑA DOMÍNGUEZ, *Litigación Internacional...* op. cit. p. 176.

<sup>14</sup> Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

according to the Regulation would entitle the complying party to resist within British jurisdiction the recognition and enforcement of any later inconsistent judgment which could be rendered by the courts of another member state of the European Union.

6. The structure of the project is divided into two parts: the first one deals with the regulation of the enforcement contained in section 66, and the second copes with the possibility to enforce a declaratory award and its use to protect the negative effect of the arbitration agreement. Finally, some conclusions will be held.

## II. Enforcement of the arbitral award under s.66 AA96

### 1. Introduction

7. Apart from the implementation of the Geneva<sup>15</sup> and the New York Convention<sup>16</sup>, the Arbitration Act 1996 recognises two methods to enforce an arbitral award: the common law remedy of the action on the award and the summary procedure of section 66. Though the party is free to opt for one or the other the advantages of the latter outweighs the former's, resulting so in a residual use of the traditional action on the award.

8. Section 66(4) of the Arbitration Act 1996 provides that “nothing in this section affects the recognition and enforcement of an award under any other enactment or rules of law, (...) or by an action on the award” and section 81 “provides for the survival of common law rights consistent with 1996 Act”<sup>17</sup>.

9. The basis of the action on the award is the implied obligation of the parties to an arbitration agreement to perform the award. Where a party dishonours the award, the counterparty is to be entitled to claim for the breach of this implied obligation and to seek a judgment from the court for the same relief as the granted by the award<sup>18</sup>.

10. Despite its statutory recognition, the action on the award “is little used in practice”<sup>19</sup> and its use seems to be limited to two groups of cases: firstly, where the award was made pursuant to an arbitration agreement which does not satisfy the broad definition contained in the Act<sup>20</sup>; and secondly, where the enforcement under section 66 is unsuitable because the debtor resists the enforcement on grounds which raise factual issues requiring full investigation<sup>21</sup>.

11. On the other hand, sections 66(1) and (2) – mirroring former section 26 of the Arbitration Act 1950<sup>22</sup> - envisage two difference methods to enforce the arbitral award: the leave of the court to enforce the award “in the same manner as a judgment or order of the court”<sup>23</sup> and the conversion of the award into a judgment<sup>24</sup>.

<sup>15</sup> s.99 AA96.

<sup>16</sup> s.100 – 104 AA96.

<sup>17</sup> C. AMBROSE/ H. SUMPTION/ K. MAXWELL, *London Maritime Arbitration* (4th edn, Informa Law 2017) para 23.19.

<sup>18</sup> C. AMBROSE/H. SUMPTION/ K. MAXWELL, *London Maritime...* op. cit. para 23.21; D. SUTTON & J. GILL, *Russell on Arbitration* (23rd edn, Sweet & Maxwell 2008) para 8–015.

<sup>19</sup> *National Ability SA v Tinna Oils & Chemicals Ltd (The Amazon Reefer)* [2010] 1 Lloyd's Rep 222 [6].

<sup>20</sup> *Goldstein v Cenley* [2002] 1 WLR 281 294.

<sup>21</sup> C. AMBROSE, H. SUMPTION & K. MAXWELL, *London Maritime...* op. cit. para 23.13.

<sup>22</sup> This provision read as follows: “An award on an arbitration agreement may, by leave of the High Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award”.

<sup>23</sup> s.66(1) AA96.

<sup>24</sup> s.66(2) AA96.

12. Originally, these methods to enforce the award were a “summary form of proceedings intended to dispense with the full formalities of the action to enforce an award”<sup>25</sup> whose scope of application was restricted to “reasonable clear cases”<sup>26</sup>. However, the procedures were developed and currently, as Lord Denning remarked, can “be used in nearly all cases”<sup>27</sup>

13. Since these procedures contained in section 66 are exclusively based on documentary evidence<sup>28</sup>, they are quicker, cheaper and therefore more popular than the action on the award. In the following lines, both are to be examined along with their scope of application and the defences which might be triggered to resist the enforcement of the award.

## 2. Scope of application: the award

14. The procedures provided in sections 66(1) and (2) are restricted to the enforcement of arbitral awards which are made pursuant to arbitration agreements which satisfy the statutory definition contained in sections 5 and 6 of the Act<sup>29</sup>.

15. Based on Art.7 of the Model Law, sections 5 and 6 establish that either the “*strict*” arbitration agreement – understood as the agreement to submit all or certain contractual or non-contractual disputes which might arise between the parties of a legal relationship - or the submission agreement – understood as the agreement to submit contractual or non-contractual disputes which have already arisen out of a legal relationship -<sup>30</sup> must be in writing<sup>31</sup>. For the purposes of the Act, the agreement will be in writing:

- a) Where the agreement is made in writing<sup>32</sup>.
- b) Where it is made by exchange of communications in writing<sup>33</sup>.
- c) Where the agreement is evinced in writing<sup>34</sup>, admitting electronic means of communication<sup>35</sup> such as email<sup>36</sup>.
- d) Where the agreement is evinced in writing if the agreement was made otherwise than in writing and was recorded by one of the parties, or by a third party with the authority of the parties<sup>37</sup>.
- e) Where the agreement is contained in an exchange of statements of claim and defence in which the existence of the arbitration agreement was alleged by one party and not denied by the other<sup>38</sup>.
- f) And finally, where in a contract there is a reference to any writing document containing an arbitration clause provided that this express reference is such as to make that clause part of the incorporating contract<sup>39</sup>.

<sup>25</sup> *National Ability SA v Tinna Oils & Chemicals Ltd (The Amazon Reefer)* [2010] 1 Lloyd’s Rep 222 [7].

<sup>26</sup> *Boks & Co v Peter, Rushton & Co Ltd* [1919] KB 491 497.

<sup>27</sup> *Middlemiss & Gould v Hartlepool Corporation* [1972] 1 WLR 1643 1647.

<sup>28</sup> “The application proceeds upon the basis of documentary evidence only, and no witness are called to give evidence at the hearing of the application.” (C. AMBROSE, H. SUMPTION & K. MAXWELL, *London Maritime...* op. cit. para 23.8).

<sup>29</sup> D. SUTTON & J. GILL, *Russell on...* op. cit. para 8–014.

<sup>30</sup> Art.6(1) AA96 establishes that an arbitration agreement means “an agreement to submit to arbitration present or future disputes (whether they are contractual or not)”.

<sup>31</sup> Art. 7(1) of the Model Law 2006 and s.5(1) AA96.

<sup>32</sup> Art. 7(3) of the Model Law 2006 and s.5(2)(a) AA96.

<sup>33</sup> Art. 7(3) of the Model Law 2006 and s.5(2)(b) AA96.

<sup>34</sup> s.5(2)(c) AA96.

<sup>35</sup> Art. 7(4) of the Model Law 2006 requires the information contained therein to be accessible so as to useable for subsequent reference.

<sup>36</sup> In *Bernuth Lines Ltd v High Seas Shipping Ltd* [2006] 1 Lloyd’s Rep 537, the Court held that an email constituted writing for the purposes of recording an arbitration agreement.

<sup>37</sup> Art. 7(3) of the Model Law 2006 and s.5(4) AA96.

<sup>38</sup> Art. 7(5) of the Model Law 2006 and s.5(5) AA96.

<sup>39</sup> Art. 7(6) of the Model Law 2006 and s.5(3) and 6(2) AA96.

16. Unlike it will happen with New York and Geneva conventional awards, section 66 makes no reference to the seat of arbitration. This means that the procedures enacted in this provision are applicable irrespective of the location of the seat of the arbitration<sup>40</sup>. Consequently, section 66 is applicable where the award is made pursuant to an arbitration whose seat was either in England, Wales or Northern Ireland<sup>41</sup>, or outside these countries<sup>42</sup>.

17. The expression “award” not only refers to the decision made by the tribunal determining the rights and obligations of the parties to the dispute<sup>43</sup>, but also to the agreed awards<sup>44</sup>. On the contrary, preliminary or interim decisions, procedural orders, directions or any order of the tribunal granting relief on a provisional basis fall outside sections 66(1) and (2)<sup>45</sup>. Therefore, the enforcement of the peremptory orders which the Tribunal might grant during the proceedings is not to be under section 66, but under section 42<sup>46</sup>.

<sup>40</sup> R.M MERKIN & L. FLANNERY, *Arbitration Act...* op. cit. p. 262. s.3 AA96 defines the seat of arbitration as the judicial seat of the arbitration and it can be designated: (a) by the parties to the arbitration agreement; (b) by any arbitral or other institution or person vested by the parties with powers in that regard, or (c) by the arbitral tribunal if so authorised by the parties. Besides, in the absence of such designation, s.3 AA96 provides that it can be determined having regard to the parties’ agreement and all the relevant circumstances.

<sup>41</sup> s.2(1) AA96. In this situation, the provisions listed in Schedule 1- sections 9-11 (stay of legal proceedings), 12 (power of court to extent agreed time limits), 13 (application of Limitation Acts), 24 (power of the court to remove arbitrator), 26(1) (effect of death of arbitrator), 28 (liability of parties for fees and expenses of arbitrators), 29 (immunity of arbitrator), 31 (objection to substantive jurisdiction of tribunal), 32 (determination of preliminary point of jurisdiction), 33 (general duty of tribunal), 37(2) (items to be treated as expenses of arbitrators), 40 (general duty of parties), 43 (securing the attendance of witnesses), 56 (power to withhold award in case of non-payment), 60 (effectiveness of agreement for payment of costs in any event), 66 (enforcement of award), 67 – 68 (challenging the award: lack of substantive jurisdiction and serious irregularity), 70 – 71 (supplementary provision and effect of order of court), 72 (saving for rights of person who takes no part in proceedings), 73 (loss of right to object), 74 (immunity of arbitral institutions) and 75 (charge to secure payment of solicitors’ cost) - are mandatory and, consequently, have effect notwithstanding any agreement to the contrary. [s.4(1) AA96].

<sup>42</sup> s.2(2) AA96. Besides, this section provides that sections 9 – 11 (stay of legal proceedings) and section 66 (enforcement of arbitral awards) apply even if the seat has not been designated or determined.

On the other hand, following s.2(3) AA96, where the seat of the arbitration is outside England, Wales and Northern Ireland or no seat has been designated or determined, s.43 (securing the attendance of witnesses) and 44 (court power exercisable in support of arbitral proceeding) might be applicable provided that, in the opinion of the court, it is appropriate to do so. See ‘Departmental Advisory...’ op. cit. para 25.

<sup>43</sup> J. HILL & A. CHONG, *International Commercial Disputes: Commercial Conflict of Laws in English Courts* (4th edn, Hart Publishing 2010) para 24.1.7.

<sup>44</sup> According to s.51(2) AA96, an agreed award is an award which records the settlement agreement of the parties during the arbitral proceedings. As stated in s.51(3) AA96, these awards have the same status and effect as any other award on the merits.

<sup>45</sup> D. SUTTON & J. GILL, *Russell on...* op. cit. paras 8–011. In Australia – whose s.8(2) of the International Arbitration Act 1974 has a similar wording to s.66(1) AA96 – in *Re Resort Condominiums International Inc* [1995] 1 Qd 406 the Court held that interlocutory or procedural orders did not constitute “foreign award” within the meaning of the Act and were consequently not enforceable under that provision.

<sup>46</sup> Peremptory orders are regulated in s.41(5) – (7) of Act. The peremptory order may be made where a party, without showing sufficient cause, fails to comply with an order or direction of the tribunal (s.41(5) AA96). These orders are enforcement measures in respect of existing directions or orders [R.M MERKIN & L. FLANNERY, *Arbitration Act...* op. cit. p. 163–164] and consequently, “a peremptory order must be “to the same effect” as the preceding order which was disobeyed.” [‘Departmental Advisory...’ op. cit. para 209].

The consequence of the failure to comply with a peremptory order is to depend upon the kind of order disobeyed: where the party fail to comply with a peremptory order to provide security for costs, the arbitral tribunal may make an award dismissing his claim [s.41(6) AA96]; on the other hand, where the party fails to comply with any other kind, without prejudice to the possibility to enforce by the court under s.42 AA96, the arbitral tribunal can: (a) 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; (b) draw such adverse inferences from the act of non-compliance as the circumstances justify; (c) proceed to an award on the basis of such materials as have been properly provided to it; and (d) make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance. [s.41(7) AA96]

For their enforcement, the Act requires:

- a. That the parties have not excluded from their arbitral proceedings the enforcement of peremptory orders. The wording of s.42(1) AA96 is clear when it provides that “otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal.” Besides, s.42 AA96 is not among the provisions deemed as mandatory by Schedule 1 of the Act.
- b. An application for the enforcement of the peremptory order made either by the tribunal upon notice to the parties [s.42(2)]

### 3. Enforcement under s.66(1) AA96

18. Before being enforced “in the same manner as a judgment or order of the court”<sup>47</sup> is necessary to obtain the permission or leave of the court. This application is usually made without notice to the other party and it must be supported by written evidence<sup>48</sup> and:

- a) Exhibit the arbitration agreement and the original award (or copies)<sup>49</sup>.
- b) State the names and the usual or last known place of residence or business of the claimant and of the person against whom it is sought the enforcement of the award<sup>50</sup>.
- c) And finally, state that either the award has not been complied or the extent to which it has been complied with at the date of the application<sup>51</sup>.

19. Where the leave is so given, all the means to enforce a judgment of the Court are to be available to enforce the award, including worldwide freezing orders<sup>52</sup>. On the other hand, the leave can be restricted only to a part of the award provided that the award is drafted so as to make possible that part of the award to be enforced<sup>53</sup>.

20. The leave of the Court cannot correct possible deficiencies in the award<sup>54</sup>. Besides, it does not amount to a Court order in its right<sup>55</sup>, and consequently, if the losing party dishonours the award enforced such behaviour will not be in contempt of court<sup>56</sup>.

### 4. Enforcement under s.66(2) AA96

21. Once the permission is given, section 66(2) empowers the Court to give a “judgment entered in terms of the award”. This mechanism results in the conversion of the award into a judgment. Hence, it can be said that it permits the enforcement of the judgment made by the court rather than the award made by the arbitral tribunal<sup>57</sup>.

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(a) AA96] or by any party to the arbitral proceedings with the permission of the tribunal and upon notice to the other parties [s.42(2)(b) AA96]. This permission might not be necessary where the parties have agreed that the powers of the court to enforce peremptory orders under s.42 AA96 shall available in relation to the arbitral proceedings they are involved. “It is possible that the intention behind section 42(2)(c) was that no permission from the tribunal would be required if the parties had positively pre-agreed to allow applications under section 42 (without specifying the conditions). Such positive pre-agreements are fairly rare (unknown to the authors) and are not contained in any of the standard arbitral institutional rules. In practice, the safer option for a party is to seek the tribunal’s permission.” [R.M MERKIN & L. FLANNERY, *Arbitration Act...* op. cit. p. 166]”. The same is suggested by the DAC Report: “The court should have power to order compliance with [peremptory orders], though (unless both parties have agreed) these can only be invoked with the permission of the tribunal” [‘Departmental Advisory...’ op. cit. para 212] -

- c. The applicant must have exhausted any available arbitral process in respect of failure to comply with the tribunal’s order. [s.42(3) AA96]
- d. The person against whom the order was directed has failed to comply with it within the time prescribed in the order or, if not time was specified, within a reasonable time. [s.42(4) AA96]

<sup>47</sup> s.66(1) AA96.

<sup>48</sup> Rule 62.18(6) CPR.

<sup>49</sup> Rule 62.18(6)(a)(i) CPR.

<sup>50</sup> Rule 62.18(6)(b) CPR.

<sup>51</sup> Rule 62.18(6)(c) CPR.

<sup>52</sup> This happened in *Aiglon Ltd & L’Aiglon SA v Gau Shan Co Ltd* [1993] 1 Lloyd’s Rep 164.

<sup>53</sup> In *TTMI Ltd of England v ASM Shipping Ltd of India* [2006] 1 Lloyd’s Rep 401, CLARKE seems “to have assumed that section 66 give to the court a power of partial enforcement of an award.” (*IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation (No 2)* [2008] 2 Lloyd’s Rep 59 [102]). See C. AMBROSE, H. SUMPTION & K. MAXWELL, *London Maritime...* op. cit. paras 23.35-23.36; H.R DUNDAS, ‘Partial Enforcement of Arbitral Awards’ (2008) 74 *Arbitration* 330.

<sup>54</sup> *Walker v Rowe* [2000] 1 Lloyd’s Rep 116; *Pirtek v Deanswood* [2005] 2 Lloyd’s Rep 728.

<sup>55</sup> “An order allowing the claimant to execute an award as if it was a judgment is comparable to an exequatur as applicable in civil law systems.” (*ED & F Man Sugar Ltd v Lendoudis* [2007] 2 Lloyd’s Rep 579 [33]).

<sup>56</sup> *ASM Shipping Co Ltd of India v TTMI Ltd of England (No 2)* [2007] 2 Lloyd’s Rep 155.

<sup>57</sup> R.M MERKIN/L. FLANNERY, *Arbitration Act...* op. cit. p. 263.

22. The conversion means that the judgment must have the same terms as the award<sup>58</sup>. As it occurs with the leave examined above, the Court cannot introduce any amendment, qualification or correction to the award. This can result in odd situations such as the enforcement of an award which specifies payment within a fixed period of time which has already expired<sup>59</sup>.

23. The mechanism contained in section 66(2) has 3 advantages and a drawback:

a) Advantages:

- i. Since the Court is giving a judgment, section 17 of the Judgments Act 1838 will apply<sup>60</sup>. Thus, where a party does not comply with the Judgment, the Court will be entitled to make an order for the payment of interests payable from the date of conversion of the award<sup>61</sup>.
- ii. According to section 7 of the Limitation Act 1980, the time limit for the enforcement of awards is 6 years. However, it has been suggested that this period may be extended where section 66(2) is triggered and it is sought the enforcement of the judgment<sup>62</sup>.
- iii. Unlike the leave, the failure to honour the judgment entered in terms of the award is to amount to contempt of court<sup>63</sup>.

b) Disadvantage: Due to the merger of the award with the judgment, the latter may no longer be enforceable under international instruments such as the Geneva and the New York Conventions<sup>64</sup>. Nevertheless, this limitation is limited to the English territory<sup>65</sup> and, consequently, the award would still be enforceable as such under these instruments in any other contracting state<sup>66</sup>, provided that it satisfies the relevant conventional conditions for its enforcement<sup>67</sup>.

## 5. Defences and the right to raise an objection:

24. Under the Act and the Model Law, there is a strong presumption as to the validity of the enforceable award<sup>68</sup>. Hence, contrary to what it occurs with the action on the award<sup>69</sup>, “the party who has

<sup>58</sup> In accordance with COOKE : “It is true that section 66 of the Act refers to enforcement of an award in the same manner as a judgment or order of the court to the same effect and that, where leave is so given to do so, “judgment may be entered in terms of the award”. Decision of Aikens J (as he then was), Moore-Bick J (as he then was) and Beatson (as he then was) support the proposition that a judgment so entered must truly be “in terms of the award”, in other words, in identical terms, and I do not think that this is in doubt.”(*Konkola Copper Mines v U & M Mining Zambia (No 2)* [2014] 2 Lloyd’s Rep 649 [100]).

<sup>59</sup> *Colliers International Property Consultants & another v Colliers Jordan Lee Jafaar Sdn Bhd* [2008] 2 Lloyd’s Rep 368.

<sup>60</sup> This provision reads as follows:

“(1) Every judgment debt shall carry interest at the rate of 8 pounds per centum per annum from such time as shall be prescribed by rules of court until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment.

(2) Rules of court may provide for the court to disallow all or part of any interest otherwise payable under subsection (1).”

<sup>61</sup> *Gater Assets Ltd v NAK Naftogaz Ukrainy* [2008] EWHC 1108 (Comm) [29].

<sup>62</sup> Mr Phillips submits that it would be contrary to public policy to give effect to an action on the judgment. To do so would, he submits, circumvent section 7 of the Limitation Act which precludes the bringing of an action to enforce an award more than six years after the date when the cause of action accrued. I am not persuaded that this is so. The Limitation Act provides a six-year limitation period (in most cases) for claims under an original cause of action, claims to enforce an award, and claims to enforce a judgment. It makes no provision that an action on a judgment may not be brought within six years of the judgment if the judgment is one which gives effect to an award.” (*ED & F Man Sugar Ltd v Lendoudis* [2007] 2 Lloyd’s Rep 579 [53]).

<sup>63</sup> R.M MERKIN/ L. FLANNERY, *Arbitration Act...* op. cit. p. 262.

<sup>64</sup> D. SUTTON/ J. GILL, *Russell on...* op. cit. paras 8–007. “Upon entering judgment, the award merges into the judgment and no longer exists in law.” (C. AMBROSE, H. SUMPTION & K. MAXWELL, *London Maritime...* op. cit. para 23.9).

<sup>65</sup> According to DARMON: “The merger of the award must be regarded as limited to the territory of the court which delivered the judgment and only the award must be taken into account for the purpose of recognition and enforcement in other state.” (*Marc Rich & Co v Società Italiana Impianti PA* Case C-190/89 [1991] ECR I - 3855 [69]).

<sup>66</sup> “The award can therefore be deemed to remain a cause of action for enforcement in other States.” [A. V.D. BERG, *The New York Arbitration Convention of 1958. Towards a Uniform Judicial Interpretation* (1st edn, Kluwer Law International 1981) 347].

<sup>67</sup> J. HILL & A. CHONG, *International Commercial...* op. cit. para 24.6.12.

<sup>68</sup> “The party who has an award is entitled to start from the position of validity.” (*Sovarex SA v Romero Alvarez SA* [2011] EWHC 1661 (Comm) [47]).

<sup>69</sup> In an action on the award, the claimant must show that the arbitrators had substantive jurisdiction. In this sense, the



obtained an award has the benefit of a presumption of validity and it is for the party resisting recognition or enforcement to prove otherwise”<sup>70</sup>.

25. Following a House of Lords amendment<sup>71</sup>, the lawmaker opted for not including an enumeration of the grounds to refuse the enforcement. Despite not being exhaustively enlisted, the grounds seem to be limited to the following:

- a) Want of substantive jurisdiction<sup>72</sup>. The act provides that the “leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction”<sup>73</sup>.
- b) Defects in form or substance. In order to be enforceable, the award must unambiguously deal with all the issues between the parties.<sup>74</sup> Where the award does not satisfy these requirements, it will be necessary to previously remedy such defects<sup>75</sup>.
- c) Not arbitrable dispute<sup>76</sup>.
- d) Limitation. The Limitation Act 1980 establishes a time limit of 6 years to the action to enforce the awards<sup>77</sup>. This time runs from the date of the breach of the implied obligation to honour the award which arises when the award is made<sup>78</sup>.
- e) Public Policy. Section 81(1)(c) of the Arbitration Act 1996 expressly empowers the court to refuse the recognition and enforcement of the award where this recognition and enforcement would be contrary to the public policy.
- f) State Immunity.

26. On the other hand, similarly to Article 4 of the Model Law, sections 66(3) and 73 of the Act provides that the right to raise an objection can be lost<sup>79</sup>. The Act distinguishes between the party who

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claimant will have to prove the validity of the arbitration agreement and the award and besides he will have to establish that the dispute was within the terms of the submission and that the arbitrators were duly appointed. See M.J MUSTILL & S.C BOYD, *Commercial Arbitration* (2nd edn, Butterworths Law 1989) 418–419.

<sup>70</sup> *Sovarex SA v Romero Alvarez SA* [2011] EWHC 1661 (Comm) [43].

<sup>71</sup> In words of FRASER OF CARMYLLIE: “The clause as drafted gives a non-exhaustive list of grounds on which leave to enforce an award in the same manner as a judgment shall not be given by the court. The list is non-exhaustive, but we see a danger in specifying only some of the relevant matters. Parties may be led astray by thinking that matters which are not mentioned are not covered. That is not the case. We have given some thought to constructing an exhaustive list, but it would be difficult to be absolutely sure that all matters had been covered. On balance now we think it would be preferable to exclude the list altogether from the Bill. I beg to move.” [Hansard 1803 – Lord Sitting of 18 March 1996 (Series 5 – Vol. 570), p.1880].

<sup>72</sup> s.30 AA96 contains the statutory recognition of the famous principle *kompetenz-kompetenz*. According to this provision, the substantive jurisdiction under the Act is confined to 3 different elements: (a) the validity of the arbitration agreement, (2) the proper constitution of the tribunal and (c) the scope of the arbitration agreement. Apart from sections 30 and 66(3), other provisions which deal with the concept of substantive jurisdiction are: s.31, 32, 67 and 72.

<sup>73</sup> s.66(3) AA96.

<sup>74</sup> C. AMBROSE/H. SUMPTION/ K. MAXWELL, *London Maritime...* op. cit. para 23.27.

<sup>75</sup> Unless otherwise agreed by the parties [s.57(1) AA96], under the Act, the correction of the award so as to clarify or remove any ambiguity can be made by the tribunal on its own initiative or on the application of a party to the arbitral proceedings. [s.57(2)(a) AA96] In this situation, the correction shall be made by the tribunal within 28 days after the reception of the application or, where the correction is made by the tribunal on its own initiative, within 28 days after the award was made. [s.57(5) AA96] In both cases, the correction is to form part of the award. [s.57(7) AA96] Similar rules can be found on Art. 36 of the ICC Rules or Art.33 of the Unictal in the Model Law on Commercial Arbitration.

<sup>76</sup> Are not arbitrable disputes whose subject matter is a matter of law not justiciable – see *O’Callaghan v Coral Racing Ltd* [1998] App LR 11/19 (CA) for a case involving unenforceable wager or *Beijing Jianlong Heavy Industry Group v Golden Ocean Group and others* [2013] EWHC 1063 for a case of illegality – or disputes not capable of private resolution because they involved the rights of children, criminal law or inalienable statutory rights – see *Exeter City AFC v Football Conference Ltd* [2004] 4 All ER 1179 regarding the inalienable rights of the parties in the bankruptcy of a company -.

<sup>77</sup> s.6 of the Limitation Act 1980.

<sup>78</sup> C. AMBROSE/ H. SUMPTION/ K. MAXWELL, *London Maritime...* op. cit. para 23.28.

<sup>79</sup> Contrary to the Model Law, the Act requires “a party to the arbitration proceedings who has taken part or continued to take part without raising the objection in due time, to show that at that stage he neither knew nor could with reasonable diligence have discovered the grounds for his objection (the latter being an important modification to the Model Law, without which one would have to demonstrate actual knowledge, which may be virtually impossible to do).” [‘Departmental Adviso-

decides to take part in the proceedings and the one who decides not to do so. Whereas the latter unlimitedly conserves its right to challenge the award on any ground<sup>80</sup>, the former's right will be restricted to the objections already risen during the proceedings and to those ones either unknown or which could not have been discovered with reasonable diligence at that time<sup>81</sup>. The intention of the act is to avoid obstructive behaviours which might seek to delay proceeding or to avoid honouring the award<sup>82</sup> by requiring the parties "to "put up or shut up" if a challenge is to be made"<sup>83</sup>.

### III. Use of s.66 AA96 against torpedo actions

#### 1. A shield judgment against a Torpedo Action

27. The following case illustrates the scenario which is to be examined in this section: X – a Spanish company – and Y – a Welsh company – enters into a "CIF Swansea" contract which incorporates an agreement to arbitrate in Belfast with English law to apply all the disputes which might arise under the contract. Whereas Y commences the arbitral proceedings in Belfast, X rejects the validity of the arbitration agreement and, instead of challenging the jurisdiction of the tribunal before the own tribunal, it opts for bringing in the dispute before the Spanish courts asserting the nullity of the arbitration agreement and the judicial jurisdiction on the dispute in accordance with Brussels I Bis Regulation.

28. In this context, a "*torpedo action*" is an action brought in breach of an arbitration agreement before a European Court with the intention to obtain a relief not only more favourable than the one likely to be granted by the arbitral tribunal but also capable of being recognised and enforced in any other member state under the privileged system provided by Brussels I Bis Regulation.

29. This conduct misuses the European framework on the recognition and enforcement of judgments in civil and commercial matters in order to demolish the binding nature of the arbitration agreement. In bad faith, the claimant seeks to avoid the adverse consequences which might stem from arbitration by asserting the competence of a more favourable jurisdiction.

30. Unlike the so-called "*Italian Torpedos*"<sup>84</sup>, this action is not based upon the *Lis Pendens* rule, but upon the arbitration exception<sup>85</sup>. Following the previous European legislation, Article 2(1)(d) of Brussels I Bis Regulation provides that the regulation shall not apply to arbitration and Paragraph 3 of Recital 12, delimitating the scope of this exception, remarks that "where a court of a Member State, exercising jurisdiction under the Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced

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ry...’ op. cit. para 297).

<sup>80</sup> s.72 AA96.

<sup>81</sup> s.73(1) AA96.

<sup>82</sup> ‘Departmental Advisory...’ op. cit. para 297.

<sup>83</sup> ‘Departmental Advisory...’ op. cit. para 105. “The broad effect of [s.73 AA96] is to prevent a party from relying upon its right to challenge any aspect of the proceedings or the award for want of jurisdiction or irregularity, if it has participated in the proceedings with (actual or constructive) knowledge of the problem, but without having registered an objection promptly.” (R.M MERKIN & L. FLANNERY, *Arbitration Act...* op. cit. p. 358).

<sup>84</sup> “A person who has just reason to believe he might soon be accused of infringement and be summoned in a Contracting State with a cross-border injunction has the possibility to initiate proceedings in another State asking for a declaration of non-infringement with effect throughout Europe in the countries where he may be attacked; thus paralysing the cross-border injunction. (...) [This] strategy is commonly known as the "*Italian torpedo*".” (V. JANDOLI, ‘The “Italian Torpedo”’ [2000] 31 International Review of Intellectual Property and Competition Law 783, 788).

<sup>85</sup> For a deep analysis of the situation of ‘*Italian Torpedos*’ under the Brussels I Bis Regulation see I. BERGSON, ‘The Death of the Torpedo Action? The Practical Operation of the Recast’s Reforms to Enhance the Protection for Exclusive Jurisdiction Agreements within the European Union’ (January 2, 2015) 11 Journal of Private International Law 1.

in accordance with this Regulation”<sup>86</sup>. This follows the doctrine previously established by the European Court of Justice in the *Marc Rich* case<sup>87</sup>.

**31.** What can the counterparty to an English arbitration agreement do against an action of this kind? As it was previously referred, the decision adopted in *The Front Comor*<sup>88</sup> has severely limited his options. In ordinary circumstances, it would be suggested to claim before the seized court for a stay of the proceedings; however, it is likely that the party in breach of the arbitration agreement has taken this possibility into account and sought a jurisdiction where the stay is likely to be dismissed. Thus, his best defence is to move as quickly as possible in order to get a ruling from the arbitral tribunal declaring its own jurisdiction on the dispute which can subsequently be converted into a judgment under section 66<sup>89</sup>. In this way, the recognition and enforcement in England of the later judgment which the member state court might render after holding the invalidity of the arbitration clause will find an impediment: the defence contained on Art.45(1)(c) of Brussels I Bis.

**32.** Out of this defensive strategy at least 3 questions which are to be examined in the following lines arise:

- a) Is it possible under English law to enforce a declaratory award?
- b) Is the English court compelled to enforce the declaratory award or it has otherwise discretion to do so?
- c) And finally, in accordance with the Brussels I Bis Regulation, are the English decisions made pursuant to sections 66(1) and (2) an effective shield against the recognition and enforcement of the judgment made by the member state court?

## 2. Enforcement of declaratory awards under English law:

**33.** Although this practice has been historically controversial, cases such as *Kohn v Wagschal & Others*<sup>90</sup> demonstrate that English Courts use section 66 to enforce declaratory awards.

<sup>86</sup> Contrary to what the United Kingdom expressed at the time of the negotiations for its adhesion to the Brussels Convention “Proceedings before a court are not excluded from the scope of the Regulation just because they are, in the view of other Member States, covered by an arbitration agreement. The fact that the court of origin took jurisdiction after deciding that an arbitration agreement was invalid or inapplicable does not disentitle the resulting judgment from recognition and enforcement under the Regulation.” (T.C HARTLEY, ‘The Brussels I Regulation and Arbitration’ *International & Comparative Law Quarterly* 859).

<sup>87</sup> In *Marc Rich & Co v Società Italiana Impianti PA* a Swiss bought oil from an Italian Seller. The Oil became contaminated and a dispute arose about who was liable. The seller sought a declaration of non-liability in Italy and the Buyer commenced arbitral proceedings in London. Since the seller refused to take part in the proceedings, the buyer asked English courts to appoint the arbitrator, as well as permission to serve the proceedings out of the jurisdiction. Both orders were granted, and the seller argued that the dispute fell within the scope of Brussels Convention and that the competent courts were the Italian, not the British. Consequently, the seller claimed for setting aside the order. The court held that “if by virtue of its subject-matter (...) a dispute fall outside the scope of the Convention, the existence of a preliminary issue which the court must resolve in order to determine the dispute cannot, whatever that issue may be, justify the application of the Convention” (ibid 26). Since the subject-matter of the dispute was the appointment of an arbitrator, the Court concluded that the case fell within the exception. (ibid 29). See J. HILL & A. CHONG, *International Commercial...* op. cit. p. 71–72; Z.S. TANG & N. DOWERS, ‘Arbitration in EU Jurisdiction Regulation: Brussels I Recast and a New Proposal’ (2015) 3 *Groningen Journal of International Law* 125, 137.

<sup>88</sup> *West Tankers Inc v Allianz SpA & Generali Assicurazione Generali SpA* [2009] ECJ - C-185/07.

<sup>89</sup> There are other alternatives routes to get a judgment declaring the jurisdiction, but they are less preferable: “either via a section 32 jurisdictional ruling (with a tribunal’s permission) (...) or in the context of, for example, an application under section 18 (if challenged on jurisdiction) or section 44 (ditto).” (R.M MERKIN & L. FLANNERY, *Arbitration Act...* op. cit. p. 287–288).

<sup>90</sup> *Kohn v Wagschal & Others* [2006] EWHC 3356 (Comm). In this case, some heirs – the daughters and the son of Mr. Is Kohn - were unable to agree on the distribution of the inheritance and agreed to arbitrate their disputes before the Beth Din applying Jewish Law. The deceased had put some shares into the names of his daughters, who were unaware of this fact and had never received any dividend from them. The tribunal had to decide whether these shares were a gift to his children during his lifetime – which meant that each one of the children were entitled to 20% of the shares – or, on the contrary, they remained as part of the deceased’s estate until his death – which meant that in accordance with Jewish Law, on death the shares would pass to the son - . The lack of intention by the Deceased to gift the shares was demonstrated and the Tribunal concluded that the shares had been put into the names of the daughters with the intention to move these shares out of the reach of the widow and

**34.** The controversy starts with *Margulies Brothers Ltd v Dafnis Thomaidēs & Co (UK) Ltd*<sup>91</sup>. In this case, the Court of Appeal held that an award granting the set-off of certain contracts and the payment of the difference among them could not be enforced as a judgment under former section 26 of the Arbitration Act 1950. Although the words of Lord Evershed<sup>92</sup> could result in the unenforceability of a declaratory award, in that case, the uncertainty and ambiguity rendered the award incapable of being enforced, not its declaratory form.<sup>93</sup>

**35.** In *Tongyuan (USA) International Trading Group v Uni-Clan Ltd*<sup>94</sup>, Moore-Bick following the *Margulies Brothers Ltd* case firstly recognised that an award formulated in purely declaratory terms cannot be enforced<sup>95</sup>; however, subsequently, he added that a declaratory award “framed in terms which would make sense if those were translated straight into the body of a judgment” could be enforced<sup>96</sup>.

**36.** Ten years later, the limits of this view were tested in *West Tankers Inc v Allianz SpA & Generali Assicurazione Generali SpA*<sup>97</sup>. In this case, a charterparty between the claimant – the owner of the vessel “*Front Comor*” – and Erg Petrol SpA – the charterer, subrogated in the proceedings by its insurers - incorporated an arbitration clause which stipulated that all the disputes arising out of the charter were to be referred to arbitration in London with English Law to apply.

**37.** A collision between the vessel and a pier owned by the charterer caused extensive damage rendering the berth unusable for a long period. Whereas the owner referred his claims regarding this incident to arbitration, the defendants brought theirs against the owner in the courts of Italy.

**38.** On 21<sup>st</sup> March 2005, an anti-suit injunction restraining the defendants to resume the judicial proceedings in Italy was granted. On the other hand, on 12<sup>th</sup> November 2008, the arbitral tribunal found that the owners were under no liability to the defendants for the damages caused by the collision.

**39.** Despite this award, the Defendants continued the proceedings brought in Italy. The claimant - concerned with the fact that the Defendants could obtain a judgment in their favour which subsequently could be enforced in England under the Brussels Regulation<sup>98</sup> - sought the conversion of the award into a judgment under section 66. His thinking was that, in accordance with Article 34(3) of Brussel I Regulation, such conversion would preclude English Courts from recognising an irreconcilable potential Italian judgment. In addition, he thought that the existence of the English judgment would render the recognition of the future Italian judgment contrary to the public policy in England and Wales, and consequently, he could shield himself behind the exception contained in Article 34(1) of Brussels I.

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to avoid inheritance taxes. Consequently, the tribunal declared that the shares belonged to the son who then obtained an order from the High Court under s.66 AA96 to enforce the award in the same manner as a judgment or order of the court. Despite the application to set aside the order made by the Daughter, Morison J upheld the order of the High Court and the award declaring the son as heir of the shares was enforced.

<sup>91</sup> [1958] 1 Lloyd’s Rep 205.

<sup>92</sup> “You cannot enforce a document which merely says by way of declaration (in effect) that certain contracts with three numbers should be set against certain other contracts with three other numbers and that [the defendant] ought to pay the difference between them.” [*Margulies Brothers Ltd v Dafnis Thomaidēs & Co (UK) Ltd* [1958] 1 Lloyd’s Rep 205 207].

<sup>93</sup> *African Fertilizers and Chemicals NIG Ltd v BD Shippersnavo GmbH & Co Reederei KG* [2011] EWHC 2542 (Comm) [22]. As MOORE-BICK said in the *Margulies Brothers Ltd* case the Court of Appeal concluded that, not only the award was not an award for a sum certain, but also, it was an unenforceable award “because it did not make its effect sufficiently clear.” (*Tongyuan (USA) International Trading Group v Uni-Clan Ltd* (2001) QDB (Comm) [8]).

<sup>94</sup> (2001) QDB (Comm).

<sup>95</sup> “An award which is effectively couched in purely declaratory terms cannot be enforced as a judgment.” [*Tongyuan (USA) International Trading Group v Uni-Clan Ltd* (2001) QDB (Comm) [8].

<sup>96</sup> *ibidem*.

<sup>97</sup> *West Tankers Inc v Allianz SpA & Generali Assicurazione Generali SpA* [2011] EWHC 829 (Comm) and *West Tankers Inc v Allianz SpA & Generali Assicurazione Generali SpA* [2012] EWCA Civ 27.

<sup>98</sup> Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

**40.** Apart from the fact that, as it was referred before, this case resulted in the infamous decision on the incompatibility of the anti-suit injunctions with the European regulation<sup>99</sup>, it demonstrates that the enforcement of a declaratory award is possible under the Arbitration Act.

**41.** Undoubtedly, the enforcement of declaratory awards seems to be contrary to the ordinary and natural meaning of the enforcement. A declaratory decision “decides some questions as to the respective rights and obligations of the parties”<sup>100</sup>, but it does not compel a party to do or not to do something<sup>101</sup>. However, in the opinion of the Court of Appeal, the impossibility to use the ordinary methods of execution provided under the CPR<sup>102</sup> does not result in the impossibility to give judicial force to a declaratory award on the same footing as a judgment<sup>103</sup>. This broader interpretation of the term “enforcement” is deemed by the court as “closer to the purpose of the [Arbitration] Act and makes better sense in the context of the way in which arbitration works”<sup>104</sup>.

**42.** Following the interpretation made in *Tridon Australia Pty Ltd v ACD Tridon Inc (Incorporated in Ontario)*<sup>105</sup> by the New South Wales Court of Appeal of a provision whose wording was similar to section 66<sup>106</sup>, the High Court of Justice held that “The purpose of sections 66(1) and (2) is to provide a mean by which the victorious party in an arbitration can obtain the material benefit of the award in his favour (...) Where the award is in the nature of a declaration and there is no appreciable risk of the losing party obtaining an inconsistent judgment in a member state which he might try to enforce within the jurisdiction, leave will not generally stand to be granted because the victorious party will not thereby obtain any benefit which he does not already have by virtue of the award per se. (...) Where, however, as here, the victorious party’s objective in obtaining an order under s.66((1) and (2) is to establish the primacy of a declaratory award over an inconsistent judgment, the court will have jurisdiction to make an s.66 order because to do so will be to make a positive contribution to the securing of the material benefit of the award.”<sup>107</sup> This judgment and reasoning of Field J were unanimously upheld later by the Court of Appeal<sup>108</sup>.

**43.** In *African Fertilizers and Chemicals NIG Ltd v BD Shipsnavo GmbH & Co Reederei KG*<sup>109</sup>, a bill of lading incorporated a London arbitration clause from a charterparty. The claimant had to carry the defendant’s cargo from Constanta in Romania to Lagos in Nigeria. The dispute arose out of the grounding of the vessel off Kythira Island when General Average was declared. Although the arbitration had to take place in London, the defendant commenced arbitration and judicial proceedings in Romania. Meanwhile, an English Court gave the claimant, under section 66, permission to enforce a declaratory arbitral award and to enter judgment against the defendant, and the defendant applied to the High Court to set aside that order on the ground that an award made in purely declaratory terms could not be enforced<sup>110</sup>.

**44.** With the enforcement of the award, the Shipowner sought to obtain an English judgment which according to Article 34(3) of Brussel I Regulation would prevent the recognition of an irreconcilable subsequent judgment of the Romanian court.

<sup>99</sup> *West Tankers Inc v Allianz SpA & Generali Assicurazione Generali SpA* [2009] ECJ - C-185/07

<sup>100</sup> *West Tankers Inc v Allianz SpA & Generali Assicurazione Generali SpA* [2011] EWHC 829 (Comm) [22].

<sup>101</sup> *ibidem* [19] and [22].

<sup>102</sup> *ibidem* [25].

<sup>103</sup> *ibidem* [35].

<sup>104</sup> *ibidem* [36].

<sup>105</sup> *Tridon Australia Pty Ltd v ACD Tridon Inc (Incorporated in Ontario)* [2004] NSWCA 146 [11].

<sup>106</sup> Section 33(1) of the Commercial Arbitration Act 1984 reads as follows: “An award made under an arbitration agreement may, by leave of the Court, be enforced in the same manner as a judgment or order of the Court to the same effect, and where leave is so given judgment may be entered in terms of the award.”

<sup>107</sup> *West Tankers Inc v Allianz SpA & Generali Assicurazione Generali SpA* [2011] EWHC 829 (Comm) [28].

<sup>108</sup> *West Tankers Inc v Allianz SpA & Generali Assicurazione Generali SpA* [2012] EWCA Civ 27 [39]–[41].

<sup>109</sup> *African Fertilizers and Chemicals NIG Ltd v BD Shipsnavo GmbH & Co Reederei KG* [2011] EWHC 2542 (Comm).

<sup>110</sup> *ibidem* [1] - [2].

45. Like in the *West Tankers Inc* case, Beatson held that “the mere fact that the award is declaratory in nature need not offend the requirement that, for the purposes of section 66 of the 1996 Act, a judgment in the form of the award entered by the leave of the Court must be capable of enforcement by one of the available methods of execution”<sup>111</sup>. Consequently, the Court dismissed the defendant’s application to set aside the order to enforce the declaratory award.

### 3. Discretion to enforce the declaratory award:

46. Like the New York Convention<sup>112</sup>, the language of sections 66(1) and (2) is permissive<sup>113</sup> and the use of the term “may” results in the recognition of the discretion of the Court whether or not to enforce the award<sup>114</sup>.

47. The discretion is wide and it must be exercised in the interest of justice, embracing issues such as the utility of a declaratory judgment<sup>115</sup>. Thus, the enforcement under these sections is not automatic<sup>116</sup> and the court must value the circumstances of the case and determine whether it is appropriate or not to enforce the award<sup>117</sup>.

48. In *Nomihold Securities Inc v Mobile Telesystems Finance SA*<sup>118</sup>, the Claimant had sold to the Defendant 51% of the shares of a company by a Share Purchase Agreement. The dispute arbitrated by the London Court of International Arbitration (LCIA) was whether the Claimant was entitled to exercise its put option to sell to the Defendant the balance of 49% of the shares under the Put Option Agreement. The Arbitrators concluded that the Claimant was entitled to sell the shares for the agreed purchase price plus damages. The enforcement of the award was granted and then challenged on the ground that the debtor had no assets within the Jurisdiction and, therefore, there was no legitimate interest in exercising the discretion of section 66 as to enforce the award in England.

49. In accordance with the opinion of Burton, unlike monetary award whose enforcement is a straightforward operation, declaratory awards can only be enforced under section 66 when there is any utility or legitimate interest in such enforcement<sup>119</sup>. However, this does not amount to place the onus of proving the utility or legitimate interest on the claimant<sup>120</sup>; on the contrary, the lack of utility or legitimate interest must be raised by the Defendant when the Court considers the objection to the enforcement<sup>121</sup>.

<sup>111</sup> *ibidem* [15].

<sup>112</sup> In *Dardana Ltd v Yukos Oil Company* [2002] EWCA Civ 543, MANCE held that Art.V(1) does not introduce an open or arbitrary discretion. In his view, the use of the term “may” intends to enable the court to consider other circumstances which might affect the *prima facie* right of the Defendant to have the enforcement of the award rejected where one or more of the grounds enlisted in Art.V(1) NYC have been proved. On the other hand, in *Kanoria & Others v Guinness* [2006] EWCA Civ 222, MAY held that the scope of this discretion was restricted to those defects which reveals serious infractions in the arbitration and the award. Besides, COLLINS in *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs of Pakistan* [2010] UKSC 46 held that such discretion should be applied in a way which gives effect to the principles behind the convention.

This recognition of the discretion and the delimitation of its scope of application were applied in *Yukos Capital SARL v OJSC Rosneft Oil Company* [2014] EWHC 2188 (Comm) and in *Nikolay Viktorovich Maximov v OJSC Novolopetsky Metalurgickesky Kombinat* [2017] EWHC 1911. In both cases, English Courts opted for enforcing the award despite the proof of one of the defences of Art.V(1) NYC.

<sup>113</sup> *West Tankers Inc v Allianz SpA & Generali Assicurazione Generali SpA* [2011] EWHC 829 (Comm) [38].

<sup>114</sup> *London Steam Ship Owners Mutual Insurance Association Ltd v The Kingdom of Spain & The State of France* [2013] EWHC 3188 (Comm) [182].

<sup>115</sup> *ibidem* [183].

<sup>116</sup> R.M MERKIN & L. FLANNERY, *Arbitration Act...* op. cit. p. 264. In words of TOULSON: It is not “an administrative rubber-stamping exercise”. (*West Tankers Inc v Allianz SpA & Generali Assicurazione Generali SpA* [2012] EWCA Civ 27 [38])

<sup>117</sup> *West Tankers Inc v Allianz SpA & Generali Assicurazione Generali SpA* [2012] EWCA Civ 27 [38].

<sup>118</sup> [2011] EWHC 2143 (Comm).

<sup>119</sup> *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2011] EWHC 2143 (Comm) [37].

<sup>120</sup> *ibidem* [38].

<sup>121</sup> *ibidem* [39].

50. Following *West Tankers Inc*, since there were in parallel enforcement proceedings elsewhere, the Court found “appropriate for the Claimant to say that there is a legitimate interest in obtaining a decision first from the supervising court”<sup>122</sup> and upheld the decision to enforce the award as a judgment<sup>123</sup>.

51. Similarly, in *London Steam Ship Owners Mutual Insurance Association Ltd v The Kingdom of Spain & The French State*<sup>124</sup>, a P&I Club sought permission pursuant to section 66 to enforce two declaratory awards of non-liability as judgments and/or to have judgments entered in their terms. The Club’s objective was to obtain an English judgment which would take primacy over any potential inconsistent Spanish judgment<sup>125</sup>. The Defendants resisted the application to enforce this award as a matter of jurisdiction – on the ground that they have state immunity – and as a matter of discretion<sup>126</sup>.

52. Having concluded that the state immunity had been lost pursuant to section 9(1) of the State Immunity Act 1978, Hamblen followed *West Tankers Inc* and *African Fertilizers and Chemical NIG Ltd (Nigeria)* and concluded that the possibility to establish the primacy of the arbitral award over any inconsistent judgment which could be rendered in Spain represented a clear utility in the interest of justice and consequently the discretion had to be exercised to grant the leave of the court<sup>127</sup>.

#### 4. Judgment Shield vs Regulation Judgment:

53. Brussels I Bis introduced Recital 12 as a guide as how the arbitration exception<sup>128</sup> is intended to operate<sup>129</sup>. Instead of introducing changes tackling some of the issues which had arisen concerning the relation between the European Regulation and Arbitration, the lawmaker opted for introducing a recital summarizing the doctrine about the delimitation of the exception established by European authorities throughout history. It goes without saying that by doing so, the lawmaker missed an opportunity to introduce changes which could have increased the attractiveness and effectiveness of arbitration as a method to resolve private disputes within the European Union.

54. Under the Regulation, the efficiency of the kind of “*torpedo action*” examined above depends upon whether the decision of English Courts to enforce the declaratory award can be regarded as a judgment which would allow the enforcing party to resist the enforcement of any inconsistent judgment rendered by the courts of any other state member<sup>130</sup>.

55. For the purposes of Brussels I Bis Regulation, a judgment means “any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court”<sup>131</sup>.

56. Either the leave to enforce the arbitral award in the same manner as a judgment or order of the court<sup>132</sup> or the judgment entered in terms of an award<sup>133</sup> satisfy this definition of judgment. However,

<sup>122</sup> *ibidem* [46].

<sup>123</sup> *ibidem* [92].

<sup>124</sup> [2013] EWHC 3188.

<sup>125</sup> *London Steam Ship Owners Mutual Insurance Association Ltd v The Kingdom of Spain & The State of France* [2013] EWHC 3188 (Comm) [186].

<sup>126</sup> *ibidem* [11].

<sup>127</sup> *ibidem* [188].

<sup>128</sup> Art.1(2)(d) Brussels I Bis Regulation.

<sup>129</sup> R.M MERKIN & L. FLANNERY, *Arbitration Act...* op. cit. p. 283–284.

<sup>130</sup> Art.45(1)(c) Brussels I Bis Regulation and Art. 34(3) of the Brussels I Regulation.

<sup>131</sup> Art.2(a) Brussels I Bis Regulation. For an analysis of this provision see: P. MANKOWSKI & M. ULRICH, *Volume I Brussels I Bis Regulation - Commentary* (1st edn, Otto Schmidt KG : Sellier European Law Publishers 2016) 88–94.

<sup>132</sup> s.66(1) AA96.

<sup>133</sup> s.66(2) AA96.

none of them would fall within the scope of the European Regulation: the former because the Fourth Paragraph of Recital 12 establishes that “The Regulation should not apply to (...) any judgment concerning the (...) enforcement of an arbitral award.”; and the latter because in the Second Paragraph of Recital 12 provides that a judgment “given by a court of Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question”.

57. Nevertheless, it has been suggested that Article 45(1)(c) of the Regulation does not require the judgment of the enforcing country to be a Regulation Judgment, and therefore, either the leave, or the judgment entered in terms of the award could be used in England to resist the enforcement of any inconsistent judgment rendered in a member state in breach of the arbitration agreement<sup>134</sup>. This view is supported by Waller LJ in *The Wadi Sudr*<sup>135</sup> where he stated: “Might it make any difference if the English court had already granted a declaration that an arbitration clause was incorporated before the court of a member state considers whether to grant a stay? If in such circumstances a stay were refused by the court of a member state then the question might arise as to whether the English court should recognise the judgment (...) In such a case, the claimant in England could proceed with the arbitration in England so as to obtain a judgment in England; if that were inconsistent with the judgment obtained in the member state then that would provide an answer on its own (see Art.34(3) [of former Brussels I Regulation])”<sup>136</sup>

58. Following this dictum<sup>137</sup>, in *African Fertilizers and Chemicals NIG Ltd*, Beatson assumed that the judgment entered in terms of the award constituted a judgment within the meaning of former Article 34 of Brussels I - current Art.45(1)(c) of Brussels I Bis regulation -. In this case, the defendant argued that in the light of *Solo Kleinmotoren GmbH v Emilio Boch*<sup>138</sup> the judgment entered in terms of the award did not constitute a judgment within the meaning of the regulation because it is a simply mechanism for summary enforcement which does not involve any consideration by the Court of the issues between the parties.<sup>139</sup> The Court dismissed this submission distinguishing *Solo Kleinmotoren GmbH* on the ground that it was a case about a court-approved settlement which, according to the own ruling of the European Court of Justice, was essentially contractual<sup>140</sup>, whilst the outcome of arbitration and the contents of the award are not consensual.<sup>141</sup>

59. It could be argued that the judgment required by Article 45(1)(c) is a Regulation Judgment, or in other words, a court decision which satisfy the definition of Art.2(a) and which falls within the scope of the Regulation. However, this construction of Article 45(1)(c) must be dismissed for the following reasons:

- a) Firstly, it is unsound with the literal wording of the provision – the provision reads as follows: “If the judgment is irreconcilable with a judgment given between the same parties in the Mem-

<sup>134</sup> R.M MERKIN & L. FLANNERY, *Arbitration Act...* op. cit. p. 287. The same conclusion is held by other authors: “The scope of Art. 45 is broader than that of Arts. 29 to 32 because the decision in conflict with the judgment whose recognition is sought, may fall outside the scope of the Regulation, either because it was rendered in a third state – for Art. 45(1)(d) – or because it covers subjects excluded from the material scope of the Regulation – for Art.45(1)(c) and (d).” (P. MANKOWSKI & M. ULRICH, *Volume 1...* op. cit. p. 919).

<sup>135</sup> *National Navigation Co v Endesa Generacion Sa (The Wadi Sudr)* [2009] EWCA Civ 1397.

<sup>136</sup> *ibidem* [63].

<sup>137</sup> *African Fertilizers and Chemicals NIG Ltd v BD Shipsnavo GmbH & Co Reederei KG* [2011] EWHC 2542 (Comm) [28(b)].

<sup>138</sup> “It follows from the foregoing that in order to be a “judgment” for the purposes of the Convention, the decision must emanate from a judicial body of a Contracting State deciding on its own authority on the issue between the parties” (*Solo Kleinmotoren GmbH v Emilio Boch* [1994] C-414/92 [17]).

<sup>139</sup> *African Fertilizers and Chemicals NIG Ltd v BD Shipsnavo GmbH & Co Reederei KG* [2011] EWHC 2542 (Comm) [9].

<sup>140</sup> *Solo Kleinmotoren GmbH v Emilio Boch* [1994] C-414/92 [18].

<sup>141</sup> *African Fertilizers and Chemicals NIG Ltd v BD Shipsnavo GmbH & Co Reederei KG* [2011] EWHC 2542 (Comm) [28(a)].



ber State addressed” (emphasis added) –. Had the lawmaker intended to restrict Art.45(1)(c) to Regulation Judgments, it would have expressly established this condition<sup>142</sup>.

- b) Secondly, in the *Solo Kleinmotoren GmbH* case, the Court held that the definition of “judgment” established in Article 2(a) of the Regulation applies to all the provisions in which that term is used<sup>143</sup> and, as it was referred above, in order to be considered a judgment, this definition does not require the decision of the court to be on a matter covered by the Regulation. Therefore, the fact that only the judgments on civil and commercial matters not excluded by Art.1(2) are to benefit from the recognition and enforcement which the Regulation provides<sup>144</sup> does not mean that others judicial decisions are not deemed as judgments as well.
- c) Thirdly, since the grounds to refuse the recognition and enforcement of a judgment constitutes obstacles to the free movement of judgments, they must be interpreted strictly<sup>145</sup>. Certain manipulation of the provisions’ verbatim might be admissible provided that the manipulation is sound with the Regulation; however, establishing that under Art.45(1)(c) “a judgment” is a decision which not only must meet the requirements of Art.2(a), but also fall within the scope of the Regulation, it is not an acceptable manipulation but the creation of an autonomous definition of the term “judgment” for the purposes only of Art.45(1)(c).

**60.** Consequently, regarding the position of the complying party to an English arbitration clause, the decisions adopted by English courts pursuant to section 66 could have two effects: firstly, under Article 45(1)(c) of Brussels I Bis, they would entitle the party to resist in England the enforcement of any inconsistent judgment rendered later in another member state<sup>146</sup>; but also, they could have a preclusive effect<sup>147</sup> in the jurisdiction where the party in breach commenced the judicial proceedings provided that such jurisdiction “recognises any principle similar to English principle of issue estoppel”<sup>148</sup>.

**61.** Similarly, since Article 45(1)(d) of Brussels I Bis does not require the irreconcilable judgment given in another Member state to be on a matter covered by the Regulation, it can be concluded that the decisions adopted by English Courts, albeit not recognisable in any other member state under the Regulation<sup>149</sup>, could instead be used to resist the enforcement of the Regulation Judgment in other

<sup>142</sup> “[This] must have been intentional, as there could be many non-Regulation judgments given by the courts in one country (e.g. in relation to insolvency proceedings, which are excluded by Art. 1.2(b)) that might be inconsistent in some material way with a latter incoming judgment between the same parties.” [R.M MERKIN & L. FLANNERY, *Arbitration Act...* op. cit. p. 287]

<sup>143</sup> *Solo Kleinmotoren GmbH v Emilio Boch* [1994] C-414/92 [15] and [20].

<sup>144</sup> P. MANKOWSKI & M. ULRICH, *Volume 1...* op. cit. p. 88.

<sup>145</sup> *Solo Kleinmotoren GmbH v Emilio Boch* [1994] C-414/92 [20]. In this sense, “it must be emphasized that [the exceptions contained in Art.45(1) of Brussels I Bis] are interpreted strictly and, even when applicable, are construed narrowly.” [J. FITCHEN, ‘Enforcement of Civil and Commercial Judgments under the New Brussels I Regulation (Regulation 1215/2012)’ (2015) 26 *International Company and Commercial Law Review* 145].

<sup>146</sup> “El art.45.1.c) RB I-bis se refiere a una “resolución dictada entre las mismas partes en el estado miembro requerido”, por lo que una resolución dictada en estado miembro por la que se otorga validez y eficacia a un laudo arbitral es una “resolución (art. 2.a RB I-bis) que puede detener el reconocimiento de una resolución dictada en otro estado miembro.” (A.L. CALVO CARAVACA, J. CARRASCOSA GONZÁLEZ & C. CAAMIÑA DOMINGUEZ, *Litigación Internacional...* op. cit. p. 577). Similarly, “if the award is, however, incorporated into a national judgment of the requested state, Art.45(1)(c) could apply and lead to refusing the enforcement of the judgment rendered in another member state.” (P. MANKOWSKI & M. ULRICH, *Volume 1...* op. cit. p. 922).

<sup>147</sup> *Sovarex SA v Romero Alvarez SA* [2011] EWHC 1661 (Comm) [57].

<sup>148</sup> *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs of Pakistan* [2010] UKSC 46 [29]. In accordance with DIPLOCK “In English Law when a plaintiff who, basing his claims on a particular set of facts, has already sued the defendant to final judgment in a foreign Court of competent jurisdiction and lost, then seeks to enforce a cause of action in an English Court against the same defendant based on the same set of facts, the defendant’s remedy against such double jeopardy is provided by the doctrine of issue estoppel.” (*The Sennar (No2)* [1985] 1 Lloyd’s Rep 521 523). Hence, as established by BRANDON OF OAKBROOK: “In order to create an estoppel of that kind, 3 requirements have to be satisfied. The first requirement is that the judgment in that earlier action on as creating an estoppel must be (a) of a Court of competent jurisdiction, (b) final and conclusive and (c) on the merits. The second requirement is that the parties (or privies) in the earlier action relied on as creating an estoppel and those in the later action in which that estoppel is raised as a bar, must be the same. The third requirement is that the issue in the later action, in which the estoppel is raised as a bar, must be the same issue as the decided by the judgment in the earlier action”. [*ibidem* p. 526].

<sup>149</sup> *Sovarex SA v Romero Alvarez SA* [2011] EWHC 1661 (Comm) [57].

European jurisdictions different from the one where it was rendered. However, in this scenario, the bar is set higher and the decisions adopted by English Courts pursuant to section 66 would only be capable of being used as shields where the following requirements are satisfied:

- a) They must have the same parties as the Regulation Judgment sought to be recognised and enforced.
- b) They must have the same cause of actions as the Regulation Judgment sought to be recognised and enforced.
- c) And finally, the English judgments must fulfil the conditions for their recognition established on the legislation of the member state addressed. Therefore, in the examined scenario, the effectivity as a shield of the English judgment entered in terms of the declaratory award is uncertain since it is to depend upon a non-homogenous and commonly adopted set of rules: the national legislation on recognition and enforcement of foreign judgments.

**62.** Alternatively, it has also been argued that the interested party could shield himself, not behind the ground contained in Art.45(1)(c), but behind the public policy exception established in Art.45(1)(a) of the Regulation. For example, in *The Wadi Sudr* case, it was argued that the enforcement of a judgment delivered by a Spanish Court in contravention of a valid arbitration agreement was contrary to English public policy. Moore-Bick dismissed this submission holding that the public policy exception cannot be “invoked on the ground that the foreign court has reached a decision which the court of the recognising or enforcing state thinks is wrong”<sup>150</sup>, on the other hand, its application is restricted to a “very narrow class of cases”<sup>151</sup> where recognition “would be inconsistent with a fundamental principle of the legal order of the enforcing member state”<sup>152</sup>. Therefore, he concluded that “it cannot be said that the failure on the part of the Spanish court in good faith to give effect in this case to an arbitration agreement imperfectly spelt out in the bill of lading (but in the eyes of English Law sufficiently incorporated by reference) would involve a manifest breach of a rule of law regarded as essential in the legal order of the United Kingdom or of a right recognised as being fundamental within that legal order.”<sup>153</sup>

**63.** Finally, another possible solution to our problem could be found in the New York Convention 1958. Brussels I Bis in the third paragraph of Recital 12 recognises that the Convention is to take precedence over the Regulation<sup>154</sup> and Article 73(2) provides that the regulation “shall not affect the application of the 1958 New York Convention.” Though the consequences of this precedence are unclear, it has been suggested that in case of contradiction between a conventional award and a regulation judgment, the former should be enforced instead of the latter<sup>155</sup>. In my opinion, some qualifications must be made to this view:

<sup>150</sup> *National Navigation Co v Endesa Generacion Sa (The Wadi Sudr)* [2009] EWCA Civ 1397 [125] and [130].

<sup>151</sup> *ibidem* [131].

<sup>152</sup> *ibidem* [130]. In the words of the European Court of Justice: “Recourse to the public policy clause (...) can be envisaged only where recognition or enforcement of the judgment delivered in another contracting state would be at variance to an unacceptable degree with the legal order of the state in which enforcement is sought inasmuch as it infringes a fundamental principle. (...) the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement is sought or of a right recognised as being fundamental within that legal order.” (*Dieter Krombach v André Bamberski* [2000] ECJ 1-1935 C-7/98 [37]).

<sup>153</sup> *National Navigation Co v Endesa Generacion Sa (The Wadi Sudr)* [2009] EWCA Civ 1397 [131].

<sup>154</sup> “An essential matter is that [Brussels I Bis] expressly voices the primacy of the New York Convention. The Recital (12 para.3) states that the New York Convention “takes precedence over this Regulation”, and according to art.73(2) this Regulation shall not affect the application of the 1958 New York Convention”. (T. LINNA, ‘The Protection of Arbitration Agreements and the Brussels I Regulation’ [2016] 19 International Arbitration Law Review 70, 72).

<sup>155</sup> “[The Brussels I Bis Regulation] allows parallel proceedings, but in the end, the arbitral award would be stronger because of the priority of the NYC.” (*ibidem*). Similarly, “Even if this part of the Recital is particularly unclear, it apparently implies that if the award contradicts the judgment rendered in another member state, and when both should be enforced (the judgment under Brussels I Bis and the award under the New York Convention) priority should be given to the award.” (P. MANKOWSKI & M. ULRICH, *Volume 1... op. cit.* p. 923).

- a) Were this precedence existent, it would not be applicable to the English declaratory award registered in England under section 66 because, for the purposes of the act, that award is domestic and the New York Convention deals with the enforcement of awards “made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention”<sup>156</sup>.
- b) After proclaiming the general duty of the Court to refer to arbitration those disputes in respect of which the parties have made an arbitration agreement, the Convention establishes that the seized court will be exempted of this duty where it “finds that the said agreement is null and void, inoperative or incapable of being performed”<sup>157</sup>. Since the determination of the agreement’s nullity, inoperability or incapability to be performed is a necessary precedent to the Court’s jurisdiction to rule on the substance matter of the dispute, it is obvious that neither the Court has breached its Conventional duty, nor the award will prevail over the judgment within the Court’s jurisdiction.
- c) Only in a country other than the United Kingdom and the country where the Regulation Judgment has been rendered, this approach could be effective because, according to the Convention, the courts of the contracting state are compelled to recognize arbitral awards as binding and enforce them<sup>158</sup>. Nevertheless, in this situation, it is very doubtful that the Court will opt for honouring a declaratory award instead of the Judgment on the merits from a European peer who has determined that, due to the nullity, inoperability or incapability to be performed of the arbitration agreement, such award ought not to exist. On the other hand, it is probable that an award on the merits could take precedence over the Regulation Judgment not only due to the precedence of the Convention over the Regulation but also, as some German scholars assert, via an analogical application of Art.41(1)(d)<sup>159</sup>. In this scenario, the chances of success would be higher where the Regulation Judgment has not been rendered either in the country in which the award was made, or in the country under the law of which the award was made, since, for the purposes of the Convention, the Courts of these two fora are the only ones capable to produce a decision regarding the nullity or suspension of the award with binding consequences on the rest of contracting states<sup>160</sup>.

#### IV. Conclusions

**64.** The impossibility to grant anti-suit injunctions in case of breach of an English arbitration agreement by commencing judicial before the courts of a member state of the European Union other than the United Kingdom on civil and commercial matters covered by Brussels I Bis Regulation leaves the complying party in a weak situation. Provided that the party in breach has decided to bring in the dispute before the Courts of a country whose legal system is to regard the arbitration clause as null and void, inoperative or incapable of being performed, the complying party can take for granted that a claim for a stay of the proceedings is to be refused and a judgment on the substance matter is to be rendered. We call this decision “*Regulation Judgment*” because, in accordance with Paragraph 3 of Recital 12 of Brussels I Bis Regulation, it will be able to take advantage of the system of recognition and enforcement provided in the European Regulation. The question which this project has tried to answer is: can the complying party benefit from the English arbitration clause to obtain an award ruling on the validity of the agreement which can subsequently be converted in a judgment under the summary procedures of section 66 and which would entitle him to resist the later recognition and enforcement of the inconsistent Regulation Judgment?

<sup>156</sup> s.100(1) AA96. The United Kingdom used the option established in Art.I(3) NYC to, on the basis of reciprocity, restrict the application of the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.

<sup>157</sup> Article II(3) NYC.

<sup>158</sup> Article III NYC.

<sup>159</sup> P. MANKOWSKI & M. ULRICH, *Volume 1* ... op. cit. p. 921.

<sup>160</sup> Article V(1)(e) NYC.

65. In order to answer this question, it has been firstly examined the regulation established in section 66 of the Arbitration Act 1996. The enforcement under this section is restricted to those awards made pursuant to an arbitration agreement which satisfies the broad definition contained in the Act. Though initially controversial, the use of this provision to enforce declaratory awards is admitted by English Courts provided that the claimant can obtain any positive benefit from its enforcement, such as establishing an issue estoppel<sup>161</sup>.

66. The main problem is whether the judgment entered in terms of the declaratory award can be used as a shield against the recognition and enforcement of the Regulation Judgment. Taking into account that Articles 45(1)(c) and (d) do not require the inconsistent judgment to be on matters covered by the European Regulation, the decisions adopted by English Courts pursuant to section 66 of the Act would entitle the complying party to resist the enforcement of the Regulation Judgment either in the United Kingdom (under Article 45(1)(c)) or, provided that they satisfy the requirements established in Article 45(1)(d), in any other European jurisdiction other than the one which has rendered the “*Regulation Judgment*”.

67. Taking into account the conditions established by Article 45(1)(d) - especially the recognisability under the legislation on recognition and enforcement of foreign judgments of the member state addressed –, it can be held that the success of the examined defensive strategy is more certain where the “*Regulation Judgment*” is sought to be recognised or enforced in the United Kingdom. Consequently, that strategy would be only recommendable where the complying party has most of its assets within the jurisdiction of English Courts.

68. Having discarded the use of the public policy defence established in Art.45(1)(a) of Brussels I Bis Regulation, the complying party would also be able to resist the enforcement of the “*Regulation Judgment*” if the New York Convention 1958 prevails over the Regulation in case of conflict between a Conventional Award and a Regulation Judgment. However, the effects of this precedence is uncertain and it would only apply to member states other than the United Kingdom (because for the purposes of this country the award would be domestic and it would not be enforceable under the Convention) and the country where the Regulation Judgment has been rendered (because for this jurisdiction the award should not exist since the arbitration agreement is null and void, inoperative or incapable of being performed).

69. Finally, it must be kept in mind the consequences of Brexit. If the United Kingdom finally leaves the European Union, the doctrine of the European Courts and the European legislation will no longer apply. Consequently, against the *Torpedo Action* examined in these lines, British Courts will be able to protect the arbitration agreement not only through anti-suit injunction as it occurs nowadays with non-EU proceedings<sup>162</sup>, but also, they will be able to refuse the recognition and enforcement of the “*Regulation Judgment*” on the ground that its recognition or enforcement is contrary to the British public policy. As Moore-Brick said “I do not think that it would be contrary to public policy to recognise the Judgment even if an English Court would have held that the parties had agreed to refer the dispute to arbitration. Different consideration might arise if the Judgment had been obtained through conscious wrongdoing, for example by pursuing proceedings in defiance of an injunction”<sup>163</sup> (emphasis added).

<sup>161</sup> C. AMBROSE, H. SUMPTION & K. MAXWELL, *London Maritime*... op. cit. para 23.11.

<sup>162</sup> *Shashoua & Ors v Sharma* [2009] EWHC 957 (Comm).

<sup>163</sup> *National Navigation Co v Endesa Generacion Sa (The Wadi Sudr)* [2009] EWCA Civ 1397 [125].