EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANGUILLA

AXAHCVAP2014/0004

In The Matter of the Revised Statutes of Anguilla, Chapter A105, the Arbitration Act

and

The Civil Procedure Rules 2000 Part 43.10

and

In The Matter of an Application for the enforcement of an arbitration award

BETWEEN:

[1] RICHARD VENTO
[2] LANA VENTO
[3] GAIL VENTO
[4] RENEE VENTO
[5] NICOLE MOLLISON
[6] FIRST NEVIS TRUST COMPANY LTD
(as trustee of MUCH LOVE INTERNATIONAL DYNASTY TRUST
[7[VITA INTERNATIONAL DYNASTY TRUST
[8] LOKI INTERNATIONAL DYNASTY TRUST
[9] FOUNDERS INTERNATIONAL DV DYNASTY TRUST)

Appellants

and

[1] KEITHLEY LAKE
[2] FIDELITY INSURANCE CO, LTD
[3] ALLIANCE ROYALTIES, INC
[4] WESTMINSTER, HOPE & TURNBERRY, LTD
[5] WATERBERRY, LTD

Respondents

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mr. Gerhard Wallbank and Ms. Rayana Dowden for the Appellants
Mr. D. Michael Bourne and Ms. Dana Campbell for the Respondents

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2015: March 24;
October 15.

Arbitration agreement – Foreign arbitral award – Enforcement of foreign arbitral award in jurisdiction – Whether learned judge erred in dismissing appellants' application to register and enforce final arbitral award in jurisdiction – Arbitration Act 1996 (UK) – Means of enforcement of arbitral awards under Arbitration Act 1996 (UK) – Whether learned judge misdirected herself as to correct interpretation of Arbitration Act 1996 (UK) as imported into the laws of Anguilla – Whether learned judge erred in construction of s. 66 of Arbitration Act 1996 – Whether learned judge had jurisdiction under s. 66 of Arbitration Act 1996 to direct that judgment be entered in terms of final arbitral award

The appellants received a final arbitral award in the amount of US$7,419,000.00. The award was issued against the respondents and others, and was made pursuant to a written arbitration agreement executed in the United States Virgin Islands ("the USVI"). The respondents are ordinarily resident in Anguilla and/or companies incorporated under the Companies Act[1] of Anguilla. The arbitration agreement provided that the governing law of the arbitration would be the law of the USVI and it was further agreed that the award would be binding without any right of appeal. The parties would be bound by the decision of the arbitrator and the award would be enforced both in foreign and United States jurisdictions without procedural or substantive objections to enforcement. It was also agreed that the award could be enforced in any location where the losing parties' assets could be located.

The appellants made an application to a judge in the court below for an order to register and enforce the final arbitral award as a judgment against the respondents, pursuant to sections 66 and 101 of the United Kingdom Arbitration Act 1996 ("the Arbitration Act 1996"). This Act applies to Anguilla by virtue of section 1 of the Arbitration Act[2] of Anguilla. The learned judge dismissed the appellants' application, holding that section 66 of the Arbitration Act 1996 'is not a substantive provision on the enforcement of foreign awards or awards capable of enforcement under any other enactment or rule of law'. She ultimately made the determination that 'section 66 applies in Anguilla to the extent only that it deals with arbitrations governed by Anguillan law' and that since the arbitration in the present proceedings was not governed by Anguillan law, 'section 66 cannot be used as the statutory basis for the enforcement of an award that is required by [rule 43.10 of the Civil Procedure Rules 2000]'. The learned judge accordingly dismissed the appellants' application and awarded costs to the respondents assessed at US$7,000.00.

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[1] Revised Statutes of Anguilla, Chapter C65.
[2] Revised Statutes of Anguilla, Chapter A105.

The appellants appealed, contending that the learned judge misdirected herself as to the correct interpretation of the Arbitration Act 1996 as imported into the laws of Anguilla, in relation to the registration and enforcement of a foreign arbitral award. They argued, inter alia that section 66 does not expressly or impliedly state that it is limited to the enforcement of domestic awards only and upon a proper interpretation, both domestic and foreign awards can be enforced by the Anguilla court.

Held: allowing the appeal and setting aside the orders of the learned judge; ordering that the arbitration award be registered so that it may be enforceable as if it were an order of the court; ordering that the said award be enforced as if it were an order of the court; and awarding costs to the appellants in the court below of US$7,000.00 and costs on the appeal to be assessed if not agreed within 21 days, that:

1. The **Arbitration Act 1996** sets out the important principles of the law of arbitration in Anguilla in a logical order and in clear language that is user-friendly and free from technicalities. The court is therefore enjoined to construe the Act in a manner that follows and gives effect to its clear language.

   Lesotho Highlands Development Authority v Impregilo SpA and Others [2005] UKHL 43 applied; **National Ability SA v Tinna Oils & Chemicals Ltd** [2009] EWCA Civ 1330 applied.

2. Section 66 of the **Arbitration Act 1996** applies generally to any arbitration under the Act. It is a statutory provision which provides a procedure for enabling an award made in consensual arbitral proceedings to be enforced. There are four different means of enforcing an arbitral award under section 66. The victorious party has the option of: (i) enforcing the award by an ordinary action in the High Court pursuant to section 66(4); (ii) enforcing the award under the Geneva Convention; (iii) enforcing the award under the New York Convention; or (iv) enforcing the award in the same manner as a judgment, pursuant to section 66 (1) and (2) of the Act. This last alternative is a summary process which is by far the most common form of enforcing an award because of its convenience. Section 66 provides in subsections (1) and (2), a means by which the successful party can obtain the benefit of the award other than by suing on it. The arbitral award in the present case is not a Geneva Convention award, the New York Convention does not apply to Anguilla, and the appellants have not instituted an action on the award. What the appellants have sought to do is invoke section 66 (1) and (2) of the **Arbitration Act 1996**.

   West Tankers Inc v Allianz Spa and Another [2012] EWCA Civ 27 applied; **National Ability SA v Tinna Oils & Chemicals Ltd** [2009] EWCA Civ 1330 applied.

3. Section 2(2)(b) of the **Arbitration Act 1996**, states that section 66 applies even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined. This section is clear and unambiguous and the court must give effect to its clarity. It expressly provides for the application

of section 66 irrespective of the seat of the arbitration or even if no seat has been determined or designated. Therefore, section 66 is not expressly or by necessary implication limited in its purview to the enforcement of domestic awards only. The learned judge accordingly erred in finding that section 66 does not apply to the enforcement of "foreign" awards. The fact that the seat of the arbitration is the USVI, does not derogate from the applicability of section 66.

JUDGMENT

[1] **BAPTISTE JA**: The appellants are the recipients of a final arbitral award issued against the respondents and others in the sum of US$7,419,000.00. The respondents are ordinarily resident in Anguilla and/or companies incorporated under the **Companies Act**[3] of Anguilla. The award was made pursuant to a written arbitration agreement executed in the United States Virgin Islands on or about 13th August 2012. The agreement provided that the governing law of the arbitration would be the law of the United States Virgin Islands. The parties to the agreement agreed that the award would be binding without any right of appeal. Additionally, they would be bound by the decision of the arbitrator and that the award would be enforced in both foreign and United States jurisdictions without procedural or substantive objections to enforcement and that it could be enforced in any location where the losing parties' assets could be located.

[2] The appellants applied to a judge in the court below for an order to register and enforce the final arbitral award as a judgment against the respondents. The application was made pursuant to sections 66 and 101 of the United Kingdom **Arbitration Act 1996** ("the Arbitration Act 1996"), which applies to Anguilla by virtue of section 1 of the **Arbitration Act**[4] of Anguilla. The learned judge dismissed the application and awarded costs to the respondents assessed at US$7,000.00. This appeal stems from the dismissal of the application by the judge.

[3] Revised Statutes of Anguilla, Chapter C65.
[4] Revised Statutes of Anguilla, Chapter A105.

[3] In dismissing the application the learned judge reasoned at paragraph 6 of her judgment that:

> "I am of the view that this section [section 66 of the Arbitration Act 1996] relates to applications for the enforcement of UK domestic arbitral awards governed by UK law. It is not a substantive provision on the enforcement of foreign awards or awards capable of enforcement under any other enactment or rule of law. In fact the section expressly directs attention to the fact that one must look elsewhere in the Act for provisions governing the enforcement of Geneva Convention or New York Convention Awards. The Act deals specifically with such awards in a separate Part III that is headed "**Recognition and Enforcement of Certain Foreign Awards**". In contrast, therefore, section 66 applies in Anguilla to the extent only that it deals with arbitrations governed by Anguillan law. In the present situation, the arbitration was not governed by Anguillan law and therefore section 66 cannot be used as the statutory basis for the enforcement of an award that is required by Part 43.10 of CPR 2000."

[4] On appeal, the appellants essentially contended that the learned judge misdirected herself as to the correct interpretation of the **Arbitration Act 1996** as imported into the laws of Anguilla in relation to registration and enforcement of a foreign arbitration award. The grounds of appeal essentially deal with the application or applicability and construction of section 66 of the **Arbitration Act 1996**. I now set out the grounds of appeal.

[5] Ground 1 alleges that the learned judge erred in law in concluding that section 66 of the **Arbitration Act 1996** is 'not a substantive provision on the enforcement of foreign awards'. Mr. Wallbank contends that this finding was wrong in law in that, as the learned judge otherwise correctly stated at paragraph 4 of her judgment, 'Section 2(2)(b) of the UK Act provides that section 66 which relates to enforcement of arbitral awards applies even if the seat of the arbitration is outside England and Wales or Northern Ireland or if no seat has been designated or determined.' It was thus not open to the court to find that section 66 does not apply to enforcement of "foreign" awards.

[6] Ground 2 states that the learned judge erred in law in finding that 'the section expressly directs attention to the fact that one must look elsewhere in the Act for

provisions governing the enforcement of Geneva Convention or New York Convention Awards. The Act deals specifically with such awards in a separate Part III that is headed "**Recognition and Enforcement of Certain Foreign Awards**."' She erred in that she failed to apply section 66 as a means of enforcement of arbitration awards which is in addition or alternative to other means of enforcement. In particular, although the learned judge correctly quoted the wording of section 66, she overlooked or incorrectly construed the highlighted words in the section, set out below:

> "**Nothing in this section affects** the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the Arbitration Act 1950 (enforcement of awards under Geneva Convention) or the provisions of Part III of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award."[5] (Emphasis added).

If the learned judge did not overlook these words, she incorrectly construed them as qualifying the application of section 66. This construction was not open to the court, as the ordinary meaning of the words is to render the provisions of section 66 additional to, and independent of, other statutory, common law or Conventional means of enforcing arbitration awards.

[7] Ground 3 complains that the learned judge erred in law when she determined that 'In contrast, therefore, section 66 applies in Anguilla to the extent only that it deals with arbitrations governed by Anguillan law', in that the limitation 'to the extent only that it deals with arbitrations governed by Anguillan law' is not contained in, nor to be implied from the provisions, correctly construed, of the **Arbitration Act 1996**. (I note that in his oral submissions, Mr. Bourne, the respondents' counsel, stated that there is no pre-condition in the Act for Anguilla law to be the governing law. He accordingly conceded ground 3 in relation to this appeal. Notwithstanding this concession Mr. Bourne maintained that section 66 was inapplicable as an enforcement mechanism to this award.)

[5] See s. 66(4) of the Arbitration Act 1996.

[8] Ground 4 alleges that the learned judge erred in law when she concluded that 'In the present situation, the arbitration was not governed by Anguillan law and therefore section 66 cannot be used as the statutory basis for the enforcement of an award that is required by Part 43.10 of CPR 2000', in that she wrongly considered that the arbitration would have had to be governed by Anguillan law for section 66 to be used as a statutory basis for enforcement of the arbitration award.

[9] Ground 5 states that the learned judge erred in failing to consider and give effect to the contractual term of the parties in the arbitration agreement (although she mentioned it) that 'the award could be enforced in both foreign and US jurisdictions without procedural or substantive objections to enforcement and that it could be enforced in any location where the losing parties' assets could be located.'[6]

[10] In his submission, Mr. Wallbank, counsel for the appellant, stated that section 66 of the **Arbitration Act 1996**, provides for the enforcement of foreign awards and section 66(4) specifies that nothing in section 66 affects the recognition and enforcement of awards under Part II and III of the Act – which deals with Geneva and New York Convention Awards – or any other enactment or rule of law. Mr. Wallbank argued that the learned judge adopted an impermissibly restricted construction to section 66 which militated against the natural and ordinary meaning of the words 'nothing in this section affects'. Mr. Wallbank contended that the ordinary meaning of these words renders the provision of section 66 additional to, and independent of other statutory, common law, or Conventional means of enforcement. Mr. Wallbank also contended that section 66 does not expressly or impliedly state that it is limited to the enforcement of domestic awards only and submitted that upon a proper interpretation, both domestic and foreign awards can be enforced by the Anguilla court.

[11] Mr. Wallbank argued that the learned judge's interpretation failed to have regard to the fact that section 2(2)(b) of the **Arbitration Act 1996** expressly and specifically

[6] See para. 1 of the judgment of the learned judge.

renders section 66 applicable where the seat of the arbitration is outside the jurisdiction (rendering it a foreign award) or where no seat has been designated. It is common ground between the parties that the arbitration award is not capable of being enforced in Anguilla by either the Geneva or New York Convention. The award is not a Geneva Convention award and the New York Convention does not apply to Anguilla. Mr. Wallbank submitted that Part III of the **Arbitration Act 1996** does not deal with the enforcement of all foreign awards; it makes provisions for the enforcement of Geneva and New York Convention awards. Mr. Wallbank submitted that section 66 read with section 2(2)(b) provides for the enforcement of foreign awards which cannot be enforced pursuant to the Geneva or New York Conventions. Mr. Wallbank further submitted that there is no statutory basis for the requirement that the arbitration should be subject to Anguilla law as a pre-requisite to the application of section 66.

[12] The respondents' position is influenced heavily by what they refer to as the legislative framework in Anguilla. Their counsel, Mr. Bourne, submitted that section 66 cannot be used as a statutory basis for the enforcement of this award in circumstances where Anguilla has neither ratified the New York Convention, expressly given it force in domestic law, nor had it extended to it by order in council. Mr. Bourne argued that the Anguilla Act[7] did not incorporate the whole of the **Arbitration Act 1996** and referred to the incorporating provision in Anguilla which states:

> "The Arbitration Act (14 Geo. 6 c. 27) (UK) [the 1950 Arbitration Act] as amended from time to time shall be, and the same is hereby declared to be henceforth, in force in Anguilla, and all the provisions of the Act, so far as the same are applicable, shall *mutatis mutandis* apply to all proceedings relating to arbitration within Anguilla."

Mr. Bourne posited that the language of the section made it clear that only 'the provisions of the Act, so far as the same are applicable' have force in Anguilla and submitted that these words are limiting words on the reception of the **Arbitration Act 1996**. The section further directs that the application of the **Arbitration Act**

[7] The Arbitration Act, Revised Statutes of Anguilla, Chapter A105

1996 shall be mutatis mutandis. Mr. Bourne accordingly submitted that it would be improper to apply a literal construction of the **Arbitration Act 1996** to Anguilla as this would achieve absurd results clearly not intended by Parliament. Further, the plain meaning of section 66 as advanced by the appellants would have resulted in the proviso to the Act being rendered moot.

[13] Mr. Bourne stated that section 2(2)(b) of the **Arbitration Act 1996** gave legislative expression to a United Kingdom policy decision that the same rules should apply to arbitral awards wherever made. Mr. Bourne argued that while section 2(2)(b) would on a plain reading make section 66 applicable to awards for which the seat was outside Anguilla, it must be read in light of the restrictions inherent in the Anguilla Act. Mr. Bourne submitted that there being no provision in domestic law for the recognition and enforcement of New York Convention awards, section 2(2)(b) cannot permit section 66 to do that which as a whole the enabling statute does not. Mr. Bourne argued that it is not the extra-territorial seat that causes the application for enforcement to fail. The fact is that the Anguilla Legislature has not provided for the enforcement of these kinds of awards the same way the United Kingdom has.

[14] Mr. Bourne argued that in Anguilla there is no provision under section 66 for the enforcement or recognition of this award and as such section 66 is inapplicable as a means of enforcement of this award. Mr. Bourne further contended that section 66 was not intended to work without the applicable provisions of the New York Convention. I will expand on this aspect of Mr. Bourne's submissions later in this judgment.

[15] Having set out the fundamental contentions of the parties, it is clear that the resolution of this appeal depends on a proper construction of the **Arbitration Act 1996**. This would also put in proper perspective the respondents' position with respect to the incorporating provision in Anguilla. The critical question in this appeal is whether the learned judge had jurisdiction under section 66 of the

Arbitration Act 1996 to direct that judgment be entered in terms of the award. In deciding that issue, it is useful to pay regard to the ethos of the **Arbitration Act 1996**, the proper way of interpreting the Act, the different means of enforcement available under the Act, as well as the purpose and effect of section 66, which, as has been seen, plays a central role in this appeal.

[16] In **Lesotho Highlands Development Authority v Impregilo SpA and Others**,[8] Lord Steyn dealt with the ethos of the 1996 Act. He stated at paragraph 17:

> "It is important to take into account the radical nature of the changes brought about by the **Arbitration Act 1996**. Lord Mustill and Stewart Boyd QC *Commercial Arbitration* (*2001 Companion Volume to the Second Edition*, preface) stated:
>
> > 'The Act has however given English arbitration law an entirely new face, a new policy, and new foundations. The English judicial authorities ... have been replaced by the statute as the principal source of law. The influence of foreign and international methods and concepts is apparent in the text and structure of the Act, and has been openly acknowledged as such. Finally, the Act embodies a new balancing of the relationships between parties, advocates, arbitrators and courts which is not only designed to achieve a policy proclaimed within Parliament and outside, but may also have changed their juristic nature.'"

[17] At paragraph 18, Lord Steyn referred to the large role Lord Wilberforce played in securing the enactment of the Arbitration Bill. During the second reading of the Bill in the House of Lords, Lord Wilberforce explained the essence of the new philosophy enshrined in it: Hansard, col 778, 18 January 1996. He said:

> "I would like to dwell for a moment on one point to which I personally attach some importance. That is the relation between arbitration and the courts. *I have never taken the view that arbitration is a kind of annex, appendix or poor relation to court proceedings. I have always wished to see arbitration, as far as possible, and subject to statutory guidelines no doubt, regarded as a freestanding system, free to settle its own procedure and free to develop its own substantive law – yes, its substantive law*. I have always hoped to see arbitration law moving in that direction. That is not the position generally which has been taken by English law, which adopts a broadly supervisory attitude, giving substantial powers to the court of correction and otherwise, and not really defining with any exactitude the relative positions of the arbitrators and the courts.

[8] [2005] UKHL 43.

> Other countries adopt a different attitude and so does the UNCITRAL model law. The difference between our system and that of others has been and is, I believe, quite a substantial deterrent to people to sending arbitrations here. …
>
> How then does this Bill stand in that respect? After reading the debates and the various drafts that have been moving from one point to another, I find that on the whole, although not going quite as far as I should personally like, it has moved very substantially in this direction. It has given to the court only those essential powers which I believe the court should have; that is, rendering assistance when the arbitrators cannot act in the way of enforcement or procedural steps, or, alternatively, in the direction of correcting very fundamental errors.' (My emphasis)"

Lord Steyn remarked that 'Characteristically, Lord Wilberforce did not express his understanding of the new Arbitration Bill in absolute terms. But the general tendency of his observations, and what Parliament was being asked to sanction, is clear. It reflects the ethos of the 1996 Act.'

[18] At paragraph 19 Lord Steyn referred to the approach to the interpretation of the 1996 Act. His Lordship stated:

> "It is also necessary to consider how the 1996 Act should be interpreted. In his speech already cited Lord Wilberforce pointed out that 'Many laymen have to participate in arbitrations and many arbitrations are conducted by people who are not lawyers' (col 777). Can they realistically be asked to interpret the 1996 Act in the light of pre-existing case law? Clearly not. In *Seabridge Shipping AB v AC Orssleff's EFtF's A/S* [1999] 2 Lloyd's Rep 685, 690 Thomas J (now Thomas LJ), a judge with enormous experience in this field, made valuable observations on which I cannot improve. He said, at p 690:
>
> > 'One of the major purposes of the **Arbitration Act 1996** was to set out most of the important principles of the law of arbitration of England and Wales in a logical order and expressed in a language sufficiently clear and free from technicalities to be readily comprehensible to the layman. It was to be "in user friendly language". (See the Report on the Bill and the Act made by the Departmental Advisory Committee, published in Arbitration International, vol 13, at p 275.)'
>
> [T]his has been the actual achievement of the Act ... . International users of London arbitration should, in my view, be able to rely on the clear 'user-friendly language' of the Act."

Lord Steyn respectfully endorsed the observation in '*Seabridge'.*

[19] In **National Ability SA v Tinna Oils & Chemicals Ltd**,[9] at paragraph 19, Thomas LJ emphasised the importance of clarity and simplicity of the law in respect of the conduct of international arbitration in London. Where the law is set out in a statute, he explained that a court should be very reluctant to construe the statute in a manner that does not follow its clear language. Thomas LJ stated at paragraph 20:

> "As the report of the Departmental Committee on Arbitration made clear at paragraph 1 of its 1996 Report and as the **Arbitration Act 1996** set out to achieve, it is essential that the law of arbitration is retained in an accessible form, available to those who, like the parties in this case, are not nationals of the United Kingdom. Its language was intended to be 'sufficiently clear and free from technicalities to be readily comprehensible to the layman'. Its statutory provisions should therefore, wherever possible, remain capable of interpretation without the encrustation of authority, as the language of the statutory provisions is in general a model of clarity."

[20] To my mind, useful guidance is to be derived from the cases referred to above with respect to the ethos and interpretation of the **Arbitration Act 1996** and it is difficult to view the position in Anguilla as being any different. The **Arbitration Act 1996** accordingly sets out the important principles of the law of Arbitration in Anguilla in a logical order, in a language that is user-friendly, free from technicalities and conduces to clarity. The court therefore is enjoined to construe the Act in a manner that follows and gives effect to its clear language. In that regard the appellants' position as to the construction of the Act is surely in consonance with the principle espoused in the cases.

[21] The application and purpose of section 66 of the **Arbitration Act 1996** now falls for consideration. Section 66 provides that:

> "(1) An award made by the tribunal pursuant to 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.

[9] [2009] EWCA Civ 1330.

(2) Where leave is so given, judgment may be entered in terms of the award.

(3) 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 to make the award.

The right to raise such an objection may have been lost (see section 73).

(4) Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the Arbitration Act 1950 (enforcement of awards under Geneva Convention) or the provisions of Part III of this Act relating to the recognition and enforcement of awards under the New York Convention by an action on the award."

[22] In **West Tankers Inc v Allianz Spa and Another**,[10] Toulson LJ cited with approval the dictum of Field J at first instance that:

> "The purpose of s66(1) and (2) is to provide a means by which the victorious party in an arbitration can obtain the material benefit of the award in his favour other than by suing on it."[11]

At paragraph 17 His Lordship remarked that the only issue before the court is the question of construction, whether the judge had jurisdiction under section 66 to direct that judgment be entered in terms of the award. His Lordship pointed out that this is a pure question of construction of a domestic statute and is not a question with a distinctively European flavour. He further stated that 'Section 66 applies generally to any arbitration under the Act, the parties to which may or may not come from EU member states'. I respectfully agree with and adopt that statement as to the general applicability of section 66, as it is quite apt to this appeal. Likewise, I opine that the question at hand in this appeal is not one with a distinctly Anguillan flavour. Toulson LJ commented at paragraph 37 that at common law a party to arbitration who has obtained a declaratory award in his favour could bring an action on the award and the court, if it thought appropriate,

[10] [2012] EWCA Civ 27.
[11] At para. 14.

could itself make a declaration in the same terms. The purpose of section 66 is to provide a simpler alternative route to bringing an action on the award, although the latter possibility is expressly preserved by section 66(4). I agree with and adopt Toulson LJ's statement as to the purpose of section 66 (1) and (2) of the **Arbitration Act 1996**.

[23] In **National Ability SA v Tinna Oils & Chemicals Ltd** the court considered the history and purpose of section 66 and its predecessor, section 26 of the 1950 Act. Thomas LJ said:

> "5 It is necessary to say a little more about the two methods of enforcing awards obtained under the Arbitration Act 1950 (which continue to apply under the **Arbitration Act 1996**).
>
> (i) Enforcement of an award by action is by an ordinary action brought in the High Court. The procedure is not subject to any statutory provision, but it has long been established at common law as an action founded upon the implied promise to pay the award. It is given statutory recognition in s.66(4) of the 1996 Act.
>
> (ii) Enforcement of the award in the same manner as a judgment is a statutory process.
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> s.26(1) 1950 Act provides:
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> '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.'
>
> S.66 of the **Arbitration Act 1996** provides:
>
> '(1) An award made by the tribunal pursuant to 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.
>
> (2) Where leave is so given, judgment may be entered in terms of the award.'

> "6 The procedure for enforcement by action is little used in practice. For many years it has been the practice of parties who seek to use the enforcement mechanism of the court in England and Wales to use the procedure under s.26 of the 1950 Act and s.66 of the 1996 Act to enforce an award. …
>
> "7 The procedure under s.26 and s.66 had its origins in earlier legislation and was a summary form of proceeding intended to dispense with the full formalities of the action to enforce an award. The summary procedure was originally intended only to be invoked in reasonably clear cases – see Boks and Co. v Peter Rushton [1919] KB 491 at 497 … . However, procedures were developed so that the court could decide summarily questions of law which did not involve issues of fact. By the 1980s courts were prepared to deal with all applications under the summary procedure provided objections could be disposed of without a trial: see, for example, Middlemiss & Gould v Hartley Corporation [1972] 1 WLR 1643 and Hall and Woodhouse Ltd v Panorama Hotel Properties Ltd [1974] 2 Lloyd's Rep 413. The summary procedure both under s.26 of the 1950 Act and s.66 of the 1996 Act is so convenient that it is by far the most common way of enforcing an award."

[24] In **National Ability SA and Tinna Oils & Chemicals Ltd**, Thomas LJ explained at paragraph 14 that there is a clear distinction between an arbitration award and a judgment. An arbitration agreement is in essence enforceable because of the implied contractual promise to pay an arbitration award contained in the arbitration agreement; all measures of enforcement essentially rest upon the contract. The provisions of s.26 of the 1950 Act and s.66 of the 1996 Act must be seen in that context. They are simply procedural provisions enabling the award made in consensual arbitral proceedings to be enforced. This is quite different to the pronouncement of a judgment by a court where the State through its courts has adjudged money to be due.

[25] In summary, the cases show that section 66 applies generally to any arbitration under the **Arbitration Act 1996**. Section 66 is a statutory provision which provides a procedure for enabling an award made in consensual arbitral proceedings to be enforced. There are different means of enforcing an arbitral award under section 66. The victorious party can enforce the award by an ordinary action in the High Court. This common law action was given statutory effect by

section 66(4). This method is little used in practice. The party may choose to enforce the award in the same manner as a judgment. This is a statutory process given effect to by section 66 (1) and (2) of the **Arbitration Act 1996**. Because of the convenience of this summary process, it is by far the most common form of enforcing an award. Section 66 provides in subsections (1) and (2), a means by which the successful party can obtain the benefit of the award other than by suing on it.

[26] Another important provision of the **Arbitration Act 1996** is section 2(2)(b). It states that:

> "(2) The following sections apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined–
>
> (a) …
>
> (b) section 66 (enforcement of arbitral awards).

Section 2(2)(b) is clear and unambiguous and the court must give effect to its clarity. It expressly provides for the application of section 66 irrespective of the seat of the arbitration or even if no seat has been determined or designated. It appears to me that the learned judge has overlooked the clear meaning of section 2(2)(b). The fact that the seat of the arbitration is the United States Virgin Islands, does not derogate from the applicability of section 66. Clear statutory words would be needed to achieve that end. I note the respondents' argument that it is not the extra-territorial seat that causes the application for enforcement to fail but rather it is the fact that the Anguilla Legislature has not provided for enforcement of foreign awards in the way the United Kingdom has. While the respondents are correct that the extra-territorial seat does not cause the application to fail, the contention that the Anguilla Legislature has not provided for enforcement of foreign awards in the way the United Kingdom has, is simply untenable. That is amply demonstrated by my discourse on section 66.

[27] Four means of enforcement are recognised by the **1996 Arbitration Act**: enforcement under the Geneva Convention, enforcement under the New York Convention, enforcement under section 66 (1) and (2) and enforcement under

section 66(4) by an action on the award. As Mr. Wallbank observed, the award is not a Geneva Convention award; the New York Convention does not apply to Anguilla; and the appellants have not instituted an action on the award – which is an action in quasi contract. What the appellants have sought to do is to invoke section 66 (1) and (2). Section 66 applies irrespective of the seat of the arbitration.

[28] As has been seen, section 66 (1) and (2) of the **Arbitration Act 1996** provides a simpler alternative route to bringing an action on the award. Section 66 is not expressly or by necessary implication limited in its purview to the enforcement of domestic awards only. The learned judge accordingly erred in finding that section 66 does not apply to the enforcement of "foreign" awards. The learned judge unnecessarily and impermissibly placed a restrictive construction on section 66. I agree with Mr. Wallbank that such a restrictive construction was not open to the judge and that the opening words of section 66 (4): 'Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law' renders the provisions of section 66 additional to and independent of other statutory, common law or Conventional means of enforcing arbitration awards.

[29] The importance of section 66 of the **Arbitration Act 1996** in the enforcement process has been amply and aptly demonstrated. Given the significance of section 66, it requires clear language to dis-apply its provisions. The limitation contained in the incorporating provision in Anguilla: 'and all the provisions of the Act, so far as the same are applicable, shall *mutatis mutandis* apply to all proceedings relating to arbitration within Anguilla' does not have the effect of dis-applying section 66 or otherwise curtailing its amplitude. It must also be pointed out that there are various provisions in the **Arbitration Act 1996** which inherently cannot apply in Anguilla. These include: section 13 – application of the English and Northern Ireland Limitation Acts; section 93 – appointment of Commercial Court judges and official referees as arbitrators; sections 100 to 104 – New York Convention awards; and section 105 – reference to county court and the power of the Lord Chancellor to make orders with respect to the jurisdiction of the High

Court and county court. While these provisions are caught by the limitation, section 66 is not so caught. I agree with Mr. Wallbank that there is no conceptual, legal or practical reason why section 66 should not be applicable to Anguilla.

[30] Mr. Bourne made submissions on section sections 66 and 101 to 103 of the **Arbitration Act 1996**. He contended, among other things, that section 66 was not intended to work without the applicable provisions of the New York Convention and could only be an alternative route in relation to New York Convention awards, where the necessary protections of the Convention are also going to be applicable. He stated that the defences in section 103 are an integral part of the mechanism for the recognition and enforcement of New York Convention awards. The New York Convention does not apply to Anguilla and section 66 is not a clause that can give effect to the enforcement of New York Convention awards.

[31] Mr. Wallbank referred to section 104 of the 1996 Act, which states: 'Nothing in the preceding provisions of this Part affects any right to rely upon or enforce a New York Convention award at common law or under section 66' and submits that when the New York Convention applies the defences apply. The award not being a New York Convention award, the defences in section 101 to 103 do not apply. If it is not a New York Convention award, it does not necessarily mean that the same defences apply.

[32] In my judgment, Mr. Bourne's argument cannot be sustained for the reasons that section 66 of the **Arbitration Act 1996** is a separate scheme from sections 101 to 103 and section 66 was not intended to give effect to the New York Convention. As Tomlinson LJ stated in **Anthony Lombard-Knight, Jakob Kinde v Rainstorm Pictures Inc**,[12] sections 100 to 103 of the **Arbitration Act 1996** give effect in the United Kingdom to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. By section 66(4) enforcement under section 66 is without prejudice to enforcement under the New York Convention. If the award being enforced is New York Convention Award, section 66 cannot be

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used in order to evade the defences open to the respondent under section 103, because the defences would be available in any event pursuant to the Convention itself. I also note that section 104 provides that 'Nothing in the preceding provisions of this Part affects any right to rely upon or enforce a New York Convention award at common law or under section 66'.

[33] The appellants validly complain in the fifth ground of appeal that the learned judge failed to give effect to the contractual term of the parties to the arbitration agreement that the award could be enforced in both foreign and United States jurisdictions, without procedural or substantive objections to enforcement and that it could be enforced in any location where the losing parties' assets could be located. As stated earlier, 'An arbitration agreement is in essence enforceable because of the implied contractual promise to pay an arbitration award contained in the arbitration agreement; all measures of enforcement essentially rest upon the contract'.

[34] For all the reasons indicated, I would allow the appeal and set aside the orders of the learned judge. I would also order that the arbitration award dated 23rd August 2013 shall be registered so that it may be enforceable as if it were an order of the court; that the said award shall be enforced as if it were an order of the court; costs to the appellants in the court below of US$7,000.00 and costs on the appeal to be assessed if not agreed within 21 days.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Louise Esther Blenman
Justice of Appeal

I concur.

Gertel Thom
Justice of Appeal