

Director Committed for Contempt of Court

Professor Michael Reynolds¹

The integrity of international commercial arbitration depends upon compliance with the tribunal's award. In practice this is rarely a problem, but sometimes cases occur where there is failure to comply with the award. This strikes at the heart of the consensual nature of the process. Such possibility should be considered by a claimant before giving notice of arbitration, especially regarding the jurisdiction in which the award may be enforced. In this case the judge has given a clear example of how the courts deal with an abuse of the process and how contempt of court can lead to imprisonment. The case gives a clear signal that our courts robustly support international arbitration in that the learned judge, Mrs Justice Cockerel, robustly enforced an international arbitration award and penalised a defaulting defendant director for contempt.

The case in question, *ADM v GHI*², was a case involving an arbitration between a claimant company registered in Switzerland and a defendant company incorporated in Morocco. In this case the defendant was ordered to pay the arbitration award in full plus a fine of £75,000 pounds and committed its president to 18 months imprisonment.

Factual matrix

ADM was a Swiss company, a subsidiary of an American company Archer Daniels Midland company. GHI failed to pay a GAFTA³ Award dated July 2018 in the sum of US\$3,423,711.14 plus interest and €152,058.07 plus interest, plus £7,865 in arbitration fees and expenses. The claim arose out of the performance of certain sale agreements, ADM having incurred costs which GHI agreed to reimburse, but failed to pay. To resolve matters ADM and GHI made an instalment agreement whereby GHI would repay ADM. GHI paid one instalment then defaulted.

On the 8th December 2017 ADM commenced a GAFTA arbitration against GHI for Breach of the agreement. GHI did not cooperate. On 17th July 2018 the GAFTA tribunal published the award referred to above.

On 23rd January 2019 the Casablanca Commercial Court gave ADM permission to enforce the award in Morocco.

¹ Professor Reynolds is a Solicitor and Chartered Arbitrator and Visiting Professor in the Law of Arbitration and Dispute Resolution at BPP University Law School, and a Visiting Senior Research Fellow (Security and Statecraft) at the Department of International Relations at the LSE.

² *ADM International Sarl (A Company Incorporated In Switzerland) Claimant - And –Grain House International S.A. (Formerly Known As Compagnie Agricole De Commercialisation Et De Conditionnement Des Cereales Et Legumineuses S.A.) (A Company Incorporated In Morocco) Defendant And In An Application Between ADM International Sarl (1) Grain House International S.A. (Formerly Known As Compagnie Agricole De Commercialisation Et De Conditionnement Des Cereales Et Legumineuses S.A.) (2) Elhachmi Boutgueray (3) Brahim Boutgueray Defendants.* [2023] EWHC 135 (Comm).

³ Grain and Feed Trade Association. GAFTA is an international trade association with over 1900 members in 100 countries. Their aim is to promote international trade in agricultural commodities, spices and general produce, and to protect our members' interests worldwide.

On 30th January 2019 an order was issued under section 66 Arbitration Act 1996 to enforce the award in Morocco. An asset disclosure order was then issued on 22nd March 2019 requiring GHI to serve an affidavit disclosing details of its worldwide assets (ADO). GHI did not attend the hearing, nor other hearings. It proceeded to ignore the court, the hearings, notices and orders. Consequently ADM was granted a worldwide freezing order (WFO) on 5th June 2019 against GHI's assets to the sum of \$4 million. The court permitted the order to be served by e-mail to the e-mail addresses of these second and third defendants.

A final worldwide freezing order (Final WFO) was issued on the 21st June 2019 on similar terms to the 5th of June order. That order required GHI to pay costs assessed at £67,000. GHI did not attend the hearing and did not pay costs.

In November 2019 ADM received correspondence from GHI's solicitors stating that GHI had not been served with the order requiring GHI to serve an affidavit disclosing details of its worldwide assets. ADM then applied to the court to strike out a Statement of Case/Defence that have been served by GHI's solicitors which was struck out and GHI ordered to pay £44,000 costs. Although the court gave GHI permission to apply to discharge the Final WFO no application was made.

On 17th December 2019 the Casablanca Commercial Court cancelled a Moroccan enforcement order. ADM then appeal to the Moroccan Court of Cassation and the Court of Appeal judgement was subsequently quashed. ADM then issued its First Committal Application which was served by virtue of Mr Justice Butcher's order dated 23rd October 2020 by e-mail. GHI's response to the order dated 22nd of March 2019 was deficient and inadequate so that ADM issued a further disclosure application. GHI was ordered to pay £10,000 costs.

A further disclosure order was then made on 2nd July 2021 (FDO) for GHI to disclose details of credit facilities, GHI being ordered to pay costs of £20,000.

On 13th August 2021 GHI served an affidavit which was again deficient in many particulars some of which have been redacted. Eventually on 12 November 2021 a response was provided which included unredacted copies of two of three credit facilities. On 17 February 2022 ADM issued committal and an anti-suit injunction applications.⁴

Legal Analysis

The law of contempt has a high bar. It is to be "*satisfied so that they are sure*."⁵ No one can be committed for contempt unless there is inter alia a breach of an undertaking that is "clear beyond all question." In effect this is the same as the traditional *beyond reasonable doubt*.⁶ In this case did the defendants know the terms of the order; act (or failed to act) in a manner which involved a breach of the order; and knew of the facts which made their conduct a breach.⁷

⁴ In the event this was not granted as the circumstances did not yet arise.

⁵ Crown Court Compendium paragraph 5.2.

⁶ R v Ching (1976) 63 Cr App Rep 7

⁷ AGM v GHI [para 38]

It was clear on the facts that the three defendants all had knowledge of the terms of the orders made by the court. Those orders contained penal notices. The defendants failed to provide an unredacted copy of GHI Société Générale credit facility.⁸ There were missing bank statements in the alleged breach of the further disclosure order (FDO).⁹ There was a breach of the Asset Disclosure Order (ADO) by non-disclosure of encumbrances¹⁰ and breach of the World Wide Freezing Order (WFO)¹¹.

Mrs Justice Cockerell considered the position of the two defendants who were directors of the company as to whether they would be committed for contempt. Did each know and were they responsible for the company's breach? The judge held that the second defendant was in contempt of court in the same respect as GHI; he swore affidavits, he knew the facts, he was in control and was in breach of the court's orders.¹² Although the second and third defendants were never served with the ADO and FDO personally¹³ it was clear from Lord Justice Rix's judgement in *JSC BTA Bank v Ablyazov (No 8)*¹⁴ the power of the court to commit for contempt those who deliberately disobeyed orders is an essential part of the machinery of justice.

Interestingly, Mrs Justice Cockerell circulated a draft judgement on 20th January 2023 indicating that she would impose an 18-month immediate custodial sentence. On 25th January the second defendant apologised to the court and provided some significant amounts of material. Despite this the judge quite rightly exercised her discretion in the context of the history of the case. Ground 2 (missing bank statements in alleged breach of the FDO) was purged, but not Grounds 3 and 4 regarding breaches of the ADO by non-disclosure of encumbrances and breach of the WFO.

Mrs Justice Cockerell followed Lord Justice Jackson in *JSC BTA Bank v Solodchenko (No 2)*¹⁵ that freezing orders and disclosure orders within freezing orders are regarded very seriously and likely to result in custodial sentences.¹⁶ Taking all the relevant sentencing guidelines into consideration the judge imposed a 12 month custodial sentence in relation to Ground 3 and six months in relation to Ground 4 with no penalty under Grounds 1 and 2.

⁸ AGM v GHI [para 45-49 and 50-57]

⁹ AGM v GHI [para 58-67]

¹⁰ AGM v GHI [para 68-82]

¹¹ AGM v GHI [para 83-93]

¹² AGM v GHI [para 99]

¹³ Dispensation was given retrospectively.

¹⁴ [2012] EWCA Civ 1411 per Rix LJ at [188].

¹⁵ [2012] 1 WLR 350 [51, 55]

¹⁶ AGM v GHI [paras 122-123]