In the recent decision of *Caucedo Investments Inc v Saipem SA* [2013] EWHC 3375 (TCC), the Technology and Construction Court was asked to consider issues in relation to costs incurred in enforcing an arbitration award against foreign defendants in circumstances where the defendants’ English solicitors, who had acted for the defendants in the arbitration, had not been instructed to accept service within the jurisdiction. Beale and Company acted on behalf of the claimants in this case.

The claimants had sought to recover the costs incurred in enforcing the arbitration award, and in particular, the costs incurred in serving those enforcement proceedings directly on the defendants out of the jurisdiction, after service had not been accepted by the defendants’ English solicitors who had acted in the arbitration.

The court held that the claimants had acted ‘reasonably and properly in the circumstances’ and awarded the claimants over £32,000 in costs.

This decision, which was handed down by Mr Justice Akenhead, is of particular interest in so far that it demonstrates that:

- in certain circumstances, the courts are prepared to grant a party leave to serve enforcement proceedings directly on a foreign party out of the jurisdiction (although this case specifically related to parties based in France);
- in certain circumstances, the courts will award a party its costs in seeking leave to serve enforcement proceedings out of the jurisdiction as well as those incurred in effecting service in that foreign jurisdiction. To that end, a losing party may face adverse cost consequences if it unreasonably refuses to instruct its solicitors, who have acted on their behalf during the arbitration, to accept service of arbitration enforcement proceedings within the jurisdiction; and
- all is not lost when a foreign losing party fails to honour an arbitration award within a reasonable amount of time and/or fails to provide any genuine indication as to whether that award will be honoured. If a party has reasonably exhausted all available avenues to enforce an arbitration award in England against a losing foreign party, there may be other avenues open whereby a party may be entitled to recover its costs.
The purpose of this article is to analyse the facts of this case, and the decision handed down by Akenhead J in more detail. A further reason is to demonstrate that perseverance pays off when seeking to enforce an arbitral award out of the jurisdiction where the defendant is a foreign entity.

**The facts**

The claimants had employed the defendants (contractors based in France) to construct a marine terminal facility at Caucedo in the Dominican Republic. Disputes arose between the parties in relation to the project which were resolved by arbitration in London. The award was handed down on 12 November 2012 deciding that the defendants were liable to the claimants in the sum of $12,927,472.

Soon after the award was handed down, the claimants’ solicitors, Beale and Company, sought confirmation from the defendants’ English solicitors that the defendants would be in a position to make payment of the award. No response was received nor was the award paid by the defendants. On that basis, the claimants issued a claim form in the TCC (the Claim Form) seeking leave to enforce the arbitration award and for judgment to be entered for the claimants pursuant to ss 66(1) and 66(2) of the **Arbitration Act 1996**. Leave was granted by the court on 30 November 2012. The order stated that the award could not be enforced until 14 days after service of the proceedings.

In the meantime, the claimants’ solicitors had written to the defendants enclosing a copy of the Claim Form asking them to confirm that they were instructed to accept service of the proceedings on behalf of the defendants. On that basis, the claimants issued a claim form in the TCC (the Claim Form) seeking leave to enforce the arbitration award and for judgment to be entered for the claimants pursuant to ss 66(1) and 66(2) of the **Arbitration Act 1996**. Leave was granted by the court on 30 November 2012. The order stated that the award could not be enforced until 14 days after service of the proceedings.

In the meantime, the claimants’ solicitors had written to the defendants enclosing a copy of the Claim Form asking them to confirm that they were instructed to accept service of the proceedings on behalf of the defendants. The defendants’ solicitors’ reply stated that they did not have instructions to accept service. The claimants’ solicitors then provided two further opportunities to the defendants’ solicitors on 29 November 2012 and 4 December 2012 to accept service of the enforcement proceedings within the jurisdiction. No response was received and on that basis the claimants applied for, and were granted, permission to serve the defendants directly at their addresses in France.

Before incurring the costs of serving the defendants out of the jurisdiction, the claimants’ solicitors sent the documents to the UK branch of one of the defendants. A response was received from the defendants’ office suggesting that the documents had been sent to the wrong address and that they should be served in France. The defendants also stated that the documents would be shredded.

Having been denied the option to serve proceedings in England, the claimants served the enforcement proceedings on the defendants in France on 14 February 2013. In doing so, the claimants incurred significant costs, particularly in relation to the necessary translation of the Claim Form and accompanying witness statement and exhibits. The full amount of the arbitration award was eventually paid by the defendants in three instalments in February and March 2013.

Correspondence ensued between the parties’ solicitors as to whether the defendants would pay the costs incurred by the claimants in enforcing the arbitration award. No agreement was reached in this respect. Therefore, on 26 July 2013, the claimants issued an application seeking the costs incurred in enforcing the arbitration award, including those costs incurred in serving proceedings on the defendants out of the jurisdiction. The court ordered the defendants to pay the claimants’ costs incurred in these enforcement proceedings, to be summarily assessed. The defendants sought to set that order aside on 9 August 2013.

**Decision**

Akenhead J considered the issue to be to what extent, if at all, the defendants should pay the costs associated with the application to serve the Claim Form, the orders and the related documents on the defendants directly in France. He was satisfied that the claimants and their solicitors, Beale and Company, behaved reasonably in seeking to serve proceedings out of the jurisdiction. In particular he noted that there were numerous opportunities for the defendants to avoid the costs of and occasioned by the service of the documents in France and that the defendants were ‘the authors of their own misfortune in this regard’. He was also of the opinion that there was no good reason for the defendants’ solicitors not to have been instructed to accept service and:

‘The only inference one can draw from sophisticated parties such as the defendants advised by sophisticated and intelligent city solicitors is that they were trying to gain time.’

In relation to the defendants’ arguments that some form of substituted service should have been sought under Practice Direction 62, Akenhead J agreed with the
claimants’ solicitors’ argument that Practice Direction 62 para 3.1, which provides that the court may exercise its powers under r 6.15 to permit service of an arbitration claim form at the address of a party’s solicitor acting for that party in the arbitration, did not apply in this case as it only relates to arbitration claims and not to enforcement proceedings.

The defendants sought to rely on Cruz City Mauritius Holdings v Unitech Ltd [2013] EWHC 1323 (Comm) to show that service of proceedings in France was unreasonable and disproportionate given that there was a process of permitting service on solicitors acting in the arbitration. Akenhead J said that the key question was whether it was reasonable and proportionate for the claimants, having obtained the order which they did on 30 November 2012, to seek permission to serve out of the jurisdiction and then, having obtained such permission, to take reasonable steps to do just that. To that end, he was satisfied that it was reasonable and proportionate for the claimants to have done so.

In terms of the delay to the payment of the award, Akenhead J commented that although he could accept that commercially it may take a losing party time to collect or secure the money needed to honour the award, in cases where the losing party is insured, courts are often asked to allow 28 days for payment to enable the money to be collected from the various insurance interests. However, he commented that whilst this may explain the delay in payment, it does not particularly or usually excuse that delay.

He held that the claimants had acted reasonably and properly in the circumstances and ordered the defendants to pay the claimants’ costs which he summarily assessed at £32,743.37.

Commentary

There had previously been little guidance as to whether a party would be entitled to recover costs incurred in enforcing an arbitration award by serving enforcement proceedings directly on a foreign company out of the jurisdiction. Akenhead J’s judgment in this case confirms the courts’ willingness to not only grant a party leave to serve such proceedings out of the jurisdiction in certain circumstances (this matter specifically related to serving in France), but to also award a party its costs in doing so. However, it is important to note that Akenhead J considered that the claimants had acted reasonably and properly in the circumstances. In particular, the defendants’ had been given a number of opportunities to accept service and/or to avoid the costs of and occasioned by the service of the proceedings out of the jurisdiction.

On that basis, when seeking to enforce an arbitration award against a foreign defendant in circumstances where the losing party’s solicitors have failed to accept service, it is worth considering the following points which the courts are likely to take into account in deciding whether to award costs:

- giving a losing party an opportunity to confirm whether the award will be honoured before commencing enforcement proceedings in the English courts;
- giving the solicitors who had acted on behalf of the losing party in the arbitration an opportunity to accept service of those proceedings. In this case, the defendants’ solicitors were given three opportunities to accept service;
- giving the losing party other opportunities to avoid the defendant incurring the costs occasioned by serving proceedings out of the jurisdiction, such as keeping the defendants informed of the progress of the enforcement proceedings throughout;
- ensuring that payment of an arbitration award is made within 28 days from the date of the award;
- whether it would be appropriate to seek an order from the court allowing some form of substituted service on the solicitors who had acted for the losing party during the arbitration. Although Akenhead J did not consider that the claimants and their solicitors behaved in any way unreasonably in seeking, eventually, to serve out of the jurisdiction, he suggested that in accordance with the overriding objective to act in a cost-efficient and proportionate way, consideration should be given to seeking to serve the various documents within the jurisdiction; and
- which documents need to be translated in order to effect service. Akenhead J accepted that key documents needed to be translated, he only allowed an assessment of reasonable costs for a reasonable number of hours.

This decision shows that if a party perseveres in seeking to enforce an arbitration award, so long as that party acts reasonably in the circumstances, the court will allow that party to recover its costs. CL