

Court orders trial for fraud allegations raised post-award

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Introduction

Section 103(3) of the Arbitration Act 1996 sets out the limited circumstances in which a court may refuse to enforce an arbitral award made under the New York Convention 1958, including where "it would be contrary to public policy to recognise or enforce the award".

The English courts have historically adopted a narrow definition of 'public policy'. They are cautious to apply the exception and only do so where:

- an award has been procured through fraud or perjury;
- an award is tainted by illegality; or
- an award's enforcement would be contrary to the United Kingdom's international or national obligations.

When considering the application of the public policy exception, the English court may not reopen the facts determined by the tribunal unless there is fresh evidence available that was not considered by the tribunal.

In the light of new evidence that had not been before the tribunal when the award was rendered, the English court in *Stati v The Republic of Kazakhstan* ([2017] EWHC 1348 (Comm)) ruled that allegations of fraud raised by Kazakhstan should be fully investigated by the English court before the court could determine whether the award could be enforced in England. In so doing, the court's judgment differed from US and Swedish court decisions considering similar applications. The court also confirmed that public policy is a matter for each state to consider itself, regardless of whether the courts of another country have ruled on the matter.

Arbitration award

In December 2013 the claimants successfully obtained a \$500 million award in Sweden for Kazakhstan's breaches of the Energy Charter Treaty. The dispute concerned losses arising out of Kazakhstan's unilateral termination of contracts for subsoil use of two subsidiaries of a liquefied petroleum gas plant in Kazakhstan owned by a company in the claimants' group. Kazakhstan also cancelled the contract with the claimants' subsidiary for construction of the plant.

The claimants had made significant investments in the plant's development (including payment of equipment for its construction). The investment amount was recorded in the company's accounts

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and formed the basis of an indicative bid made for the purchase of the plant by Kazakh state-owned company KazMunaiGas Exploration Production JSC. The arbitration award included damages for losses calculated by reference to the indicative bid.

The claimants sought enforcement of the award in the English court and the US District Court for the District of Columbia. Both were resisted by Kazakhstan. Kazakhstan separately sought to set aside the award at its seat in Sweden.

New evidence

New evidence came to light in the US proceedings that had not previously been disclosed in the arbitration. This formed the basis of Kazakhstan's allegations that the claimants and their affiliates had fraudulently inflated the plant's construction costs and falsified financial statements, which were used to obtain the indicative bid. As the tribunal's damages calculation was based on the indicative bid, which was in turn based on untrue investment costs, Kazakhstan argued that the quantum awarded was inaccurate.

The US court rejected Kazakhstan's application to amend its pleadings in the enforcement proceedings to include reference to the allegation of fraud and held that the tribunal had not relied on allegedly fraudulent evidence in assessing quantum. Enforcement proceedings were stayed pending the outcome of the set-aside proceedings in Sweden, where the Supreme Court recently held that the indicative bid was not, in itself, false; therefore, the new evidence relied on by Kazakhstan was irrelevant.

English proceedings

The English court gave permission to enforce the award in 2015 and subsequently stayed the enforcement proceedings pending the Swedish court's decision. In 2015 Kazakhstan applied to set aside the permission to enforce the award on several bases. Following the disclosure of the new evidence, Kazakhstan applied to include the new allegation of fraud in its set-aside application.

The English court granted Kazakhstan permission to amend the application. It further held that the fraud allegations may be a reason to set aside the permission to enforce the award on the basis that it was contrary to public policy. However, the court ordered that the issue of fraud should be considered fully by the English court.

Applicable tests

The court reiterated that when considering whether the public policy exception can be applied in respect of alleged fraud, the court should apply:

- a presumption in favour of the recognition and enforcement of New York Convention awards; and
- a cautionary attitude to the application of the policy exception.

To assess whether an award has been obtained contrary to public policy, the court noted that it requires evidence that "some form of reprehensible or unconscionable conduct has contributed in a substantial way to the obtaining of the award". However, it may be sufficient to show that a party "had deliberately and dishonestly failed to disclose [material] in the arbitration and made submissions or called evidence which deliberately and dishonestly continued that concealment and misled the Tribunal" and that the material would have had "an important influence on or would probably have affected the result of the arbitration".

To determine whether an issue of fraud on the award should be considered by the English court, the following needs to be established:

- There must be a *prima facie* case of fraud (*IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* ([2015] EWCA Civ 1144)).
- The evidence of the fraud had to be unavailable to the party alleging the fraud at the time of the arbitration (*Westacre Investments Inc v Jugoinport-SPDR Holding Co Ltd* ([2000] QB

Estoppel

The claimants argued that the US and Swedish decisions had created an estoppel that bound the English court to follow decisions already issued by other courts on the same issue. The court examined each decision carefully.

The court noted that the Swedish decision clarified that to establish the invalidity of an arbitral award on the grounds of false evidence, the false evidence must be:

- directly decisive to the outcome; or
- have an indirect impact on a tribunal's assessment which was of "decisive significance for the outcome in the case".

In basing its conclusions solely on the indicative bid – which the Swedish court determined was decisive in the tribunal's calculation of damages, the court considered that the Swedish court had failed to consider whether the false information that informed the bid had an indirect impact on the decision of the tribunal.

Similarly, in considering the US decision, the English court held that the US court had not fully considered whether the tribunal had been misled by the claimants' presentation of the indicative bid, in the knowledge that the bid was based on allegedly fraudulent material.

In any event, the court held that there was no estoppel binding the English court, as the question of whether fraud had occurred had not been considered by the US or the Swedish court (even though they had had the evidence to do so before them).

Public policy and abuse of process

Even if an estoppel had arisen, the English court was still permitted to consider whether the award ran contrary to public policy, as "public policy can and does differ from country to country" and "English public order must ultimately be a matter for the English Court".

The court acknowledged that, in general, it is for the court of the seat to oversee any procedural defects in an award or arbitral proceedings. Typically, the supervisory court's remit to review awards is limited. However, in exceptional cases an enforcing court can go further than the supervisory court in policing an award – for example, where the enforcement of the award would contravene the requirements of English public policy. The court held that *Stati* was such a case.

Comment

The claimants' efforts to enforce the 2013 award against Kazakhstan are yet to be fully played out in the US and English courts. However, the claimants' attempts to set aside the award at the seat have been finally rejected by the Swedish Supreme Court.

This series of cases shows that parties seeking to enforce New York Convention awards in multiple jurisdictions cannot assume that they will be able to do so in a uniform manner, especially in cases raising public policy issues.

There is a long running debate in international arbitration regarding how much a court should follow the decisions of the court of the seat when considering the enforcement of an arbitral award rendered under the New York Convention.

However, when it comes to public policy, each jurisdiction is entitled to take its own approach in refusing the enforcement (or setting aside) of foreign arbitral awards.

If the allegations of fraud are upheld, it is open to the English court to refuse enforcement of the award, regardless of the stance of other courts (including the court of the seat) on similar issues.

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