

The UK Court of Appeal upholds the enforcement of CIETAC Award

On Monday 23rd April the Court of Appeal handed down their judgment in *Sinocore v RBRG (UK) Ltd* [2018] EWCA Civ 838, dismissing the appeal of RBRG against the decision of Phillips J [2017] EWHC 25614 (Comm) to permit enforcement of the CIETAC Award. The result is a resounding endorsement by the English Courts of the public policy in favour of the enforcement of international arbitral awards. Nick Vineall QC and Neil Henderson, instructed by HFW LLP, represented the successful Respondent, Sinocore.

Background

Sinocore is a Chinese trading company. It agreed to sell rolled steel coils to RBRG, an English trading company. The sale contract contained a CIETAC arbitration clause which provided that any dispute would be governed by Chinese law, in Chinese and the venue of the arbitration would be Beijing. Payment was to be by an irrevocable letter of credit. The letter of credit was provided by Rabobank, a Dutch bank.

RBRG subsequently unilaterally amended the shipment date in letter of credit, without agreement from Sinocore. Forged bills of lading were then presented by Sinocore to comply with the amended shipment date. RBRG injunctioned Rabobank to prevent it paying out under the letter of credit.

Sinocore terminated the contract. It sold the coils to a third party, below the contract price.

Sinocore subsequently sued Rabobank in Beijing, but that claim failed because the presentation to Rabobank was held by the Chinese Court to be fraudulent. Sinocore appealed that decision.

RBRG commenced a CIETAC arbitration claiming damages for breach of the inspection clause. Sinocore counterclaimed for the difference between the contract price and the price at which it had sold the steel coils based on RBRG's breach of the sale contract because of its unilateral amendment of the letter of credit.

The CIETAC tribunal made its award. It held that RBRG was in breach of contract because it had amended the letter of credit without Sinocore's consent. This breach (which predated the fraudulent presentation of the bills) caused the termination of the contract of sale and the subsequent losses. Importantly, the Tribunal expressly dealt with the effect of the presentation of the forged bills, holding that it was not a deception of RBRG.

The enforcement challenge

Sinocore subsequently obtained a without notice order in the Commercial Court from Burton J for leave to enforce the Award under Section 101 of the Arbitration Act 1996.

RBRG applied to set aside that order. It did so on three grounds.

First, that Sinocore's claim was in reality based on its fraudulent presentation of the forged bills of lading, because it was Rabobank's (and therefore RBRG's) failure to make a payment against those bills of lading which Sinocore had relied on

as a repudiatory breach of the contract of sale. The real cause of Sinocore's loss, it said, was Sinocore's presentation of forged bills of lading.

Secondly, that the English Court should not assist Sinocore by enforcing the award because Sinocore had presented forged bills of lading in a fraudulent attempt to obtain payment from RBRG. In other words, that its fraudulent conduct 'tainted' the Award and disqualified Sinocore from being permitted to use the English courts for the purposes of its enforcement.

Thirdly, that there was a risk of Sinocore making a double-recovery and RBRG correspondingly having to pay twice – both under the Award and by way of an indemnity to Rabobank if Sinocore was successful in its appeal before the Chinese Courts.

The judgment of Phillips J

Phillips J dismissed RBRG's application to set aside enforcement, holding that there were no public policy grounds why the Award should not be enforced in England. He also accepted an undertaking from Sinocore to the effect that it would not make a double-recovery.

The judgment of the Court of Appeal

RBRG appealed to the Court of Appeal. In doing so it raised the new ground that Phillips J had failed to apply the approach to fraudulent behaviour identified by the Supreme Court in *Patel v Mirza* [2016] UKSC 42. RBRG also asserted that the judge had been wrong to find that Sinocore's claim was not 'based on' its own illegality, and that the Court should not have accepted the undertaking but should instead have required Sinocore to discontinue the appeal against Rabobank.

The Court of Appeal disagreed and dismissed the appeal on all four grounds advanced. Hamblen LJ gave the judgment of the Court. In doing so he identified the following guiding principles as to whether an award should not be enforced on public policy grounds:

- When public policy is relied upon to preclude enforcement it should be given a restrictive interpretation and approached with extreme caution.
- Where the arbitral tribunal has jurisdiction to determine the relevant issue of illegality, and has held that there is no illegality, the English court should not re-open the facts save in exceptional circumstances. In doing so the Court approved the approach of the majority of the Court of Appeal in *Westacre Investments Inc. v Jugoimport-SPDR Holding Co Ltd* [2000] QB 785 which was to be preferred to the approach of the earlier Court of Appeal in *Soleimany v Soleimany* [1999] QB 785 (CA).
- Where on the facts found there is no illegality under the governing law but is under English law, public policy will only be engaged where the illegality reflects considerations of international public policy rather than purely English domestic public policy.
- In considering whether public policy is engaged, the degree of connection between the award sought to be enforced and the relevant illegality will be important.

By way of examples, an attempt to enforce an award based on a contract to smuggle or to bribe would be refused on public policy grounds, but an award based on a contract which was procured by bribery would not. Addressing the new ground of appeal, the Court held that *Patel v Mirza* does not affect the principles to be applied when considering recognition and enforcement under s.103, although the principles might overlap:

- The Supreme Court did not contemplate in *Patel v Mirza* that its new approach to substantive claims involving illegality might also be applicable in the context of the enforcement of international arbitral awards.
- There are sound justifications to taking a different approach to substantive claims and enforcement claims because of the strong public policy in favour of the enforcement of international arbitral awards.
- *Patel v Mirza* might have moved the approach to the enforcement of substantive claims closer to the multi-factorial approach that has always applied to the public policy defence to enforcement of an international arbitral award. As to the ground of appeal that Sinocore's claim was in fact 'based on' the fraudulent presentation of the bills of lading, the Court of Appeal held that the fraudulent conduct was not sufficiently closely connected to its claim for enforcement of the Award to engage public policy. Even if it was engaged, it did not justify refusal of enforcement.
- It was not appropriate to go behind the findings made by the Tribunal that the fraudulent conduct was not causative of the loss suffered by Sinocore.
- The underlying sale contract was not illegal.
- This was in fact only a case of attempted fraud because Sinocore's demand under the letter of credit had not resulted in it being paid. There is no public policy to refuse to enforce where there has been a failed attempt at fraud.
- The public policy in favour of the enforcement of awards clearly outweighed any public policy considerations against enforcement. The Court of Appeal also refused to interfere with Phillips J's decision to accept the undertaking from Sinocore, holding that there was no legal principle which could or would prevent the court accepting such an undertaking.

Summary

The decision is a welcome restatement of the English courts' firmly pro-enforcement approach to international arbitral awards and the due respect that is to be given to the parties' choice of dispute resolution forum and the decision of that tribunal. It also provides clarity on the very limited extent to which an English court may go behind a tribunal's findings.