
DOES THE USE OF FRAUDULENT DOCUMENTS ENGAGE PUBLIC POLICY REASONS TO REFUSE ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS?

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INTRODUCTION

One of the most interesting sectors of the law that inspired me at the bar was international arbitration and the way this forum reaches over various jurisdictions. There are scholars who support delocalisation inasmuch as an arbitration award should be statelessⁱ deriving its force not from the *lex arbitri*ⁱⁱ but from the parties' agreement. However, the overwhelming body of opinion is that the parties' choice of *lex arbitri* cannot be ignored.

i That the arbitral award cannot be interfered with by any member state's own legal system.

ii The law of the arbitration *Lex arbitri* – procedural rules of the place of the arbitration or may refer to the arbitration rules and/or conflict-of-laws rules applicable in the place of arbitration or may refer to the arbitration institution procedural rules

States are at the mercy of the *lex mercatoria*ⁱⁱⁱ and any inconsistency in enforcing international arbitral awards may be seen as interfering with party autonomy and bad for business.

The New York Convention is a product of *lex mercatoria* and its purpose is to facilitate the international enforcement of arbitral awards which could be made in one state and enforced against assets in any other state around the world. The New York Convention has been incredibly successful with no fewer than 157 member states. Nonetheless, it remains at the discretion of each member state as to whether international awards are enforced.

An international arbitration award floats on the international stage looking for recognition of enforcement and it is up to individual member states as to whether such an award is enforceable. Member states do have their own grounds for refusing enforcement of arbitral awards, by way of example England & Wales sets out its grounds under section 103 of the Arbitration Act 1996.

The preferred formulated approach set out by *Patel v Mirza*^{iv} was proffered by Professor Burrows as follows:

“If the formation, purpose or performance of a contract involves conduct that is illegal (such as crime) or contrary to public policy (such as restraint of trade), the contract is unenforceable by one or either party if to deny enforcement would be an appropriate response to that conduct, taking into account where relevant-

- a) *How seriously illegal or contrary to public policy the conduct was*
- b) *Whether the party seeking enforcement knew of, or intended, the conduct*
- c) *How central to the contract or its performance the conduct was*
- d) *How serious a sanction the denial of enforcement is for the party seeking enforcement*
- e) *Whether denying enforcement will further the purpose of the rule which the conduct has infringed*
- f) *Whether denying enforcement will act as a deterrent to conduct that is illegal or contrary to public policy*
- g) *Whether denying enforcement will ensure that the party seeking enforcement does not profit from the conduct*
- h) *Whether denying enforcement will avoid inconsistency in the law thereby maintaining the integrity of the legal system”*

The latest Court of Appeal decision *RBRG Trading (UK) Limited v Sinocore International Co. Ltd*

iii Lex mercatoria literally means “merchant law”. It evolved as a system of custom and practice, which was enforced through a system of merchant courts along the main trade routes. It functioned as the international law of commerce. It emphasised contractual freedom, alienability of property, while shunning legal technicalities and deciding cases ex aequo et bono.

iv *Patel v Mirza* [2016] UKSC 42, 3 WLR 399

[2018] EWCA Civ 838 reinforces the New York Convention's regime. The appeal concerns the enforceability of a New York Convention arbitration award where there were issues of illegality relating to the underlying claim triggering public policy considerations.

The principle behind these authorities applies equally to arbitral awards in construction and engineering disputes under international arbitration.

BACKGROUND

The parties entered into contract dated 15 April 2010 to buy and sell steel rolled coils which were to be shipped from China to Mexico by July 2010 at the latest (Contract). The Contract had a CIETAC^v arbitration clause, with a Chinese governing law clause and a Chinese seat. RBRG was to make payment by an irrevocable letter of credit which was to be drafted in strict conformity with the Contract in the value of US\$12,616,000.

In about May 2010 the parties amended the Contract to provide for RBRG to arrange an inspection of the quality and quantity of the goods prior to or during loading.

On about 12 June 2010 RBRG and its bank (Rabobank) attempted to amend the letter of credit to change the period of shipment without Sinocore's knowledge or consent to between 20 to 30 July. Sinocore proceeded to ship the coils in advance of the amended date. Thereafter on about 5 and 6 July genuine bills of lading were issued. On 7 July the vessel set sail and Sinocore advised RBRG on the same day that the date of the bills of lading was 6 July 2010.

On about 22 July Sinocore's collecting bank requested payment under the letter of credit presenting bills of lading dated 20 - 21 July 2010. It was common ground that these bills of lading were forgeries. It seemed that Sinocore presented said bills of lading to comply with the purported amended letter of credit. Rabobank refused to pay Sinocore pursuant to the letter of credit.

On 26 July 2010 the Court of Amsterdam granted a temporary injunction preventing Rabobank from making payment under the letter of credit against false bills. Sinocore commenced proceedings against Rabobank in the Chinese courts claiming damages for non-payment. The claim was dismissed on the basis of the forged bills of lading. Sinocore appealed which has yet to be heard.

Lord Denning in the case of [Edward Owen Engineering Ltd v Barclays Bank International Ltd \[1978\] QB 159 at p 171](#) described letters of credit as 'the life blood of international commerce'. Further, Lord Diplock stated in the judgment of [UCM v Royal Bank of Canada \[1982\] 1 AC 168 at pg 183G - 184B](#):

v China International Economic & Trade Arbitration Commission

“..... to this general statement of principle as to the contractual obligations of the confirming bank to [pay] the seller, there is one established exception; that is, where the seller, for the purpose of drawing on the credit, fraudulently presents to the confirming bank documents that contain, expressly or by implication, material representations of fact that to his knowledge are untrue. Although there does not appear among the English authorities any case in which this exception has been applied it is well established in the American cases

The exception for fraud on part of the beneficiary seeking to avail himself of the credit is a clear application of the maxim ex turpi causa non oritur actio or, if plain English is preferred, ‘fraud unravels all’ The courts will not allow their courts to be used by a dishonest person to carry out fraud.”

Sinocore terminated the Contract and sold the goods to a third party at a loss.

RBRG commenced arbitration under the CIETAC rules alleging that Sinocore had breached an inspection clause in the Contract, Sinocore counterclaimed for the difference between the Contract price and the value it recovered from the third party buyer.

THE AWARD

The arbitrator (Tribunal) dismissed RBRG’s claim on the grounds that:

RBGR had not requested an inspection and in any event such breach was not causative of RBRG’s loss as the termination was caused by a failure of the parties to agree whether the attempted amendment to the letter of credit was consistent with the Contract, rather than issues with the quality and quantity of the goods or their inspection.

RBGR had breached the Contract by instructing Rabobank to issue an amendment to the letter of credit which was not compliant with the terms of the Contract

It had no jurisdiction to determine whether the bills of lading were forgeries but accepted the Dutch and Chinese rulings that they were forgeries.

The tribunal went on to consider the consequences of that determination on Sinocore’s position in the arbitration.

The Tribunal concluded that the fundamental cause of the termination of the Contract and Sinocore’s failure to obtain payment was the non-conforming letter of credit tendered by RBRG following amendments to which Sinocore did not agree and awarded Sinocore US\$4.8 million.

ENFORCING THE AWARD

On 24 December 2014 RBGR applied to the Chinese court to set aside the Award, which was dismissed, meaning that RBGR had exhausted its rights of appeal from the Award.

In about February 2016 Sinocore applied to enforce the Award in England and RBGR sought to set aside the order on the ground that it would be contrary to public policy as Sinocore's claim was based upon forged bills of lading. This argument was put two ways; firstly: on the narrow basis that it was open to Sinocore to present the genuine bills and obtain payment under the letter of credit as the attempted amendments to the letter of credit were ineffective, so that Sinocore's claim was based on its own fraud and secondly: on the more broader ground that the English courts will not assist a seller who presents forged documents under a letter of credit.

The matter came in front of Justice Philips and he stated that there was no suggestion that the Contract itself was fraudulent, or otherwise contrary to public policy and the Award, on the face of it, did not uphold a claim for payment against the presentation of forged documents, rather causation was the breach of Contract by RBGR which occurred before the forged documents were created and presented.

Philips J held that the narrow ground mischaracterised the Award, and/or sought to go behind its finding as to causation of the loss.

RBGR contends that recognition and enforcement of the Award would be contrary to public policy and should be refused under section 103(3) of the Arbitration Act 1996.

On the broad ground, the maxim that 'fraud unravels all' arose in the context of the strict duty upon an issuing bank to pay under a letter of credit against apparently conforming documents. The recognised exception that a bank should not pay against fraudulent documents did not support the wider proposition, relied upon by RBGR, that a party who presents forged documents cannot obtain relief from the court in respect of the transaction more generally, even if his claim is for damages for prior breach of contract. The argument that this 'taints' an award so that public policy sounds against its enforcement would introduce uncertainty and undermine party authority

Justice Philips dismissed RBGR's defence.

COURT OF APPEAL

RBGR appealed on four (4) grounds primarily upon public policy.

Section 103(3) provides:

“Refusal of recognition or enforcement

Recognition or enforcement of a New York Convention award shall not be refused except in the following cases:

.....

Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.”

The court reviewed a number of authorities, in summary English law recognises an important public policy on the enforcement of arbitral awards, and the courts will only refuse to do so in a clear case. A controversial question, which has been the subject of several recent decisions, is the extent to which it may be contrary to English public policy to enforce a foreign arbitral award rendered on the basis of an underlying contract the enforcement of which (as distinct from enforcement of an arbitral award) might be contrary to English public policy.

First, it is legitimate for the court, in considering whether a foreign arbitral award should not be enforced on the ground of public policy, to take account of the underlying contract on which the award is based.

Second, if that contract is in itself contrary to public policy (i.e. contract to share criminal proceedings) the award may be refused enforcement on the ground of public policy.

Third, it is important to distinguish between domestic public policy in English law and consideration of international public policy applied by the English courts so as to disapply foreign law or refuse to enforce an arbitral award, as the case may be. Thus, the mere fact that English law would have arrived at a different result does not of itself justify the application of English public policy.

Fourth, the mere fact that the performance of the contract may be illegal in the place of performance, without more, will not render an award on the basis of such a contract unenforceable in England, where the contract is legal by its applicable law and by the *lex arbitri*.

Fifth, if it is apparent on the face of the award that the contract was made with the intention of violating the law of a foreign friendly state, then the enforcement of an award rendered on the basis of such a contract may be contrary to English public policy.

Sixth, the court has to perform a balancing exercise between the finality that should *prima facie* exist particularly for those that agree to have their disputes arbitrated, against the policy of ensuring that the enforcement power of the English court is not abused; the nature of, and strength of the case for illegality, and the extent to which it can be seen that the asserted illegality was addressed by the arbitral tribunal are factors in the balancing exercise between the competing public policies of finality and illegality.

It is widely accepted and recognised in English authoritiesⁱ that the public policy ground should be given a restrictive interpretation.

Where the arbitration tribunal has jurisdiction to determine the relevant issue of illegality and has determined that there was no illegality on the facts the English court should not allow the facts to be re-opened, save but for in the most exceptional cases.

Where, on the facts found, there is no illegality under the governing law but there is illegality under English law, public policy will only be engaged where illegality considerations of international public policy rather than purely domestic public policy. This accords with the rules at common law and under the Rome 1 Regulation (Article 21) in relation to the refusal of the application of governing law on public policy grounds.

In considering whether and, if so, to what extent public policy is engaged the degree of connection between the claim sought to be enforced and the relevant illegality will be important. The main example of the court refusing to enforce an award on the grounds of illegality is *Soleimany*ⁱⁱ in which, on the facts found by the arbitral tribunal, the contract was illegal as a matter of English law reflecting international public policy grounds (a contract to smuggle goods out of Iran).

By contrast, whilst recognising that an award enforcing a contract to bribe would not be enforced, the courts have enforced awards where it has been alleged that the underlying contract has been procured by briberyⁱⁱⁱ. In bribery cases it is not the contract that is not enforceable by reason of public policy, but rather the public policy impact would not relate to the contract but to the conduct of one party or the other.

The Court of Appeal (CA) dismissed RBGR's appeal on the basis that RBGR had not been deceived and that it had prevented payment under the letter of credit and that was the finding of fact of the Tribunal.

Further, the CA, in supporting the longstanding policy, refused to go behind the findings made by the Tribunal. To do so would have significantly undermined party autonomy.

Furthermore, and perhaps crucially the Contract did not involve any illegality either under Chinese or English law and therefore did not prevent a party from seeking more general remedies thereunder.

The CA found that there was no fraud only an attempt of fraud and there is no public policy not to enforce an award based on a failed attempt of fraud. This is analogous to that in the *National Iranian Oil*^{iv} case which there was a failed attempt to bribe.

i *Deuche Schachtbau v National Oil* [1987] 3 WLR 1023 at pg 1035D & *IPOC (Nigeria) v Nigeria National Petroleum* [2005] 2 Lloyds Rep 326 at [11]

ii *Soleimany v Solemany* [1999] QB 785

iii *Wilson v Hurstanger* [2007] 1 WLR 2351 and the *National Iranian Oil* case

iv *National Iranian Oil v Crescent Petroleum* [2016] 2 Lloyd's Rep 147

CONCLUSION

There is no short answer to the hypothesis in the title of this article save to say it depends on the facts and circumstances. The mid to longer version is that following a review of the authorities [RBGR v Sinocore](#) does not jar with [Patel](#) and equally clear is that engaging public policy to refuse an award remains very much restricted. The fact that fraud and/or a bribe has taken place, attempted or otherwise, matters not; insofar as such act does not prevent a party from obtaining relief from the court in respect of the transaction more generally, providing the contract itself is not illegal under the *lex arbitri* or in English law. Further, finality required by party autonomy is a serious counterweight when considering whether to engage public policy reasons to refuse an award.

39 ESSEX CHAMBERS

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