

THE PERILS OF ARBITRATION ENFORCEMENT

- ▶ It is rare that an arbitral award will not be enforced and the New York Convention 1958 (implemented in England and Wales through ss.103-106 Arbitration Act 1996 (AA 1996)) has a key part to play in that.
- ▶ A ream of case law confirms the position that arbitral awards will, in most cases, be enforced.
- ▶ However, this is not an absolute, as confirmed by the recent cases and our own experience, where fraud or other possible irregularity is a factor.

What's it about?

The ability to enforce arbitral awards is a central factor to be borne in mind by any party intending to issue arbitration proceedings. Another key consideration to take into account when deciding on enforcement is confidentiality. An often-cited benefit of arbitration is that it is confidential. Once you go to court to enforce (or to challenge) an arbitrator's award, confidentiality may be lost.

Why does it matter?

The English courts have long followed a general policy of wanting to uphold arbitral awards and underpin the effectiveness of the arbitration process. Recent cases confirm that only in exceptional circumstances will an arbitral award not be upheld by the court:

- ▶ *Halcrow Group Limited v Blackpool Borough Council and another* [2016] EWHC 3596 (TCC) – this challenge to an arbitrator's award was held to be an attempt to re-argue points that had already been decided by the arbitrator or that were simply procedural and evidential complaints that should have been argued during the arbitration itself. The application was therefore dismissed on the basis that the arbitrator had properly summarised and applied the law in reaching his decision.
 - ▶ *Sinocore International Co Limited v RBRG Trading (UK) Limited* [2017] EWHC 251 (Comm) – This case in particular shows the importance attached by the courts to upholding arbitral awards. It was a sale of goods case, where to try to obtain payment under a letter of credit the seller had presented a forged bill of lading in which the shipping date of the goods had been falsified. The seller subsequently won an award of damages against the buyer in an arbitration conducted in China, the arbitral tribunal having been made aware of the forgery, for which the buyer had not been able to offer any explanation. The High Court summarised the general approach as being a strong presumption in favour of enforceability. An exception is where there is clear evidence of the award having been obtained by fraudulent means. However, in this case the damages awarded were for a breach of contract by the buyer in which the fraud had played no part. There is no rule that the court will not enforce an award in favour of a party simply because he has acted dishonestly. The importance of the finality of arbitration awards (particularly international) clearly and distinctly outweighs any broad objection that the transaction is tainted by fraud.
 - ▶ *Celtic Bioenergy Limited v Knowles Limited* [2017] EWHC 472 (TCC) – Here, however, the claimant's application to set aside the award due to fraud by the defendant was successful. The defendant had acted wrongfully towards the claimant over certain invoices and had concealed its conduct by not disclosing certain documents, in order to mislead the arbitrator in coming to his decision. The court found this was deliberate and fraudulent on the part of the defendant, where even recklessness might have been sufficient reason to set aside the award.
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Now what?

Fraud by party is not the only ground on which the court will set aside an arbitrator's award, but it is one of the more difficult grounds on which to succeed. A key difference between *Sinocore* and *Celtic Bioenergy* was that, in *Sinocore*, the fraud was entirely separate from the substantive cause of action, whereas, in *Celtic Bioenergy*, the fraud was 'substantively' focused at the hearing in an attempt to mislead the Tribunal.

Interestingly, despite the clear predisposition of the courts towards enforcement, this firm successfully resisted an arbitration enforcement action in Singapore, the case in question involving an arbitral award made by consent. Against the award our client set off damages incurred in respect of defects which the other side had deliberately concealed from our client. Ultimately, the (Singaporean) court agreed the 'fraud' factor weighed heavily in the balance, and permitted the set-off and stayed the attempt to enforce. Subsequently, a further arbitration was commenced and settled on favourable terms.

The cases therefore show that while it can be difficult to defeat an arbitration award by alleging fraud by the successful party, nevertheless where the fraud can be proven and can be shown to have had a direct bearing on the result of the arbitration, it may be well worth the attempt.

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