

ENGLISH COMMERCIAL COURT ORDERS FULL TRIAL OF PUBLIC POLICY CHALLENGE TO ENFORCEMENT OF NEW YORK CONVENTION AWARD

Stati & Ors v The Republic of Kazakhstan [2017] EWHC 1348 (Comm)

Introduction

In a decision handed down on 6 June 2017 in *Stati & Ors v The Republic of Kazakhstan* [2017] EWHC 1348 (Comm), Knowles J held that there was sufficient *prima facie* evidence that an arbitral award had been obtained by the Claimants by fraud so as to warrant a full trial of the fraud allegations and to determine whether, under Section 103(3) of the Arbitration Act 1996, enforcement of the award should be refused on grounds of public policy. Permission was granted for the respondent State (“Kazakhstan”) to amend its application to set aside the permission that had been granted to enforce the award in England.

Background

On 19 December 2013, the Claimants obtained a \$500 million arbitral award (“the Award”) in Swedish arbitration proceedings against Kazakhstan based on alleged violations of the Energy Charter Treaty. A component of the damages awarded was for the value of an LPG Plant owned by the Claimants. Regarding valuation, the Claimants submitted evidence that an entity controlled by Kazakhstan had submitted a bid of US\$199 million (“the Indicative Bid”), upon which the Tribunal decided to base its valuation. Kazakhstan later claimed, following discovery proceedings in the US courts, that the valuation evidence was fraudulent. A company described by the Claimants as a third party (Perkwood Investments Ltd), which it appeared was actually related to the Claimants, appeared to have sold equipment to the Claimants’ companies at a highly inflated price and to have charged management fees of US\$44 million without documenting what management was undertaken. These apparently inflated or non-existent costs were a factor in the Tribunal’s valuation of the LPG Plant.

In enforcement proceedings in the US, Kazakhstan’s motion to amend to add the alleged fraud to its grounds for resisting enforcement was refused on the basis that it was clear that “the arbitrators did not rely upon the allegedly fraudulent evidence in reaching their decision”. Kazakhstan’s application to set aside the Award through the Swedish courts was dismissed, with the Swedish court finding that because the Award was based on the Indicative Bid (which was not itself *per se* regarded as false evidence), rather than other allegedly fraudulent evidence, the Tribunal’s assessment could not be impugned on the grounds of Swedish public policy.

Decision

Knowles J granted Kazakhstan permission to amend its application to set aside permission granted to the Claimants to enforce the Award in England and ordered a full trial of the fraud allegations to determine whether enforcement should be refused on grounds of English public policy.

As regards the public policy exception to enforcement of an award under Section 103(3), Knowles J stated that the court will normally look to see whether the award was procured by some form of reprehensible or unconscionable conduct. It may be sufficient to show that a party had deliberately and dishonestly failed to disclose materials and misled the tribunal, which would have had an important influence on or would have affected the result of the arbitration.

As regards whether the US or Swedish decisions created an estoppel, Knowles J held that those decisions were to be read narrowly and, on that basis, no such estoppel arose. The US court's decision had not concluded the question of the consequences of the Tribunal's reliance upon the Indicative Bid, including the question of whether the allegedly fraudulent evidence had misled the Tribunal in their valuation. As regards the Swedish court's decision, under Swedish law, to declare an award invalid on the ground of false evidence it must be clear that either the false evidence was directly decisive of the outcome or had an indirect impact and that such indirect influence was of decisive significance. Whilst the Swedish court's decision had considered the issue of 'directly decisive', but did not deal with 'indirect decisive impact'.

As regards the allegations of fraud, two conditions must be fulfilled for an English court to permit a party to pursue to trial an allegation that a New York Convention award was obtained by fraud: (1) that the evidence of the fraud was not available to the party alleging the fraud at the time of the hearing; and (2) that there is a *prima facie* case which is sufficient to overcome the extreme caution of the court when invited to set aside an award on the grounds of public policy. Where perjury is alleged, the evidence must be so strong that it would have been decisive. Knowles J held: (1) that not all relevant evidence was available to Kazakhstan at the time of the Award, nor was it available by means of due diligence; and (2) that the evidence adduced in respect of the allegations of fraud was sufficient to fulfil the requirement of a *prima facie* case.

Concluding Remarks

The case will now proceed to a full trial of the allegations of fraud to determine whether enforcement of the Award should be set aside on grounds of public policy. Successful challenges on public policy grounds are rare.

This case is illustrative of how different approaches can be taken to public policy challenges to awards and their enforcement by courts in different jurisdictions. Knowles J drew particular attention, at paragraph 12, to "*the importance of mutual respect between courts that have responsibilities in relation to commercial arbitration that is of international reach – whether responsibilities in relation to oversight or enforcement – is increasing all the time as commerce becomes more globalised and interconnected*".