Case No: A3/2017/0626

Neutral Citation Number: [2018] EWCA Civ 838
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
(COMMERCIAL COURT)
MR JUSTICE PHILLIPS

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/04/2018

Before :

LORD JUSTICE LEWISON
LORD JUSTICE HAMBLEN
and
LORD JUSTICE IRWIN

- -

Between :

RBRG TRADING (UK) LIMITED	**Appellant**
- and -	
SINOCORE INTERNATIONAL CO. LTD.	**Respondent**

- -
- -

Neil Calver QC and Tom Pascoe (instructed by **King & Spalding International LLP**) for the **Appellant**
Nicholas Vineall QC and Neil Henderson (instructed by **Holman Fenwick Willan LLP**) for the **Respondent**

Hearing date : 27 March 2018

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Judgment

LORD JUSTICE HAMBLEN :

Introduction

1. This appeal concerns the enforceability of a New York Convention arbitration award where there are issues of illegality relating to the underlying claim.

2. The award dated 30 June 2014 ("the Award") was issued by the China International Economic and Trade Arbitration Commission ("CIETAC"). The Award awarded damages of US$4,857,500 to the Respondent Sellers ("Sinocore") for breach by the Appellant Buyers ("RBRG") of a contract for the sale of rolled steel coils.

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

The Factual and Procedural Background

4. By a contract of 15 April 2010 (the "Sale Contract"), Sinocore agreed to sell 14,500MT of rolled steel coils (the "Goods") to RBRG at a price of US$870/MT C&F, to be shipped from China to Mexico by July 2010 at the latest. Payment was to be made by an irrevocable letter of credit, which was to be opened by RBRG in strict conformity with the Sale Contract. The Sale Contract also provided that disputes were to be determined by CIETAC arbitration, under Chinese law, in Chinese, in China.

5. On 22 April 2010, on the instructions of RBRG, a conforming letter of credit was issued by Rabobank in the Netherlands for the full sum of US$12,616,000. This letter was subject to the Uniform Customs and Practice for Documentary Credits ("UCP600").

6. On 7 May 2010, the parties amended the Sale Contract to provide for RBRG to arrange an inspection of quality and quantity of the Goods prior to or during loading. On 12 June 2010, under instruction from RBRG, Rabobank purported to issue an amendment to the letter of credit, so that the required shipment period was changed to "20th to 30th July 2010".

7. On 5-6 July 2010, the Goods were loaded on board a vessel in China. Genuine bills of lading dated 5 and 6 July 2010 were issued. The vessel departed on 7 July 2010 and on the same day Sinocore sent a shipping advice to RBRG which stated that the date of the bills of lading was 6 July 2010.

8. On 22 July 2010, Sinocore's collecting bank requested payment from Rabobank under the letter of credit, presenting bills of lading dated 20-21 July 2010. It is now common ground that these bills were forgeries. Although Sinocore has offered no explanation for the existence or presentation of the false bills of lading, it appears they were presented to comply with the purported amended shipment date terms in the letter of credit.

9. On 26 July 2010, the Court of Amsterdam granted a temporary injunction preventing Rabobank from making payment under the letter of credit against the false bills. Subsequently, on 13 August 2010, Sinocore commenced proceedings against Rabobank in the Chinese courts, claiming damages for Rabobank's non-payment

under the letter of credit. This claim was dismissed on 26 June 2013, on the basis that the bills of lading presented upon the request for payment were fraudulent. Sinocore brought an appeal against this decision in China, which has yet to be heard.

10. By a letter of 20 August 2010, Sinocore purported to terminate the Sale Contract due to RBRG's "repudiatory breach by failing to fulfil [their] contractual obligations under the [Sale] Contract". RBRG accepted the termination without prejudice to its right to claim damages for breaches of contract.

11. By a contract of 26 August 2010 Sinocore sold the Goods to a third party, Chimay, for US$670/MT. On 30 August 2010 the Goods arrived at Houston Port, USA, where they were detained by the US authorities on RBRG's application from 3 September 2010 until their release on 21 October 2010 following a decision of the US District Court. On 29 March 2011 the price was reduced to US$535/MT by a supplemental agreement with Chimay.

12. On 11 April 2012 RBRG commenced CIETAC arbitration proceedings against Sinocore for damages caused by Sinocore's breach of the inspection clause in the Sale Contract. RBRG alleged that Sinocore had shipped the Goods on 5-6 July 2010 to prevent RBRG from inspecting them, and then produced forged bills of lading to falsely show a later shipment date which complied with the amendment to the letter of credit. RBRG inferred from this conduct that the Goods were of insufficient quality. Sinocore counterclaimed for damages for breach of contract based on RBRG's unilateral attempt to amend the letter of credit.

The Award

13. Following oral hearings on 10 April and 9 August 2013, the CIETAC tribunal ("the Tribunal") issued the Award on 30 June 2014. The Tribunal found as follows:

    (1) RBRG had not requested to inspect the Goods before or during shipment. Sinocore had given sufficient notification of shipment. Sinocore was, therefore, not in breach of the inspection clause. Further, any breach would not have been 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 Sale Contract, rather than issues with the quality of the Goods, or their inspection.
    (2) RBRG had breached the Sale Contract by instructing Rabobank to issue an amendment to the letter of credit which was not compliant with the terms of the Sale Contract and which, contrary to RBRG's case at the arbitration, had not been agreed to by Sinocore.
    (3) Although the Tribunal held that it did not have jurisdiction to determine whether the bills of lading were forged, it referred to the fact that the Dutch court and the Chinese court had both ruled on the issue and "totally accept the judgments rendered by the courts".
    (4) The Tribunal then went on to consider the consequence of that determination on Sinocore's position in the arbitration:

        > "…the arbitral tribunal believes that it is an important task of this arbitration to decide if it constituted falsification under the sales contract to forge such bills of lading by the seller and if the seller had to assume any liability thereof based on the above fact found."

(5) RBRG alleged in the arbitration that there had been a fraud against it which had serious consequences, namely that it could not have taken delivery of the Goods with the forged bills of lading even if it had paid and that the bills of lading could not have been forwarded to its sub-buyer with the result that RBRG would have been in breach of the sub-sale contract. The Tribunal held that Sinocore had not deceived RBRG about the shipment date of the Goods because RBRG had been made aware of it by the shipping notice sent by Sinocore on 6 July 2010:

> "The bills of lading under the letter of credit which were submitted by the seller to the issuing bank were forged … That the seller submitted, to the issuing bank, forged bills of lading under the letter of credit in order to get the payment was equivalent to concealing the fact and deceiving the issuing bank, which was also the sole reason why the letter of credit was enjoined from payment by the Dutch court. Such deception or fraud was a fact between the beneficiary and the bank in the legal relationship of the letter of credit, but deceiving the bank did not mean deceiving the buyer. The facts and evidence in this case have to be taken into consideration to decide if the seller deceived the buyer or not. According to the evidence in this case, the seller had informed the buyer of the dates of issue of the true bills of lading as early as July 6, 2010 (see paragraph 13). From evidence C in paragraph 62 above, we can see that with knowledge of the actual shipment period of the goods the buyer took the initiative to ask STX PAN OCEAN only to get evidence from the carrier to apply for the injunction at the Dutch court. Many pieces of evidence above could prove that the buyer knew the movement of the goods very well. It all indicates that the buyer fully understood the actual shipment period of the goods, so the claim that the seller deceived the buyer is unfounded" (Award paras. 65-66).

(6) The Tribunal agreed with RBRG that Sinocore "could have done it better" and in particular could have insisted that RBRG's unilateral amendment had no effect under UCP 600 and presented documents conforming with the original, unamended letter of credit:

> "The arbitral tribunal totally agrees that the seller could have done it better. For example, the seller may insist that such amendment did not have any effect on it according to the provision of Article 10.a UCP 600, and act and present the documents according to the terms of the letter of credit first issued by the buyer, instead of making such an unwise decision" (Award para. 68).

(7) The Tribunal concluded that the fundamental cause of the termination of the Sale 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. This is borne out by a number of passages in the Award, in particular:

(i) Paragraph 32 - "…according to the description of the factual background of this case, the arbitral tribunal holds that the direct reason leading to the termination of Contract No. 415 in this case had nothing to do with the quality of the goods because both parties failed to reach an agreement on whether if the amended letter of credit was consistent with Contract No. 415 in terms of shipment period, which then made the seller unable to

settle exchange or get the payment, and caused the seller to cancel the contract."

(ii) Paragraph 56: "(3) According to the provision of Article 10.e of UCP600, "Partial acceptance of an amendment is not allowed and will be deemed to be notification of rejection of the amendment." The seller held that it did not fully, but partially accept the second amendment of the letter of credit by the buyer, so it should be deemed to be notification of rejection of the amendment.

The arbitral tribunal decides:

56) The arbitral tribunal reiterates now that this dispute is the key dispute in this case, and has the most direct causal relationship with the consequence that the seller did not get the payment, the Contract was terminated, and losses were caused."

(iii) Paragraph 68 - "…the buyer issued a letter of credit that did not meet the contracted requirement and put the seller into trouble. Such breach where the buyer failed to provide a letter of credit complying with the sales contract is still the primary or fundamental cause why the seller could not get the payment and why the sales contract was terminated".

(8) The Tribunal disallowed Sinocore's claim for interest because of its "improper operation" in presenting false bills of lading:

"As a company that has been engaged in international trade for years, the seller shall be familiar with related practices of the letter of credit and know the risk of submitting the bills of lading whose dates are amended to the bank for negotiation. The seller shall take the risk produced by its improper operation. Therefore, the seller's claim for the loss of interest is not supported."

14. On 24 December 2014 RBRG applied to the Chinese court to set aside the Award, although as a foreign company they were confined to an appeal on procedural grounds only. This application was dismissed on 18 March 2015, meaning that RBRG has exhausted its rights of appeal from the Award.

15. By an application of 15 February 2016, Sinocore applied to enforce the Award in this jurisdiction. The order was made by Burton J on 2 March 2016, pursuant to s.101(2) of the Act, under the New York Convention. RBRG applied to set aside the order on the ground that enforcement would be contrary to public policy as Sinocore's claim was based on forged bills of lading. This argument was put in two ways: firstly, on the 'narrow ground' that it had been open to Sinocore to present the genuine bills and obtain payment under the letter of credit as the attempted amendment to the letter of credit was ineffective, so that their claim in the arbitration was based on their own

fraud; secondly on the 'broad ground' that the English courts will not assist a seller who present forged documents under a letter of credit.

The Judgment

16. The matter came before Phillips J for an oral hearing on 5 October 2016. By a judgment of 17 February 2017, the judge dismissed RBRG's application and upheld the enforcement of the Award.

17. The judge stated that RBRG's claim must be considered in light of the fact that there was no suggestion that the Sale Contract itself was fraudulent or otherwise contrary to public policy, and that the Award did not, on its face, uphold a claim for payment against the presentation of forged bills. Rather, it was for breach of the Sale Contract by RBRG, with such breach occurring before the forgery or presentation of the bills, which breach the Tribunal held was the cause of the loss.

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

19. 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 on by RBRG, 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 a 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.

20. Finally, the judge also dealt with an issue concerning undertakings which had arisen during the hearing, and on which the parties served further written submissions. RBRG was concerned that Sinocore might enjoy double recovery, due to their outstanding appeal against Rabobank in China. Sinocore offered an undertaking that they would recover no more than the amount of the Award in total, but refused to abandon the proceedings in China. RBRG argued that this amounted to a lack of good faith, and/or that the court should not accept an undertaking relating to proceedings which were known to be fraudulent, and that both amounted to good reason to refuse to enforce the Award. Further, RBRG submitted that the nature of the undertaking demonstrated that Sinocore saw the claim against themselves and Rabobank as interchangeable, and therefore supported their arguments on the 'narrow ground'. The judge held that the undertaking was acceptable: it was sufficient to prevent double recovery and it did not require Sinocore to pursue its fraudulent claim.

<u>Grounds for Appeal</u>

21. There are four grounds of appeal:

    (1) The judge applied the wrong test for assessing the consequences of Sinocore's illegality. He applied the overly narrow (and now discarded) test, set out in *Tinsley v Milligan* [1994] 1 AC 340, of whether Sinocore's pleaded claim relied on its own fraud. He should have applied the more flexible approach laid

down by the Supreme Court in *Patel v Mirza* [2016] UKSC 42, [2016] 3 WLR 399.

(2) If the judge had applied the correct illegality test, he would have approached the balancing exercise that he purported to carry out at paragraphs [44] and [47] of the judgment differently, by applying the factors laid down in *Patel v Mirza*. That would have led him to refuse to enforce the Award.

(3) The judge was in any event wrong to find that Sinocore's claim was not "based on" its own illegality. Sinocore's loss was caused by its own deliberate (and admitted) decision to present forged documents to the bank under the letter of credit which was the agreed payment mechanism under the Sale Contract.

(4) The judge was wrong to enforce the Award in the light of his (correct) finding that Sinocore was conducting "plainly fraudulent" parallel proceedings in China, in respect of the very same loss claimed in these proceedings. He should, at the very least, have required Sinocore to discontinue those fraudulent proceedings as the price for the court agreeing to enforce its Award in this jurisdiction.

The law relating to section 103

22. Section 103 of the Act provides:

> "**103 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."

23. We were referred to a number of cases which address the circumstances in which the court may refuse recognition or enforcement of an arbitration award on public policy grounds relating to illegality. These included *Soleimany v Soleimany* [1999] QB 785 (CA); *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [2000] QB 288 (CA); *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 All ER 146; *Honeywell International Middle East Limited v Meydan Group LLC* [2014] 2 Lloyd's Rep 133, and *National Iranian Oil v Crescent Petroleum* [2016] 2 Lloyd's Rep 147.

24. A helpful summary of principles to be derived from the authorities is provided in *Dicey, Morris & Collins, The Conflict of Laws* (15th edition) at 16-150:

> "English law recognises an important public policy in the enforcement of arbitral awards, and the courts will only refuse to do so under Rule 69(2) 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 the arbitral award) might be contrary to English public policy. The following principles can be derived from the authorities. 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 (e.g. the classic case of a contract to share the proceeds of crime) 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 considerations 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, the 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."

25. For the purposes of the present appeal the following matters are of particular relevance:

(1) As is emphasised in *Dicey, Morris & Collins*, it is widely accepted that the public policy ground should be given a restrictive interpretation. This is recognised in the English law authorities – for example, Sir John Donaldson MR in *Deutsche Schachtbau v National Oil* [1987] 3 WLR 1023 at p1035D – "Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution"; Gross J in *IPOC (Nigeria) v Nigerian National Petroleum* [2005] 2 Lloyd's Rep 326 at [11] – "…there can be no realistic doubt that section 103 of the Act embodies a pre-disposition to favour enforcement of New York Convention Awards, reflecting the underlying purpose of the New York Convention itself; indeed, even when a ground for refusing enforcement is established, the court retains a discretion to

enforce the award: *Mustill & Boyd, Commercial Arbitration, 2nd edn, 2001 Companion,* at page 87".

(2) 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 possibly in exceptional circumstances. In this connection, I consider that the views expressed on this issue by the majority of the court in *Westacre* are to be preferred to those put forward by Waller LJ in the same case and in *Soleimany*. As Mantell LJ stated at p316G-H:

> "It is of crucial importance to evaluate both the majority decision in the arbitration and the ruling of the Swiss Federal Tribunal, Swiss Law being both the proper law of the contract and the curial law of the arbitration and Switzerland, like the United Kingdom, being a party to the New York Convention. From the award itself it is clear that bribery was a central issue. The allegation was made, entertained and rejected. Had it not been rejected the claim would have failed, Swiss and English public policy being indistinguishable in this respect. Authority apart, in those circumstances and without fresh evidence I would have thought that there could be no justification for refusing to enforce the award.
>
> However, in the obiter passage cited by Waller L.J. from the judgment in *Soleimany v. Soleimany [1999] Q.B. 785* , 800, it seems to have been suggested that some kind of preliminary inquiry short of a full scale trial should be embarked upon whenever "there is prima facie evidence from one side that the award is based on an illegal contract . . . " For my part I have some difficulty with the concept and even greater concerns about its application in practice, but, for the moment and uncritically accepting the guidelines offered, it seems to me that any such preliminary inquiry in the circumstances of the present case must inevitably lead to the same conclusion, namely, that the attempt to reopen the facts should be rebuffed…."

As *Mustill & Boyd* comment at p95 of the *2001 Companion:*

> "…the opinion of the majority accords best with the principles of international arbitration and the great importance to international commerce of trusting the foreign arbitrators and the courts of the forum, even in cases where the judge called on to enforce the award has grounds for concern."

(3) 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

the illegality reflects considerations of international public policy rather than purely domestic public policy. This is in accordance with the rules at common law and under the Rome 1 Regulation (Article 21) in relation to the refusal of the application of the governing law on public policy grounds – see generally *Dicey, Morris & Collins* Rule 229 at 32R-181. In *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1998] 1 Lloyd's Rep 361 Phillips J referred to the heads of public policy which would be engaged as being those "based on universal principles of morality". In *Westacre* the court stated at p304F that what the *Lemenda* case decided was that; "there are some rules of public policy which if infringed will lead to non-enforcement by the English court whatever their proper law and wherever their place of performance but others are based on considerations which are purely domestic".

(4) 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* 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 bribery – see *Wilson v Hurstanger* [2007] 1 WLR 2351 and the *National Iranian Oil* case. As Burton J stated in the *National Iranian Oil* case at [49]:

> "(2) There is no English public policy requiring a court to refuse to enforce a contract procured by bribery. A court might decide to enforce the contract at the instance of one of the parties. It is not that the contract is unenforceable by reason of public policy, but that the public policy impact would not relate to the contract but to the conduct of one party or the other.
>
> (3) There is certainly no English public policy to refuse to enforce a contract which has been preceded, and is unaffected, by a failed attempt to bribe, on the basis that such contract, or one or more of the parties to it, have allegedly been tainted by the precedent conduct….."

26. In my judgment *Patel v Mirza* does not affect the principles to be applied when considering recognition and enforcement under section 103, as set out in the authorities referred to above. Indeed, this was not contended for or even suggested by RBRG in argument before the judge. *Patel v Mirza* will be relevant to whether, on the facts found, there is any illegality as a matter of English law. The policy considerations taken into account for the purpose of that determination may overlap with those to be considered under section 103, but *Patel v Mirza* neither purports to nor does it consider or decide the proper approach to be taken in section 103(3) cases. In particular:

(1) Prior to *Patel v Mirza* it is clear that a distinct approach applied in the context of a challenge to enforcement of arbitration award under s.103(3), compared to the enforcement of a substantive claim.

(2) In *Patel v Mirza* the Supreme Court did not consider any of the authorities on illegality and public policy in the context of section 103(3). These authorities were not cited in argument, nor were they referred to in the judgment. There is nothing in the judgment to suggest that the Supreme Court contemplated that the approach it set out might also be applicable in the context of section 103(3).

(3) There are sound justifications for taking a different approach to substantive claims and enforcement claims, reflecting the different role performed by the court in each circumstance. This is illustrated by the authorities referred to above and by the following comments of Waller LJ at [36] of his judgment in *Westacre:*

> "…albeit the award is not isolated from the underlying contract, it is relevant that the English court is considering the enforcement of an award, and not the underlying contract...The English court takes cognisance of the fact that the underlying contract, on the facts as they appear from the award and its reasons, does not infringe one of those rules of public policy where the English court would not enforce it whatever its proper law or place of performance. It is entitled to take the view that such domestic public policy considerations as there may be, have been considered by the Arbitral Tribunal. It is legitimate to conclude that there is nothing which offends English public policy if an Arbitral Tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might have taken a different view".

(4) It may be that *Patel v Mirza* has moved the jurisprudence on illegality as a defence to a substantive claim rather closer to the multifactorial approach that has always applied in the context of illegality as a public policy defence to enforcement, but the context and the relevant factors remain different. In particular, as the authorities make clear, there is always a strong public policy in support of enforcement.

Application to the facts

27. The first two grounds of appeal depend upon RBRG's new argument that the judge applied the wrong legal test and failed to follow the flexible approach laid down in *Patel v Mirza*. If, as I have concluded, *Patel v Mirza* is not the relevant test to be applied under section 103(3), then these grounds of appeal fall away. That leaves the third ground of appeal, namely that, based on the findings made in the Award, the judge should have held that the claim was based on Sinocore's illegality.

28. As to the nature of the illegality, RBRG points out that the Tribunal accepted as a matter of fact that the bills of lading which Sinocore had presented to Rabobank were forgeries. It submits that there is a very strong international public policy in refusing to lend assistance to a party who presents forged bills of lading under a letter of credit. In this connection it referred to Lord Denning's well known statement in *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 at p171 describing letters of credit as "the life-blood of international commerce". Reference was also made to the following passage from Lord Diplock's judgment in *UCM v Royal Bank of Canada* [1983] 1 AC 168 at p183G-184B:

> "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 of which the leading or "landmark" case is *Sztejn v J Henry Schroder Banking Corporation* (1941) 31 NYS 2d 631. This judgment of the New York Court of Appeals was referred to with approval by the English Court of Appeal in [*Edward Owen*] … The exception for fraud on the 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 to be preferred, "fraud unravels all". <u>The courts will not allow their process to be used by a dishonest person to carry out fraud</u>." (emphasis added)

29. RBRG contends that Sinocore's fraud is sufficiently connected with the Award that the English court should not enforce it for a number of reasons and, in particular:

(1) Pursuant to the Sale Contract, the only payment mechanism for the Goods was by letter of credit. Sinocore attempted to obtain payment under that letter of credit by presenting fraudulent documents, but did not choose to terminate the Sale Contract until it became clear that Rabobank was not going to pay against the forged documents. It is submitted that this chronology of events demonstrates how Sinocore's fraud was central to its performance under the Sale Contract. If Sinocore's claim had really been for losses caused by RBRG's instruction to issue a non-conforming letter of credit, it would have terminated the contract at that time (i.e. on or just after 12 June 2010). Instead, it falsified the dates on the bills of lading and waited to see whether it would obtain payment against the forged documents and only terminated the Sale Contract on 20 August, once it became clear that the bank would not pay out against the forged documents.

(2) Since Sinocore never agreed to the amendment of the letter of credit the amendment was of no effect by reason of Article 10a of the UCP. The shipment date on the letter of credit therefore remained as "Latest date of Shipment 31 July 2010" and (consistently) the shipment date under the Sale

Contract remained as "July 2010". Had Sinocore presented the genuine bills of lading, it would therefore have suffered no loss whatsoever because it would have been entitled to obtain payment of the full sale price from Rabobank under the letter of credit.

(3) Instead, what Sinocore chose to do was to present forged documents under the letter of credit and then to terminate the Sale Contract after it failed to obtain payment against those documents. It had no entitlement to payment under the letter of credit because it chose to present forged documents thereunder.

(4) It follows that Sinocore's true claim is for Rabobank's failure to pay against the forged bills of lading and it was the presentation of those forged bills that was the effective cause of its loss.

30. In my judgment there are a number of reasons why the degree of connection between Sinocore's fraud in presenting forged bills of lading and its claim for enforcement of the Award is not sufficient to engage public policy or, if it is engaged, to justify refusal of enforcement on public policy grounds.

31. First, as the judge held, the Tribunal expressly considered the issue of causation and found that the cause of the termination of the Sale Contract and of Sinocore's failure to obtain payment for the Goods and resulting losses was the non-conforming letter of credit tendered by RBRG – see the findings summarised at paragraph 13(7) above. The Tribunal also expressly considered the causal significance of the forged bills of lading but found that there was none as RBRG had not been deceived and it had prevented payment under the letter of credit (see paragraphs 13(3)-(5) above).

32. RBRG submitted that these conclusions reflected the reasoning of the Tribunal rather than findings of fact, but in my judgment they are clearly factual findings on causation. Further or alternatively, it submitted they were at most findings as to "but for" causation and that it was open to this court to reach its own conclusion as to the effective cause of the claim and loss. This is not correct. It is clear that the Tribunal regarded causation as being "the key dispute" in the case and that its findings were as to the "primary" or "fundamental" cause. Those are findings of effective causation. In any event, causation was a matter of Chinese law, not English law.

33. On RBRG's own case, it is not seeking to go behind the findings made by the Tribunal, but in my judgment it needs to do so in order to pursue the causation arguments it seeks to raise. It would in any event not be appropriate so to do, as the judge held.

34. Secondly, even if it was permissible and appropriate for this court to review the findings made, RBRG's case faces the fundamental difficulty that its position at the time of the performance of the Sale Contract and at the arbitration was that Sinocore had agreed to the amendments to the letter of credit and that payment had to be sought in accordance with the terms of the amended letter of credit. The Tribunal found as a fact that, contrary to RBRG's case, the amendment had not been agreed. It is difficult to see how RBRG can now contend that the Tribunal should have found that the effective cause of the claim and loss was Sinocore's failure to present documents under the original letter of credit when at all material times its case was that there was no entitlement so to do.

35. Thirdly, it is not and cannot be suggested that the Sale Contract or its required performance involved any illegality under Chinese law or English law.

36. Fourthly, this is at most a case of attempted fraud. RBRG was not deceived, nor was Rabobank. Rabobank did not pay and the forged bills of lading did not go into circulation. Sinocore obtained no benefit from its attempted wrongful act. Sinocore's claim did not succeed because of its wrongful act, but rather it succeeded despite its wrongful act.

37. In enforcing the Award the court is not allowing its "process to be used by a dishonest person to carry out a fraud". In the event, there was no fraud; only an attempt at fraud. There is no public policy to refuse to enforce an award based on a contract during the course of the performance of which there has been a failed attempt at fraud. As the judge held, the position is analogous to that in the *National Iranian Oil* case in which there was a failed attempt to bribe.

38. Although RBRG was not deceived, it suggests that it nevertheless suffered detriment as it was not presented with any bills of lading which it could present under its sub-sale contract. The solution for this, however, always lay within its own hands. Had RBRG at any material time indicated a preparedness to adhere to the original letter of credit terms, conforming bills of lading could and no doubt would have been presented.

39. For all these reasons, I accept Sinocore's submission that on the Tribunal's findings the attempted fraud was not the basis of its claim or loss and was essentially collateral. The same conclusion follows even if it is permissible to review the causation findings.

40. In those circumstances, public policy is not engaged. Alternatively, if it is engaged, any public policy considerations are clearly outweighed by the interests of finality, as the judge held.

41. For completeness, the same conclusion would follow even if it was relevant to have regard to the approach set out in *Patel v Mirza.* Under that approach an important consideration is how central to the contract or its performance the relevant conduct is. Here, for reasons given, it was far from central and was essentially collateral.

42. For all these reasons I would dismiss the appeal on the first three grounds of appeal.

The fourth ground of appeal

43. In my judgment whether to refuse to stay enforcement in the light of the undertaking provided was essentially a matter for the discretion of the judge and it has not been shown that he has erred in law or reached a decision outside the generous ambit of that discretion. The judge was satisfied that the undertaking offered met any concerns there might be as to possible double recovery and, as he held, RBRG could not identify any legal principle which could or would prevent the court accepting such an undertaking. It is also to be noted that RBRG is seeking to rely on matters arising after the award has been issued, and involving third parties rather than RBRG.

Conclusion

44. For the reasons outlined above, I would dismiss the appeal.

LORD JUSTICE IRWIN:

45. I agree.

LORD JUSTICE LEWISON:

46. I also agree.