Should an Enforcing Court Re-open a Tribunal's Decision on a Question of Public Policy?

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When discussing public policy, English lawyers like to quote the famous comment of an English judge in the early 19th century that "public policy is a very unruly horse, and once you get astride it you never know where it will carry you".

Recent history shows how difficult it is to ride the 'unruly horse'; most attempts to resist enforcement on grounds of public policy fail. But it remains a live issue, as the recent decision of the English court in *Heinz v EFL* illustrates.

Heinz revisits the thorny question of whether an enforcing court may re-open a decision of the tribunal in relation to an issue of public policy. This, of course, brings into play two potentially conflicting principles: the finality of arbitration awards and non-enforcement of awards which violate public policy.

Unsurprisingly, this issue has come up before in England, notably in three cases all dating from around 2000 – *Westacre, Soleimany and Hilmarton*.

Westacre concerned an attempt to resist enforcement in England of a Swiss award, on the basis of evidence which had not been produced at the hearing. This evidence was alleged to show, first, that the award had been procured by perjury and, second, that the contract was tainted by bribery.

On the perjury point, the Court of Appeal broadly speaking adopted the test applicable in English litigation, such that so-called "fresh evidence" may only be considered if it was not available to the party at the time of the hearing and is sufficiently strong that it may reasonably be expected to have been decisive at the hearing. On the basis of the facts of that case, it refused to consider the evidence.

As to the second point, the court found that it was clear from the award that the bribery allegation was rejected by the tribunal and refused to re-open the point. The award was therefore enforced.

Soleimany was different. It concerned an English arbitration which was conducted before the Beth Din, which applies Jewish law. It was apparent from the face of the award that the contract in question related to smuggling carpets and that the arbitrator considered that illegality was irrelevant as a matter of Jewish law. The English court found that it would be against English public policy to enforce

an award which in turn enforces an illegal contract, but there was no question of re-opening the arbitrator's findings of fact or law.

In *Hilmarton*, the attempt to resist enforcement of another Swiss award failed. For present purposes, it is sufficient to note that the English court commented that it would be "*quite wrong*" for it to entertain any attempt to go beyond the arbitrator's "*explicit and vital*" finding of fact that there had been no bribery or corrupt activity. That left a question as to whether enforcement could be resisted in England on grounds of illegality under the place of performance which did not offend Swiss law (as the governing law of the contract) or Swiss public policy. The court held it could not and enforced the award. (There is an entirely separate discussion about how *Hilmarton and Soleimany* should be reconciled.)

That brings us then to *Heinz*. In the arbitration (which was seated in Hungary), EFL claimed damages in relation to three distribution agreements between it and third parties. Heinz argued that these distribution agreements were "shams", entered into solely for the purpose of inflating EFL's damages claim. The tribunal found that Heinz had not proved this allegation and awarded EFL damages in relation to those agreements.

Having failed to have the award set aside in the Hungarian courts, Heinz sought to prevent ELF enforcing the award in England on grounds of public policy. It argued – on the basis of fresh evidence it had gathered since the award – that the distribution agreements were forgeries.

The key issue was therefore whether Heinz was entitled to rely on the fresh evidence of forgery to counter the Tribunal's finding as to the distribution agreements – that is, the first limb of the discussion in *Westacre*. On the facts, this boiled down to the question of whether the evidence was reasonably available to Heinz at the time of the hearing.

ELF argued that a reasonable solicitor could have discovered this evidence during the arbitration and that the "fresh evidence" test was not therefore satisfied. The judge held, however, that it was at least arguable that the proper test is whether Heinz and its solicitors should have discovered the evidence (i.e. whether they acted reasonably). He then found that it was arguable that Heinz's failure to investigate "*the opposite camp*" before the hearing did not represent a failure to act reasonably.

Pausing there for some technical background, this was a summary judgment application, which meant that ELF had to show that Heinz's arguments had no real prospect of success. The judge's finding that Heinz's position was arguable was therefore sufficient to dispose of the application, such that the case will now proceed to trial.

So what does *Heinz* mean? On its face, it is limited to cases where a party argues, based on fresh evidence, that an award has been obtained fraudulently. It is different, therefore, to cases like *Hilmarton* or the bribery limb of *Westacre*. But the point remains that alleging perjury or fraud in obtaining an award is still another way of seeking to re-open a tribunal's findings of fact in enforcement proceedings. As was observed in the first instance court in *Westacre*, it represents an open invitation for a disappointed party to re-litigate a New York Convention award at the enforcement stage.

This invitation is, however, limited to situations where the disappointed party can point to fresh evidence. Much depends, therefore, on where the line is drawn in terms of the admissibility of such evidence. This should be explored at trial in *Heinz*, making it one to keep an eye on.