

The trial must not go on: English Court of Appeal overturns a ruling that had prevented claimants from discontinuing proceedings

Introduction

Back in May 2018, in the case of *Anatolie Stati and others v The Republic of Kazakhstan*¹, the English High Court had ordered the Claimants to continue their claim for enforcement of a foreign arbitral award, despite their wish to withdraw from the proceedings. The ruling was exceptional, as it effectively forced unwilling claimants to proceed to trial.

In a judgment handed down on 10 August 2018², the Court of Appeal has overturned the decision, clarifying the correct approach to applications for discontinuance.

Background to the dispute

In February 2014, the English court had granted the Claimants permission to enforce a Swedish-seated US\$500m arbitral award in England under the New York Convention. Enforcement proceedings were also commenced by the Claimants in the United States, Belgium, the Netherlands, Luxembourg, Italy and Sweden.

The Defendant, the Republic of Kazakhstan (the “State”), applied to set aside the English enforcement order on the basis that the arbitral award had been obtained by fraud. The English court was satisfied that there was a sufficient prima facie case of fraud, and gave directions for the matter to proceed to an 8-day trial to be held in October 2018 to determine whether the award had indeed been obtained by fraud. If it had, it would provide a basis in English public policy for not enforcing the award in this jurisdiction.

In February 2018, a few days before the parties were due to give disclosure, the Claimants filed a notice of discontinuance of the enforcement proceedings, which the State applied to set aside. As stated above, in May 2018, Knowles J granted the State’s application, setting aside the notice of discontinuance and effectively forcing the Claimants to continue to trial.

Knowles J noted that the Claimants’ real reason for discontinuing was their fear that the trial might lead to adverse findings against them in relation to the fraud allegations, which might affect the enforcement proceedings in the other jurisdictions. The judge found that the State had a legitimate interest in having the order for enforcement set aside on the merits, and decided that it would be useful for the courts hearing the enforcement proceedings in the other jurisdictions to have a concluded answer on the fraud issues.

The Appeal

The Claimants appealed against Knowles J’s May 2018 decision to set aside their notice of discontinuance, offering undertakings not to enforce the award in the jurisdiction. On 10 August 2018, David Richards LJ handed down the leading judgment in the appeal (with which the other Lord Justices, Patten LJ and Leggatt LJ, agreed).

The issues to be decided in the appeal were as follows:

1. Is the State’s fraud claim independent of the enforcement proceedings?
2. What is the proper approach to setting aside a notice of discontinuance?

1 [2018] EWHC 1130 (Comm)

2 [2018] EWCA Civ 1896

3. Does the State have a legitimate interest in pursuing the fraud claim?
4. Is there a public interest in determining whether the Claimants have committed a fraud on the English courts by seeking to enforce an award obtained by fraud?

The Court of Appeal's decision

Taking each of the issues in turn:

1. The Court of Appeal found that the State's fraud claim was not independent of the enforcement proceedings. It is commonplace for a court to order the trial of an issue within existing proceedings, and the effect of such an order is not to constitute the issue of a separate, free-standing set of proceedings. The fraud claim was only ever a defence to the enforcement claim.
2. CPR Rule 38 provides for the discontinuance of claims. The Court of Appeal confirmed that the court's discretion conferred by CPR 38.4 to set aside a notice of discontinuance is not confined to cases of abuse of process or collateral tactical advantage. It is a discretion expressed in general, unqualified terms, to be exercised by reference to the relevant circumstances of the particular case.
3. David Richards LJ observed that as arbitrations are subject to control by the laws and courts of the country of the seat, the only issue for the English court to determine in this case was enforcement; it had no role in ruling generally on the validity of the award. Once the Claimants discontinued and undertook not to seek to enforce the award in England, no purpose would be served by the court making declarations that enforcement would be contrary to English public policy. It is not the function of the English court to hear cases which have no relevant result. Therefore, the State did not have sufficient interest in pursuing the fraud claim to justify an 8-day trial, particularly when there are many cases waiting to be heard in the Commercial Court.

4. The Court of Appeal accepted that courts have the power to require the continuation of proceedings in order to determine whether its processes have been knowingly abused. However, as the State's allegations of fraud were insufficient to invalidate the award, they were incapable of establishing that the Claimant's application to enforce was a fraud on the English court. There was, therefore, no public interest in determining the issue.

In reaching their judgment, the Court of Appeal Lord Justices ultimately agreed with Knowles J's first instance decisions on issues 1, 2 and 4. However, their finding on issue 3 that the State did not have a legitimate interest in pursuing the fraud claim led to the Claimants' appeal being successful.

Conclusions

This Court of Appeal judgment refines the approach courts should take when exercising their discretion to set aside notices of discontinuance, i.e. the discretion is not confined to cases of abuse of process or collateral tactical advantage, and should be exercised by reference to the relevant circumstances of the particular case. Following this decision, it is clear that the English courts will not set aside notices of discontinuance unless there is a legitimate need to make further findings that would lead to a relevant result or form of relief. This is a logical conclusion, particularly in light of the need for the courts to use their limited resources efficiently.

The judgment also provides interesting commentary and clarification on the English court's role in relation to the enforcement of foreign arbitral awards. In a case such as this, where there is no possibility of future enforcement of the award within the jurisdiction, the English court ceases to have a role. The courts cannot rule generally on the validity of a foreign award, which is the exclusive domain of the law and courts of the seat of arbitration.

If you have any questions or comments in relation to the above, please contact the authors or your usual Mayer Brown contact.

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