

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17 February 2017

Before :

MR JUSTICE PHILLIPS

Between :

SINOCORE INTERNATIONAL CO LTD

Claimant

- and -

RBRG TRADING (UK) LTD

Defendant

Nicholas Vineall QC and Neil Henderson (instructed by **Holman Fenwick Willam LLP**) for the **Claimant**

Neil Calver QC and Tom Pascoe (instructed by **King & Spalding International LLP**) for the **Defendant**

Hearing date: 5 October 2016. Further written submissions on 10 and 12 October 2016

Judgment Approved

Mr Justice Phillips :

1. On 2 March 2016 Burton J made an order (“the Order”) pursuant to s.101(2) of the Arbitration Act 1996 (“the Act”) giving the claimant (“Sinocore”) permission to enforce a CIETAC¹ arbitration award dated 30 June 2014 (“the Award”) against the defendant (“RBRG”) and providing for judgment to be entered in the terms of the Award. The Order was sought and made under s.101(2) of the Act as the Award was made in China, a party to the New York Convention.
2. The Order, made on Sinocore’s without notice application on paper, provided (as required by CPR 62.18(9) and (10)) that RBRG had liberty to apply to set the Order aside within 14 days after service and that the Award was not to be enforced pending any such application and its disposal.
3. By application notice dated 18 March 2016 RBRG applied to set aside the Order pursuant to s.103(3) of the Act on the grounds that recognition or enforcement of the Award would be contrary to public policy. The gist of RBRG’s contention is that the Award gives effect to a claim by Sinocore which is “based on.... forged bills of lading”.

¹ China International Economic and Trade Arbitration Commission.

The background facts

(i) The Sale Contract

4. On 15 April 2010 Sinocore agreed to sell 14,50MT (+/- 10%, at sellers option) of prime newly produced cold rolled steel coils (“the Coils”) to RBRG (then named Metalloyd Limited) at a price of US\$870/MT CNF FO, shipped from any port of China to Tampico or Altamira in Mexico (“the Sale Contract”). The Sale Contract, governed by Incoterms 2000, required RBRG to open an irrevocable letter of credit for 100% of the contract price in strict conformity with the Sale Contract. The letter of credit was to allow shipment by July 2010 at the latest.
5. The Sale Contract contained a CIETAC arbitration clause and expressly provided that any dispute would be determined according to Chinese law, that the language of the arbitration would be Chinese and that the venue of arbitration proceedings would be Beijing, China.
6. On 7 May 2010 the Sale Contract was amended to permit RBRG to arrange an inspection of the Coils for quantity and quality, providing that such inspection might be carried out during and prior to loading. The quantity tolerance was also adjusted to +5/-10%.

(ii) The Letter of Credit

7. RBRG procured that, on 22 April 2010, a conforming letter of credit was issued by Rabobank Nederland (“Rabobank”) in the sum of US\$12,616,000 (“the Letter of Credit”), providing that the latest date of shipment was 31 July 2010. The Letter of Credit was subject to the UCP600.
8. On 12 June 2010, on the instructions of RBRG, Rabobank purported to issue an amendment to the Letter of Credit, changing the shipment period to read “*20th to 30th July 2010*”. It is common ground that that change was not agreed by Sinocore and was therefore ineffective (see Article 10 of the UCP600).

(iii) Shipment of the Goods

9. On 5 and 6 July 2010 the Coils were loaded onto the “Magic Striker” at Xingang port, China. Genuine bills of lading were issued bearing the dates 5 and 6 July 2010. The vessel departed on 7 July 2010. That same day Sinocore sent a formal shipping advice to RBRG recording that the date of the bills of lading was 6 July 2010.

(iv) Request for payment under the Letter of Credit

10. On 22 July 2010 the Bank of Communications Beijing Branch (“BoC”), as collecting bank for Sinocore, requested payment from Rabobank under the Letter of Credit, presenting purported bills of lading bearing the dates 20 and 21 July 2010. As shipment in fact took place on 5 and 6 July 2010, it is plain (and Sinocore now accepts) that those bills were forgeries, being concocted so that documents were presented to Rabobank which, on their face, evidenced shipment within the period required by the purported amendment to the Letter of Credit referred to above. No

explanation has been provided by Sinocore of how or by whom the forgeries were created and provided to BoC for presentation to Rabobank.

(v) Disputes and proceedings between the parties

11. On 26 July 2010 the Court of Amsterdam, on the petition of RBRG, granted a temporary injunction restraining Rabobank from making payment under the Letter of Credit.
12. On 13 August 2010 Sinocore commenced proceedings against Rabobank in the Beijing First Intermediate People's Court, claiming damages for Rabobank's alleged failure to make payment under the Letter of Credit pursuant to the request made by BoC on 22 July 2010. The claim was subsequently reduced by the amount Sinocore received on re-selling the Coils as set out in paragraph 14 below, but was dismissed on 26 June 2013 on the grounds that the presentation to Rabobank was fraudulent. Sinocore has appealed that decision and the appeal is still pending.
13. On 20 August 2010 Sinocore sent notice of termination of the Contract of Sale to RBRG, alleging that RBRG had repudiated the agreement and reserving its right to claim damages. RBRG accepted the termination without prejudice to its right to claim damages for breaches of contract.

(vi) Re-sale of the Coils

14. On 26 August 2010 Sinocore sold the Coils to another buyer, Chimay Industrial Inc ("Chimay"), at a price of US\$535/MT, well below the price agreed with RBRG in the Sale Contract.

(vii) The arbitration proceedings

15. On 11 April 2012 RBRG commenced CIETAC arbitration proceedings against Sinocore in Beijing for damages caused by Sinocore's breach of the inspection clause added to the Sale Contract on 7 May 2010. In its skeleton argument for this hearing RBRG explained that the essence of its contention in the arbitration was that Sinocore had shipped the Coils early in order to prevent RBRG from inspecting the (presumably defective) Coils, and had then produced forged bills of lading to cover this up.
16. Sinocore counterclaimed for damages for breach of contract, claiming the difference between the sale price in the Sale Contract and the price obtained from Chimay.
17. RBRG and Sinocore each appointed an arbitrator, but failed to agree on the joint appointment of a chief arbitrator. CIETAC therefore appointed Ms Yan Siyi to that position. Oral hearings took place before the arbitral tribunal ("the Tribunal") in Beijing on 10 April and 9 August 2013. The Award was handed down in Beijing on 30 June 2014.

(viii) The Award

18. In its written Award, the English translation of which extends to 53 pages, the Tribunal determined (applying Chinese law) as follows:

- i) that RBRG had not requested that it be permitted to arrange an inspection of the Coils before or during shipment, notwithstanding that Sinocore had given sufficient notice of shipment. Sinocore was therefore not in breach of the Sale Contract. Further, any such breach was not causative of any loss suffered by RBRG, the Tribunal holding that the termination of the Sale Contract had nothing to do with the quality of the Coils but with the failure of the parties to reach an agreement as to whether the amendment of the shipment period in the Letter of Credit was consistent with the Sale Contract.
 - ii) that, as Sinocore had not agreed to the revised shipment date, RBRG was in breach of the Sale Contract in procuring that Rabobank amended the Letter of Credit so that it was inconsistent with the terms of the Sale Contract in that regard. It was this breach of contract, the Tribunal found, which resulted in Sinocore not receiving payment and caused the termination of the Sale Contract and losses to be incurred.
 - iii) that the submission of forged bills of lading under the Letter of Credit was a deception of Rabobank, but did not mean deceiving RBRG. RBRG had actual knowledge of the true shipment dates, and its purported amendment of the Letter of Credit “*was like a trap set by the buyer for the seller...*”.
19. The Tribunal therefore ordered RBRG to pay Sinocore damages of US\$4,857,500, costs of RMB535,492 and a proportion of the arbitration fees. The tribunal declined to award Sinocore any interest.
20. On 24 December 2014 RBRG applied to the Beijing Second Intermediate People’s Court to set aside the Award, but that application was dismissed on 18 March 2015. It is common ground that the Award is final and that RBRG has exhausted its rights of appeal.
- (ix) The application for leave to enforce the Award
21. On 15 February 2016 Sinocore issued its application for leave to enforce the Award. The application was supported by witness statements from (i) Feng Jing, a partner in the firm of Chinese lawyers which acted for Sinocore in the arbitration and (ii) Marie-Anne Claire Smith, an associate of Holman Fenwick Willan LLP, Sinocore’s Solicitors. As already stated, the Order was made on 2 March 2016.

The grounds of RBRG’s challenge to the Order

22. The main ground on which RBRG seeks to set aside the Order is that recognition or enforcement of the Award would be contrary to public policy within the meaning of s.103 of the Act. That section provides, in so far as relevant, as follows:

“103 Refusal of recognition or enforcement

(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases

...

(3) ... if it would be contrary to public policy to recognise or enforce the award.”

23. RBRG contends that enforcement of the Award would be contrary to the policy of the English courts of not allowing their processes to be used to give effect to commercial fraud, putting its case as follows:

- i) firstly, on the narrow basis that it had been open to Sinocore to present the genuine bills of lading under the Letter of Credit and to obtain payment according to its original terms (as Sinocore had not consented to the proposed amendment), with the result that Sinocore’s case, properly analysed, can only be that a breach occurred and loss was suffered when payment did not result from the presentation of the forged bills of lading to Rabobank. It follows, it is argued, that Sinocore’s claim in the arbitration was directly based on its own fraudulent presentation of documents, to which the court would be giving effect if the Award were enforced; and/or
- ii) secondly, on the much wider basis that the English courts will not assist a seller who presented forged documents under a letter of credit. In this regard RBRG refers to the well-known statement, approved by Lord Denning M.R. in *Edward Owen v Barclays Bank International Ltd.* [1978] QB 159 at 171D, that letters of credit are “*the life-blood of international commerce*” and to the exception to the strict contractual obligation of a bank which has issued a letter of credit to pay against apparently conforming documents where they contain fraudulent statements, an exception explained by Lord Diplock in *UCM v Royal Bank of Canada* [1983] 1 AC 168 at 184A as follows:

“... *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”. The courts will not allow their process to be used by a dishonest person to carry out a fraud.*”

24. RBRG further contends that Sinocore, in its without notice application, failed to make full and frank disclosure of all material matters in that it did not draw to the court’s attention (i) the fact that it had presented forged bills of lading under the Letter of Credit and (ii) that it was still separately pursuing its claim against Rabobank for payment under the Letter of Credit against the forged bills of lading. However, Mr Calver QC, leading counsel for RBRG, accepted that non-disclosure by Sinocore (if established) would be relevant only to questions of costs and that the point added nothing to the substantive merits of RBRGs application: if the only objection to the Order was material non-disclosure in the way it was obtained, Sinocore would be entitled to an order for recognition and enforcement, if necessary by making a fresh application.

25. RBRG also points out that Sinocore’s continued pursuit of its claim against Rabobank under the Letter of Credit in Beijing, by way of appeal, not only demonstrates that Sinocore continues to rely on the forged bills of lading, but also gives rise to a risk of double-recovery by Sinocore (under both the Award and any judgment against Rabobank, RBRG undoubtedly being liable to indemnify Rabobank in respect of any

such judgment), particularly as it appears that there is no principle of Chinese law which would prevent such double recovery. However, in its skeleton argument RBRG expressly confirmed, for the avoidance of doubt, that it did not rely upon the risk of double-recovery as a free-standing public policy reason for refusing to enforce the Award. Further, Sinocore has offered to give an undertaking to the court designed to exclude the risk of double recovery: issues arising in relation to that offer are addressed at the end of this judgment.

26. It follows from the above that the sole substantive issue arising on RBRG's application is whether it would be contrary to public policy to recognise and enforce the Award on either of the two bases identified by RBRG.

The relevant legal principles

(a) The proper approach to s.103(3)

27. The general approach to an application under s.103 of the Act, recognising that there is a strong presumption that New York Convention awards are enforceable and that public policy defences are to be treated with extreme caution, was summarised by Gross J (as he then was) in *IPOC (Nigeria) v Nigerian National Petroleum* [2005] 2 Lloyd's Rep 326 as follows:

"11... First, 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.

.....

13. Thirdly, considerations of public policy, if relied upon to resist enforcement of an award, should be approached with extreme caution: Deutsche Shachtbau-und Tiefbohrergesellschaft mbh v Ras Al, Khaimah National Oil Co [1987] 2 Lloyd's Rep 246, at page 254. The reference to public policy in section 103(3) was not intended to furnish an open-ended escape route for refusing enforcement of New York Convention awards. Instead, the public policy exception in section 103(3) is confined to the public policy of England (as the country in which enforcement is sought) in maintaining the fair and orderly administration of justice: Mustill & Boyd, at pages 91-92.

28. Whilst the court does retain a discretion to enforce an award even where a ground for refusing to do so is established (broadly, where the award is subject to a fundamental or structural defect), that discretion is not open-ended. It is unlikely to be exercised unless the right to object to enforcement had been lost, for example, by way of another agreement or estoppel or some other recognised principle: see *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of*

Pakistan [2011] 1 AC 763 SC per Lord Mance at §68 and *Honeywell International Middle East Ltd. v Meydan Group LLC* [2014] 2 Lloyd's Rep 133 per Ramsey J at §66.

(b) The approach to awards alleged to give effect to fraud or illegality

29. It is clear that the public policy exception will be engaged where an award, on its face, gives effect to a contract or enterprise which is unlawful in the place of performance or is otherwise contrary to English public policy (such as a contract to pay a bribe). The court will not enforce such an agreement and the interposition of an arbitration award will not isolate the successful party's claim from the illegality which gave rise to it: see *Soleimany v Soleimany* [1999] QB 785 CA, in which the Court of Appeal refused to enforce an award of the Beth Din in relation to the performance of a contract to smuggle carpets out of Iran.
30. The same approach will apply where the award gives effect to a corrupt practice, such as to enforce payment or recovery of a bribe (see *National Iranian Oil v Crescent Petroleum* [2016] 2 Lloyd's Rep 146 at §41-42, referring to *Nayyar v Denton Wilde Sapte* [2010] Lloyd's Rep PN 139). Although I was not directed to any authority directly on the point, there is no doubt that the court would equally refuse to enforce an award which upheld a fraudulent claim to payment based on the presentation of documents which were admitted (or found by the Tribunal) to be forgeries.
31. It is recognised, however, that the position is more complex where illegality does not appear on the face of an award, but is asserted by a party opposing enforcement. The position is further complicated where the arbitral tribunal has itself considered and rejected the alleged illegality. Colman J in *Westacre Investments Inc v Jugoimport-SPDR Holding Co. Ltd.* [1999] QB 740 at 767C-768A considered that the approach the court should adopt in such cases was as follows:

“(i) Where it is alleged that an underlying contract is illegal and void and that an arbitration award in respect of it is thereby unenforceable the primary question is whether the determination of the particular illegality alleged fell within the jurisdiction of the arbitrators. (ii) There is no general rule that, where an underlying contract is illegal at common law or by reason of an English statute, an arbitration agreement, which is ancillary to that contract is incapable of conferring jurisdiction on arbitrators to determine disputes arising within the scope of the agreement including disputes as to whether illegality renders the contract unenforceable. (iii) Whether such an agreement to arbitrate is capable of conferring such jurisdiction depends upon whether the nature of the illegality is such that, in the case of statutory illegality the statute has the effect of impeaching that agreement as well as the underlying contract and, in the case of illegality at common law, public policy requires that disputes about the underlying contract should not be referred to arbitration. (iv) When, at the stage of enforcement of an award, it is necessary for the court to determine whether the arbitrators had jurisdiction in respect of disputes relating to the underlying contract, the court must

consider the nature of the disputes in question. If the issue before the arbitrators was whether money was due under a contract which was indisputably illegal at common law, an award in favour of the claimant would not be enforced for it would be contrary to public policy that the arbitrator should be entitled to ignore palpable and indisputable illegality. If, however, there was an issue before the arbitrator whether the underlying contract was illegal and void, the court would first have to consider whether, having regard to the nature of the illegality alleged, it was consistent with the public policy which would, if illegality were established, impeach the validity of the underlying contract, that the determination of the issue of illegality should be left to arbitration. If it was not consistent, the arbitrators would be held to have no jurisdiction to determine that issue. (v) If the court concluded that the arbitration agreement conferred jurisdiction to determine whether the underlying contract was illegal and by the award the arbitrators determined that it was not illegal, prima facie the court would enforce the resulting award. (vi) If the party against whom the award was made then sought to challenge enforcement of the award on the grounds that, on the basis of facts not placed before the arbitrators, the contract was indeed illegal, the enforcement court would have to consider whether the public policy against the enforcement of illegal contracts outweighed the countervailing public policy in support of the finality of awards in general and of awards in respect of the same issue in particular.”

32. In *Soleimany* the above difficulties did not arise because the illegality of the underlying contract was recognised in the award itself. However, the Court of Appeal, albeit *obiter*, approved Colman J’s suggested approach, save to express the view that (vi) above should not be limited to cases where the challenge to enforcement of the award is on the basis of facts not before the arbitrators. Waller LJ, giving the judgment of the Court, stated as follows at 800F:

“... In our view, an enforcement judge, if there is prima facie evidence from one side that the award is based on an illegal contract, should inquire further to some extent. Is there evidence on the other side to the contrary? Has the arbitrator expressly found that the underlying contract was not illegal? Or is it a fair inference that he did reach that conclusion? Is there anything to suggest that the arbitrator was incompetent to conduct such an inquiry? May there have been collusion or bad faith, so as to procure an award despite illegality? Arbitrations are, after all, conducted in a wide variety of situations; not just before high-powered tribunals in international trade but in many other circumstances. We do not for one moment suggest that the judge should conduct a full-scale trial of those matters in the first instance. That would create the mischief which the arbitration was designed to avoid. The judge has to decide

whether it is proper to give full faith and credit to the arbitrator's award. Only if he decides at the preliminary stage that he should not take that course does he need to embark on a more elaborate inquiry into the issue of illegality."

33. In the subsequent appeal from Colman J's decision in *Westacre*, reported at [2000] 1 QB 288, Waller LJ, at 311D, explained his understanding of the approach of both Colman J and the Court of Appeal in *Soleimany* as follows:

"... although normally at the enforcement stage a party who brings an action on the award will be estopped from attempting to re-argue the points on which he has lost the arbitration ... there are exceptional circumstances where the court will not allow reliance on an estoppel

There are authorities which in my view support the proposition that where illegality is raised and at least where the evidence of illegality is so strong that if not answered it would be decisive of the case, the court would not allow reliance on issue estoppel, or on the principle in Henderson v Henderson to prevent the point being ventilated. In other words, illegality can if raised provide the special circumstances in which an estoppel will not provide a defence."

34. Mantell LJ and Sir David Hirst expressed some reservation as to the *obiter* suggestion that there should be a preliminary enquiry of some nature, but both emphasised that, in any event, if there is to be an enquiry, the court must balance the competing public policy considerations of finality of arbitration awards on the one hand and the alleged illegality on the other.

(c) The approach to awards alleged to be "tainted" by fraud or illegality

35. Whilst the court will consider refusing to enforce awards which give effect to fraudulent or illegal enterprises or claims on the basis of the approach set out above, it will not refuse to enforce a lawful claim under a lawful transaction (even if voidable) on the basis that the transaction is "tainted".
36. Thus in *Honeywell* (above), Ramsey J upheld the enforcement of an award notwithstanding that it was alleged that the underlying contract had been induced by bribery. Applying the reasoning in *Wilson v Hurstanger* [2007] 1 WLR 2351, Ramsey J stated, at §178-185, that whilst bribery is clearly contrary to English public policy and contracts to bribe are unenforceable, contracts which have been procured by bribes are not unenforceable but voidable.
37. In *National Iranian Oil* (above), an arbitration award was challenged on the ground that the successful parties in the arbitration had offered a bribe to procure the underlying contract, with the result that the contract was "tainted" by corruption. Burton J (at §49) rejected that submission in the following robust terms :

"(1) English public policy applies so as to lead a court to refuse to enforce an illegal contract, even if not illegal at relevant

foreign law, such as a contract to pay a bribe. The contract cannot be enforced because ex turpi causa non oritur actio: out of a disgraceful cause an action cannot arise....

(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. The siren call of Ms Dohmann, referring to recent international Conventions to outlaw bribery, and the increase of legislation to criminalise it, is attractive. But to introduce a concept of tainting of an otherwise legal contract would create uncertainty, and in any event wholly undermines party autonomy. There may be many contracts which have been preceded by undesirable conduct on one side or other or both – lies, fraud, threats and worse – but the Court would not interfere with a contract entered into by such parties, even if one or more of those parties had committed criminal acts for which they could be prosecuted, unless the contract itself was illegal and unenforceable, or one or more of the acts of such parties induced the contract, in which case it might be voidable at the instance of an innocent party so induced.

(4) In any event, in this case, the conclusion to which the Arbitrators came was that the GSPC was not procured by bribery, after full consideration and evidence. The English Court should not interfere with the Arbitrators' decision under s.68, or s.103, without fresh evidence of which there is none, or save in very exceptional circumstances, of which there are none."

Whether the Award in the present case is contrary to public policy

(a) The common ground

38. RBRG's grounds for challenging the Award must be considered in the following context:
- i) this is not a case in which there is any suggestion that the contract the Tribunal was considering was unlawful or otherwise contrary to public policy: it is common ground that the Sale Contract and its intended performance was entirely lawful.

- ii) further, the Award does not, on its face, uphold a claim for payment against the presentation of the forged bills of lading. There is no doubt that a claim for such payment, whether against RBRG or Rabobank, would be fraudulent (and the claim against Rabobank has been rejected in Beijing on the ground) and it is difficult to imagine circumstances in which the court would enforce an Award (or judgment of a foreign court) which upheld such a claim. But the Award in the present case is expressed to be for damages for breach of the Sale Contract by RBRG in respect of its instruction to Rabobank to amend the Letter of Credit, a breach which occurred before the forgery of the bills of lading, let alone their presentation.
- iii) yet further, the Tribunal was aware of the full facts of the matter, including the fact that the bills of lading were forgeries: RBRG does not rely on any new evidence and does not assert that the Tribunal was misled or acted improperly in any way. The Tribunal, with knowledge of the full facts, considered the question of whether the presentation of such forged instruments afforded RBRG a defence to Sinocore's claim, but concluded that it did not, both because RBRG was not in fact itself deceived and also because the Tribunal considered that the "*real cause for the breach of contract and all the consequences*" (§65-68 of the Award) was the amendment to the Letter of Credit.

(b) The narrow ground: that the Award is based on fraud

- 39. RBRG's first ground of challenge is that, notwithstanding the above considerations, Sinocore's claim (upheld by the Award) was based on its fraudulent presentation of forged bills of lading as it was the failure of Rabobank (and thereby RBRG) to make payment against those bills of lading which Sinocore relied upon as a repudiatory breach of the Sale Contract.²
- 40. In my judgment that argument mischaracterises both the claim and the Award:
 - i) As to the claim, Sinocore's letter of termination dated 20 August 2010 alleged a repudiatory breach on the part of RBRG, but did not identify the breach, let alone assert that the breach was a failure to pay against presentation of the (forged) bills of lading. The Award simply records that Sinocore's case was that RBRG breached the Sale Contract (§27);
 - ii) The reasoning of the Award is that RBRG was in breach of its obligation under the Sale Contract to provide a conforming letter of credit, having instructed Rabobank to amend the Letter of Credit without Sinocore's consent (§57-59 and §69). That breach was held to be the real cause of Sinocore being unable to obtain payment, the termination of the Sale Contract and the losses which were thereby incurred (§56, §68-69). The Award was accordingly for damages for breach of the obligation to provide a conforming letter of credit, not for failure to pay against the (forged) bills of lading.
- 41. RBRG seeks to go behind the Tribunal's reasoning by pointing out that, as the amendment of the Letter of Credit was not binding on Sinocore by virtue of the UCP,

² See RBRG's Skeleton Argument at §59(e).

Sinocore could have presented the genuine bills of lading and thereupon been entitled to payment, demonstrating that the real cause of Sinocore's losses was its failure to present the genuine bills of lading (or Rabobank's refusal to pay against the forged bills), not RBRG's contractually ineffective instructions to Rabobank to amend the Letter of Credit.

42. However, that submission is a direct attack on the Tribunal's findings, applying Chinese law, that RBRG's wrongful instruction to Rabobank to amend the Sale Contract was (i) the operative breach of contract and (ii) was the real cause of the termination of the Sale Contract and the losses which followed. It may be that an English court would not have reached the same conclusion (as a matter of English law or even as a matter of logic), but that is entirely irrelevant. The Tribunal clearly had jurisdiction to determine which party breached the Sale Contract and the losses caused by that breach: the Tribunal did so decide, and found that RBRG breached the Sale Contract and caused Sinocore loss regardless of the forgery of the bills of lading.
43. Further, the Tribunal expressly considered the argument now advanced by RBRG and rejected it in the following terms:

"68. ... Under Contract No 415, 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. 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 of UCP600, 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. However, even if the seller had acted poorly or defectively in a difficult situation (e.g., failing to timely show its disagreement on the amendment of the shipment period in the letter of credit), it would not change the real cause for the breach of contract and all the consequences thus incurred."

44. It follows that the Award was expressly not based on RBRG's failure (through Rabobank) to pay against the presentation of the forged bills so lading, but on RBRG's prior breach of contract in wrongfully instructing Rabobank to amend the Letter of Credit. In my judgment it is not appropriate or, indeed, permissible for this court to subject the Tribunal's analysis of the issues to scrutiny with a view to deciding whether the Tribunal was wrong (as a matter of applicable Chinese law) in its determination of what was the operative breach and the real causation of loss. But even if it was permissible to undertake such an exercise, it would plainly be appropriate to uphold and enforce the decision of a Tribunal which considered the matter fully and properly as a matter of Chinese law: the public interest in upholding the finality of arbitration awards clearly must prevail in such a situation.

(c) The wider ground: not assisting a seller who presents forged documents

45. RBRG's contention is that, regardless of whether or not the Tribunal was right in its analysis of the operative breach of the Sale Contract and the cause of losses on its termination, the fact that Sinocore had presented forged bills of lading in a fraudulent attempt to obtain payment from RBRG entails that the court should refuse to enforce the Award.
46. However, the well-established fraud exception to which RBRG refers, summarised in the maxim "fraud unravels all", arises in the context of an issuing bank's strict duty to pay under a letter of credit against the presentation of apparently conforming documents. A recognised exception is that a bank need not pay against such documents (and may be restrained from so doing) if the presentation is in fact fraudulent. What the authorities do not support is the much wider proposition 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 is similar to that mounted in *National Iranian Oil*, namely, that fraudulent behaviour by the successful party in an arbitration in some way "taints" the Award, so that it should not be enforced as a matter of English public policy. As Burton J stated in that case, to permit such an argument to succeed would be to introduce uncertainty and to undermine party autonomy. In my judgment there is no merit in RBRG's wider argument.
47. Further, even if it was appropriate to consider such a wider issue, I would nevertheless conclude that public interest in the finality of arbitration awards, particularly an international award such as in the present case determined as a matter of a foreign law, clearly and distinctly outweighs any broad objection on the grounds that the transaction was "tainted" by fraud.

(d) Conclusion on public policy

48. In the light of the above, I am satisfied that enforcement of the Award would not be contrary to public policy.

Whether Sinocore was guilty of material non-disclosure

49. It is recognised that the duty of disclosure in the context of a without notice application to enforce an award is not diminished by reason of the fact that enforcement will be stayed until after the respondent has had an opportunity to be heard: *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd.* [1999] 2 All ER (Comm) 146 per Timothy Walker J at 152E. Sinocore did not suggest otherwise.
50. However, as the Award (which was exhibited to the witness statement of a solicitor from Holman Fenwick Willan ("HFW") in support of the application) referred to and dealt with the fact that the bills of lading presented to Rabobank had been forged, I do not consider that it was necessary for Sinocore to have specifically identified that fact in making its application. Further, it is inconceivable that, in those circumstances, a specific reference to such forgeries would have had any material effect on Burton J's consideration of the application.
51. I also see no merit in the complaint that Sinocore did not disclose its continuing appeal in the proceedings against Rabobank given that RBRG does not even assert that the risk of double recovery is in itself a ground for refusing to enforce the Award.

52. I therefore reject the contention that Sinocore breached its duty of making full and frank disclosure.

Sinocore's offer of an undertaking

53. RBRG first raised its concerns as to the risk that that Sinocore would make double recovery in a letter to HFW dated 11 March 2016. On 14 September 2016, by letter from HFW, Sinocore offered to undertake to the court (i) to withdraw its claim against Rabobank in the event that it made full and actual recovery against RBRG in respect of the Award and (ii) in the event that it did not make full recovery, to inform the Beijing High Court of how much it recovered and give credit for those sums in its claim against Rabobank.
54. In its Skeleton Argument (at paragraph 82) RBRG invited the court to accept that undertaking, whether or not RBRG's application was successful.
55. At the hearing I raised the question of whether it was appropriate for the court to accept and act on the basis of an undertaking from a party as to how it would pursue a plainly fraudulent claim to obtain payment against documents it knows are forgeries. I asked Mr Vineall QC, counsel for Sinocore, why his client was not abandoning its appeal in the claim against Rabobank (or offering an undertaking to do so) given its acceptance that the documents on which the claim was based were not genuine. Mr Vineall asked for an opportunity to take instructions on the point.
56. In subsequent written submissions Sinocore offered a revised form undertaking, reworded so as to ensure that it would in no circumstances recover a total amount greater than the amount of the Award, but firmly declined to undertake to abandon its appeal in the proceedings in Beijing against Rabobank. Sinocore asserted that it would not be appropriate to insist on abandonment of its appeal as the price of Sinocore being permitted to enforce a valid New York Convention award.
57. In written submissions in response RBRG contended that Sinocore's revised undertaking and its refusal to discontinue its claim against Rabobank demonstrated both (i) that Sinocore was not acting in good faith and (ii) that the loss that Sinocore was seeking to recover in the arbitration was interchangeable with the loss claimed in the fraudulent proceedings against Rabobank. RBRG further reversed the position it had adopted in its Skeleton Argument, contending that it was not open to me to accept an undertaking from Sinocore which related to proceedings it knows to be fraudulent.
58. In my judgment, however, Sinocore's conduct in commencing and continuing separate proceedings against Rabobank, even though they are plainly fraudulent in nature, cannot have any effect on the enforceability of the Award. The fact that Sinocore is willing to undertake to ensure that it does not recover more than the Award in total does not entail that the Award is somehow to be treated as merged with or tainted by the separate claim against Rabobank. The only potential relevance of those proceedings would be the risk of double recovery, but RBRG has expressly accepted that that risk does not in itself justify setting aside the Order. Further in that regard, and despite the questions I posed in argument, I see no reason why Sinocore's undertaking, which removes the possibility of double recovery, should not be accepted. The undertaking does not require or permit Sinocore to pursue its fraudulent claim or otherwise conduct itself unlawfully from an English law perspective, but

merely requires it to take steps (which are in themselves unobjectionable) to procure the entirely lawful and beneficial result that RBRG is not liable for more than the amount of the Award. RBRG has not identified the legal principle which would prevent the court accepting an undertaking in such circumstances, let alone any authority in support of its contention that the court cannot do so.

59. It follows that, unless RBRG invites me not to do so, I will accept Sinocore's revised undertaking and require it to be recorded in the order dismissing RBRG's application.

Conclusion

60. For the reasons set out above, RBRG's application is dismissed.