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Contax v Kuwait: Commercial Court fraud, enforcement and the Arbitration Act 1996

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In this article, Elysia-Elena Stellakis and Jasen Pomakov of King & Spalding discuss the High Court's decision in *Contax Partners Inc BVI v Kuwait Finance House [2024] EWHC 436 (Comm)*, exploring the potential for abuse of the international arbitration regime to procure arbitral awards through fraud.

Arbitration as a dispute resolution mechanism can have many benefits for clients and lawyers alike – controversies can be resolved efficiently, often with considerable flexibility, extended by tribunals and opposing counsel, complete confidentiality, and, with thanks to the New York Convention (NYC), the ability to enforce an arbitral award almost anywhere in the world. However, as we explore below, this may present an opportunity for malevolent parties to abuse the international regime and procure arbitral awards through fraud.

In a series of legal actions, Contax Partners Inc BVI (Contax) commenced arbitration proceedings against the defendant banking group, collectively referred to as Kuwait Finance House (KFH) (together, the Parties). It was alleged that this was under a purported arbitration agreement between the Parties for the dispute to be resolved before the Kuwait Chamber of Commerce and Industry Commercial Arbitration Centre (KCAC). Contax alleged to have liquidated its investment account with KFH, claiming it was owed EUR53 million. Subsequently, an arbitration before KCAC allegedly took place, resulting in an award in favour of Contax. An attempt was made to challenge it before the Kuwaiti Court of Appeal, but to no avail.

The purported award was initially enforced under section 66 of the Arbitration Act 1996 (AA 1996) and KFH became subject to Third Party Debt Orders (TPDOs) for the judgment amount of over £70 million. After KFH's bank accounts were frozen, the award was challenged. It was at this stage that the truth was revealed. The court in *Contax Partners Inc BVI v Kuwait Finance House [2024] EWHC 436 (Comm)* (see Legal update, Court sets aside order for enforcement of fabricated arbitral award (English Commercial Court)) found that the agreement according to which the arbitration took place was fabricated, together with the award itself, which included, without much imagination, word-for-word insertions of the judgment in the High Court case, *Manoukian v Societe Generale de Banque Au Liban Sal [2022] EWHC 669 (QB) (25 March 2022)*. Parallels were immediately drawn, and it was set aside. It was later discovered that Contax was also a victim as the fraudsters had hijacked its management and executed the fraud in its name. Contax subsequently submitted a declaration during the proceedings that it was not involved in the whole scheme or any of the legal actions.

Enforcement under section 66 or sections 100-103 of AA 1996?

Contax is illustrative of the mechanics of enforcing arbitral awards in England and Wales. The AA 1996 sets out two avenues for enforcing an arbitration award: under section 66 and under sections 100-103. The latter applies to awards issued outside the United Kingdom by states which are party to the NYC, and are therefore collectively referred to as the NYC provisions. Additionally, enforcement is possible under section 66 which applies to arbitrations from anywhere in the world, as per section 2(2)(b).

The accepted practice is to enforce awards from states party to the NYC through its provisions, whereas domestic awards and awards from other states are enforced under section 66 (see Robert Merkin, *Arbitration Law* (Lloyd's List Intelligence, 2024), 626-627). It must be noted that there is no perceived advantage under either approach, as guaranteed by section 66(4). For further details of the enforcement regime in England and Wales, see Practice note, Enforcing arbitration awards in England and Wales.

Therefore, the enforcement approach under section 66 of the AA 1996 is yet another aspect of the case that is severely unusual, casting further mystery over the whole charade.

Challenging an arbitral award on the grounds of fraud

Regardless of whether enforcement is sought under section 66 or the NYC provisions, the AA 1996 unsurprisingly accommodates the possibility of challenging an award or preventing its enforcement on the grounds of fraud.

Under section 68, an award may be challenged on the grounds of a "*serious irregularity*", and fraud is explicitly enumerated as such under section 68(2)(g), which also includes the broader language for awards that are "*contrary to public policy*". For example, in *Double K Oil Products 1996 Ltd v Neste Oil Oyj [2009] EWHC 3380 (Comm),* the High Court instructively sets out the guiding principles for a successful challenge based on fraud. It is observed that, among other things, that:

- The threshold is high and inadvertently misleading a party is insufficient.
- Reprehensible or unconscionable conduct must have substantially contributed to procuring the award.
- Innocently failing to give proper disclosure or producing false evidence is equally insufficient.
- The party moving for a challenge carries the burden of demonstrating that the evidence was not reasonably available during the arbitration.
- Evidence would have had an important influence on the result.

For further details, see Practice note, Challenging the award under section 68 of the English Arbitration Act 1996: serious irregularity.

In *Contax*, these criteria were comfortably met. The misleading behaviour carried out by the fraudsters was not inadvertent, but entirely intentional. Fabricating the award included language from another court decision, which is unequivocally reprehensible and otherwise unconscionable behaviour. Moreover, the fabrication was not innocent but sinister. Given that the entire award was fabricated, it is trite to say that evidence of fraud would have had an important influence on the result. For those reasons, KFH was able to set aside the award.

The analogous section within the NYC provisions is section 103(3) which allows for an award to be set aside if its enforcement would be contrary to public policy. Judicial guidance can be found in *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp [2005] EWHC 726 (Comm)* where this overarching principle is understood to be "*maintaining the fair and orderly administration of justice*". Therefore, fraudulently obtaining an arbitral award is clearly against English public policy. Academic opinion is that section 103(3) assertions can equally be applied to the public policy head of section 68(2)(g). For more discussion on the provisions of the NYC see Practice note, Enforcing arbitral awards under the New York Convention 1958: overview.

On the specific facts of *Contax*, it is likely that the award could have been successfully challenged under section 103(2)(b) – invalidity of the arbitration agreement under domestic situs law – because the arbitration agreement was also fabricated.

A trend in fraudulent awards against banks?

Despite the observation of Butcher J that the nature of this case was "*unique in [his] experience*", fabrication of awards is unfortunately not unique. What is more troubling, however, is that the other major attempt to enforce a fraudulent award in the courts of England and Wales also involved proceedings against a bank. In Arab National Bank v El-Abdali [2004] EWHC 2381 (Comm), the High Court found "*overwhelming evidence*" that an arbitral award had been obtained through fraud. It was discovered that witnesses' signatures were cut and pasted from previous documents, with glaring mistakes as to the persons' job titles and relevant signature norms when attesting documents in Arabic and English. Consequently, the court held "*that there was no arbitration agreement in force; that the arbitral tribunal was not properly constituted and that there was never any agreement as to the scope of the arbitration*".

Concluding remarks

The NYC presents an age-old problem consonant with many efforts for international cooperation. Jurisdictions with laxer standards, less scrutiny and a potential for corruption can be abused by parties who then seek "*rubber stamp*" legitimisation before reputable jurisdictions like England and Wales through an international legal instrument geared towards worldwide cooperation and mutual recognition. This therefore presents a trade-off endemic to arbitration between the possibility of fraud and the ability to fully utilise the enforceability provisions of the NYC. Some legal practitioners observe that it may be impossible to hedge against this risk, without sacrificing enforceability of legitimate awards. Others are more critical, given a "*pro-enforcement*" bias, and aptly suggest utilising modern technology such as artificial intelligence to screen awards and related materials.

Contax and *Arab National Bank* should present a clear warning to banking and other major financial institutions to guard against fraud. The cases do not explicitly suggest why they were the chosen victims, but one can imagine the criminal's allure to defrauding a wealthy enterprise with liquid assets. If any indication can be extrapolated from *Contax*, KFH found out about the proceedings after its accounts were frozen under the TPDO procedure, suggesting that fraudsters may have been hoping for the award to go under the radar.

Lastly, the case also stands as a clear-cut precedent that fabricated awards will be set aside. But aside from this undoubted conclusion, in the words of Butcher J, "*[t]he result of this decision is that there are a considerable number of unanswered, but serious, questions [...]*".