Disclosure in arbitration: paint the full picture not a vignette

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It is relatively hard to establish successful grounds for appealing an arbitration award – and particularly unusual where the appeal is based on the fraudulent conduct of one of the parties. The decision in Celtic Bioenergy Ltd v. Knowles Ltd [2017] EWHC 472 (TCC) is, therefore, a good reminder of the court's ability to set aside an arbitrator's award having found that it had been obtained by the respondent's fraud.

In Celtic, the applicant asked the court to set aside an arbitration award under section 68(2) of the Arbitration Act 1996 (AA96) on the grounds of serious irregularity. The irregularity complained of was the respondents' failure to disclose a series of correspondence which the applicant argued would have affected the arbitrator's decision. Despite there being no order for production of documents in the arbitration, the applicant argued that the respondents' failure to reveal this correspondence in the arbitration was so misleading that it amounted to fraud.

On reviewing the facts and hearing the cross-examination of a key witness for the respondents, the court agreed: the failure to disclose the correspondence was deliberate and created a wholly misleading impression. Since the correspondence was contrary to the respondents' case and would have been material to the outcome of the arbitration, the court sent back key parts of the award to the arbitrator so that he could reconsider "in possession of the full facts".

The high threshold for establishing fraud for the purposes of getting an award set aside

Mrs Justice Jefford, in reaching her decision, provided a useful judicial review of the authorities on what is required under section 68(2) of the AA96 to set aside an award for fraud:

- the threshold is high: the irregularity complained of must fall within one of the categories listed in section 68(2) (a) to (i) and the applicant must establish a serious irregularity which has caused or will cause substantial injustice. Fraud falls within the category at sub-section (g): "the award being obtained by fraud or the way in which it was procured being contrary to public policy" (see Lesotho Highlands Development Authority v. Impregilo SpA [2005] UKHL 43 at [28]);

- the challenge is only available "in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected" (see The 1996 Departmental Advisory Committee Report, paragraph 280);

- English law should adopt "the internationally recognised view that the court should be able to correct serious failure to comply with the "due process" of the arbitral proceedings" (see The 1996 Departmental Advisory Committee Report, paragraph 282);

- it is not sufficient to show that one party inadvertently misled the other, however carelessly (see Double K Products 1996 Ltd. v. Neste Oil OYJ [2009] EWHC 3380 (Comm) at [33]);

- there must be some form of dishonest, reprehensible or unconscionable conduct that has contributed in a
The key facts in the *Celtic* case

In concluding that the respondents' omission had been fraudulent, the following facts were instrumental:

- the respondents did not explain why they did not disclose the correspondence;
- the judge regarded the respondents’ reliance on there being no disclosure order to justify its failure to disclose the correspondence as an attempt to avoid the real issue. The judge was clear that the lack of a disclosure order was irrelevant. The respondents had a duty to disclose to the arbitrator material which on its face would have contradicted the versions of fact put forward. In fact, the respondents’ attempts to "hide behind the absence of an order for disclosure merely reinforce[d] the impression that [their] failure to refer to the … correspondence was deliberate". (See paragraph 91 of the judgment);
- the respondents’ willingness to give correspondence an unsustainable meaning supported the judge’s view that they were doing so because they knew all along that this correspondence was completely inconsistent with their stance and evidence in the arbitration;
- while the judge referenced as unclear the authorities on whether "dishonest conduct" and "reprehensible or unconscionable conduct" are distinct types of conduct or synonymous, she indicated that the respondents’ recklessness alone might have been enough to amount to fraud in this case.

**Parties must paint the full picture not a vignette**

Omitting key evidence can mislead the arbitrator and could amount to fraud. While cases of evidence being withheld dishonestly are quite rare, the decision in *Celtic* reminds all parties to review their evidence carefully to ensure nothing is missed - whether by accident or otherwise. Parties must disclose all evidence needed to paint the full picture of the issues – whether or not there is a formal arbitrator's order for disclosure.

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