Dispute Resolution

ALERT | 14 October 2025

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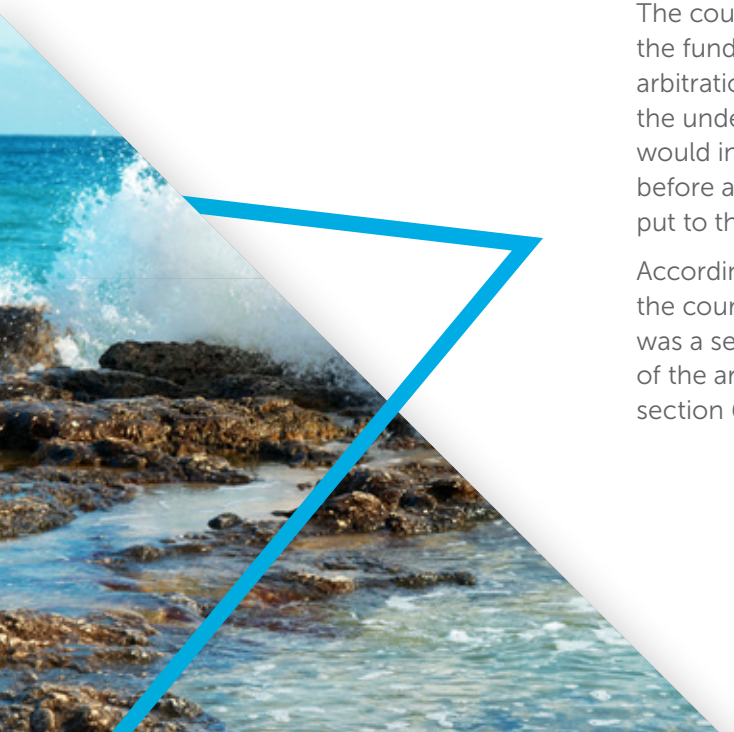
DISPUTE RESOLUTION ALERT

The challenge threshold for English-seated arbitral awards remains challenging



The English High Court recently handed down a judgment in *K1 and Others* v B [2025] EWHC 2539 (Comm), dismissing an application to bring a challenge to an arbitral award under section 68(2)(g) of the Arbitration Act.

Section 68 allows a party to challenge an award for a serious irregularity affecting the tribunal, the proceedings, or the award. Such irregularity must have caused, or will cause, substantial injustice. Section 68(2)(g) specifically refers to a serious irregularity where the award has been obtained by fraud, or where the award or the way in which it was procured is contrary to public policy.

The case

In this case, the claimants contended that the contract containing the arbitration agreement was a *"contract for fraud"*, as it related to the provision of services to obtain information by deception. On that basis, they sought to challenge the award under section 68(2)(g), arguing that because the underlying contract was fraudulent, meant the award issued pursuant to that contract's arbitration agreement was either obtained by fraud or contrary to public policy.

The court dismissed the application, reaffirming that section 68(2)(g) concerns the fundamental character of the arbitration process, the parties' conduct in the arbitration, and the process by which the award is obtained. It does not focus on the underlying claim on which an award is based or the cause of action, which would involve an examination of the merits. Those issues should instead be raised before and determined by the tribunal. In this instance, no such case had been put to the tribunal for determination.

Accordingly, even if the underlying contract was a *"contract for fraud"* (a point the court did not determine), that would not of itself necessarily mean there was a serious irregularity in the procurement of the award or the conduct of the arbitral process and procedure sufficient to meet the threshold for section 68(2)(g) of the Arbitration Act.

The challenge threshold for English-seated arbitral awards remains challenging

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Distinction between challenge and enforcement

The case serves as a useful reminder of the important distinction between:

- challenges or appeals to an award before the courts at the seat of arbitration in accordance with the applicable arbitration legislation; and
- resisting the enforcement of an award in the jurisdiction where enforcement is sought in accordance with the applicable grounds for refusal of recognition or enforcement.

For example, in England, the grounds for appeal or challenge to English-seated arbitration awards are set out at sections 67-69 of the Arbitration Act. The grounds on which the courts may decline recognition or enforcement of a foreign-seated arbitration award, whose enforcement is sought in England, are set out in section 103 of the Arbitration Act. This incorporates the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Section 103 allows English courts to refuse recognition or enforcement of a foreign award if to do so would be contrary to public policy. In such cases, the court exercises a public interest discretion. Unlike challenges under section 68(2)(g), the *"public policy"* ground under section 103 is not confined to procedural defects in the arbitral process and can extend to circumstances where the nature of the underlying contract renders enforcement of the award contrary to public policy.

In this case, the court referred to *Soleimany v Soleimany* [1999] QB 785, where the Court of Appeal refused to enforce an arbitral award based on an illegal smuggling contract, holding that *"the award in this case, which purports to enforce an illegal contract, is not enforceable in England and Wales"*. Recognising the distinction between challenges and enforcement, the court in *Soleimany* emphasised that *"illegality was a matter for consideration in enforcement proceedings and not on an appeal against the award"*.

Relevance for South Africa

South African legislation makes a similar distinction between:

- challenges before the South African courts to awards seated in South Africa under Article 34 of the International Arbitration Act 15 of 2017, and
- the grounds for refusal of recognition or enforcement of a foreign award in South Africa under the New York Convention.

Parties arbitrating or seeking to enforce awards in either England or South Africa should be aware that the grounds for challenge at the seat of arbitration may differ from the grounds for resisting enforcement in another jurisdiction.

In both contexts, the threshold for intervention is high, and courts will rarely interfere in the arbitral process, reserving intervention for cases of clear procedural injustice or manifest public policy violation. By way of example, the English Commercial Court Report for 2023-2024 confirmed that of 37 section 68 challenges made during that court year, not a single one had been successful at the time of reporting.

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