

London arbitral award not enforced in Netherlands

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Introduction

Charterparties commonly contain an arbitration clause. One of the perceived advantages of arbitration over litigation is worldwide recognition and enforceability of arbitral awards on the basis of the New York Convention.

However, a recent ruling by the Dutch Supreme Court should serve as a warning to those considering inserting an arbitration clause in their contracts with a view to seeking subsequent enforcement in the Netherlands.

Facts

The issue before the court related to the fixture of the cargo vessel Alexander Tkachenko under a charterparty concluded by email between its Russian owner and a charterer domiciled in the Netherlands.

When a dispute arose under the charter in connection with the payment of dead freight, the owner initiated arbitration in London. A default award was granted by the arbitrator when the charterer failed to appear.

The owner subsequently applied to the Dutch courts for an order to facilitate enforcement of the arbitral award against the assets of the charterers in the Netherlands.

Decision

The Den Bosch Appeal Court denied the application and refused the enforcement order on the grounds that the owner had been unable to submit an original arbitration agreement.

This decision was subsequently confirmed by the Dutch Supreme Court in a recent ruling.

In its decision, the court ruled that it would need to verify the original arbitration agreement in order to find in favour of the owner.

The owner argued that, in line with common market practice, such original documentation did not exist, since the charterparty and the arbitration agreement therein had been documented only by email.

The court insisted that it was unable to process the enforcement award without sight of the original agreement.

IT specialists were then engaged in an attempt to prove the authenticity of the arbitration agreement made by email. These specialists were able to establish how the relevant email had travelled from the originator to the addressee.

But although they maintained that it was unlikely that anyone could have interfered with the contents of the email, they were unable to state categorically that it was impossible for anybody to have done so.

As a result, the court ruled that it was unable to issue the enforcement award.

Comment

This ruling will come as an unpleasant surprise to many parties in the shipping industry where the vast majority of charterparty and arbitration agreements are concluded by email. Indeed, the decision is at odds

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with prevailing commercial practice.

The ruling should serve as a warning to those considering inserting a clause for foreign arbitration in their contracts which are concluded only by email. Parties that enter into charter agreements and that may look to rely on enforcement in the ports of Rotterdam or Amsterdam, or elsewhere in the Netherlands, in the event of a future dispute, may have to reconsider their approach.

For further information on this topic please contact [Haco van der Houwen van Oordt](#) at AKD by telephone (+31 88 253 50 00) or email (hvanoordt@akd.nl). The AKD website can be accessed at www.akd.nl.

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