Summary Judgment in International Arbitration – No Longer Dismissed?

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An M&A dispute between Travis Coal Restructured Holdings LLC ("Travis") and Essar Global Fund Limited ("EGFL") and related parallel proceedings in England and New York have shone the spotlight back on the issue of summary judgment in international arbitration. The United States District Court for the Southern District of New York ("New York Court") was due to decide whether it should confirm or vacate an award including a summary finding. In the meantime, the English Court adjourned enforcement proceedings of the same award in England pending the New York court's decision (*Travis Coal Restructured Holdings LLC v Essar Global Fund Limited*, [2014] EWHC 2510).

On 29 March 2010, Essar Minerals Inc ("EMI") (a wholly owned subsidiary of EGFL) purchased shares in Trinity Parent Corporation ("Trinity") from Travis. As part of the consideration, EMI issued promissory notes in favour of Travis to the sum of $203 million. On the same date, EGFL guaranteed EMI's obligation to make payment to Travis in accordance with the promissory notes (the "Guarantee").

Following the acquisition, EMI claimed that Trinity's financial position had been misrepresented by Travis. Following non-payment by EMI, Travis claimed payment from EGFL under the Guarantee. EGFL refused to pay, relying on the alleged misrepresentations by Travis for non-payment (the "Fraud Defences").

The Guarantee included an arbitration clause providing for arbitration under the ICC Rules in New York. Travis commenced arbitral proceedings on 25 May 2012 and the Tribunal comprising Professor William W. Park, Mr Mark Kantor and Mr Philip Lacovara was appointed on 26 October 2012. On 7 December 2012, Travis submitted a motion for summary judgment. EGFL opposed the motion on the basis that the Tribunal did not have the power to determine the claim on a summary basis; and that doing so would contravene EGFL's right to a fair opportunity to be heard on its Fraud Defences. On 25 November 2013, the Tribunal ruled that, in light of the waivers and disclaimers contained in the Guarantee, there were no reasons why the Fraud Defences could deny its effect. Subsequently, on 7 March 2013 the Tribunal granted a final award ordering EGFL to pay Travis $210,889,788.20 under the Guarantee ("Award").

Travis applied to the New York Court to have the Award confirmed and EGFL filed a cross-petition to have the award vacated. Following EGFL's cross-petition, Travis applied to the English Court and successfully obtained judgment to enforce the Tribunal's award. EGFL then applied for an order setting aside the judgment or, in the alternative, an adjournment of the decision on recognition and enforcement of the award pending the determination of EGFL's motion to vacate the award in the New York Court. When faced with an application to adjourn enforcement of an arbitral award under s.103(5) of the Act, one of the factors that the English courts will consider is whether the challenge before the court of the seat has a realistic prospect of success.

It is in this context that the English court looked into the validity of an award made on the basis of a summary judgement procedure. In particular, the court considered the two grounds relied upon by EGFL for the purpose of its motion to vacate: (1) that the Tribunal had acted ultra vires by adopting a summary judgment procedure and (2) that it had manifestly disregarded the summary judgment standard under New York law by dismissing the claim when substantial disputes of fact existed.

In support of its assertion that the Tribunal has exceeded its power by dismissing its defences on a summary basis, EGFL argued that summary judgment is strongly disfavoured in international arbitration and that a distinction needs to be drawn between empowering a tribunal to conduct proceedings efficiently and exercising a summary judgment power. Further, it submitted that (at least in the absence of express power) the exercise of summary judgment by arbitrators constitutes a denial of due process. The English Court rejected these submissions, holding that the question of whether or not a tribunal in international arbitration has the power to make summary judgment will depend on the terms of the arbitration agreement and the procedure adopted by the tribunal.

In this case, the arbitration agreement provided that the *"arbitrators shall have the discretion to hear and determine at any stage of the arbitration any issue asserted by any party to be dispositive of any claim or counterclaim, in whole or part, in accordance with such procedure as the arbitrators may deem appropriate, and the arbitrators may render an award on such issue"*. Such wording gave the Tribunal wide powers in respect of any procedure adopted to determine dispositive issues, the Court said. Furthermore, the Court noted the steps the Tribunal took to ensure proper consideration of EGFL's Fraud Defences, including the fact that the Tribunal had heard oral testimony in respect of these defences. The Court indicated that the Tribunal had made every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the nature of the dispute it had to decide. In doing so, the Court found that the Tribunal gave each party a fair opportunity to present its case and, insofar as the Tribunal's decision was summary, the procedure it adopted fell within the ambit of its powers set out in the arbitration agreement.

EGFL's second contention was that the Tribunal misapplied the summary judgment standard under New York law, and determined disputed issues of fact on the basis of the limited evidence that had been submitted and without a full evidentiary hearing. Whilst the English Court observed that this issue is primarily a matter for the New York Court, it indicated that it did not consider that there was any realistic prospect of EGFL demonstrating that the arbitrators *"intentionally flouted"* the New York summary judgment test, which EGFL accepted it had to follow to be successful.

Ultimately, despite the fact that it did not believe that EGFL's challenge had a realistic prospect of success on either of the grounds discussed above, the English Court adjourned the enforcement proceedings of the award pending final determination of the New York proceedings, in order to avoid the risk of conflicting judgments. This would occur if the award was enforced in England and successfully challenged at the seat.

Whilst the English Court did not rule on the availability of summary judgment in international arbitration (it expressly refused to enter into the wider debate concerning the desirability of such procedure in arbitration generally), its findings relating to the prospect of success of the ongoing challenge in New York offer useful insight into what appear to be the prerequisites for summary judgment to be accepted in an international arbitration context. The tribunal must be technically empowered by the parties to decide a claim on a summary basis and the procedure it adopts must comply with due process requirements. The first condition relates to the mandate of the tribunal to which the terms of the arbitration agreement and the applicable procedural rules are relevant, whereas the second condition concerns the more factual issue of what happened during the proceedings.

Starting with the latter, of particular importance is the fact that a hearing was held in this case – a step which even EGFL recognised went beyond the summary judgment procedure adopted in either New York or London. Giving the opportunity to the parties to be heard in relation to the claim or defence to be dismissed appears to designate the limit beyond which a summary procedure may be deemed unfair at least under certain rules and arbitration laws.

In respect of the Tribunal's mandate, in this case, the wording relating to awards on dispositive issues contained in the arbitration agreement did not expressly refer to the disposal of a claim or defence on a summary basis. Further, arbitration laws and procedural rules, including the ICC Rules, generally provide that tribunals may render awards on separate issues.

One may therefore question whether that wording resulted in the scope of the tribunal's prerogatives being increased under the ICC Rules.

In this case, EGFL who had advocated the position that summary judgment was not appropriate in international arbitration, made the point that when the ICC Rules were revisited in 2012, the absence of a summary procedure was deliberate. In the same vein, most major arbitration rules have been revised in the last few years, and yet none of the leading rules have provided for a procedure under which a meritless claim or defence could be disposed of on a summary basis (except for Article 41(5) of the ICSID Arbitration Rules which was introduced in 2006). This suggests that the arbitration community feels that there is no need for such a provision in procedural rules. What remains unclear is the rationale behind this consensus amongst the institutions and the committees who were in charge of the redraft of these arbitration rules. Do these stakeholders agree that there is no need for a summary procedure provision to be included in arbitration rules because they consider that summary judgment is not appropriate in international arbitration? Or do they consider that such a provision is not necessary because summary judgment is de facto already available and (impliedly) allowed under the leading commercial arbitration rules and arbitration regimes?

The authors have now learned that the ongoing proceedings in New York have been discontinued following settlement, under which EGFL agreed to withdraw its motion to vacate. This will enable Travis to proceed with the enforcement of the award in England or any other jurisdictions in which assets are available. Ultimately, despite considerable delay, the use of summary procedure in an arbitration context did not jeopardise the validity of the award that embodied the Tribunal's summary judgment.