SUMMARY JUDGMEN
INTERNATIONAL ARB

TO BE OR NOT TO BE? THAT IS

This article explores the extent to which summary judgment awards are being used and the procedures available in the context of modern international Arbitration.

In Common Law jurisdictions the concept of securing summary judgment Orders is well enshrined in our civil Courts system. However, a party seeking summary judgment must demonstrate to the Court that granting summary relief will not contravene and offend accepted rules of natural justice. A party against whom such an award is being sought must be given every opportunity to be heard and to oppose such potentially damaging orders. The goal for the defending party is to convince a Court that summary judgment is inappropriate and that there is a bona fide defence which should be heard at a full hearing on sworn evidence. So what is happening in modern Arbitrations, is this remedy available and if so, by what means?

Introduction

This article explores:

- If the concept of summary judgment awards already exist in Arbitrations, but under a different guise – of protective measure awards and/or interim awards;

and

- Would the formal adoption of summary judgment award procedures within the arbitration rules of (many of the major) arbitral institutions improve the effectiveness of Arbitration processes and the access to justice.

Traditionally, Arbitration has been heralded as a means of dispute resolution that is flexible, efficient and cost effective for commercial disputes that require a strategic and confidential resolution. However, commentators and detractors of Arbitration would in fact argue that not only has the glow of Arbitration dimmed in recent years but that Arbitration is more and more gaining an (arguably undeserved) reputation of being a slow and overly expensive dispute resolution process when compared to the existing and traditional Court processes.

Criticisms of the system of Arbitration have led to on-going debate on how the arbitral systems and procedures in operation can be improved for all participants. It is in this context that the debate has at times centred on the availability of summary judgment procedures within Arbitration. The question being in simple terms, whether an Arbitrator has the ability to hear and determine an issue within an Arbitration without the necessity to have a full exchange of pleadings, experts Reports and witness statements and to convene a hearing to hear all the evidence within the Arbitration, before s/he can reach a conclusion and make an award on foot of an application for a summary award. Such

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applications often relate to claims for monetary sums (for liquidated amounts) which are neither defended nor contested (in a stateable manner) and where there is no express claim for a right to set off by way of counterclaim to such claims (ie a monetary claim on a Guarantee and Indemnity).

In similar circumstances within the Common law court systems, summary judgment applications are readily heard and frequently granted. The courts are careful to ensure that the parties rights are fully respected; and this is done by affording the parties all their usual rights to be heard under the rules of natural justice. This ensures that each party has an opportunity to be heard, to make factual submissions (often on affidavit) and to make legal submissions. By doing so the courts ensure that justice is served (and is seen to be served too). Judgment will only be granted where the circumstances permit. This system is successfully operated by the common law courts and has led to greater efficiency in the progression of claims through the courts.

It is clearly arguable that that Arbitral claims could also benefit from the strategic use of summary procedures and that (as a matter of practice) arbitral tribunals are already doing so but under a different guise. This guise takes the form of applications for interim awards and/or protective measures within the arbitration.

Why is summary judgment not readily provided for within the procedural rules of many of the major arbitral institutions?

A review of the procedural rules of a number of the major arbitral institutions shows a stark and clear absence of any express provisions for the use and operation of summary judgment provisions within their procedural rules. The rational for this is far from clear. However, the answer most probably lies in the fact that summary proceedings have traditionally been perceived as opposing the underlying concepts of fair procedures which are operated within Arbitration. This lies in the requirement for each party to be given and receive an equal opportunity to present their case. Equally, issues arise around the perceived difficulties with enforceability of Arbitration Awards obtained summarily.

By way of example, the arbitration rules of most of the major arbitral institutions, including the International Chamber of Commerce **(ICC),** the London Court of International Arbitration **(LCIA)**, the American Arbitration Association **(AAA)**'s International Centre for Dispute Resolution **(ICDR)**, the Singapore International Arbitration Centre **(SIAC)**, and the Hong Kong International Arbitration Centre **(HKIAC)**, are silent on this issue, and do not expressly authorise Arbitrators to utilise such procedures.

Likewise, the arbitration laws of many of the popular arbitration jurisdictions, such as London, Paris, Singapore and Hong Kong, are generally silent on whether or not Arbitrators are empowered to summarily dispose of a case

without proceeding to a hearing on the merits [1].

A notable exception being Rule **41(5)** of the International Centre for settlement of Investment Disputes **(ICSID)** Arbitration Rules, which provides as follows:

Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.

Equally the ICSID rules permit a party to raise a preliminary objection that a claim is 'manifestly without legal merit' **[2]** and it provides:

"If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect."

It is also worth looking at the AAA International Arbitration rules and UNCITRAL rules provide Tribunals with some latitude on the conduct of the Arbitration and in particular Article 16.3 of the AAA rules provides that:

"the Tribunal may in its discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case."

And Article 15.2 of the UNCITRAL rules also provides that:

"If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials."

Both Article 16.3 and Article 15.2 as referred to above are clearly capable of being read as wide enough to incorporate within the Tribunals inherent powers to permit applications for summary awards and certainly for interim awards and protective measures within its scope.

The approach of the Courts in England and Wales to use of summary procedures in Arbitration:

Judicial precedent on the issue is scant to non-existent within the Courts in England and Wales (and Ireland). Issues on the enforceability of summary awards from arbitral tribunals have however come before the Courts of Canada, England and Wales, and in New York (in the USA).

Most recently, the Canadian Supreme Court in 2014 heard the appeal arising from **Hryniak v Mauldin [3]** and sought to broaden the scope of summary judgment awards arising in an arbitral hearing. Here, the Supreme Court found there was no reason to restrict summary judgment awards to court proceedings on the basis that an agreement between parties to submit their dispute to arbitration may well, absent an express provision to the contrary, allow parties to avail of summary judgment where appropriate. The logic is that to restrict access to summary judgment as a result of that choice would appear to be counter-intuitive to

the whole aim of agreements between parties to arbitrate.

The most informative case from perspective of the Courts of England and Wales (and Ireland) is **Travis Coal v Essar Global Fund [4]**. Here an arbitral award, made under the ICC rules, was made against Essar Global Fund in favour of Travis on a summary basis. Travis then sought to enforce the award in New York and London. In this case, the High Court in London entered the award as a judgment, and Essar applied to have the judgment set aside on the basis that the Tribunal had deprived it of a fair and full opportunity to be heard on its fraud defence by utilising the summary judgment procedures. The High Court of Justice, Queens Bench Division, Commercial Court ("Commercial Court") looked into the validity of the summary judgment award and evaluated whether it was appropriate to adjourn the enforcement proceedings of the award, pending the outcome of the challenge by Essar to the award in the New York courts.

Essar argued that the absence of a summary procedure was deliberate when the ICC amended its rules in 2012. The two key arguments advanced by Essar was that firstly, the Tribunal had exceeded their powers in determining that it had the power to adopt a New York law standard of Summary Judgment procedure for determining Travis's claims and secondly, that the Tribunal acted in manifest disregard of the summary judgment standard under New York law by adopting summary judgment notwithstanding important facts.

Ultimately the Commercial Court did not rule on the availability of summary judgment in international Arbitration, and deferred making a final determination pending the outcome of the New York Court. Justice Blair in his decision noted that the court should avoid the risk of conflicting decisions, which would occur if the English court enforced the award and the New York court subsequently decided to set it aside. An adjournment of the case was granted however, on the condition that security (for the full amount of the award) was given by Essar.

The Commercial Court in this case, offered some useful insight into what appears to be the prerequisites for summary judgment to be accepted in an International Arbitration context. Justice Blair noted that he disagreed with the general position that the adoption of summary procedures by arbitrators amounted to a denial of due process and noted that the real question to be asked was whether the procedure adopted by the Tribunal was within the scope of their powers and was conducted fairly. In this case, the arbitration clause had been drafted in a manner which gave the Tribunal wide powers in respect of the procedure to be adopted in determining summary issues in the manner it considered to be appropriate. In addition, the Tribunal in this case had complied with the criteria as outlined in Articles 19 and 22 of the ICC rules and had allowed the parties an opportunity to present their case.

The proceedings in New York were ultimately discontinued following settlement by the parties which involved Essar withdrawing its motion to vacate and allowed Travis to proceed with enforcement of the award in the Courts of England and Wales. This case can ultimately be used as a guide to practitioners to highlight that the use of summary procedures does not affect the validity of an award directed by the Tribunal and it is likely that going forward the Courts in England and Wales will be willing to enforce awards by arbitrators on the basis that they have acted within the parameters of the powers granted to them under the arbitration agreement.

Arbitration – how summary procedures can be used to the benefit of the Arbitration process

Although there are still inherent risks in an Arbitrator making an award on the basis of a summary application, the Maudlin and Travis decisions emphasise that parties seeking summary judgment awards do so in the knowledge that they may subsequently face jurisdictional challenges on the basis that the

Tribunal has acted outside its powers. In addition, there is the possibility that an application to set aside the award due to the failure of the Arbitrator to act within the arbitral rules and procedures will be made, with a parallel complaint that the Tribunal has failed to have due regard to the rules of natural justice with the argument that the of awarding of a summary judgments is ultra vires and impugns the party against whom the award is made legal rights.

As matters stand, Arbitrators are not expressly precluded from making summary judgment awards but do so in the knowledge that such awards remain open to criticism and legal challenge. To avoid such a dichotomy there is clear scope for the major arbitral institutions to grasp this nettle and to expressly include within their rules a process for permitting summary judgment awards but noting Tribunals obligations when doing so to ensure that the party against whom such awards are made are given every reasonable opportunity to present their defence and seek a full hearing on the merits, if this is their desired outcome.

Finally, in light of the Travis decision and the insights offered by the Courts of England and Wales as to the prerequisites for summary judgment in Arbitration it may be helpful to consider the inclusion of summary judgment as an option at the time of preparing the Arbitration agreement. If arbitration is to deliver on its promise to offering a faster and cheaper dispute resolution process, arbitrators should be proactive in considering with the parties the possible advantages of addressing claims or defences that are legally insufficient at the earliest opportunity [5]. Although, the summary procedure method may not be appropriate in many arbitrations, the availability of such a tool, if utilised in the correct manner, may enhance the ability of arbitrators to expedite the completion of arbitrations where a parties claims or defences manifestly lacks merit.

End Notes:

[1] Chan, C & Ho, W. [2014] The use of summary disposition in international arbitration: some observations, Skadden, Arps, Slate, Meagher & Flom LLP, Financier Worldwide, October 2014.
[2] ICSID Convention Arbitration Rule 41(5).
[3] Robert Hryniak v Mauldin & Ors, [2014] SCC 7, file no. 34641 (26 March 2014).
[4] Travis Coal Restructured Holdings Llc v Essar Global Fund Ltd [2014] EWHC 2510 (Comm) (24 July 2014).
[5] Sussman, E & Ebere, S. [2011] Reflections on the use of dispositive motions in arbitration, NYSBA, New York dispute resolution lawyer, Spring 2011, Volume 4, No 1.

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