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Summary Disposal In Arbitration and Tribunals' Ability To Order Summary Procedure Without Express Authority

Claire Morel de Westgaver (Bryan Cave Leighton Paisner LLP) · Wednesday, May 23rd, 2018 · Bryan Cave Leighton Paisner LLP

The recent American case of *Weirton Medical Center Inc v Community Health Systems Inc* (N.D. W. Va. Dec. 12, 2017) is another reminder that the debate over the place of summary disposal in arbitration has not been settled. This issue has previously been in the spotlight notably through the transatlantic case of *Travis Coal Restructured Holdings LLC v Essar Global Fund Ltd* [2014] EWHC 2510 (Comm), a case relating to an ICC award rendered in New York and sought to be enforced in England (see previous post of the author on Summary Judgment in International Arbitration – No Longer Dismissed?).

The fundamental question is whether tribunals' general power to conduct arbitral proceedings in a fair and efficient manner enables them to order a summary procedure in circumstances where the parties have not expressly agreed such procedure. The answer to this question can have important and costly ramifications. More broadly, the availability of summary disposal as part of the arbitration process can potentially impact the way in which arbitration may be perceived and used in the future.

Certain industries, such as the financial services sector, have been reluctant to embrace arbitration as a dispute resolution mechanism due to the alleged lack of such summary procedure. Yet, tribunals are faced with applications for summary disposal on a regular basis. In that context, tribunals are often threatened by defending parties that any award rendered on a summary basis would impact that party's ability to present its case and ultimately would be challenged on that basis. Recognising the uncertainty and the shortfall of cases that a more streamlined process could attract, institutions have considered revisiting their rules to introduce summary procedures with some taking the plunge and others not.

The Weirton case concerned the annulment proceedings of an arbitral award rendered by a sole arbitrator on a summary basis. A dispute had arisen between a hospital, Weirton Medical Center, Inc. ("Weirton") and Quorum Health Resources LLC and affiliated persons ("Quorum") in relation to the termination and payment under two separate administrative services agreements. Each agreement provided for arbitration in accordance with *"the arbitration rules of the American Arbitration Association (AAA)"* albeit in different cities in the United States. In addition, one agreement invoked *"the substantive and procedure laws of the State of Tennessee applicable to contracts made and to be performed therein"* and the second invoked *"the substantive and procedure laws of the State of West Virginia applicable to contracts made and to be performed*

therein".

Following another arbitration between the same parties and Weirton's unsuccessful attempt to vacate the ensuing award rendered in favour of Quorum, on 24 March 2016, Weirton commenced a new arbitration against Quorum. On 29 July 2016, Quorum requested the arbitrator to dispose of Weirton's claims on a summary basis. Three months later, the arbitrator granted the application for summary disposal and disposed of all Weirton's claims in an award dated 2 November 2016. In response to Weirton's argument that a motion for disposition was not appropriate under the 2009 AAA Commercial Arbitration Rules, the arbitrator held that Rule L-4 empowers tribunals *"to hear and grant motions for summary disposition"*. Rule L-4 of the 2009 AAA Commercial Arbitration Rules states that *"(a) Arbitrator(s) shall take such steps as they may deem necessary or desirable to avoid delay and to achieve a just, speedy and cost-effective resolution of a Large, Complex Commercial Case."* The arbitrator based his decision on the case of *Sherrock Bros. Inc. v. DaimlerChrysler Motors Co., LLC*, 260 F. App'x 497, 502 (3rd Cir. 2008).

On 12 December 2017, Weirton filed a motion in the US District Court for the Northern District of West Virginia to vacate the award on the grounds that the arbitrator had exceeded his powers and manifestly disregarded applicable law. Weirton argued *inter alia* that the arbitration agreements, the 2009 AAA Commercial Arbitration Rules and procedural laws of Tennessee and West Virginia prohibited summary disposals. Weirton further argued that the arbitrator was obligated to apply the West Virginia and Tennessee Rules of Civil Procedure, which would not have permitted summary disposal without adequate discovery and an evidentiary hearing. Finally, Weirton argued that each of the arbitration agreements designated a specific location for the arbitration and therefore the judicial procedural rules of those locations were applicable.

The District Court rejected Weirton's arguments and held that the arbitrator did not exceed his powers or manifestly disregard the law in ordering the disposal of Weirton's claims on a summary basis. As part of its decision to deny the motion to vacate and confirm the award, the District Court found that *"read as a whole, these agreements make clear that the AAA rules governed procedural matters in the arbitration, while Tennessee and West Virginia law governed the substantive legal issues"*. The District Court recognised that the express reference to arbitration rules and state procedural laws in the arbitration agreement created an ambiguity which – the District Court considered – justified the arbitrator to exercise discretion to resolve which procedural law applied. It also highlighted that it is well-established in the US that an arbitrator has jurisdiction to *"adopt such procedures as are necessary to give effect to the parties' agreement"* and that *"procedural questions which grow out of the dispute and bear on its final disposition are presumptively… for an arbitrator [ ] to decide."* It further concluded that *"while the arbitration agreements do not expressly permit summary disposition, they do not expressly prohibit it either"*.

Regarding the parties' choice in relation to Weirton's reference to the arbitration *"locations"*, the District Court dismissed Weirton's argument that by agreeing to binding arbitration in Brentwood, Williamson County, Tennessee and in Pittsburgh, Pennsylvania, the parties had intended to require full discovery and a full evidentiary hearing. It held that *"these designations of sites for arbitration hearings are not equivalent to express requirements that the parties conduct discovery and participate in a full evidentiary hearing"*.

Whilst it may not have the implications it would have had it not been a domestic arbitration, the decision in the Weirton case reinforces the position that tribunals' general case management powers encompass the power to dispose of a claim or issue on a summary basis and therefore that

express authority is not necessarily required. Express authority can be derived from the arbitration agreement itself. This was the case in the *Travis Coal* case where the arbitration agreement authorised the arbitral tribunal to hear any issue said to be *"dispositive of any claim"* in such manner as was considered appropriate. Express authority may also be found in any applicable arbitration rules. Yet, until recently, save for their general discretion with respect to the conduct of the proceedings, most arbitration rules were silent on arbitrators' powers to dismiss claims or defences or determine an issue on a summary basis. A noticeable exception to this trend was article 41(5) of the ICSID Rules.

Over the last decade, many sets of commercial rules have been revisited to include a summary procedure. Pointedly, the 2013 version of the rules at stake in the *Weirton* case contemplates the possibility of dispositive motions (whereas the 2009 version which applied in the *Weirton* case did not). Rule R-33 of the 2013 AAA Commercial Arbitration Rules states that *"the arbitrators may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case"*.

Some of the leading arbitration institutions took the view that inserting a specific summary procedure provision in their respective arbitration rules was desirable. Arbitration rules containing such a provision include the SIAC Rules effective on 1 August 2016 (Rule 29.1) and the SCC Rules effective on 1 January 2017 (Article 39(1)). In contrast, the LCIA Rules, the ICC Rules, the ICDR Rules and the UNCITRAL Rules constitute examples of arbitration rules that do not include any specific summary procedure provision. In the *Travis Coal* case, the party resisting enforcement had run the argument that because summary procedures had been deliberately omitted from the ICC Rules on their 2012 revision, the general power of Article 22 of the ICC Rules could not implicitly support such procedures. The English court in *Travis Coal* was not persuaded by that argument.

In fact, the decision of the ICC (and indeed other institutions) to refrain from inserting a summary procedure provision into its rules may support the opposite position. It has been widely argued that there is no need for such provision to be inserted in arbitration rules. This would be the case because express authority is not required and the power to render an award on a summary basis forms part of tribunals' general case management powers. The decision of the District Court in *Weirton* certainly reinforces that argument and in that sense might contribute to the gradual dissipation of arbitrators' paranoia over summary procedure-related challenges. With respect to rules that now do incorporate a summary procedure provision, what remains to be seen is how these provisions work in practice and any positive impact on arbitrations conducted under these rules.

The author is grateful for the assistance of ***Alice Simon*** *and* ***Lydia Burke*** *(Bryan Cave Leighton Paisner).*

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