Summary and expedited procedures in arbitration: good news for the financial services sector?
Nicholas Peacock, Dominic Kennelly and Anees Naim - 19 May, 2016

Nicholas Peacock, Dominic Kennelly and Anees Naim of Herbert Smith Freehills, London consider three recent developments which suggest that summary and expedited procedures are becoming more available in arbitrations. Will this make arbitration increasingly suitable for banks and financial institutions?

In our experience, banks are already turning to arbitration more and more, largely because of the enforcement advantages that it offers compared to the more traditional litigation options such as the English or New York courts. This is of particular importance when doing business in emerging market jurisdictions.

However, choosing arbitration has traditionally meant foregoing the ability to apply for summary or default judgments. In the finance context, these can be a useful way of quickly cutting through weak defences to a claim to obtain judgment promptly following a default. Such procedures can avoid the costs and time involved in a full-scale hearing on the merits.

Despite the advantages of such procedures, arbitrators and arbitration practitioners have historically been wary about expressing a firm view about their availability in arbitration, given the obligations placed on arbitrators to allow both sides the opportunity to put their case, coupled with the scope for challenges to an award (including on enforcement) if such obligations are not observed.

A number of recent decisions and initiatives in the arbitration sphere suggest that arbitrators and arbitral institutions (and supervisory courts responsible for hearing challenges to awards) are becoming more willing to support summary and expedited procedures in appropriate cases. In a summary procedure, the tribunal resolves the case without a full hearing on the merits.

In contrast, an expedited procedure involves a full hearing on the merits, with the arbitration being conducted on an accelerated timetable. Both procedures have the potential to make arbitration a quicker process and one that is more suitable for financial services disputes (albeit that they are not without drawbacks).

The emergence of new options to shorten arbitral procedure is a welcome development for banks and others in the financial services sector, and it will go some way to addressing the absence of summary and default judgment procedures in arbitration.

THE TRAVIS COAL CASE

In Travis Coal Restructured Holdings v Essar Global Fund (2014), the English High Court considered an application to set aside an ex parte enforcement order in respect of a New York arbitration award, or to adjourn a decision on enforcement
pending the outcome of a challenge to the award in the New York courts.

The arbitration involved a claim by Travis Coal for payment under a guarantee. That claim was resisted by Essar on a number of bases, including various fraud-based defences. Travis Coal applied for summary judgment on such fraud defences, seeking to apply the summary judgment standard of the New York courts.

Essar objected to Travis Coal's summary judgment application, arguing that the tribunal did not have power to grant summary judgment and that the adoption of a summary procedure would contravene its right to be heard on the fraud defences.

The tribunal held hearings and heard oral testimony relevant to Essar's fraud defences from a witness for each party, but appears not to have conducted a full hearing of the fraud defences. The tribunal then issued a procedural order in which it ruled that Essar's fraud defences did not bar Travis Coal's claim under the guarantee by virtue of certain waiver provisions in that agreement.

While not comparable to summary judgment as understood by the New York (and English) courts, the procedure adopted was somewhat summary in nature and fell short of a full hearing on the merits.

In adopting that procedure, the tribunal highlighted, firstly, the parties’ arbitration agreement, which contained a clause granting the arbitrators

“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”.

Secondly, article 22 of the International Chamber of Commerce (ICC) Rules (being the applicable arbitration rules), which requires the tribunal to ‘conduct arbitration in an expeditious and cost-effective manner’, and empowers the tribunal (after consultation with the parties) ‘to adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties’.

In the English High Court, Mr Justice Blair concluded that there was no realistic prospect of resisting enforcement of the award based on the summary procedure adopted by the tribunal. He observed that the adoption of a summary judgment process by the tribunal does not necessarily amount to a denial of due process.

This is a question that cannot be addressed in general terms; regard must be had to the facts of the particular case and the terms of the arbitration agreement to determine whether the procedure adopted by the tribunal was within the scope of its powers and was otherwise fair. This is a question of substance, rather than of how a procedure is labelled.

THE AQZ CASE

The dispute in AQZ v ARA (2015) arose out of a transaction for the sale of coal. The buyer commenced Singapore International Arbitration Centre (SIAC) arbitration proceedings against the seller for its alleged failure to deliver.

The buyer also applied for the arbitration to be conducted under the expedited procedure provided for in the SIAC rules under which the chairman of SIAC has discretion to apply the expedited procedure in certain circumstances.

Where the chairman so orders, then, the case is usually referred to a sole arbitrator (which is typically faster than having a 3-person tribunal), and the award is required to be made within six months of the tribunal being constituted, although this can be extended.

Further, the award is only required to state the reasons on which it is based in summary form. Other time limits under the rules can also be abridged.

Importantly, the tribunal is still required to hold a hearing, unless the parties agree that the dispute shall be decided on the basis of documentary evidence only.
The supplier resisted the buyer's application, arguing that the expedited procedure was unsuitable and relying upon the terms of the arbitration agreement, which provided for a tribunal of three arbitrators. However, SIAC allowed the buyer's application and appointed a sole arbitrator who ultimately issued a partial award upholding the buyer's claim.

The supplier applied to set aside the award before the Singapore High Court on several bases, including that the arbitration tribunal and/or the arbitral procedure was not in accordance with the parties' agreement.

That High Court rejected the challenge, ruling that the relevant provisions of the SIAC rules had been incorporated by reference into the parties' arbitration agreement, and that they overrode the parties' stipulation that there should be three arbitrators.

This case provides a helpful endorsement of an expedited procedure under the rules of an established arbitral institution and of the discretion associated with that procedure. It indicates that the use of an expedited procedure is unlikely, without more, to found a successful challenge to the resulting award.

**LONDON ARBITRATION CLUB INITIATIVE**

The Financial Sector Branch of the London Arbitration Club has recently issued financial services expedited arbitration procedures aimed at promoting expedited and cost effective arbitration proceedings in financial services disputes. The procedure is intended to work alongside and supplement the rules of some of the major arbitration institutions, with the aim of resolving financial disputes more efficiently and expeditiously. The objective is still to deliver a full hearing of the dispute, but to do so according to an accelerated timetable.

To that end, parties are invited to include specific provisions and clauses for expedited procedures in their arbitration agreements, for example by agreeing to restrict or exclude disclosure, or to vary or eliminate the right to an oral hearing or restricting rights of cross-examination.

**GOOD NEWS?**

The various recent developments described above suggests that tribunals, arbitral institutions, and supervisory courts are moving towards a slightly less cautious and more pragmatic approach to expedited and summary arbitral procedures.

This may also prompt financial sector parties and their counsel to be more willing to agree clear and express clauses in arbitration agreements that give tribunals discretion to adopt summary and/or expedited procedures, and to apply for such procedures to be used when the need arises.

This trend is, however, by no means universal. While arbitral institutions may be willing to embrace quicker proceedings through expedited processes, there remain significant concerns in some quarters about summary procedures, given arbitrators' obligations to observe due process and the scope for an award to be challenged on the basis that this obligation has not been complied with.

Further, summary and expedited procedures are not without drawbacks, and these need to be carefully weighed against the potential advantages of using such procedures.

Nonetheless, the increased procedural effectiveness, certainty, costs savings and speed offered by the above developments are good news for parties in the financial sector who want to make use of all the enforcement and other advantages arbitration has to offer.

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