Applications to refuse enforcement of arbitration awards: lessons learnt from *Eastern European Engineering v Vijay Construction*[1]

Overview

This case relates to a dispute between two Seychellois companies, Eastern European Engineering Ltd (**"EEEL"**) and Vijay Construction (Proprietary) Ltd (**"VCL"**), arising out of the construction of a hotel complex.

Following a Paris-seated ICC arbitration award being made in EEEL's favour in 2014 (the **"Award"**), EEEL was granted permission in 2015 to enforce the Award in England. VCL fought that decision, but its application was stayed pending the final determination of VCL's challenge to have the Award set aside by the French Courts.

After VCL's challenge in France was dismissed, the English Court had to decide whether it should refuse enforcement of the Award. It held in October 2018 that each of the grounds VCL raised to refuse enforcement failed on the merits.

Factual background and previous challenges

As the judge noted in her recent judgment, there had been a "*hiatus*" in the progress of VCL's application before the English Courts for enforcement of the Award to be refused. That "*hiatus*" was due to parallel proceedings brought by VCL in France and the Seychelles to set aside and challenge enforcement of the Award, on grounds which were "*essentially similar*" to those raised in England.

This meant that the English enforcement proceedings once again became "*live*" in 2017 after the French appellate court dismissed VCL's set aside challenge in 2016 and VCL did not pursue its further appeal to the French Court of Cassation.

At the same time, VCL succeeded in its challenge for enforcement to be refused in the Seychelles. The Seychellois appellate court held that because the Seychelles had repudiated the New York Convention in 1979, there was as matter of Seychellois law no power to order enforcement of a Convention award.

VCL's enforcement challenge in the English Courts

VCL originally advanced four arguments before the English Courts to challenge enforcement of the Award under section 103 of the Arbitration Act 1996. It pursued three of those arguments before the judge:

i) Ground 1: that the arbitral tribunal (the **"Tribunal"**) lacked jurisdiction because its composition was not in accordance with the parties' agreement (section 103(2)(e)). The factual basis of this argument was VCL's contention that both parties were required to serve notices of dispute upon each other before any arbitration was started. Since EEEL had not served a notice of dispute on VCL in the context of the present dispute, it had failed to comply with the contractual dispute resolution procedure before commencing the arbitration.

ii) Ground 2: that VCL was unable to present its case because the Tribunal had permitted EEEL to rely on a third report from its expert, Mr Large ("**Large 3**") , but had denied VCL a proper opportunity to respond to that report (section 103(2)(c)).

iii) Ground 3: that EEEL had interfered with a witness, Mr Egorov, preventing him from giving evidence in the arbitration, and that enforcement of the Award would therefore be contrary to public policy (section 103(3)). EEEL denied that there was any such interference.

1 [2018] EWHC 2713 (Comm)

EEEL, for its part, submitted that the English Court should reject VCL's arguments on the basis of two preliminary points: issue estoppel and public policy on finality. Grounds 1, 2 and 3 had already been raised before the French Court, and rejected. They had also been raised before the Seychelles Court, and rejected. In these circumstances, the conditions for establishing an issue estoppel were met.

In addition, the fact that a party had been refused a remedy by the supervisory court of the arbitration in relation to an alleged defect in the award or conduct of the arbitration was usually a "*very strong policy consideration*" that the award should be enforced.[2]

The English judge's conclusions

The English judge concluded that it did appear that "*the issues explored before the French Court and the Seychelles Court were very similar if not quite identical in some respects at least*" to the issues raised before the English Court. Such circumstances "*point[ed] towards a refusal*" of VCL's application for enforcement to be refused.

But since the issues were not identical, the judge held that "*it would be wrong to short circuit the argument here*", and the better course was to consider the merits of VCL's challenges in full. Taking each of VCL's arguments in turn, the judge concluded:

i) Ground 1 (lack of jurisdiction): VCL's arguments were based on a misreading of the dispute resolution clause and had no merit. The words "*each Party shall notify another Party of such dispute*" provided that *either* party was to notify the other of a dispute. They did not require that both parties notify each other of the same dispute.

ii) Ground 2 (inability to present the case/Large 3): EEEL's submissions that VCL created difficulties as to expert evidence were accepted. The burden was on VCL to show that it was prevented from being heard by matters beyond its control or exceptional circumstances were present. Both VCL and EEEL were given permission to rely on expert evidence in good time. It was VCL's decision not to call expert evidence. VCL then caused a further procedural issue by cross-examining EEEL's expert by reference to input from VCL's own expert without any notice of the points to be taken. This approach necessitated the production of Large 3.

iii) Ground 3 (Mr Egorov and public policy): this ground failed. There was no evidence that the hypothetical bribery alleged by VCL led to Mr Egorov not appearing as a factual witness in the arbitration. What appeared to the judge to have happened was that in the light of Mr Egorov's "*contradictory (and unsatisfactory) statements*" VCL took the decision that he was too great a risk to call. Contemporaneous evidence pointed to VCL being aware of the pressure being put on Mr Egorov. VCL had also manifestly failed to discharge the burden on them to show that the evidence would (or even might) have contributed substantially to a different outcome.

Key takeaways

The decision acts as a useful reminder for arbitration practitioners of some pitfalls to avoid during the life of an arbitration and at the enforcement stage:

i) A party who chooses not to call expert evidence of its own volition, having been given permission to do so in good time, will face difficulties in successfully arguing at a later stage that it was unable to present its case.

ii) Timing is of utmost importance in pleading bribery/intimidation of witnesses. If a party knows of alleged intimidation before the rendering of an arbitration award but does not ask for a ruling, raising public policy arguments at the enforcement stage is likely to fail.

iii) Issue estoppel could be engaged where essentially identical issues are raised at enforcement as during earlier set aside proceedings. Parties should consider at the outset how to present their arguments in set aside and enforcement refusal applications, and how judicial findings in different jurisdictions could impact on each other.

2 *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] CLC 647 at p. 661

If you have any questions about the issues raised in this legal update, please contact your usual Mayer Brown contact or:

Raid Abu-Manneh
Partner, London
E: rabu-manneh@mayerbrown.com
T: +44 20 3130 3773

Catherina Yurchyshyn
Associate, London
E: cyurchyshyn@mayerbrown.com
T: +44 20 3130 3962

0579ldr