Neutral Citation Number: [2014] EWHC 2510 (Comm)

Case No: 2014 FOLIO 326

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2014

Before :

MR JUSTICE BLAIR

- -

Between :

TRAVIS COAL RESTRUCTURED HOLDINGS LLC	**Claimant**
- and -	
ESSAR GLOBAL FUND LIMITED (FORMERLY KNOWN AS ESSAR GLOBAL LIMITED)	**Defendant**

- -
- -

Edmund King (instructed by **Latham & Watkins (London) LLP**) for the **Claimant**
Ricky Diwan (instructed by **Shearman & Sterling (London) LLP**) for the **Defendant**

Hearing dates: 5 June & 20 June 2014

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Judgment

Mr Justice Blair :

1. This is an application by the defendant, a Cayman company called Essar Global Fund Limited ("EGFL"), in respect of proceedings in England brought by the claimant, a Delaware company called Travis Coal Restructured Holdings LLC ("Travis"), to enforce an ICC arbitral award dated 7 March 2014 in the claimant's favour in the sum of US$148m plus pre-award interest of US$56.7m and costs. Judgment was entered by this court in terms of the award in the claimant's favour on 26 March 2014 under s. 101 Arbitration Act 1996.

2. On 10 April 2014, EGFL applied under s. 103 Arbitration Act 1996 (1) for an order setting aside the judgment, (2) alternatively seeking an adjournment of the decision on recognition and enforcement of the award pending the determination of proceedings filed by EGFL challenging the award. These were filed on 9 April 2014 before the United States District Court for the Southern District of New York applying to vacate the award pursuant to the provisions of s. 10 of the Federal Arbitration Act and New York law. EGFL's contention at the hearing has been that the proceedings in England should be adjourned, and this is where the argument has centred. Travis opposes its

application, contending that the court should order immediate enforcement in full, but in the event that the court decides to adjourn, seeks an order for suitable security pursuant to s. 103(5) Arbitration Act 1996. EGFL denies that this is a case in which to order security.

3. There was a dispute between the parties as to whether the hearing should be in public or in private. Neither party had addressed the relevant provisions of CPR Part 62 in their written submissions. In short, Travis submitted that the hearing should be in public because it concerned enforcement, whilst EGFL submitted that it should be held in private because it related to its application to set aside or adjourn the decision on recognition or enforcement of the award. This raised a somewhat complex question as to the interrelationship of the various provisions of the CPR, and whilst the parties' respective positions were further explained in letters exchanged by their solicitors between hearings, the question should (I consider) be decided in a case where there has been proper argument. I add that the dispute is somewhat unreal, since the arbitration award (with some minor redactions relating to financial information) is now publicly available on the website of the New York court. The parties agree that this judgment should be in public. However, the hearing itself will be treated as in private, which is the usual position in arbitration proceedings.

The facts

4. The facts are complex, but for the purposes of this application can be stated relatively simply. By a Stock Purchase Agreement of 29 March 2010, a company called Essar Minerals Inc (which is a wholly owned subsidiary of EGFL) acquired from Travis the shares in a US coal mining operation called Trinity Parent Corporation. As part consideration for the purchase, on 7 April 2010 Essar Minerals Inc issued promissory notes in favour of Travis in the sum of US$203m.

5. Also on 7 April 2010, an Intercreditor and Subordination Agreement was entered into between Essar Minerals Inc, Travis and Crédit Agricole. Further on 7 April 2010, a Guarantee was entered into between EGFL, Travis and Crédit Agricole (the latter on behalf of the Senior Lenders). Under the Guarantee, EGFL guaranteed (1) Trinity's obligation to repay the Senior Lenders, and (2) Essar Minerals Inc's obligation to Travis to make payment under the US$203m notes issued in respect of the price.

6. Under the terms of the Guarantee, EGFL's guarantee to the Senior Lenders was capped at US$103m, and EGFL's total liability under the Guarantee was capped at US$203m. EGFL's case is that Travis's rights under the Guarantee were subordinated to the fulfilment of EGFL's guarantee obligations to the Senior Lenders, so that the Senior Lenders were to be paid first up to the cap amount of US$103m. Thus, payments to the Senior Lenders under the Guarantee counted against the overall US$203 million cap, thereby reducing any amount due to Travis.

7. Following the acquisition, EGFL's case is that Essar Minerals Inc discovered that the true financial position of Trinity was very different to that which had been represented by Travis in that it is claimed that Travis failed to disclose that Trinity would need a US$200m capital infusion to continue operating and had significantly understated Trinity's environmental rehabilitation obligations and significantly overstated the amount that Essar Minerals Inc would receive from a third party. These are described in the papers as EGFL's "fraud defences".

8. Following a non-payment by Essar Minerals Inc in April 2012, Travis accelerated the amounts due under the notes, but the notes were not paid. Travis then claimed payment from EGFL under the Guarantee, but this claim was not met either.

9. By clause 7.7 of the Guarantee, which is governed by New York law, the parties agreed to settle disputes by arbitration, to "…be conducted in accordance with the Rules of Arbitration of the International Chamber of Commerce (the "ICC Rules") as in effect at the time of arbitration, except as may be modified herein… The place of arbitration shall be New York, New York".

10. On 25 May 2012, Travis commenced arbitral proceedings under this clause. An ICC arbitral tribunal was appointed on 26 October 2012 comprising Professor William W. Park, Mr Mark Kantor and Mr Philip Lacovara. It is not in dispute that these are leading international arbitrators.

11. The procedural history of the arbitration is set out in the award. Of particular relevance to the present proceedings is that on 7 December 2012, Travis filed a motion for summary judgment, which was opposed by EGFL on the basis that the Tribunal had no power of summary judgment, and that this procedure would contravene its right to a fair opportunity to be heard on its fraud defences. This gives rise to one of the two complaints that EGFL makes in this case.

12. Meanwhile, on 11 February 2013, the Senior Lenders accelerated Trinity's debt and demanded payment from EGFL of US$166.7m comprising US$117.4m being the outstanding principal amount of Loans, and US$49.3m being the amount of outstanding Letters of Credit. On 19 February 2013, the Senior Lenders filed an involuntary bankruptcy petition against Trinity in the US Bankruptcy Court for the Eastern District of Kentucky under Chapter 11 of the Bankruptcy Code. (They also commenced their own arbitration proceedings against EGFL under the Guarantee, though these proceedings were eventually withdrawn following the payment mentioned below under the bankruptcy Reorganization Plan by EGFL.)

13. EGFL's case is that a complex arrangement was negotiated in the bankruptcy proceedings involving numerous parties (including the Senior Lenders, unsecured creditors and employees of the company), which culminated in Trinity and certain of its affiliates submitting a proposed Reorganization Plan for approval by the Bankruptcy Court. The Reorganization Plan provided for the payment of US$103m to the Senior Lenders under the Guarantee comprising: (1) repayment of certain Loans; and (2) satisfaction of the Senior Lenders contingent obligations under Letters of Credit issued for Trinity's benefit.

14. Travis submitted objections to the proposed Reorganization Plan because of concerns as to the effect of the proposals on its claims under the Guarantee. EGFL responded to the effect that it was not seeking the Bankruptcy Court to make any finding or conclusion with respect to EGFL's obligations to Travis whilst (as EGFL says in its submissions) noting that Travis's obligations might be affected as a result of the operation of the Guarantee.

15. A hearing took place before the Bankruptcy Court on 8 November 2013, and it is sufficient to summarise EGFL's case in this respect. Travis's counsel made oral submissions objecting to the Trinity Reorganization Plan allocating payments to the

Guarantee. Counsel for EGFL took the opposing position that confirmation of the Reorganization Plan would require the Bankruptcy Court to find that the payments made to the Senior Lenders were payments under the Guarantee and thus satisfied its guarantee obligations. At the same time, Counsel for EGFL acknowledged that the Court was not being asked to determine the impact on Travis.

16. The Bankruptcy Court's Chapter 11 Confirmation Order *In re Trinity Coal Corporation et al* is dated 8 November 2013. EGFL's case is that in its Findings of Facts and Conclusions of Law, the Bankruptcy Court stated that payment of US$103m was pursuant to the terms of the Guarantee. Paragraph 7 of the Order is to the effect that upon payment of the Loan amounts and replacement of the Letters of Credit, EGFL shall have paid the amount of US$103m in respect of the guaranteed obligations. This gives rise to the second of the two complaints that EGFL makes in this case, which is that the Bankruptcy Court in effect decided that this sum went towards the US$203m cap, and that its decision was binding on the Tribunal under the doctrine of "collateral estoppel" (which is similar to the English law doctrine of issue estoppel or res judicata).

17. Travis contests this. It relies among other things on paragraph 52 of the Findings of Facts, by which the Bankruptcy Court recorded that, "For the avoidance of doubt, the Plan Proponents have not requested, and nothing in the Plan requires this Court to make any finding of fact or reach any conclusion of law regarding the effect that EGFL's payments pursuant to the EGFL Guarantee under the terms of the Plan will have on Travis …".

18. EGFL's case is that this was the position that it had contended for and an accurate statement of the position since the Bankruptcy Court was confining itself to determining the amount that EGFL had paid to the Senior Lenders pursuant to the Guarantee. EGFL says that Travis's reliance on this language as rebutting EGFL's "collateral estoppel" defence in the guarantee claim against EGFL is misconceived, because it reflects a rejection of Travis's position that the Bankruptcy Court should not determine whether the payments under the Reorganization Plan satisfied the obligations of EGFL to the Senior Lenders under the Guarantee. EGFL says that it amounted to an adoption of its position.

19. It is necessary now to say something more about the arbitration. The Trinity bankruptcy proceedings in Kentucky and the ICC arbitration between Travis and EGFL were proceeding at the same time. There was a hearing in New York on 3 April 2013, and a further hearing in New York (presumably by coincidence) also on 8 November 2013, which was the same day as the bankruptcy hearing. On 25 November 2013, the Tribunal issued a procedural order ruling that on the basis of the waivers and disclaimers in the Guarantee, there were no reasons to deny effect to the Guarantee because of the fraud defences.

20. On 31 January 2014, EGFL made a payment of US$103m to the Senior Lenders and informed the Tribunal on the same day. (EGFL says it was a cash payment as acknowledged by a Crédit Agricole letter, whilst Travis says that in fact it paid US$55m and posted collateral for replacement letters of credit for the balance of US$48m). The arbitration proceedings brought by the Senior Lenders under the Guarantee were terminated shortly afterwards. EGFL's case was (and is) that as a result of this payment, taken with what it says is the Bankruptcy Court's

determination as to the amounts paid by EGFL to the Senior Lenders under the Guarantee, the maximum amount recoverable by Travis under the Guarantee is now capped at US$100m.

21. However, the arbitrators disagreed. They considered that the collateral estoppel doctrine did not apply, and that they had to make their own calculation. Of the US$103m payment, they decided that US$55m was properly applied as part of the cap calculations to reduce EGFL's obligations under the Guarantee from US$203m to US$148m. But the balance of US$49.3m being conditional pre-payment of contingent reimbursement obligations under letters of credit was not to be so applied (nor was the face amount of any subsequent replacement letters of credit).

EGFL's case

22. On 19 March 2014, Travis applied before the New York court to confirm the award, being a step required prior to enforcement of the award in the United States. On 9 April 2014, EGFL submitted its opposition to this application, and filed a cross-petition applying to vacate the award. As it has been argued before me by EGFL, the cross-petition advances two independent complaints giving rise to four grounds of challenge before the New York court as follows.

23. The first complaint arises out of what is said to be the arbitral Tribunal's failure to conclude that the prior determination of the Bankruptcy Court as to the amounts paid by EGFL to the Senior Lenders under the Guarantee to which Travis was party gave rise to a collateral estoppel that capped the maximum amount that could ever be payable to Travis under the Award to US$100m. EGFL contends that (a) the failure of the Tribunal to apply collateral estoppel constituted a manifest disregard of the law of collateral estoppel, "manifest disregard" being a doctrine applied by the New York courts where an arbitral tribunal has acted in manifest disregard of the law, and (b) an excess of the Tribunal's powers given its finding that it could re-determine the issue previously determined by the Bankruptcy Court by reason of the parties' arbitration agreement.

24. EGFL's fundamental complaint is that by refusing to give effect to the Bankruptcy Court's decision, the Tribunal has required EGFL to make combined payments of US$252m (i.e. US$103 + US$148m) plus interest on liabilities that are expressly capped at US$203m under the terms of the Guarantee. If EGFL is successful on the collateral estoppel challenge it will succeed in reducing the amount payable under the award by US$48m from US$148m to US$100m.

25. The second complaint arises out of the Tribunal's decision to entertain Travis's application for summary judgment on EGFL's fraud defences with respect to the payments alleged due under the Guarantee and to proceed to determine that application in favour of Travis thereby (EGFL says) depriving EGFL of a fair and full opportunity to be heard on its fraud defences. EGFL asserts that this amounted to: (a) an excess of power by the Tribunal because it had no power to resolve EGFL's fraud defences on the basis of summary judgment such power having not been conferred on the Tribunal under the terms of the arbitration agreement; (b) in manifest disregard of the summary judgment standard under applicable principles of New York law given the existence of disputed issues of fact relating to EGFL's fraud defences which the

Tribunal determined without a full hearing on the merits. If EGFL is successful on the summary judgment challenge, it will succeed in vacating the award in its entirety.

26. EGFL says that a decision on the cross-petition by the New York court is likely to be given by no later than November 2014 based on the average time for resolution from initial filing of 8 months, and could be sooner given that written briefing was completed on 1 May 2014. It submits that an adjournment should therefore be granted pending the New York court's determination, with liberty to both parties to restore the matter before this court following that determination.

27. As I mentioned at the outset, additional to the adjournment application, EGFL's application of 10 April 2014 also applies to set aside the award pursuant to section 103(2) of the 1996 Act on grounds of due process and breach of agreed procedure, the underlying substance of which complaints are raised in the cross-petition. EGFL submits that it would equally be appropriate for the court to adjourn determination of this application pending the determination of the cross-petition by the New York Court as a matter of comity and to avoid the possibility of conflicting decisions.

28. It follows from this that the substantive question for this court is whether or not to adjourn pending the decision of the New York court, and if so, whether or not to order EGFL to give security, and if so, how much.

The approach of the English court to adjournment under s. 103(5) Arbitration Act 1996

29. There was a considerable measure of agreement between the parties as to the applicable principles. As it was put by Lord Clarke in *Cukurova Holding A.S v Sonera Holding B.V.* [2014] UKPC 15 at [4], "It is important to note the narrow grounds upon which the court can refuse to enforce an award made under the … New York Convention. … In particular the court cannot refuse to enforce an award on the ground of error of law or fact".

30. The provisions of s. 103 Arbitration Act 1996 which incorporate the relevant provisions of the New York Convention were summarised recently by Eder J in *Diag Human SE v The Czech Republic* [2014] EWHC 1639 (Comm) at [9] and following, to which I refer. It is not in dispute that s. 103 of the Arbitration Act 1996 embodies a strong pre-disposition to favour enforcement of New York Convention awards, reflecting the underlying purpose of the New York Convention itself, the burden of proof being "firmly" on the party resisting enforcement: see *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Govt. of Pakistan* [2011] 1 AC 763, Lord Collins at [101].

31. Section 103(5) Arbitration Act 1996 deals with the adjournment of decisions on the recognition or enforcement of an award in cases where (as here) an application to set aside the award has been made to the appropriate court (i.e. the "… competent authority of the country in which, or under the law of which, [the award] was made" as mentioned in s. 103(2)(f)). The subsection provides that:

> "(5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which the award is sought to be relied upon may, if it considers it proper,

> adjourn the decision on the recognition or enforcement of the award.
>
> It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security."

32. As Gross J put it in *IPCO (Nigeria) v Nigerian National Petroleum Corporation* [2005] 2 Lloyd's Rep 326 at [14] citing Fouchard, Gaillard, Goldman on International Commercial Arbitration (1999) at pp 980-981:

> " … s.103(5) "achieves a compromise between two equally legitimate concerns": *Fouchard*, at p.981. On the one hand, enforcement should not be frustrated merely by the making of an application in the country of origin; on the other hand, pending proceedings in the country of origin should not necessarily be pre-empted by rapid enforcement of the award in another jurisdiction. Pro-enforcement assumptions are sometimes outweighed by the respect due to the courts exercising jurisdiction in the country of origin – the venue chosen by the parties for their arbitration …"

33. Gross J went on at [15] to set out the way the court should exercise its power under s. 103(5) in terms that have been applied by this court since (e.g. *Dowans Holding SA v Tanzania Electric Supply Co Ltd* [2011] 2 Lloyd's Rep 275 at [42], Burton J):

> "… the Act does not furnish a threshold test in respect of the grant of an adjournment and the power to order the provision of security in the exercise of the court's discretion under s.103(5). In my judgment, it would be wrong to read a fetter into this understandably wide discretion (echoing, as it does, Art. VI of the New York Convention). Ordinarily, a number of considerations are likely to be relevant: (i) whether the application before the court in the country of origin is brought *bona fide* and not simply by way of delaying tactics; (ii) whether the application before the court in the country of origin has at least a real (i.e., realistic) prospect of success (the test in this jurisdiction for resisting summary judgment); (iii) the extent of the delay occasioned by an adjournment and any resulting prejudice. Beyond such matters, it is probably unwise to generalise; all must depend on the circumstances of the individual case."

34. He continued:

> "As it seems to me, the right approach is that of a sliding scale, in any event embodied in the decision of the Court of Appeal in *Soleh Boneh v Uganda Govt.* [1993] 2 Lloyd's Rep. 208 in the context of the question of security:

> '….two important factors must be considered on such an application, although I do not mean to say that there may not be others. The first is the strength of the argument that the award is invalid, as perceived on a brief consideration by the Court which is asked to enforce the award while proceedings to set it aside are pending elsewhere. If the award is manifestly invalid, there should be an adjournment and no order for security; if it is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security. In between there will be various degrees of plausibility in the argument for invalidity; and the Judge must be guided by his preliminary conclusion on the point.
>
> The second point is that the Court must consider the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult…if enforcement is delayed. If that is likely to occur, the case for security is stronger; if, on the other hand, there are and always will be insufficient assets within the jurisdiction, the case for security must necessarily be weakened." (Staughton LJ, at p.212)'"

35. This passage from *Soleh Boneh* refers to assessing the strength of the argument that the award is invalid "on a brief consideration by the Court which is asked to enforce the award while proceedings to set it aside are pending elsewhere". In my view, there are good practical as well as principled reasons for this approach. Whilst the court needs sufficient information about the foreign law in question (here New York law) to appraise the strength or otherwise of the challenge to the award, lengthy arguments about foreign law should be avoided if possible on such an application.

36. Finally, there is the question of comity. At [16], Gross J considers the position in which an award is made abroad in an arbitration between parties of the same nationality. He says, "… in the exercise of the discretion under s.103(5) of the Act, the fact that the arbitration was domestic in the country of origin, must generally be likely to enhance the deference due to the court exercising supervisory jurisdiction in that country. Comity and common sense are likely to require no less; pre-empting the decision on a challenge to an award before the court exercising supervisory jurisdiction in the country of origin would be a strong thing in a case where all parties were domiciled or incorporated in that country". (And see *Yukos Oil Co v Dardana Ltd* [2002] 2 Lloyd's Rep 326 at [23], Mance LJ).

37. In the present case, both parties are not of the same nationality, the claimant being a Delaware company, and the defendant/respondent being a Cayman company. But the same kind of comity considerations can in my view arise, depending on the facts. Where it is plain that a challenge to an award is being properly dealt with in the courts of the seat of the arbitration, common sense may indicate that an adjournment is preferable to a decision by the enforcing court dealing with the same issues. In such a case, the power to order security may be particularly important to prevent the inevitable delay prejudicing the recovery prospects of the party in whose favour the award was made.

EGFL's case: discussion

38. In the light of the above principles, I set out my view as to the strength of EGFL's challenge to the award as set out above dealing with its summary judgment case first, then with its collateral estoppel case. (These points are also the foundation of EGFL's alternative application to set aside the award by reference to s. 103(2) Arbitration Act 1996.)

39. It is convenient to begin by setting out the New York law doctrine as to manifest disregard, because it applies to both arguments. There was considerable debate at the hearing about the effect of the US case law, but it is sufficient to set out the formulation of EGFL's New York counsel who was also its counsel at the arbitration:

> "Under New York law, in order to challenge an award for manifest disregard of the law a party must establish: (1) the arbitrator knew of a governing legal principle yet refused to apply it or ignored it altogether; and (2) the law ignored by the arbitrator was well defined, explicit and clearly applicable to the case. See *D.H. Blair & Co., Inc. v Gottdiener*, 462 F.3d 95, 110 (3d Cir. 2006) at 110-111. A party seeking vacatur on the basis of manifest disregard must show more than an error of law in the underlying arbitration. See, e.g., *Interdigital Commc'ns Corp. v. Samsung Elecs. Co.*, 528 F. Supp. 2d 340, 354-55 (S.D.N.Y. 2007). A party must show that the arbitrators intentionally flouted a legal principle. Such intent may be shown by an "explicit acknowledgement thereof"; "Alternatively, a court may infer the arbitrator's intent if it finds that the error made by the arbitrator is so obvious that it would be instantly perceived by the average person qualified to serve as an arbitrator." In this respect, the Court must determine whether there was 'even a barely colorable justification for the outcome reached.'"

40. Again, there is discussion in the case law as to what is meant by "barely colorable" in this context, but it is clear that an error of law by arbitrators is not enough. A "party must show that the arbitrators intentionally flouted a legal principle". It is not disputed that there is a high threshold before a US court will invalidate an arbitration award based on arbitrators' manifest disregard of the law.

41. I should add that EGFL submitted that the doctrine does not require (as appeared to be suggested on behalf of Travis) a conspiracy on the part of the arbitrators to disregard the law, and I accept this. EGFL makes no such suggestion in this case. On the basis of a correct reading of *Stolt-Nielsen SA v Animal Feeds Int'l Corp.*, 548 F.3d 85, 9192 (2d Cir. 2008), EGFL also submits that the doctrine allows for the arbitrators' awareness of the law to be inferred. This may be a correct reading, but it does not materially affect the issues I have to decide.

(i) Summary judgment

42. EGFL submits that:

(1) The Tribunal exceeded its powers in determining that it had power to adopt a New York law standard of summary judgment procedure for the determination of

Travis's claims under the Guarantee and EGFL's fraud defences: award, paragraphs 420-421.

(2) The Tribunal acted in manifest disregard of the summary judgment standard under New York law by adopting summary judgment notwithstanding the acknowledged existence of controverted issues of fact: award, paragraph 436.

EGFL's argument and the factual background is set out above. Both these points are contested by Travis.

43. In argument, EGFL suggested that when the ICC Rules were amended in 2012, the absence of a summary procedure was deliberate. It says that summary judgment is strongly disfavoured in international arbitration, and that there is an important distinction between empowering a tribunal to conduct proceedings efficiently and exercising a summary judgment power. Travis says that EGFL's argument that summary judgment is a violation of due process should be rejected, and that the English court should not say that a procedure that provides for summary determination is a denial of due process. In support of their respective positions, both parties referred to recent commentaries by leading practitioners in international arbitration.

44. In so far as EGFL submits that (at least in the absence of an express power) a summary judgment process by arbitrators necessarily amounts to a denial of due process, I do not accept such a submission. Further, this is not a question that can be addressed in general terms without regard to the particular case. The question before the court in the present instance is 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 how it was labelled. It depends on the terms of the arbitration agreement and the procedure in fact adopted by the Tribunal. The availability or otherwise of summary judgment procedures in international arbitration generally is an important debate, but not one that the court needs to enter into.

45. The arbitration agreement in clause 7.7 of the Guarantee provided at sub-clause (e) 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." This clearly gives the Tribunal a wide power in respect of the procedure adopted to determine dispositive issues on the basis it considers appropriate.

46. In the 2012 ICC Rules, the relevant provisions are Articles 19 and 22, which provide:

> "Article 19: Rules Governing the Proceedings
>
> The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration."
>
> Article 22: Conduct of the Arbitration

> 1) The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.
>
> 2) In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.
>
> …
>
> 4) In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case."

47. It is to be noted that the challenged procedure adopted by the Tribunal concerned EGFL's "fraud defences" to the Travis claim in the light of the waivers and disclaimers in the Guarantee. The award shows the importance the Tribunal attached to the fact that the claim arose under a guarantee. The award sets out in detail the steps it took to ensure proper consideration of EGFL's defences, which culminated in the hearing on 8 November 2013 when it heard oral testimony from a witness from each party (in the case of EGFL, Mr Vuppuluri).

48. EGFL recognises that the receipt of oral testimony in this way goes beyond the summary judgment procedure adopted in the courts of New York or London. (It was described during the hearing as a "hybrid" procedure.) Nevertheless, EGFL submits that there can be no legitimate dispute that the Tribunal resolved this case summarily and without providing EGFL with a full hearing on the merits.

49. In its award, the Tribunal itself notes that it moved beyond a simple summary judgment process. In explaining the course it took, the Tribunal stated, "As a commercial center, New York is even more rigorous in expecting that parties that have given a written guarantee of performance – in which they waive certain defenses and disclaim certain subjects of reliance – will promptly honor their commitments".

50. It is in my view apparent from the award and the other material before the court that the Tribunal 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, it gave each party a fair opportunity to present its case. So far as it was summary, the procedure fell within clause 7.7 of the Guarantee, and particularly sub-clause (e). Against that background, I conclude that EGFL does not have a realistic prospect of showing that the Tribunal exceeded its powers in the procedure which it adopted.

51. EGFL's second contention as regards summary judgment was advanced much more briefly. It is that the Tribunal misapplied the summary judgment standard under New York law, and determined controverted issues of fact on the basis of the limited evidence that had been submitted and without a full evidentiary hearing.

52. In this regard, the Tribunal noted that, "to the extent a summary judgment standard would be relevant, the Parties do not disagree about the applicable legal principles

under New York law". It decided that "making all reasonable assumptions in favour of Respondent in connection with the underlying factual allegations, the Tribunal finds that Respondent's fraud-in-the-inducement defense must be rejected as a matter of law…".

53. The essence of this complaint is that the Tribunal decided factual disputes under a summary procedure in defiance of the applicable principles. However, Travis relies upon *Rexnord Holdings, Inc v Bidermann*, 21 F.3d 522, 525 (2d Cir. 1994) for the proposition that the existence of factual disputes between the parties will not necessarily preclude summary judgment. EGFL's response is that that case stands for the proposition that legal submissions are not evidence and cannot create issues of fact capable of defeating a summary judgment motion which requires a party to provide competent evidence raising a genuine issue of material fact, and that such evidence was presented by EGFL.

54. I observe that the application of its summary judgment test is pre-eminently a matter for the New York court. The New York practitioners in this arbitration will also have been very familiar with the test. As noted, to make good this ground of challenge, EGFL will have to show that the arbitrators "intentionally flouted" the test, which it accepts it must establish in order to challenge the award for manifest disregard of the law on this ground. I do not consider that there is any realistic prospect of it doing so.

(ii) Collateral estoppel

55. EGFL submits that the Tribunal:

(1) Manifestly disregarded the law of collateral estoppel in determining that collateral estoppel did not apply so that the Tribunal was not bound by the prior determination of the US Bankruptcy Court that EGFL had made payments of US$103m to the Senior Lenders pursuant to the Guarantee which thereby capped the amount payable to Travis: award, paragraphs 663-666, 667.

(2) Exceeded its powers in determining that it did not need to apply collateral estoppel because the referral of disputes under the Guarantee to arbitration meant that the Tribunal was conferred with the power to decide the issue without regard to any prior determination of the US Bankruptcy Court: award, paragraph 666.

EGFL's argument and the factual background is set out above. Both these points are contested by Travis.

56. The legal principles are not in dispute. In order to establish collateral estoppel two requirements must be satisfied: (i) the identical issue must have been decided in the prior proceedings and be decisive of the present proceedings; (ii) the party to be precluded must have had a full and fair opportunity to contest the prior proceedings. This test is recorded in the award at paragraph 662.

57. EGFL's case is that both of these requirements were clearly met: (1) there was identity of issue because both the Bankruptcy Court and the Tribunal addressed the question of whether payments made by EGFL to the Senior Lenders were made pursuant to the Guarantee (see the award, paragraphs 669 to 686); (2) Travis had a full

and fair opportunity to contest the issue prior to the Bankruptcy Court rendering its order.

58. EGFL takes issue with the Tribunal's reasoning to the effect that it must have the final word on this question, saying that by agreeing to have their disputes resolved by arbitration, the parties did not agree to forgo the doctrine of collateral estoppel. (It is this point that is relied upon in relation to the excess of powers argument.) The Tribunal was wrong, EGFL submits, to reason that it was deciding a different issue to that determined by the Bankruptcy Court, because central to the question of the effect of payment to the Senior Lenders on the cap was the issue of how much the Senior Lenders had paid under the Guarantee. This question was decided by the Bankruptcy Court and this was binding on the Tribunal. The Tribunal was also mistaken to say that there was nothing in the Reorganization Plan or the Bankruptcy Court order that determined the impact of the conditional payment of US$49.3m.

59. The difficultly with this contention, as the Tribunal pointed out, is that the Confirmation Order expressly provided that the Plan Proponents had not requested, and nothing in the Plan required, the Bankruptcy Court to make any finding of fact or reach any conclusion of law regarding the effect that EGFL's payments pursuant to the Guarantee under the terms of the Plan would have on Travis. I have set this out above. EGFL seeks to draw a distinction between a factual finding that payment is being made under the Guarantee as opposed to a conclusion regarding the effect of such payment. This is not however a convincing distinction in the context of a claim under the Guarantee by a third party to the bankruptcy proceedings.

60. Further, whilst in one sense EGFL may be correct to say that the Bankruptcy Court dealt with amounts due under the Guarantee, and in that sense reached a determination of that question, it does not follow that the identical issue, or even the same issue, arose in the arbitration. The Tribunal considered that it did not. There may also be force in the point made by Travis that the lack of identity of parties and issues between the bankruptcy proceedings and the arbitration appears to have been recognised in the Plan Sponsors' submissions to the Bankruptcy Court.

61. I accept EGFL's submission to the extent that the question of the effect on EGFL's cap under the Guarantee of the payment made to the Senior Lenders pursuant to the Reorganization Plan was one of considerable difficulty. However, the Tribunal treated it as such, and sought to apply the collateral estoppel principles that EGFL relied upon. EGFL's complaint is in substance a disagreement with its conclusion. I do not consider that there is a realistic prospect of EGFL showing that the Tribunal acted in manifest disregard of the law, or in excess of power.

The adjournment and security issue

62. I have found that there is no realistic prospect of EGFL's establishing any of its grounds of challenge to the award. It follows that I consider that its application is at the bottom of the "sliding scale" in terms of prospects of success. I refer to the other considerations held in *IPCO* (ibid) to be relevant to the question of adjournment. Whilst I do not accept the submission of Travis that the New York challenge is not brought in good faith, I do consider that the proceedings can properly be described as delaying tactics in the face of what is likely to be held to be an unimpeachable award.

63. That leaves the important question of the effect of the delay on Travis that an adjournment would occasion, and the court's power to order suitable security. In short, EGFL submits that the prejudice would be negligible because it has no available assets in this country that are amenable to enforcement. Travis on the other hand says that the picture is changing and that even a relatively short delay will greatly work to its disadvantage.

64. Travis points to the fact that it made a request for security pending the outcome of the arbitration, but that this was refused by the Tribunal. In doing so, the Tribunal took note of EGFL's majority ownership of Essar Energy Plc, a UK public company, and took into account the fact that EGFL had the ability to sell some of its shares of Essar Energy plc on the LSE market to raise additional funds.

65. The position as regards Essar Energy plc however has changed, because as of 10 June 2014, the company has been taken private by EGFL in circumstances which Travis say are controversial. In particular, by letter dated 13 May 2014, the independent directors of the company wrote to shareholders referring to their belief that the shares offer "materially undervalues Essar Energy and its prospects". Among the factors identified to be taken into account, the independent directors said, was the "risk that the amount of debt within the Essar Energy Group may be increased as a result of the Shares Offer".

66. This is plainly an unusual state of affairs, and in my view supports the concern expressed by Travis that by the time the challenge in New York is determined, there is a risk of a restructuring of EGFL's assets which may have led to assets being taken out of the English jurisdiction. When a comparison is made between the position of the would-be enforcing party if it were allowed to enforce immediately, and its position if any steps by way of enforcement were delayed as a result of the grant of an adjournment (see *Dowans* at [49]) Travis can, in my view, point to substantial potential prejudice occasioned by an adjournment.

67. Whilst EGFL accepts that the presence of assets in the jurisdiction is not a precondition to the enforcement of an award (*Rosseel N.V. v Oriental* [1991] 2 Lloyd's Rep 625 at 629, Steyn J), it submits that an application for security cannot be used as a mechanism for bringing assets into the jurisdiction. There are in fact, it submits, no substantial assets in the jurisdiction against which Travis could enforce the award.

68. Its evidence is to the effect that although EGFL owns 77.99% of Essar Energy plc's issued share capital, these shares are all fully secured to a consortium of banks pursuant to a 2010 agreement. Since this judgment will be public, EGFL has requested that neither the banks nor the sums in question are referred to. I can summarise the matter by saying that the evidence is to the effect that the total amount of the debt secured on the shares is considerably in excess of the value at which they traded prior to the company going private (this would value the holding at just over US$700m). I am told that so far as the minority shares are concerned, these are to be pledged to a different bank in return for providing debt facilities for the offering.

69. However, this evidence does not (in my view) lead to the conclusion for which EGFL contends, namely that the assets are of no value and should be left out of account. The fact that the shares are encumbered will not prevent Travis enforcing against

them. Enforcement by this means may be ineffective in terms of recoverable proceeds, but on the other hand it may be effective if (as Travis suggests) the alternative to paying the award is a default on the lending arrangements. There is no reason, in my view, to treat these as anything other than potentially valuable assets.

70. In terms of assets, Travis also makes reference to a refinery in the North West of England. EGFL responds that this refinery is not owned by it, but by a different company Essar Oil (UK) Ltd, and that there are five different holding companies between EGFL and Essar Oil (UK) Ltd. It denies press speculation relied upon by Travis that it plans to sell the refinery. I consider that even accepting EGFL's evidence to the effect that the refinery is "not owned directly by EGFL", its indirect holding may itself be an asset of value. The future of that holding must be in some doubt.

71. Finally, Travis adduced press articles about the financial difficulties of the Essar Group (described as a "struggling conglomerate"). I accept that Essar is a very substantial group, and that evidence of this kind must be treated with caution, but it is consistent with the rest of the material available to the court as regards possible restructuring. Travis has, in my view, demonstrated that delay in enforcement would cause it prejudice.

Conclusion

72. It follows from the above that if the court now decides EGFL's application to set aside the court's order of 26 March 2014 by which judgment was entered in terms of the award, that application must fail. Travis submits that this is indeed the course which the court should take, and that it should be free to enforce the award in this country, whilst EGFL submits that the decision should nevertheless be adjourned pending the outcome of its challenge to the award in the New York court.

73. This is not an altogether easy question to decide. Ultimately it is necessary to recognise that whilst this court is required to and has expressed its view as to the prospects of EGFL's challenge succeeding, it is the New York court that will decide the matter. If possible, the court should avoid the risk of conflicting decisions, which would occur if the English court enforces the award and the New York court subsequently decides to set it aside. I refer in this respect to the discussion above as to comity. I am also influenced by the fact that the evidence is that the challenge will be determined relatively soon.

74. An adjournment must however be conditional upon the giving of security by EGFL. I have considered the possibility of ordering security for a lesser amount than the full amount of the award calculated by reference to the collateral estoppel challenge only. Given the views expressed above, I do not think that this would be appropriate, and am satisfied that "suitable security" in this case is (as Travis contends) security for the full amount of the award. The court will therefore order an adjournment conditional upon provision by EGFL to Travis of such security. The form of such security was touched on at the hearing, and I need say nothing more in this judgment. I am grateful for the assistance that both parties and their lawyers both in London and New York have given to the court, and will hear them on any consequential matters.