

Irrelevance of arbitration awards on related legal proceedings

Vale SA v Steinmetz

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In the recent case of ***Vale SA and others v Steinmetz and others***, the Court of Appeal was asked to determine whether an arbitration award issued in respect of an arbitration between Vale SA (Vale) and BSG Resources Ltd (BSGR) was binding on Vale in respect of Commercial Court proceedings brought by it against Nysco (owners of BSGR) and Balda (owners of Nysco).

Vale concluded a joint venture agreement with BSGR for the purpose of exploiting valuable mining licences granted by the Republic of Guinea, which were held by a wholly owned subsidiary of BSGR.

The licences were revoked by the Government of Guinea, which triggered a claim by Vale against BSGR for, among other things, rescission of the joint venture agreement for fraudulent misrepresentation.

The LCIA tribunal upheld Vale's claim for fraudulent misrepresentation and, as a result, made an order rescinding the joint venture agreement.

However, the tribunal appear to have rejected Vale's claim in restitution for the repayment of the initial consideration paid under the joint venture agreement, although the award was not particularly clear in this respect.

Under the LCIA Rules, Vale had no right of appeal.

By the Commercial Court proceedings, Vale brought proprietary claims against a number of defendants, including Nysco and Balda, alleging that some or all of the initial consideration had been transferred to Nysco and Balda and that the money in their hands was impressed with a constructive trust by reason of the rescission so as to give rise to a proprietary claim.

Nysco and Balda sought summary judgment dismissing the proprietary claims against them. Their essential arguments were that:

- » A proprietary claim could only arise against third parties if there was a proprietary claim against the original contracting party.
- » A proprietary claim against the original contracting party could only arise if there was a personal restitutionary claim.
- » The LCIA tribunal had held that Vale had no personal restitutionary claim against BSGR.
- » That finding was binding on Vale, although made in an arbitration to which Nysco and Balda were not party, and for Vale to assert otherwise amounted to an abuse of process as a collateral attack on the award.
- » Therefore, Vale's proprietary claim against Nysco and Balda had no real prospects of success.

The Court of Appeal proceeded on the basis that the first two points were correct as a matter of law and that the third point was a correct interpretation of the tribunal's award (which was somewhat unclear).

It is trite law that the general position is that an arbitration award is not binding in other legal proceedings where the parties are not the same parties. However, Nysco and Balda sought to argue that on the facts of this case, the apparent finding of the LCIA tribunal that Vale did not have a personal restitutionary claim was binding on Vale in the Commercial Court proceedings by reason of an exception to that general position.

Firstly, Nysco and Balda argued that the tribunal's determination that BSGR had no obligation to return the initial consideration in restitution constituted a legal fact and, therefore, by reference to authorities which made clear that a tribunal's determination of "a fact in the world" could be relied upon as evidence of that fact (if not necessarily conclusive), that finding was indeed binding.

The Court of Appeal rejected that argument. In ***Sun Life Assurance Co of Canada v Lincoln National Life Insurance Co***, Longmore LJ had said that a good example of a "fact in the world" was found in ***The Sargasso***, where a charterer had been held liable by an arbitration award in favour of a sub-charterer, who had sued to recover damages for damage to cargo.

The charterer then sued the shipowner in respect of its liability to the sub-charterer. The measure of damages to which he was entitled was governed by the award pursuant to which he had been held liable to the sub-charterer. Since that award quantified his loss, he was entitled to put the award in evidence for that purpose and say he should be able to recover not less than the amount of the award.

The Court of Appeal held, in effect, that the apparent determination of the LCIA tribunal that Vale had no personal restitutionary claim against BSGR was not a “fact in the world”. Therefore, the usual position applied, namely, “that principle, founded on the consensual nature of arbitration, is that save for limited purposes not applicable here, an award between A and B has no binding effect in proceedings between A and C”.

The usual position applied notwithstanding that it was Vale which had introduced the LCIA award into the Commercial Court proceedings (as it wished to rely upon the determination that the joint venture agreement was rescinded by reason of fraudulent misrepresentation).

Secondly, Nysco and Balda alleged that it was an abuse of process for Vale to seek to rely on the LCIA tribunal’s rescission of the joint venture agreement as referred to above without also accepting the burden of the decision that it had no restitutionary claim against BSGR.

The principles which establish the circumstances in which a party cannot indirectly challenge an arbitral award in separate proceedings even where the award is not strictly binding in those proceedings are well-established. The Court of Appeal referred to the summary given by Simon LJ in **Michael Wilson and Partners Ltd v Sinclair**.

The courts’ general approach to such arguments was summarised by Simon LJ as follows:

“[...] there are good reasons why a court should be cautious before accepting that later court proceedings are an abuse of its process because it involves a collateral attack on an earlier arbitration award.

[...] it will probably be a rare case, and perhaps a very rare case, where court proceedings against a non-party to an arbitration can be said to be an abuse of process.”

The Court of Appeal held that this was not one of those rare cases. The court held that there was no question of Vale making any collateral attack on the award and, to the contrary, Vale was relying in large part on the award. The court also said that on the assumption that Nysco and Balda had received some of the initial consideration with notice of the fraud, any submission that it was Vale that was guilty of an abuse of process in seeking to bring a claim against them was “farfetched”.

The Court of Appeal’s judgment, therefore, confirms that it will be a very rare case indeed where an arbitral award will be binding in other arbitral or legal proceedings where the parties in both sets of actions are not the same (or the parties in one action are not the privies of the parties in the other action).

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Paul is an experienced junior barrister specialising in commercial and international trade disputes. He has been recommended for many years in the Legal Directories, namely Who’s Who Legal: UK Bar, the Legal 500 and Chambers UK. His depth of experience in working with clients in the Asia Pacific region is reflected by his inclusion in the Legal 500’s Asia Pacific rankings.

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