

# **The Finality of Dismissal of Claims By The Tribunal**

## **Under Section 41(6) of The English Arbitration Act, 1996**

In a recent decision rendered by the Queen's Bench in the case of *Swallowfalls Limited v. Monaco Yachting & Technologies S.A.M. and ANR*, it has been re-iterated that the dismissal of claims by the Tribunal on account of failure of a Party to provide security for costs is final and binding. The claims cannot be brought up subsequently in Court despite the fact that they were dismissed without any discussion as to their merits.

### **Facts Of The Case:**

The dispute arose out of a construction contract entered into in 2006 for the construction of a 71.5m luxury yacht that the Claimant had commissioned from the Defendants. It was, however, understood between the Parties that the actual construction would be sub-contracted to *Cantiere San Marco SRL, in Italy*. The total consideration for the yacht was Euro 35, 231, 6000, to be paid in 11 instalments which were linked to the construction of the yacht.

The agreement was amended four times to provide interim finance to the Defendant as the Defendant did not seem monetarily equipped to complete the construction in time. In accordance with all four amendments, the Claimant gave an advance directly to the suppliers and sub-contractors of the Defendant and the latter agreed that this advance would be deducted from the payment due to them in accordance with the next instalment or a fixed deadline (failing the completion of the construction milestone by the Defendant), whichever was earlier. The title of the yacht which was earlier supposed to be transferred on payment of the fifth instalment, was to be transferred within 30 days of the first interim finance loan.

The most pertinent amendment with respect to the dispute herein was the fourth amendment, dated 3rd November 2010, under which a Loan Agreement was signed and a personal guarantee was given by the Chairman and Managing Director of the Defendant. The Defendant, however, failed to repay the interim loans, nor did they transfer the title.

In 2011, after the fourth amendment, when the construction was still not progressing in a timely manner and the title had not been transferred, the Parties referred their disputes to arbitration as per the construction agreement which provided for arbitration in London in accordance with the LMAA Rules.

During arbitration, the Tribunal ordered the Defendants to provide security for costs to the Claimant, which the Defendant failed to comply with. The Defendant's failure to follow this order resulted in a partial Final Award wherein the Tribunal allowed the Claimant's application for dismissal of the Defendant's claims under Section 41(6) of the English Arbitration Act, 1996 which provides that: *"If a claimant fails to comply with a peremptory order of the tribunal to provide security for costs, the tribunal may make an award dismissing his claim."*

### **Issue Before The Court:**

While the arbitration was pending, the Claimant had initiated proceedings in the Court for a summary judgement under the Loan Agreement of 2010 and the personal guarantee given by Chairman of the Defendant. In response, the Defendant raised the claims which it had brought against the Claimant in arbitration, for set-off. Thus, the proceedings had been stayed till the arbitration was concluded. Subsequently the stay was lifted and the Claimant requested the Court for a summary judgement in view of the fact that the claims of the Defendant had been dismissed by the Tribunal by a partial final award.

The Defendant contended that the Court should consider whether the claims of the Defendant provided a defence of set-off, notwithstanding the award by the Tribunal. However, the Court rejected their submission.

## **Decision**

It concluded that by virtue of Section 46(6) and the arbitral award, the claims of the Defendant had been dismissed “*with all the consequences of finality that such an award brings*”. Thus, allowing the Defendant to raise those claims a second time would be an abuse of process and a vexatious burden for the Claimant.

## **Analysis**

This decision sends a strong pro-arbitration message to all Parties and highlights the importance of compliance with a preemptory order of the Tribunal.

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