

BRITISH VIRGIN ISLANDS PRIVY COUNCIL

Cukurova Holdings A.S -v- Sonera Holdings B.V. [2014] UKPC 15

APPEAL TO HER MAJESTY IN COUNCIL - ARBITRATION ORDINANCE (THE "ACT") - CONSTRUCTION OF SECTION 36(2)(C) AND 36 (2)(D) OF THE ACT - JURISDICTION OF THE ENFORCING COURT TO SET ASIDE THE REGISTRATION OF AN AWARD

Cukurova Holdings A.S.'s ("Cukurova") appeal to the Board was against the Commercial Court and Court of Appeal's refusal to set aside the registration of an ICC arbitration award. The appeal raised three questions, namely whether:

- (i) the Tribunal had jurisdiction to grant the relief in the final Award or whether enforcement of the final award should be refused pursuant to Section 36(2)(d) of the Act. Section 36(2)(d) provides that enforcement of a Convention award may be refused if it is proven that the award deals with a difference not contemplated by or falling within the terms of the submission or contains decisions on matters beyond the scope of the submission;
- (ii) (the Court of Appeal was correct in concluding that Cukurova had not been unable to present its case before the Tribunal within the meaning of Section 36(2) (c) of the Act; and
- (iii) the Court of Appeal was correct to conclude that enforcement of the Final Award would not be contrary to the public policy of the British Virgin Islands within the meaning of Section 36(3) of the Arbitration Ordinance.

The Board unanimously dismissed Cukurova's appeal emphasising that the BVI Court as the enforcing Court had no jurisdiction to set aside an award on the basis of an error of fact or law and that the sole question was whether the enforcement of the award should be upheld under Section 36. The Board emphasised that the Court could only refuse to enforce a Consideration Award on narrow grounds and confirmed that the general approach to the enforcement of an award should be in favour of enforcement. In relation to Section 36(2)(d) the Board indicated that it was common ground that the court must

determine this question for itself although it must have regard to the reasoning and conclusion of the Tribunal (see example in *Dallah Real Estate and Tourism Co -v- Ministry of Religious Affairs of the Government of Pakistan*). On the facts the Court held that the Judge was correct to hold that the Tribunal had jurisdiction to make the award it did.

The Board referred to the decision of Coleman J in *Minmetals Germany GmbH -v- Fero Steel Ltd* [1999] CLC 647 in relation to the English equivalent of Section 36(2)(c) wherein it was said that what was being contemplated was an enforcee being prevented from presenting his case by matters outside his control which will normally cover the case where the procedure adopted operated in a manner contrary to natural justice. The Board accepted that it was still open to the court to refuse to enforce an award on the ground of public policy even if a particular breach did not fall within Section 36(2)(c) and cited as an example where the foreign proceedings violated the principles of natural justice. The Board said that they detected no breach of natural justice and that both the Judge and the Court of Appeal were correct in rejecting Cukurova's allegations that it was unable to present its case and enforcement would be contrary to public policy.

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