BERMUDA

COURT OF APPEAL

IN THE MATTER OF THE ARBITRATION ACT 1986 BETWEEN: BAS-SERCO LIMITED - v - THE GOVERNMENT OF BERMUDA

[2018] CA (BDA)17 CIV (22 JUNE 2018)

APPEAL AGAINST ARBITRATOR'S AWARD UNDER THE ARBITRATION ACT 1986 – APPLICATION OF THE TEST FOR THE GRANT OF LEAVE AND ON THE SUBSTANTIVE APPEAL – WHETHER THE PARTICULAR CONTRACTUAL INDEMNITY COVERED LEGAL COSTS INCURRED IN RELATION TO DEALING WITH LIABILITIES OWED TO EMPLOYEES

This appeal is concerned with only one of the matters covered in the Award, namely whether certain costs which had been incurred by the Appellant prior to the arbitration were covered by an indemnity which had been contained in the contract made between the parties.

The contract included a provision whereby if for any reason the contract was not extended beyond 31 March 2016, the Respondent promised to indemnify the Appellant. In the event, the contract was not extended beyond 31 March 2016.

A dispute arose between the parties as to whether the Respondent was required to indemnify the Appellant under the terms of the Indemnity in respect of various matters, which for the purpose of this appeal can be limited to the legal costs which the Appellant had incurred.

The learned arbitrator found that the relevant costs did not fall within the parameters of the indemnity in the contract and refused to grant them.

Grounds of Appeal

In relation to the issue of the relevant costs and the scope of the indemnity, the Appellant claimed that the learned arbitrator was wrong to conclude that the indemnity was not wide enough to cover the specific legal costs in question.

The arbitration took place pursuant to the provisions of the Arbitration Act 1986 ("the 1986 Act"), and accordingly for the Award to be challenged in the Court, leave to appeal was required pursuant to section 29(3) (b) of the 1986 Act. Subsection 2 of section 29 provides that "an appeal shall lie to the Court of Appeal on any question of law arising out of an award", and the grant of leave is further circumscribed by subsection 4 of section 29, which provides that:

"The Supreme Court shall not grant leave…unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement…"

The Chief Justice (Kawaley CJ) granted leave to appeal to the Appellant on 8 March 2018.

There remained the question as to the basis upon which the Court should determine the correctness or otherwise of the learned arbitrator's decision.

Authorities and basis on which the Award may be set aside

The position governing the grant of leave to appeal in England is different from that in Bermuda. In Bermuda, the grant of leave is governed by section 29 of the 1986 Act, and section 29 (3) (b) provides that an appeal may be brought by any of the parties to the reference with the consent of all other parties to the reference, or (subject to section 31 of the Act, which relates to exclusion clauses and is not relevant for these purposes), with the leave of the Supreme Court.

Section 29 (2) indicates that the appeal lies to the Court of Appeal, but nothing more is said about the role of the Court of Appeal or as to the manner in which appeals should be determined. In relation to that last matter, section 29(4) provides in relation to the grant of leave that leave shall not be granted unless the court considers, having regard to all the circumstances, that the determination of the question of law concerned could substantially affect the rights of one or more of

the parties to the arbitration agreement. That language mirrors that of the equivalent English legislation.

The Court of Appeal next addressed the test to be met on the argument of the substantive appeal. The judgment states: "*There would not appear to be any difference between the test to be applied in the English High Court, and that to be applied in the Bermuda Court of Appeal. Both courts are acting at the same stage of the process."*

The judgment continued: "*It will no doubt be helpful to consider the test to be applied on the grant of leave - that mentioned above - as enunciated by Lord Diplock in The Nema. Lord Diplock essentially affirmed what Lord Denning had said in the Court of Appeal, namely that leave should not normally be given unless it was apparent to the judge, on a mere perusal of the reasoned award itself without the benefit of adversarial argument, that the meaning ascribed to the clause by the arbitrator was "obviously wrong"… In considering the merits of an appeal in this Court, when leave has been granted by the Supreme Court, the same question must be considered; was the arbitrator "obviously wrong" in the construction of the clause in issue before him. This question can be put in different forms; can it be shown that the arbitrator misdirected himself in law or had reached a decision which no reasonable arbitrator could have reached? But on any basis, the threshold is a high one."*

The Court of Appeal found that *MRI Trading AG v Erdenet Mining Corp LLC* [2012] EWHC (Comm) 320 (in the Commercial Court), and [2013] EWCA Civ 156 (in the Court of Appeal) supports its view in regard to the basis upon which it is entitled to interfere with the arbitrator's award. The test to be applied in arguing the substantive appeal is the same as that to be applied when considering the grant of leave.

The Appeal was dismissed on the basis that the test was the appropriate one and that it was "*impossible to say that the Award was obviously wrong".*

The judgment concluded: *"It is important to emphasise the importance of finality in domestic arbitrations in this jurisdiction, and to make clear that the principles of The Nema, now more than 35 years old, are applicable to such arbitrations in this jurisdiction."*