Braes of Doune Wind Farm (Scotland) Ltd v Alfred McaLpine Business Services Ltd [2008] APP.L.R. 03/13

JUDGMENT : Mr. Justice Akenhead: TCC. 13th March 2008

Introduction

1. There are two applications before the Court relating to the First Award of an arbitrator, Mr John Uff CBE QC. This award relates to an EPC (Engineering, Procurement and Construction) Contract dated 4 November 2005 ("the EPC Contract") between the Claimant ("the Employer") and the Defendant ("the Contractor") whereby the Contractor undertook to carry out works in connection with the provision of 36 wind turbine generators (the "WTGs") at a site some 18 kilometres from Stirling in Scotland. This award deals with the enforceability of the clauses of the EPC Contract which provided for liquidated damages for delay.

2. The Claimant applies for leave to appeal against this award upon a question of law whilst the Defendant seeks in effect a declaration that this Court has no jurisdiction to entertain such an application and for leave to enforce the award.

3. I will deal first with the issue of jurisdiction.

Jurisdiction

4. The issue here arises out of the application of Section 2 of the Arbitration Act 1996:

"(1) The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland".

The seat of the arbitration is identified in Section 3 as being the "*juridical seat"* of the arbitration *"designated by the parties to the arbitration agreement"*. If the juridical seat of the arbitration was in Scotland, the English Courts have no jurisdiction to entertain an application for leave to appeal. The Contractor argues that the seat of the arbitration was Scotland whilst the Employer argues that it was England.

5. There were to be two contractors involved with the project. Whilst Vestas-Celtic Wind Technology Limited was to design, supply, construct and install the 36 WTGs themselves, the Contractor was to design and carry out the bulk of the remaining works such as the foundations for the WTGs, other civil and building works, electrical works connecting the WTGs to the switch room and other connection works. There was an "Interface Agreement" between the Contractor, the Employer and the Wind Turbine Contractor.

6. The material clauses of the EPC Contract were:

"1.4.1. The Contract shall be governed by and construed in accordance with the laws of England and Wales and, subject to Clause 20.2 [Dispute Resolution], the Parties agree that the courts of England and Wales have exclusive jurisdiction to settle any dispute arising out of or in connection with the Contract.

20.2.2. (a) …any dispute or difference between the Parties to this Agreement arising out of or in connection with this Agreement shall be referred to arbitration.

*(b) Any reference to arbitration shall be to a single arbitrator…and conducted in accordance with the Construction Industry Model Arbitration Rules February 1998 Edition, subject to this Clause (**Arbitration Procedure**)…*

(c) This arbitration agreement is subject to English Law and the seat of the arbitration shall be Glasgow, Scotland. Any such reference to arbitration shall be deemed to be a reference to arbitration within the meaning of the Arbitration Act 1996 or any statutory re-enactment."

7. The Arbitration Rules, known colloquially as the "CIMAR Rules" provided as follows:

"1.1 These Rules are to be read consistently with the Arbitration Act 1996 (the Act), with common expressions having the same meaning. Appendix 1 contains definitions of terms. Section numbers given in these Rules are references to the Act.

1.2 The objective of the Rules is to provide for the fair, impartial, speedy, cost-effective and binding resolution of construction disputes, with each party having a reasonable opportunity to put his case and deal with that of his opponent. The parties and the arbitrator are to do all things necessary to achieve this objective: see Sections 1 (General Principles), 33 (General duty of the tribunal) and 40 (General duty of parties).

1.4 The arbitrator has all the powers and is subject to all the duties under the Act except where expressly modified by the Rules.

1.5 Sections of the Act which need to be read with the Rules are printed in the text. Other Sections referred to in the text are printed in Appendix II.

1.6 These rules apply where:
(a) a single arbitrator is to be appointed, and
(b) the seat of the arbitration is in England and Wales or Northern Ireland.

1.7 These rules do not exclude the powers of the Court in respect of arbitral proceedings, nor any agreement between the parties concerning those powers.

4.1 The arbitrator has the power set out in Section 30

4.2 The arbitrator has the powers set out in Section 37…

4.3 The arbitrator has the powers set out in Section 38(4) to (6)…"

In Appendix I the "Act" was defined to mean the Arbitration Act 1996.

8. One must seek to construe the EPC Contract having regard to all its material terms. It is only if there is some irreconcilable ambiguity that one will have to have regard to other principles.

9. I do bear in mind that, in the absence of clear wording, the parties are unlikely to have wished to exclude this or the Scottish Courts' powers of control and intervention. I was told by the parties in argument that the Scottish Courts' powers of control and intervention would be, at the very least, seriously circumscribed by the parties' agreement in terms as set out in Paragraph 6 above. Mr Bartlett QC indicated to me that the Scottish Courts' powers of intervention might well be limited to cases involving such extreme circumstances as the dishonest procurement of an award.

10. It is of course always possible for parties to a wholly English arbitration to exclude the right of appeal from an arbitrator's award on questions of law. There are however mandatory provisions of Part 1 of the Arbitration Act (set out in Schedule 1 to the Act) which one can not exclude such as challenges to an award on the grounds of lack of jurisdiction and serious irregularity (Sections 67 and 68). It would be odd, at least, if the parties had consciously agreed that no court should have the right of intervention if for instance there was a material serious irregularity, falling short of any criminal behaviour.

11. There are a number of different laws which can at least potentially relate to an arbitration:
(a) There is the substantive or proper law of the contract which governs the law by which the parties' substantive rights are to be determined.
(b) There is the law to which the parties have agreed that the arbitration agreement is to be subject.
(c) The curial law relates to the place in which the arbitration is held.
(d) There may be a yet further law which covers the reference to arbitration itself.

Of course, all these applicable laws may be the same as or different to each other.

12. Lord Justice Kerr in ***Naviera Amazonica Peruana SA v Compania Internacionale De Seguros Del Peru*** [1988] 1 Lloyds Rep 116 said this at page 119:

*"B. English law does not recognise the concept of a "delocalised" arbitration… or of "arbitral procedures in the transnational firmament unconnected with any municipal system of law" (**Bank Mellat v Helleniki Techniki SA** [1984] QB 291 at p. 301 (Court of Appeal). Accordingly, every arbitration must have a "seat" or locus arbitri or forum which subjects its procedural rules to the municipal law there in force…*

C…Where the parties have failed to choose the law governing the arbitration proceedings, those proceedings must be considered, at any rate prima facie, as being governed by the law of the country in which the arbitration is held, on the ground that it is the country most closely connected with the proceedings…

*See Dicey & Morris…and the references to the approval of this classic statement by the House of Lords in **Whitworth Street Estates v James Miller**…Or, to quote the words of Mr. Justice Mustill in the Black Clawson case…at p. 453 where he characterised law (3) as "the law of the place where the reference is conducted: the lex fori". Although Mr. Milligan contested this, I cannot see any reason for doubting that the converse is equally true. Prima facie, i.e. in the absence of some express and clear provision to the contrary, it must follow that an agreement that the curial or procedural law of an arbitration is to be the law of X has the consequence that X is also to be the "seat" of the arbitration. The lex fori is then the law of X, and accordingly X is the agreed forum of the arbitration. A further consequence is then that the courts which are competent to control or assist the arbitration are the Courts exercising jurisdiction at X…*

E. There is equally no reason in theory which precludes parties to agree that an arbitration shall be held at a place or in country X but subject to the procedural laws of Y…

F. Finally…it seems clear that the submissions advanced below confused the legal "seat" etc. of an arbitration with the geographically convenient place or places for holding hearings…"

13. It is not uncommon at least in this current century and some considerable time before for the parties to agree that arbitrations can be physically conducted in one country but be subject to the procedural control of the laws of another country. However, cases such as in ***Naviera Amazonica*** reveal the English courts' reluctance to accept that the parties can agree to a binding or enforceable arbitration taking place in a procedural limbo and not subject to some curial law. But the Court did investigate whether the parties had agreed to arbitrate in Lima subject to the curial law of England.

14. Various other authorities have been provided but do not take the matter further. Mr Justice Cooke in ***C v D*** [2007] EWHC 1541 noted at Paragraph 26 of his judgment that:

"…the seat of the arbitration and the choice of procedural law will almost invariably coincide, apart from the possibility, provided for in s 4(5) [of the 1996 Act] of the parties choosing another procedural law in relation to the matters covered by the non-mandatory provisions of pt 1, which will take effect…"

15. I must determine what the parties agreed was the "seat" of the arbitration for the purposes of Section 2 of the Arbitration Act 1996. This means by Section 3 what the parties agreed was the "juridical" seat. The word "juridical" is not an irrelevant word or a word to be ignored in ascertaining what the "seat" is. It means and connotes the administration of justice so far as the arbitration is concerned. It implies that there must be a country whose job it is to administer, control or decide what control there is to be over an arbitration.

16. Mr. Bartlett QC submitted that the meaning of Clause 20.2.2(c) was plain and unambiguous: the parties had obviously and expressly agreed that the "seat" was to be "Glasgow, Scotland", and they must be taken by various references to have appreciated that the Arbitration Act 1996 was applicable in some limited respects

and to have known what was meant and implied by using the word "seat". Mr Sears QC and Ms Cheng argue that one needs to look at what the parties agreed in substance in relation to the applicable curial law.

17. I have formed the view that this Court does have jurisdiction to entertain an application by either party to this contract under Section 69 of the Arbitration Act 1996. My reasons are as follows:

(a) One needs to consider what, in substance, the parties agreed was the law of the country which would juridically control the arbitration.

(b) I attach particular importance to Clause 1.4.1. The parties agreed that essentially the English (and Welsh) Courts have "exclusive jurisdiction" to settle disputes. Although this is "subject to" arbitration, it must and does mean something other than being mere verbiage. It is a jurisdiction over disputes and not simply a court in which a foreign award may be enforced. If it is in arbitration alone that disputes are to be settled and the English Courts have no residual involvement in that process, this part of Clause 1.4.1 is meaningless in practice. The use of the word "jurisdiction" suggests some form of control.

(c) The second part of Clause 1.4.1 has some real meaning if the parties were agreeing by it that, although the agreed disputes resolution process is arbitration, the parties agree that the English Court retains such jurisdiction to address those disputes as the law of England and Wales permits. The Arbitration Act 1996 permits and requires the Court to entertain applications under Section 69 for leave to appeal against awards which address disputes which have been referred to arbitration. By allowing such applications and then addressing the relevant questions of law, the Court will settle such disputes; even if the application is refused, the Court will be applying its jurisdiction under the 1996 Act and providing resolution in relation to such disputes.

(d) This reading of Clause 1.4.1 is consistent with Clause 20.2.2 (c) which confirms that the arbitration agreement is subject to English law and that the "reference" is "deemed to be a reference to arbitration within the meaning of the Arbitration Act 1996". This latter expression is extremely odd unless the parties were agreeing that any reference to arbitration was to be treated as a reference to which the Arbitration Act 1996 was to apply. There is no definition in the Arbitration Act of a "reference to arbitration", which is not a statutory term of art. The parties presumably meant something in using the expression and the most obvious meaning is that the parties were agreeing that the Arbitration Act 1996 should apply to the reference without qualification.

(e) Looked at in this light, the parties' express agreement that the "seat" of arbitration was to be Glasgow, Scotland must relate to the place in which the parties agreed that the hearings should take place. However, by all the other references the parties were agreeing that the curial law or law which governed the arbitral proceedings was that of England and Wales. Although authorities establish that, prima facie and in the absence of agreement otherwise, the selection of a place or seat for an arbitration will determine what the curial law or "lex fori" or "lex arbitri" will be, I consider that, where in substance the parties agree that the laws of one country will govern and control a given arbitration, the place where the arbitration is to be heard will not dictate what the governing or controlling law will be.

(f) In the context of this particular case, the fact that, as both parties seemed to accept in front of me, the Scottish courts would have no real control or interest in the arbitral proceedings other than in a criminal context, suggests that they can not have intended that the arbitral proceedings were to be conducted as an effectively "delocalised" arbitration or in a "transnational firmament", to borrow Lord Justice Kerr's words in the ***Naviera Amazonica*** case.

(g) The CIMAR Rules are not inconsistent with my view. Their constant references to the 1996 Act suggest that the parties at least envisaged the possibility that the Courts of England and Wales might play some part in policing any arbitration. For instance, Rule 11.5 envisages something called "the court" becoming involved in securing compliance with a peremptory order of the arbitrator. That would have to be the English Court, in practice.

18. The Employer also relied upon an estoppel argument whereby in effect the Contractor is estopped from asserting that this Court does not have jurisdiction. Although I do not have to decide the point, I would have been against the Employer on this argument:

(a) It was predicated upon the fact (supported by witness statement evidence) that both parties orally accepted at the arbitration hearing that English law governed the dispute and did not assert that Scottish law governed the procedure.

(b) The fact that the parties' representatives did not assert that Scottish law governed the procedure does not give rise to any estoppel; it is very rare for silence to give rise to any form of estoppel and the circumstances when it does (for instance, a fiduciary relationship) do not apply here.

(c) Even if both parties' lawyers both parties did orally accept at the arbitration hearing that English law governed the dispute, that acceptance does not amount to some unequivocal or any material estoppel. The acceptance is as much, and in context more, applicable to an acceptance that the substantive law was English, rather than that the English Courts had jurisdiction to control the arbitration. Something much clearer would be required to support the type of estoppel relied upon by the Employer.

The application for leave to appeal

19. It is certainly unusual for liquidated damages clauses to be found to be unenforceable. There is however established authority in English law, the substantive law in this case, that, if such damages amount to a penalty, the clause will be unenforceable (**Dunlop Pneumatic Tyre Co. v New Garage and Motor Co** [1915] AC 79). Various variants on that have been developed in construction cases such as ***Bramall & Ogden Ltd v Sheffield City Council*** (1983) 29 BLR 76.

20. Clause 8.7 materially says as follows:

"*8.7.1 Subject to the limitations contained in this Clause 8.7, if the requirements of Clause 8.2 [Time for Completion] are not complied with, the Contractor shall…pay delay damages to the Employer for this default at the rate set out in Clause 8.7.2 below. These delay damages shall be paid for every day which shall elapse between the relevant Time for Completion up to and including the date of issue of the Taking-Over Certificate. For the avoidance of doubt, the Contractor will be entitled to an extension of time pursuant to Clause 8.4.1(c) to the extent that it suffers any delay, impediment or prevention caused by or attributable to other contractors on the Site (including for the avoidance of doubt the Wind Turbine Contractor) subject to compliance by the Contractor of his applicable and relevant obligations under this Contract and under the Interface Agreement.*

8.7.2 The amount of delay damages shall be £642…for each MW of the total installed capacity for the Plant which is unavailable ("Unavailable Capacity") for each day of such unavailability for the period from 1 October to 31 March and £385… for each MW of Unavailable Capacity for each day of such unavailability for the period from 1 April to 30 September, provided that the Contractor's maximum total liability to pay delay damages under this Clause 8.7 shall not exceed 50%...of the Contract Price…"

21. The Arbitrator, who is well known and extremely experienced in construction law fields, was required to address disputes between the parties which related to the Employer's entitlement to liquidated damages under Clause 8.7 for allegedly culpable delay on the part of the Contractor. Issues arise, although not addressed in detail by the Arbitrator in this first award, as to whether the Contractor was entitled to extensions of time which would reduce or eliminate any culpable delay.

22. A one day hearing was held on 5 December 2007 in Edinburgh. The issue to be addressed was whether:
"…absent any extension of time under the EPC Contract, the [Employer] is entitled to withhold liquidated or other delay damages against sums otherwise due to the [Contractor] under the EPC Contract; and whether in consequence the [Contractor] is entitled to an award in respect of the liquidated damages so withheld." (Paragraph 1.14 of the award)

23. The Arbitrator analysed the EPC Contract against the parties' contentions and concluded that for various reasons:
"…the provisions of Clause 8.7 are not capable of generating with certainty liquidated damages flowing from an identified breach by the [Contractor]. Accordingly, in accordance with established authority, Clause 8.7 should not be enforced."

He then decided that there was no entitlement to withhold or set off against sums otherwise due to the Contractor and issued his award in a money sum, £2,836,840.30 plus VAT and interest.

24. Having seen the papers lodged by the Employer and initially spent some four hours reading the papers, I formed the view that a short hearing would be helpful because (a) I suspected that there could be a jurisdictional challenge although I did not anticipate precisely that which was taken, (b) it was unusual for liquidated damages clauses freely agreed to by the parties to be regarded as unenforceable and (c) it was at the least arguable that the Arbitrator, eminent though he is, was obviously wrong.

25. I am mindful of the requirements of Section 69(3) of the Arbitration Act 1996. The Court can only grant leave to appeal an arbitrator's award if the following conditions are met:

"*(a) that the determination of the question will substantially affect the rights of one or more of the parties;*

(b) that the question is one which the tribunal was asked to determine;

(c) that, on the basis of the findings of fact in the award-

(i) the decision of the tribunal on the question is obviously wrong; or

(ii) the question is one of general public importance, and the decision of the tribunal is at least open to serious doubt; and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question."

It is accepted, and properly so, that the first two requirements have been met.

26. Mr Bartlett QC reserves an argument for another court that the issue on this application was not a question of law because it involved a one off point of contractual construction, which even if wrong was one which an arbitrator could reasonably have adopted. That can not be right. Questions of contractual construction do involve questions of law: the parties have legally made the law governing their particular relationship by agreeing the contract in question. Rules of interpretation apply as a matter of substantive law. Clearly, on that basis, the issue resolved by the Arbitrator was a question of law, namely whether the liquidated damages provisions for culpable delay are enforceable. If it is obviously wrong, the 1996 Act requires the Court, subject to other criteria being established, to give leave to appeal.

27. I do not consider that the question of law, however, involved a question of general importance although, of course, it was of particular importance to the parties. Although the form of contract was adapted from the FIDIC "Silver Book" used for EPC contracts, the liquidated damages clause is very much a "one-off". It is not unheard of, particularly on "turnkey" power station contracts, for liquidated damages to be related to the loss of electricity which could have been generated during a period of culpable delay. However, what is very much a "one-off" liquidated damages arrangement, and I have never heard of one before, lies in the practical juxtaposition of the work of the Contractor and the Wind Turbine Contractor.

28. Therefore, I must approach the question of leave to appeal on the basis of considering whether the Arbitrator was obviously wrong in reaching his decision. It is not enough that a part of his or her reasoning is wrong or that conceivably another tribunal might respectably have reached the opposite decision. I consider however that the test of obviousness is not only passed if the Award is obviously wrong to the judge considering leave after half an hour's reading of the papers by the judge considering leave. The reference in ***CMA CGM SA v Beteiligungs-Kommanditgesellschaft MS Norther Pioneer*** [2003] 1 Lloyds Rep 212 at Paragraph 23 that the judge should be able to digest the written submissions in 30 minutes does not impose such a restriction. If it takes four hours for the judge to understand the submissions and he or she then forms the view that the Section 69 criteria are established, those criteria are established.

29. To be "obviously wrong", the decision must first be wrong at least in the eyes of the judge giving leave. However, any judge of any competence, having come to the view that it is wrong, will often form the view that the decision is obviously wrong. It is not necessarily so, however, as a judge may recognise that his or her view is one reached just on balance and one with which respectable intellects might well disagree; in those circumstances, the decision is wrong but not necessarily "obviously" so.

30. I have formed the view, perhaps contrary to my initial impressions, that the Arbitrator was not obviously wrong. Although my own analysis would have been different and I might disagree with part of the Arbitrator's reasoning, I consider that his decision was ultimately right. The most convincing argument advanced by Mr Bartlett QC for the Contractor was that the liquidated damages clause could well impose a liquidated damages liability on the Contractor in respect of delays to individual wind turbines caused by the Wind Turbine Contractor:

    A. The extension of time clause (Clause 8.4) did allow the Contractor extensions to the extent that overall or critical delay was caused by the Wind Turbine Contractor.

    B. There was no provision in the contract for sectional completion of the Works. Thus, until all 36 WTG's were complete and fully connected into the (Contractor's) Works, the Works could not be completed.

    C. However, if overall or critical delay was caused by the Contractor but individual WTG's were delayed by the default of the Wind Turbine Contractor, there was no provision to alleviate the imposition of liquidated damages on the Contractor.

    D. As each WTG accounted for 2 MW and each MW accounted for £642 or £385 (depending upon the time of year) by way of liquidated damages per day of unavailability, the Contractor could end up paying liquidated damages for delays caused by the Wind Turbine Contractor's defaults in completing their work on the turbines even though the parties had agreed that for critical or overall delay the Contractor was not responsible.

    E. Because it was clearly intended that the Contractor was not as such to be responsible for the defaults of the Wind Turbine Contractor or at least those which good co-ordination by the Contractor would have avoided, the parties nonetheless agreed a liquidated damages clause which would impose such damages upon the Contractor in certain foreseeable circumstances.

    F. In those circumstances, there is in law a penalty which English Law will not enforce.

31. It is unnecessary to determine whether the Section 69(3)(d) criterion was made out by the Contractor. Although this is a separate criterion, it can not necessarily be considered in isolation from the other criteria. I accept that the fact that the arbitrator was here a highly experienced and well known construction law QC is a relevant factor to take into account under Section 69(3)(d) (see ***Keydon Estates Ltd v Western Power Distribution (South Wales) Ltd*** [2004] EWHC 996 (Ch)). It seems to me that this sub-section is an overall "catch-all" provision, albeit an important one. However, it could properly be said that, if all the other criteria were established, it would often, but not invariably, be unjust for an obviously wrong decision on an important question of law not to be put right by the Court. That could be thought to be even more so if the chosen highly respected arbitrator has simply had a major intellectual aberration.

32. I hasten to say that, in this case, the fact that Mr Uff QC is a very experienced construction law Silk coupled with the fact that his decision is not obviously wrong leads me to the inevitable conclusion that the Claimant's application be dismissed and the Defendant must have leave to enforce the Award pursuant to Section 66(1).

David Sears QC and Serena Cheng (instructed by Shepherd and Wedderburn) for the Claimant
Andrew Bartlett QC (instructed by Dundas & Wilson LLP) for the Defendant