Court of Queen's Bench of Alberta

Citation: Karaha Boda Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 2004 ABQB 918

Date: 20041209
Docket: 0203 03768
Registry: Edmonton

Between:

Karaha Bodas Company, L.L.C.

Plaintiff/Applicant

- and -

Perusahaan Pertambangan Minyak Dan Gas Bumi Negara and P.T. PLN (Persero)

Defendants/Respondents

Reasons for Judgment
of
W. BREITKREUZ, Master in Chambers

---

[1] This is an application under Rule 159 of the Alberta Rules of Courts and the International Commercial Arbitration Act being c. I-5, R.S.A. 2000.

[2] Specifically it is an application for summary judgment to enforce an arbitration award made against the respondents in Paris, France but agreed by all parties to be legally made in Geneva, Switzerland because that is the site of the arbitration selected in the contracts between the parties.

[3] The plaintiff/applicant, also known as the claimant throughout many of the proceedings which occurred in the quasi-litigation and litigation between the parties is a Cayman Islands

Company involved in the development of a geothermal energy project in West Java, Indonesia. For convenience it will subsequently be referred to as KBC.

[4] The defendant Perusahaan Pertambangan Minyak Dan Gas Bumi Negara subsequently called Pertamina, is the state-owned Indonesian oil and gas corporation. Pertamina sells oil throughout the world and maintains offices in several cities outside Indonesia. Pertamina is the holder of an authority issued by the government of Indonesia for the exploration and exploitation of geothermal resources and generation of electricity in Indonesia.

[5] The defendant PLN is a state-owned electric utility for Indonesia and the holder of the Power Enterprise Authorization granted by the government of Indonesia to undertake the supply of electricity to the public in Indonesia. (The description of the parties is taken from the affidavit of William A. Isaacson sworn in support of this application on July 9, 2002).

[6] On November 28, 1994, Pertamina, PLN, and KBC entered into two contracts to establish their roles and obligations in a project to develop and distribute geothermal resources for the generation of electricity in Indonesia.

[7] Pursuant to the Joint Operations Contract "JOC" between KBC and Pertamina, Pertamina was responsible for management of the geothermal operations and KBC was designated the contractor responsible for financing the project and building, owning, and operating the generating facilities.

[8] The Energy Sales Contract "ESC" among KBC, Pertamina, and PLN obligated PLN to purchase from Pertamina the electricity generated by KBC's facilities for specified prices.

[9] In virtually identical provisions, both the JOC and the ESC required the parties to arbitrate any disputes in Geneva, Switzerland, pursuant to the Arbitral Rules of the United Nations Commission on International Trade Law (the "Uncitral Rules"). These provisions are found in article 13.2 (a) of the JOC, and section 8.2(a) of the ESC.

[10] Additionally, the arbitration provisions required the parties to appoint arbitrators within thirty days of a party's request to initiate arbitration. The JOC provided that each party will appoint an arbitrator, "while the ESC specified that "PLN on one hand, and company KBC and Pertamina on the other hand, will each appoint one arbitrator." In the event that an arbitrator was not selected within this thirty-day time frame, both contracts provided that an arbitrator would, by default, be appointed by the Secretary General of the International Center for Settlement of Investment disputes "ICSID" upon the request of any party. The JOC and the ESC also contained virtually identical provisions limiting the parties' rights to appeal or otherwise bring legal proceedings concerning a dispute subject to the arbitration provisions JOC, Art. 13.2(d); ESC, s. 8.2(d).

[11] The Government of Indonesia issued a Presidential Decree dated September 20, 1997 indefinitely postponing the project. However, KBC continued development of the project based

on Pertamina's and PLN's assurances that the project suspension was temporary and would be restored. The project was restored briefly by a Presidential Decree dated November 1, 1997, but yet another Presidential Decree dated January 10, 1998 confirmed the indefinite postponement of the project. As a result, Pertamina and PLN did not fulfill their contractual obligations to purchase the energy to be generated by KBC's facilities. In February 1998, KBC gave Pertamina and PLN notice that this latest Presidential Decree constituted an event of Force Majeure under both the JOC and ESC. On April 30, 1998, KBC served its Notice for Arbitration.

[12] The chronology of what took place is as follows:

(1) arbitration award notionally made in Geneva, December 18, 2000;

(2) United States District Court for the Southern District of Texas enforcement order dated November 30, 2001;

(3) Central Jakarta District Court (Indonesia) annulled the arbitration award on August 27, 2002;

(4) Hong Kong High Court grants order enforcing arbitration award March 27, 2003;

(5) United States District Court for the Southern District of Texas dismissed the motion to rehear the application based on new evidence May 30, 2003;

(6) The United States Court of Appeals for the Fifth Circuit dismisses the appeal from the Texas District Court decision March 26, 2004;

(7) The United States Supreme Court refused the petition of the respondents to appeal the decision of the United States Fifth Circuit Court of Appeals on October 4, 2004;

(8) Indonesia Supreme Court reverses the Jakarta District Court decision, November, 2004.

[13] As indicated earlier, the parties in the JOC and ESC have agreed that any dispute shall be settled according to the Uncitral Arbitration Rules adopted by the United Nations General Assembly on December 15, 1976. These rules are incorporated as schedules 1 and 2 in the Alberta International Commercial Arbitration Act. The only part of the Act or schedule relevant for the application before me is Article V which reads as follows:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

b) The recognition or enforcement of the award would be contrary to the public policy of that country.

[14] It will be immediately apparent from the wording at the beginning of Article V that the onus of proof is on the respondent, the party resisting enforcement, to satisfy the court that enforcement should not be granted, and enforcement can only be refused on the narrow grounds set out in Article V.

[15] It should be mentioned at the outset that even though the article in the JOC and corresponding section in the ESC contain clauses waiving "the right to appeal the decisions of the arbitral panel" courts have consistently maintained a right to exercise a limited jurisdiction to

review the arbitral award. The cases are collected and reviewed at pp. 26 to 28 of the written submissions prepared by the respondents in the application before the Texas District Court and attached as exhibit "E" to Mr. Isaacson's affidavit. I suppose the issue is only tangentially before me in the sense that it is manifestly clear I am not sitting on appeal from the arbitration award - nor was the Texas District Court for that matter - but the "no appeal" issue is relevant in the context of what an enforcement court can consider under schedule V of the New York Convention. (The Uncitral Rules adopted by the United Nations in New York in 1976 are often referred to as the New York Convention).

[16] Mr. Redmond in his first brief, filed on October 22, 2002, describes the purpose of the New York Convention and how it was adopted in Alberta. At p. 15, paras. 64 and 65 as follows:

> 64. The Convention was drawn with the intention that it would supply for countries throughout the world the legal principles for recognition and enforcement of foreign arbitral awards, with such modifications as each particular country might make. The Convention has been made part of the law of Alberta through its inclusion as Schedule 1 to the International Commercial Arbitration Act. The Convention was adopted in Indonesia on August 5, 1981 by Presidential Decree No. 34 of 1981, and became part of the domestic law of Indonesia (Declaration of Prof. Gautama, para. 20, Slater Aff., Ex.63). (He then describes the application of the New York Convention in the United States.)
>
> 65. In Alberta, the rules for recognition and enforcement of foreign arbitral awards have been statutorily codified by the incorporation of the Convention into the Act. Article V of the Convention spells out the grounds upon which the Court of Queen's Bench may refuse recognition and enforcement, and there is no need for the Court to draw analogies to other common law principles, such as those relating to enforcement of foreign judgments. In enforcement proceedings the forum country applies its own laws. *Schreter v. Gasmac Inc.* (1992), 7 O.R. (3d) at p. 617, para. h to p. 618, para. a.

[17] In the application before me a great deal of argument took place around the issue of which court had jurisdiction to annul the award. Whether it was exclusively the Swiss Court as the country in which the award was made, or whether it also included Indonesia being the country where the contracts were to be performed. A court that has the jurisdiction to annul or set aside the arbitral award is said to have primary jurisdiction. A primary jurisdiction court is the only court that can annul or set aside an arbitral award. All other courts are said to have secondary jurisdiction. Their jurisdiction is limited to enforcing an arbitral award. Obviously the Alberta Court is a court of secondary jurisdiction.

[18] The reason a great deal of discussion revolved around the issue of whether the Jarkarta Court had primary jurisdiction is because it was extremely important to the respondents' position that the Jarkarta Court had set aside or annulled the arbitral award.

[19] Article V (1)(b) of the New York Convention provides that recognition and enforcement of the award may be refused . . . if the award has been set aside or suspended by a competent authority of a country in which, or under the law of which, that award was made.

[20] The Texas District Court and the Fifth Circuit Court of Appeals in the United States had to wrestle with the issue of whether the Jakarta Court was a court of competent jurisdiction to set aside the arbitral award; i.e. was the Jakarta Court a court of primary jurisdiction. That issue is now moot in view of the Indonesian Supreme Court decision reversing the Jakarta District Court's decision. The current status of the arbitral award is that it is an arbitral award in good standing that has not been set aside or annulled.

[21] But the respondent's have a number of other grounds on which they rely as grounds for refusing to recognize or enforce the arbitral award. It will be seen from the chronology of events that I set out early in these reasons that identical proceedings have been launched in Texas and in Hong Kong. Enforcement was granted in Texas and in Hong Kong. I am not aware of whether the Hong Kong decision was appealed, but as the chronology shows the Texas District Court decision was appealed and the Fifth Circuit Court of Appeals confirmed the decision and the United States Supreme Court declined to hear an appeal from that decision. Accordingly, as it stands the various levels of courts in the U.S. and in the only level in Hong Kong at which this was heard have sustained the enforcement applications. And, as mentioned earlier, even though it was not an enforcement application, the Indonesian Supreme Court has now confirmed the validity of the arbitral award. It is apparent from the history of these various proceedings that the respondents face a formidable hurdle. The other courts I have referred to have set out their reasons for not refusing to enforce the arbitral award in extensive reasons. The Fifth Circuit Court of Appeals in the U.S. noted at p. 4 that "the length of this decision reflects the number of arguments Pertamina raises to evade its obligations under the Award more than the strength of those arguments." I need to assure respondents' counsel that the brevity of my decision in no way reflects the weakness of the arguments presented.

[22] I do not propose to issue lengthy reasons because of the extensive reasons already given by other courts on the identical issue, which are in the court file, but because of the length of time taken to argue the application and the volume of material presented and the enormous amount of money involved ($260 million dollars U.S.), the case calls for more than my conclusion.

[23] In addition to the argument relating to the Jakarta District Court annulling the award, the respondents raised further opposition to the enforcement application as follows:

A. The question of insufficient service of the Notice of Arbitration, the composition of the arbitral panel, and consolidation of the parties can be dealt with together;

B. Enforcement would be contrary to Alberta public policy.

A. **Composition of arbitral tribunal and consolidation of the JOC and ESC for arbitration**;

[24] It was forcefully argued that the composition of the arbitral authority and the consolidation of the two agreements is a violation of the arbitration clauses in the two agreements that justifies refusal to recognize and enforce the arbitral award. The respondents' quote Law and Practice of International Commercial Arbitration, the authors are Redfern and Hunter, (3d) at p. 180:

> Finally, there may be a problem in obtaining recognition and enforcement for such awards. Reference has already been made to the requirement of Article V 1.d) of the New York Convention to the effect that the composition of the arbitral authority, and the arbitral procedure, must be in accordance with the agreement of the parties. Where an arbitral tribunal which has been imposed upon the parties makes an award, it may be argued that the award should be refused recognition and enforcement under this provision of the Convention.

[25] The discussion regarding consolidation must necessarily begin with the issue of service of the Notice of Arbitration. There was discussion and evidence regarding the respondents' not knowing that KBC would be taking a consolidation position by virtue of the content of the Notice of Arbitration, and actually failing to receive these various notices. However, at p. 88 of the cross examination of Matthew Slater it is clear that the correct office was served but that the person's name (not the company's name) was omitted from the envelope. And at p. 89 at line 21 the question was "fair enough, but it's the same office, correct?" And the answer at line 22 is "the office location appears to be the same." In regard to other correspondence, at p. 87 of the same cross examination transcript Mr. Slater admitted that he does not "have any information that Pertamina or PLN did not get a copy of this particular letter."

[26] When the respondents failed to appoint arbitrators as requested by the Notice of Arbitration, the plaintiff proceeded to have arbitrators appointed by default as provided for in the two contracts, and those two arbitrators appointed a chairman, also in accordance with the contracts.

[27] In addition, there are other grounds for rejecting the argument to refuse recognition and enforcement of the award on the grounds of improper consolidation.

[28] The JOC contains a clause in Article 3, the "Exclusion of Area" article as follows:

> "Energy Sales Contract" means any and all contracts among PERTAMINA as seller, CONTRACTOR as deliverer and PLN or other Buyer as purchaser of Electricity, or of Geothermal Energy produced from the Contract Area to be utilized for conversion to Electricity, which is supplied to such Buyer pursuant to Geothermal Operations. Each such Energy Sales Contract shall be an integral part

> of this Contract, and to the extent the provisions of the energy Sales Contract obligate the Parties hereto, shall be deemed incorporated into this contract for all purposes.

[29] "CONTRACTOR" is defined earlier as KBC.

[30] The ESC contains a clause in the recitals as follows:

> WHEREAS PERTAMINA has contracted with COMPANY under a Joint Operation Contract dated as of _____, 1994 to carry out Geothermal Operations, including electrical energy generation, in the Karaha Area; and
>
> WHEREAS COMPANY as contractor to PERTAMINA under the Joint Operation Contract is authorized by PERTAMINA and is responsible for the production of Geothermal Energy from the Contract Area, the conversion of such Geothermal Energy to Electricity and the delivery of such Electricity to PLN; and

[31] Company is defined earlier as KBC.

[32] Even more significantly, Article 15.3 of the ESC provides that "the term of this Contract and the Joint Operation Contract constitute the entire agreement between the parties hereto ...".

[33] The arbitral tribunal found that the result of these provisions is that the parties did not contemplate the performance of two independent contracts but the performance of a single project consisting of two closely related parties. (p. 28 of Preliminary Award)

[34] Later, on the same page, this is found:

> . . . In such circumstances, the conclusion of this Arbitral Tribunal is the KBC's single action should be admitted, provided it is appropriate. The Arbitral Tribunal has not the slightest doubt in this respect. Due to the integration of the two contracts and the fact that the Presidential Decrees, the consequences of which are at the origin of the dispute, affected both of them, the initiation of two separate arbitrations would be artificial and would generate the risk of contradictory decisions. Moreover, it would increase the costs of all the parties involved, an element of special weight in the light of difficulties faced by the Indonesian economy, to which counsel for the Respondents legitimately drew the Arbitral Tribunal's attention.

[35] A further factor that cannot be ignored which shows the alignment of the parties in relation to each other is the fact that the respondents were represented by the same counsel at the arbitration hearing.

[36] Any one of these arguments relating to the issue of notice, composition of the arbitral panel, and consolidation of the parties, might be insufficient to justify the refusal to recognize and enforce the arbitral award, but taken together, especially in view of the fact that these are procedural matters within the broad discretion of the arbitral panel, I would not refuse recognition and enforcement under this general heading.

B. **Recognition and enforcement of the award would be contrary to public policy;**

[37] In Canadian Conflict of Laws, 5th Ed. J.G. Castell and Janet Walker at s. 8.6 the authors have stated the following:

> Canadian Courts will not recognize or enforce a foreign law or judgment or a right, power, capacity, status or disability created by a foreign law that is contrary to the forum's fundamental public policies, its "essential public or moral interest", or its "conception of essential justice and morality". Public policy serves a corrective function. Its use is generally defensive. ... It is difficult to give a precise definition of public policy; nor can a general statement be made about its scope. Evidence of public policy can be found in the total body of the constitutional and statute law as well as the case law of the forum, since it will reflect the local sense of justice and public welfare ... Fundamental values must be at stake.

[38] In ***Petrogas Processing Ltd. v. West Coast Transmission Co.*** (1988), 59 Alta. L.R. (2d) 118 O'Leary J. stated that:

> Supervening illegality occurs when, after the making of a contract, a change in the law renders it illegal to perform the contract in accordance with its terms.

and found that because changes in the law relating to gas pricing made the price provisions in a gas purchase contract illegal, the contract was discharged by the supervening illegality. The decision was affirmed by the Court of Appeal in (1989) 66 Alta. L.R. (2d) 254.

[39] The argument relating to this defence against enforcement is that the Presidential Decrees constituted part of the law of Indonesia, validly enacted under international pressure in the form of a request from the International Monetary Fund. Specifically the argument is the enforcement of the award is contrary to the public policy of Alberta because of the finding of liability against Pertamina and PLN by the arbitral tribunal interprets the performance of the obligations under the JOC and ESC to continue in defiance of the law of Indonesia, i.e. in defiance of the Presidential Decrees.

[40] This issue can be resolved by reference to what the parties have specifically provided in the contracts regarding the government related events. Article 15 of the JOC and s. 9 of the ESC are entitled "FORCE MAJEURE". Both provisions begin with the identical language as follows:

> "An Event of Force Majeure" shall mean any event or circumstance not within their reasonable control, directly or indirectly, of the affected Party ..."

[41] Article 15.2 of the JOC provides that Events of Force Majeure will include a number of items but won't be limited to certain specific obvious instances of force majeure, but it specifically excludes any Government Related Event only with respect to the contractor i.e. KBC.

[42] The ESC in s. 9.2 has the identical phraseology, substituting the word company for the word contractor, again meaning KBC.

[43] It is clear from this that only KBC would be excused from performance in the event of a government related event. This cannot be attributable to anything other than the potential risk of the government of Indonesia causing an event to occur which would make it impossible for the contract to continue, and excusing KBC from performance in that circumstance, but not Pertamina and PLN. It is a clear recognition of the close connection between the government of Indonesia and Pertamina and PLN.

[44] As stated by the U.S. Fifth Circuit Court of Appeals at p. 56 of the their judgment "the record does not support Pertamina's argument that enforcing the Award penalizes obedience to a governmental decree."

[45] In this unusual situation it would not be contrary to the public policy of Alberta to grant recognition and enforcement of the arbitral award.

[46] Another element was argued under this heading, namely that KBC did not disclose political risk insurance and this is an act of bad faith that warrants refusal to recognize and enforce the award. In fact it was the disclosure of the political risk insurance that was the result of an application in Alberta for disclosure of documents which yielded this information, and that in turn generated the application before Judge Nancy Atlas in the Southern District Court of Texas to rehear the matter based on the existence of the political risk insurance policy issued by Lloyd's of London.

[47] The issue of the existence of the insurance is important because it is argued that one of the investors was only prepared to continue with the contract to protect the investment it had already made of 40 million dollars. It turned out that investor or its shareholders had political risk insurance and recovered their investment by payment from the insurer.

[48] The arbitral tribunal dealt extensively during the hearing with KBC's ability to carry on and found that there were other investors besides the one who was covered by insurance. In

addition, a Mr. McCutcheon was asked about insurance at the hearing, and said he wasn't sure, and the tribunal specifically gave an opportunity to respondents' counsel to follow this up and he declined. It would appear that if counsel for the respondents had regarded this issue as relevant they would surely have thoroughly explored it at the arbitration hearing.

[49] As stated by the U.S. Fifth Circuit Court of Appeals at p. 59:

> KBC's failure to produce evidence of political risk insurance, given Pertamina's decision not to pursue the subject, does not violate public policy.

[50] Accordingly the application for recognition and enforcement of the arbitral award is granted together with costs. I am open to argument by telephone conference call relating to what the amount of the costs award should be.

Heard on the 23rd day of October, 12th and 13th day of December, 2002.

Dated at the City of Edmonton, Alberta this 8th day of December, 2004.

W. BREITKREUZ
M.C.C.Q.B.A.

Appearances:

Stephen J. Livingstone
McLennan Ross LLP
for the Plaintiff

J. E. Redmond, Q.C.
for the Defendants