School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
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Award Name and Date: Anatolie Stati et al. v. The Republic of Kazakhstan (Case No: CL-2014-000070), [2019] High Court of Justice, Queen's Bench Division, Commercial Court, EWHC 1715 – Judgement – 2 July 2019

Case Report by: Andreas D. Desyllas**, Editor Ignacio Torterola***

Summary: The High Court of Justice ("the Court") partially approved Defendant's application for an order for indemnity costs. Based on the out of the norm concept, the Court ordered Claimants to pay Defendant's costs of £1,300,000.00 on account. Such costs were estimated regarding judicial proceedings, which took place between July 1, 2015 and February 26, 2018. The Court indicated that those costs should be assessed on the standard basis, save that Defendant's costs incurred after July 19, 2017, which should be assessed on the indemnity basis.

Main Issues: indemnity costs; out of the norm concept; payment on account; discontinuance of proceedings; forum shopping

Justice: The Honourable Mr Richard David Jacobs QC ("Mr Justice Jacobs")

Claimants' Counsel: No attendance

Defendant's Counsel: Ali Malek QC and Paul Choon Kiat Wee (Herbert Smith Freehills LLP)

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Digest:

1. Relevant Facts

On February 28, 2014, Anatolie Stati, Gabriel Stati and two of their companies ("Claimants") were granted permission to enforce a Swedish arbitration award against the Republic of Kazakhstan ("Defendant") in the United Kingdom ("UK") (¶3). In April 2015, Defendant applied to the Court, aiming at setting aside the order of permission based on grounds of procedural irregularities (¶3). On August 27, 2015, Defendant filed an extra application so as to amend its grounds for challenging the award, asserting that the enforcement would violate English public policy since it had been procured by fraud (¶3). Both proceedings were, thus, stayed by Popplewell J. pending the ruling of the Svea Court of Appeal (¶3).

On December 9, 2016, the Svea Court of Appeal dismissed Defendant's first application to set aside the award, including, as such, Defendant's fraud argumentation (¶4). The stayed proceedings came back. On June 6, 2017, the Court decided that the grounds of challenge were no longer maintainable in the light of the decision of the Svea Court of Appeal ("2017 Judgment") (¶4). Yet, it was held that Defendant had established a prima facie case of fraud (¶5). Therefore, Defendant's claim concerning fraud was directed to trial proceedings (¶5).

The trial date was fixed to commence on November 5, 2018; until then, all of the required pleadings had been served (¶6). However, on February 26, 2018, Claimants served a notice of discontinuance of the trial. Defendant challenged the notice by submitting that the case should proceed to trial (¶7). On May 11, 2018, the Court set aside the notice of discontinuance ("2018 Judgment") (¶7). On July 6, 2018, Claimants appeal, in part, against the 2018 Judgment (¶7). In the meantime, Claimants' solicitors came off the record (¶7). On August 10, 2018, the Court of Appeal declared Claimants' notice of discontinuance valid and, *inter alia*, recorded Claimants undertaking "not to seek to pursue further enforcement proceedings in this jurisdiction in respect of the Award" (¶8). The order of permission to enforce the award in the UK was that way set aside (¶8). In any event, the Court of Appeal ruled that the Court was competent to decide upon Defendant's application for an order for indemnity costs and for a payment on account with regard to the proceedings prior to the date of the notice of discontinuance (¶11).

2. Procedural History

The present proceedings arose as a result of Claimants' notice of discontinuance of the upcoming trial filed in 2018 (¶1). On November 22, 2018, Defendant filed an application for costs on an indemnity basis and for a payment on account before the Court (¶11) with respect to the Judgment of the Court of Appeal. Several witness statements followed suit from both parties until the day of hearing (¶11). However, on June 24, 2019, Defendant served a skeleton argument signed by its representatives in support for its application, whereas Claimants did not (¶12). In this vein, Claimants did not attend the hearing as well.

According to Mr Justice Jacobs, Claimants were fully aware of the application and the date of the hearing given their active presence on the pre-hearing stage (¶12). In any case, no request for an adjournment had been served (¶12). Those were deemed enough for the case to proceed in Claimants' absence (¶12); nonetheless, Mr Justice Jacobs clarified that Claimants' absence was not enough to automatically entitle Defendant to the remedies sought (¶12).

3. Defendant's Position

Defendant submitted that this was an out of the norm case, which merited an order for indemnity costs based on eight grounds (¶17). Defendant stated first that a prima facie case for fraud had already been established. Second, that it was deprived of its right of proving the fraud allegation in this jurisdiction. Third, that Claimants' previous attempt of discontinuing the proceedings proved to be meritless, yet Defendant suffered injury by preparing for the trial proceedings. Fourth, that Claimants' factual answer to the allegation of fraud was unclear and the discontinuance reflected Claimants' weakness. Fifth, that the discontinuance was driven by Claimants' desire to avoid giving disclosure. Sixth, that Claimants were represented by their former counsels behind the scenes. Seventh, that there seemed to be a contradiction between the witness statements of Claimants' officials. Finally, that Claimants conducted forum shopping by continuing to pursue enforcement proceedings in London, despite having undertaken not to pursue further enforcement proceedings in this jurisdiction (¶17).

4. Analysis of Legal Issues by the Court

4.1 Legal principles

Mr Justice Jacobs commenced his analysis by setting out the relevant legal principles. According to him, a case does not have to be "exceptional" for an award for indemnity costs to be issued (¶13). The crucial factor remains whether there is an out of the norm case at hand, as a result of a certain unreasonable or out the of the ordinary conduct (¶13). Relying on the *Hosking* case, Mr Justice Jacobs declared that, although an order for indemnity costs can be made when a claim has been discontinued prior to judgment, the state of reasonableness would be difficult to be accessed due to the non-adjudication of the case itself (¶14).

Further, Mr Justice Jacobs stated that in case where a claimant has alleged fraud against a defendant and that led to success in trial, the Court may also order indemnity costs (¶15). Still, that was not the case in these proceedings since Claimants had not alleged fraud; instead, Defendant had (¶15). Mr Justice Jacobs put forward the 2018 Judgment where it was found that the real reason for the notice of discontinuance was that claimant did not wish to take the risk of the trial proceedings (¶16).

4.2 Indemnity Costs

Mr Justice Jacobs went on to reject the fraud claim brought by Defendant (¶19). He provided that no change of circumstances had occurred since the 2018 Judgment, which would enable him to go beyond those findings (¶19). Moreover, he supported the findings of the 2018 Judgement by stating that Claimants preferred not to take the risk of going on trial (¶20).

Considering if he should form a view on the issue of Claimants' alleged fraudulent actions, Mr Justice Jacobs decided to refrain from it (¶21). Turning to the indemnity costs matter, he decided to view that issue by looking at the three phases of the litigation proposed by Defendant (¶22).

The first period of January 1, 2015 to August 31, 2015 was deemed insignificant so as to justify an award for indemnity costs. Bearing in mind the out of the norm standard, he found

no reason to believe that Claimants acted unreasonably by commencing litigation to enforce their arbitral award in the UK (¶23). He, thus, found no merit for ordering an award for indemnity costs in Defendant's favour at that time. On the contrary, he considered that an order as such should only run from the time when work began on the fraud ground, so he ordered that the award for indemnity costs should run from July 1, 2015 (¶24).

Conversely, during the second period between September 1, 2015 and June 6, 2017, no conduct of Claimants could be characterised as unreasonable or out of the norm (¶25). Claimants had succeeded in the Swedish and the United States of America proceedings, thus, their arbitral award remained enforceable and the further pursue of enforcement in the UK was reasonable enough (¶25).

The third period initiated from the 2017 Judgment and lasted for approximately eight months. During that time, considerable costs were incurred and, as a result, this was the strongest case Defendant had (¶26). Taking into account the 2017 Judgment, Claimants already had an answer to their case of enforcement in the UK. However, they chose to further pursue the case; had they reflected on the position and discontinued shortly afterwards, according to Mr Justice Jacobs, an order for indemnity costs would not have been appropriate (¶26). Instead, the case proceeded as though a trial would take place, with significant costs being incurred by Defendant (¶27). In this vein, nothing materially changed during those eight months until Claimants' decision to discontinue. Claimants had a reasonable time for reflection on the 2017 Judgment and they must have foreseen the risks of pursuit of the English proceedings by then (¶27).

In addition, Mr Justice Jacobs determined that there was no case of forum shopping because Claimants did not seek to have the dispute determined in an inappropriate forum (¶29). There can be nothing objectionable in a party seeking to enforce an award in different jurisdictions which is legitimate, even though enforcement proceedings elsewhere may have an impact on assets held in London (¶29).

Upon these findings, Mr Justice Jacobs decided that Claimants' pursuit of proceedings was unreasonable and outside the norm (¶27). Therefore, he ordered Claimants to pay Defendant's costs of the proceedings incurred between July 1, 2015 and February 26, 2018. Such costs should be assessed on the standard basis, save that Defendant's costs incurred after July 19, 2017 shall be assessed on the indemnity basis (¶30).

4.3 Payment on account

By virtue of Article CPR r 44.2 (8), when the Court orders a party to pay costs subject to detailed assessment, it will order for a reasonable sum on account of costs to be paid, unless there is good reason not to do so (¶31). Mr Justice Jacobs found no such reason in the present case. With respect to the *Excalibur* case, the reasonable sum cannot be a detailed assessment but involves an element of uncertainty and depends on the circumstances of the case at hand. That kind of reasonable sum would often be an estimate of the likely level of recovery subject, allowing for any potential error in the estimation (¶31). Moreover, in determining whether to order any payment, account needs to be taken of all relevant factors such as the likelihood of a successful appeal, the means of the parties, etc. (¶31).

Turning to the estimation of the costs, Mr Justice Jacobs decided that the costs incurred by Defendant prior to the notice of discontinuance were US $4,302,271.00 in respect of profit

costs, plus disbursements of US $1,623,900.55 and other expenses of US $175,038.21, amounted to US $6,101,209.86, equating to approximately £4,835,000.00 (¶33). Nevertheless, that sum seemed more commensurate with the costs which one would expect from a lengthy trial involving factual evidence, rather than a case which never reached that stage (¶34).

5. Decision

Under such circumstances, Mr Justice Jacobs ruled that a substantial reduction in the amount payable must be applied taking into account that the relevant estimation of the recoverable costs should start from July 1, 2015 (¶35). He conclusively decided that it was reasonable to take a figure of £1,500,000.00 as representing the likely level of recovery, prior to credit for costs payable to Claimants, but after allowance for an appropriate margin of error, thus, ordering a payment on account of £1,300,000.00 (¶36).