



School of International Arbitration

IACL
International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law**

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Award Name and Date: Leidos Inc. v. The Hellenic Republic (Case No: CL-2018-000672), [2019] High Court of Justice, Queen's Bench Division, Commercial Court, EWHC 2738 (Comm) – Judgment – 17 October 2019

Case Report by: Federica Cristani**, Editor Ignacio Torterola***

Summary: The High Court of Justice (‘the Court’) exercised its discretion in allocating costs of proceedings and departed from the general rule according to which the unsuccessful party should pay the costs of the successful party. The Court found that the parties should bear its own costs of the proceedings, taking into consideration their conduct during and after the proceedings and all the relevant circumstances of the case.

Main Issues: allocation of the costs of proceedings and relevance of all the circumstances of the case; material non-disclosure of a party during a without notice proceeding; meaning of ‘suspension’ of an Award.

Justice: The Honourable Mr Richard David Jacobs QC (‘Mr Justice Jacobs’)

Claimant's Counsel: Mr Ben Williams (King & Spalding)

Defendant's Counsel: Mr Craig Morrison (Enyo Law LLP)

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Digest:

1. Relevant Facts

Leidos Inc. ('Leidos' or 'Claimant'), formerly known as Science Applications International Corporation (SIAC) is a company incorporated under the Laws of the United States of America; Defendant is The Hellenic Republic ('Greece' or 'Defendant'). The initial dispute arose out of a contract concluded on 19 May 2003 between the parties for the development of a public security system during the Athens Olympic and Paralympic games in 2004 (¶ 24). Leidos started arbitration proceedings against Greece in 2009 under the International Chamber of Commerce ('ICC') arbitration rules; Claimant was awarded € 39,818,298 for damages, plus \$162,500 for arbitration costs and relevant interest (¶ 24). Firstly, Claimant sought to enforce the arbitration award ('the Award') in Greece, while Defendant started annulment proceedings before Greek tribunals. Pending an appeal application filed by Greece before the Greek Supreme Court, Claimant started enforcement proceedings in England. In the meantime, Greece obtained from the Greek Supreme Court an interim order suspending the enforcement of the Award in September 2018 (¶ 24).

On 30 October 2018, Teare J issued an order for the enforcement of the Award in favour of Claimant; Greece proposed Leidos to stay the order pending the decision of the Greek Supreme Court. Upon refusal of Leidos, on 13 June 2019 Greece filed an application to set aside the order. One week later, the Greek Supreme Court issued its decision and dismissed Greece's appeal. On 10 September 2019, Greece paid € 53,158,997.37 according to the Award (¶ 10).

The parties agreed to fix a hearing in front of the Court in order to determine the allocation of costs for the enforcement order of Teare J and for the set aside application filed by Greece (¶ 24).

2. Procedural History

Claimant started ICC arbitration proceedings in 2009, resulting in the Award of 2 July 2013 that was issued in its favour. Greece was initially successful in the annulment proceedings before the Athens Court of Appeals in June 2014; the Greek Supreme Court then reinstated the Award in September 2016 and the question returned to the Athens Court of Appeals, which rejected the petition to annul the Award. Consequently, Greece filed an appeal before the Greek Supreme Court. When Leidos started enforcement proceedings in England, Greece obtained on 7 September 2018 an interim order from the Greek Supreme Court suspending the enforcement of the Award "until a decision of the Supreme Court is delivered" (¶ 4). This order was confirmed by a judgment on 1 October 2018 and in writing on 18 October 2018 (¶ 26).

Upon a without notice application filed by Leidos according to Civil Procedure Rule ('CPR') 62.18 (1), on 30 October 2018, Teare J issued an order for the enforcement of the Award in favour of Claimant pursuant to section 101 of the English Arbitration Act ('the Act'). Claimant made reference during the enforcement proceedings to the pending decision of the Greek Supreme Court, but did not mention the possible defence to enforcement under section 103(2)(f) of the Act, according to which enforcement may be refused where "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, it was made" (¶ 9).

The order was served upon Greece on 22 March 2019; Defendant proposed Leidos to stay the order pending the decision of the Greek Supreme Court. However, Claimant refused the proposal to stay until Defendant had paid in full the amount determined by the Award as a security (¶ 8). Consequently, on 13 June 2019 Greece filed an application to set aside Teare J's order on the ground of section 103(2)(f) of the Act, as well as on the ground of an alleged non-disclosure by Leidos during the without notice application of the content of section 103(2)(f) of the Act as a potential legal basis for refusing the enforcement of the Award (¶ 9).

On 20 June 2019, the Greek Supreme Court issued its decision and dismissed Greece's appeal. Accordingly, the suspension of the enforcement of the Award was lifted (¶ 10). On 16 August 2019, a Consent Order was agreed by the Leidos and Greece, according to which Defendant agreed to withdraw its set aside application, subject the recovery of the costs of the application, and the date of 11 October 2019 was fixed for a hearing in front of the Court on the question of the allocation of costs for the enforcement order and for the set aside application (¶ 10). Each party sought its full costs of the proceedings from the other party: Leidos claimed £ 215,647.78 (£ 151,496.54 for its application to enforce and £ 64,151.24 in relation to Greece's application to set aside); Greece claimed £ 53,576.03(¶ 19).

3. Analysis of Legal Issues by the Court

3.1 Nature and scope of the hearing of 11 October 2019

The first question the Court had to deal with was about the nature and scope of the hearing of 11 October 2019; Greece sought to set aside the order of Teare J during this hearing claiming the material non-disclosure by Leidos during the without notice proceedings. However, Mr Justice Jacobs found that the effect of the consent Order was “solely to determine the issue of the award of costs relating to the prior applications” (¶ 15). The Court remarked that while the non-disclosure argument would be considered in the context of the decision on the allocation of costs, “[i]t does not automatically follow [...] that the order of Teare J would have been set aside because of such non-disclosure”. On the contrary, Mr Justice Jacobs affirmed that he would have continued the order of Teare J, on the ground that (1) the non-disclosure was not deliberate; (2) the facts of the existence of the proceedings and the interim order of the Greek Supreme Court were disclosed; (3) the decision on the application to set aside the order of Teare J would have been issued after the decision of the Greek Supreme Court of 20 June 2019, “at a time when Leidos had, as a matter of substance, established its right to the enforcement of the Award as a matter of principle”; (4) consequently, it would have been “inappropriate” to set aside the order of Teare J (¶ 17).

3.2 Allocation of costs of the proceedings: parties' arguments

Leidos claimed it was the successful party. Moreover, he argued that section 103(2)(f) was not applicable in the enforcement application, since the interim order of the Greek Supreme Court suspended the enforcement of the Award, but it did not suspend the Award as such, as required by the aforementioned provision. Claimant further argued that it was not unreasonable to refuse the offer from Greece to stay enforcement of Teare J's order before Greece had paid the amount determined by the Award as a security (¶ 21).

According to Greece, section 103(2)(f) was applicable, since the Greek Supreme Court's interim order had suspended the Award; accordingly, the set-aside application of Teare J's order was justified at the time it was filed. Defendant further claimed additional costs due to

the refusal of Claimant to stay enforcement of the order (¶ 22). According to Greece, the Court should only consider the position of the parties at the time they filed the application to enforcement and to set aside, prior to the final decision of the Greek Supreme Court (¶ 26).

3.3 Allocation of costs of the proceedings: Court's analysis

The Court recalled the general rule on costs under CPR 44.2(2), according to which the unsuccessful party will be ordered to pay the costs of the successful party. However, the Court recalled that it could exercise its discretionary power and make a different order having regard “to all of the circumstances, including the conduct of all of the parties”, which, under CPR 44.2 (5) “includes conduct before, as well as during, the proceedings, as well as whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue” (¶ 23). Accordingly, the Court had to determine (1) whether Claimant was the successful party in the case, and (2) if so, whether a different costs order should be made taking into account the circumstances of the case.

3.3.1 On whether Claimant was the successful party in the case

Mr Justice Jacobs confirmed that Leidos was the successful party in the case: (1) at the time of the enforcement proceedings, an Award had been issued in favour of Claimant; (2) Teare J issued an order in favour of Leidos; (2) the Greek Supreme Court dismissed Greece's appeal and Greece paid the substantial part of the Award; (3) Greece agreed in the Consent Order to withdraw the set aside application (¶ 24).

3.3.2 Discretion of the Court as to allocation of costs: conduct of Greece and relevance of the decision of the Greek Supreme Court

Mr Justice Jacobs affirmed that the final decision of the Greek Supreme Court should be taken into consideration when deciding on the allocation of costs and taking into account the conduct of the parties. As regards Greece, the Court found that it carried on a long judicial battle after the Award was issued in July 2013 and that such battle resulted in the dismissal by the Greek Supreme Court of Defendant's appeal. Accordingly, the Award should have been paid years ago and the conduct of Greece in this regard should be taken into consideration (¶ 27).

3.3.3 A different scenario: what if the Greek Supreme Court's final decision was still pending

Mr Justice Jacobs found that in case the set-aside application filed by Greece had been heard still pending the decision of the Greek Supreme Court, it would have been “highly probable that the application to set aside would have succeeded” (¶ 29). Indeed, in this case, section 103 (2) (f) of the Act would have applied. On the question as to the meaning of ‘suspension’ of the Award and its difference with the ‘suspension’ of the enforcement of the Award, the Court pointed out that there was no authority and no case yet on this point (¶ 30). According to Mr Justice Jacobs, the interim order of the Greek Supreme Court had the effect to suspend the Award and that “it makes no sense to distinguish between suspension of the Award and suspension of the enforcement of an award” (¶ 31). The Court indicated some commentaries (¶ 32) and decisions in support (¶ 33). In any case, the Court further affirmed that Leidos was entitled to seek enforcement during the suspension period and to bring arguments why the enforcement should be granted; under section 103 (5), a court - different from the court of the seat before which an application to set aside the Award is pending - “may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award”; and in the event

the application resulted in the setting aside or suspension of the Award, section 103 (2) (f) is applicable and the recognition of the Award “may be refused” (¶ 34).

3.3.4 On the relevance of non-disclosure on the without notice application

Mr Justice Jacobs recalled that a without notice application required a “proper preparation” and “full and frank disclosure” by Claimant, including the identification of the “crucial points for and against the application” (¶ 37) and found that Leidos failed to do so. During the enforcement proceedings before Teare J there was no reference to the potential defence under section 103 (2) (f), which was “an important legal argument”; the Court found that there was a “material” omission in this respect by Leidos (¶ 38) and that this omission was “highly culpable” and “sufficiently serious that it justifies a departure from the general approach that a successful party is entitled to his costs”. On the other hand, the Court affirmed that it would not be just to order Leidos to pay the cost of the unsuccessful party (¶ 40).

3.3.5 On the conduct of the parties after the enforcement order

The Court took into account the conduct of the parties after the order of Teare J and found that Leidos should have accepted the proposal of Greece to stay the order pending the final decision of the Greek Supreme Court. By accepting the proposal, both sides might have saved some costs. Mr Justice Jacobs found that Leidos’s arguments for its refusal were not reasonable; accordingly, Claimant should not be awarded the costs of the relevant proceedings (¶ 41)

4. Judgment

Mr Justice Jacobs concluded that there should be no order as regards the costs and each side should bear its own costs, since each one of them “in substance, failed” (¶ 42).