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Judicial Intervention in Trinidad Award Considered: Crossing the Line?

Tammi Pilgrim (Lex Caribbean) · Thursday, April 20th, 2023

Typically, when a country is labelled as an "arbitration-friendly jurisdiction", contracting parties are assured that the Judiciary of that country will respect their autonomy and choice to resolve their disputes privately. Usually, courts in a pro-arbitration jurisdictions will likely adopt a hands-off approach and decline to interfere with the outcome of a decision to arbitrate.

However, the recent decision by the High Court of Trinidad & Tobago in ***National Infrastructure Development Company Limited ("NIDCO") v. Construtora OAS S.A. ("OAS")*** **(Claim No. CV2022-01832, Delivered: December 14, 2022, unreported, "'NIDCO v. OAS")**) illustrates the circumstances which might lead a court to reject a non-interventionist posture and, ultimately, invalidate an award.

In this post, we consider the decision of Justice Frank Seepersad in the Trinidad High Court in *NIDCO v. OAS* and conclude that it is a strong signal to arbitrators and contracting parties that, notwithstanding the attractiveness of the "arbitration-friendly" label, courts remain willing to exercise their supervisory jurisdiction, particularly in public interest cases where the commercial parties include a State via a State-owned corporation.

Background

In *NIDCO v. OAS,* NIDCO (a State-owned corporation) commenced a claim challenging a partial arbitration award issued in favour of OAS (a Brazilian contractor) for damages caused by NIDCO's allegedly wrongful termination of a construction contract (the "Contract") for an extension of a public highway in Trinidad.

NIDCO engaged AECOM to be the project's Engineer. Under the Contract, OAS was entitled to issue interim payment certificates ("IPCs"), which would be approved and certified by AECOM within 28 days and paid within 56 days of AECOM's receipt of supporting documents by NIDCO.

Essentially, OAS issued – and AECOM certified – a number of IPCs which went unpaid by NIDCO, despite agreed extensions of the payment deadline. NIDCO attempted to reduce the scope of works under the Contract and to have negative adjustments applied to significantly diminish the outstanding balance owed to OAS. Subsequently, OAS entered into a judicially-approved arrangement with its creditors. AECOM also certified IPC 55 in the amount of approximately

negative USD$22Million. Although OAS continued to issue IPCs for work done, NIDCO became concerned about the lack of progress of the works. Consequently, NIDCO alleged – through AECOM – that OAS had abandoned the works (within the meaning of Clause 15.2(b) of the Contract) and did not have the capacity to meet its contractual obligations.

For its part, OAS contended that IPC 55 was invalid because it related to prior events that had been expressly waived by the Parties and asserted a right to payment under several IPCs starting with IPC 50. NIDCO then purported to terminate the Contract based on Clause 15.2(b).

OAS submitted a Request for Arbitration based on the arbitration agreement in Clause 20 of the Contract and a three-member panel composed by John Fellas, Adam Constable KC and Andrew White KC (the "Tribunal"), established under the arbitration rules of the London Court of Arbitration, eventually rendered its award. The Tribunal found, among other things, that NIDCO had invalidly terminated the Contract on the basis of Clause 15.2(b), and alternatively under Clause 15.2(e) (which entitled NIDCO to terminate the Contract on the basis that OAS had become insolvent), and ordered NIDCO to pay OAS the sum of USD $126,365,899.30.

In challenging the award, NIDCO asserted that:

1. The Court had jurisdiction to review the Tribunal's decision despite the presence of a 'No Appeals' clause contained in the arbitration agreement between the parties;
2. The Tribunal made manifest errors of fact and law (including by wrongly finding that IPC 55 was retroactively invalidated because AECOM had no power under the Contract to issue IPC 55); and
3. The Tribunal's finding of fact that OAS's conduct was inconsistent with abandonment of the works under the Contract or an intention not to perform its obligations under the Contract was an error of law and/or fact or a conclusion which no reasonable tribunal could have reached.

Court's jurisdiction to hear the claim (the 'No Appeals' provision and the public policy rationale)

The Court endorsed the view that where parties chose to resolve their disputes via arbitration, it has long been recognized that the courts should respect that choice and recognise the arbitrator's findings of fact, assessment of evidence and formations of judgment, unless they can be shown to be unsupportable. [¶25]

In this regard, the Court found that courts had statutory authority to set aside awards under section 19 of the Arbitration Act, Chapter 5:01 ("Arbitration Act") where the arbitrator misconducted himself or the proceedings, or the award had been improperly procured [¶23] or under its inherent jurisdiction, if the award is (i) subject to an error on its face, (ii) wholly or in part in excess of jurisdiction, (iii) subject to a patent substantive defect, or (iv) subject to an admitted mistake. [¶24] That inherent jurisdiction had been placed on statutory footing in section 3 of the Arbitration Act, which stipulated that an arbitration agreement shall be irrevocable except by leave of the Court. [¶27]

However, the Court held that the power exercised by the court to set aside awards on the above bases was not an appellate power but part of the Court's supervisory jurisdiction. Accordingly, the "No Appeals" provision in the Contract effectively deprived the parties from seeking relief under the Court's supervisory jurisdiction and was, therefore, contrary to public policy.

In arriving at this conclusion, the public interest in the case played a significant role. The Court noted [¶34]:

> *"The factual matrix mandates that it is in public interest for the Court to exercise its supervisory jurisdiction. The effect and impact of the Award is not limited to the insular rights of the named parties but extends to every citizen of this Republic as the Tribunal's Award, if upheld, would have to be borne by the public purse. On the other hand there are many local businesses and suppliers who provided materials and services to OAS and who are still awaiting payment. In the circumstances the No Appeals Provision must be viewed as being contrary to public policy and same cannot be upheld. The Court as the guardian of the Constitution must always protect the public interest and uphold the rule of law. Consequently, this Court will not arbitrarily divest itself of its jurisdiction and shall methodically exercise its discretion so as to ascertain whether or not the Award should be set aside."*

Merits of setting aside

In reviewing the merits of the award, the Court was guided by the principle that judicial intervention should be cautiously exercised, and that awards must be read in a manner that is reasonable, practical and consistent with commercial viability. Consequently, the Court found that decisions to set aside an award should primarily be limited to a circumstance where there is an error of law on the face of the award. [¶60]

Further, the Court was of the view that where the error of law occurred on the face of the award, the court must then consider whether the erroneous decision was specifically referred to the arbitrator and, if so, then it should exercise heightened caution. [¶64] However, the Court found that it should intervene where the decision wasn't merely erroneous but was premised upon fundamentally flawed and/or incorrect settled principles of law. [¶65]

Applying these guiding principles, the Court determined that the Tribunal failed to act consistently with settled legal principles concerning the binding nature of AECOM's certifications of IPCs and AECOM's ability to make provisional determinations based on its interpretation of the Contract. [¶¶66-72] Moreover, the Court found that the Tribunal neglected to properly explain how it evaluated and applied the relevant law [¶72], and that the Tribunal's decision to declare IPC 55 as void *ab initio* was apparently not anchored in law, with no authority being cited in support of the decision to retroactively invalidate IPC 55. [¶79]

In addition, the court held that no reasonable tribunal considering the evidence before it that OAS had (i) removed substantial resources from the work site, sold equipment and issued IPCs for nil value and (ii) entered into arrangements with its creditors, would have found that (as the Tribunal did) that NIDCO was not entitled to rely on these events as the bases for terminating the Contract under Clauses Clause 15.2(b), and alternatively under Clause 15.2(e) (which entitled NIDCO to terminate the Contract on the basis that OAS had abandoned the works and for OAS's insolvency, respectively). Further, the Tribunal failed to explain how the evidence adduced by OAS reflected OAS's capacity to perform its contractual obligations.

Conclusion

The court effectively found the analysis of the Tribunal to be manifestly deficient, and was liberal in its criticism of the manner in which the Tribunal arrived at its decision, particularly given the financial burden to be borne by the citizens of Trinidad & Tobago. Since OAS has appealed the decision, it remains to be seen whether the Trinidad courts will endorse this particular exercise of supervisory jurisdiction, or allow the award to stand.

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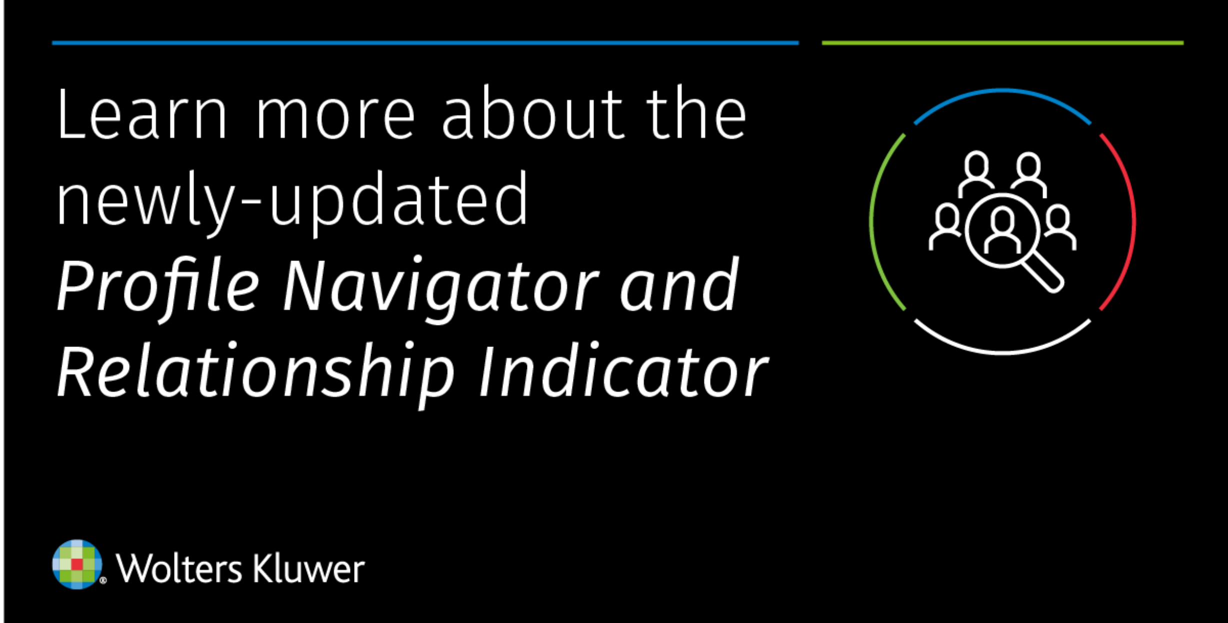

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