THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

BRITISH VIRGIN ISLANDS

CLAIM NO. BVIHC (COM) 235 of 2013

BETWEEN:

BELPORT DEVELOPMENT LIMITED

Claimant/Respondent

and

CHIMICHANGA CORPORATION

Defendant/Applicant

Appearances: Mr Brian Doctor QC for the Applicant, Chimichanga Corporation
Mrs Penelope Madden for the Respondent, Belport Development Limited

JUDGMENT

[2014: 22 January; 6 February]

(Arbitration Act 1976, ss 36(2)(a) and 36(3) – whether fact that party unable to cross examine witness means that he has been unable to make his case – whether reliance by tribunal on findings in an anonymous valuation report the makers of which have not been called to be treated as reliance by tribunal upon witness evidence)

[1] **Bannister J [Ag]:** This is an application by the Defendant, Chimichanga Corporation, a Virgin Islands company ('Chimichanga'), to set aside an order obtained *ex parte* on 28 August 2013 by the Claimant, Belport Development Limited, a company organized under the laws of the Cayman Islands ('BDL'), giving BDL leave to enforce in this jurisdiction a final award obtained against Chimichanga by BDL on 19 June 2013 in an ICC arbitration.

Background

[2] The arbitration concerned a joint venture between BDL and Chimichanga for the development of a container terminal on the Sea of Marmara. The owner of the terminal

itself is a Turkish company called, for short, Belde.[1] Belde had a concession with the National Land Office of the Turkish Finance Ministry, which extended to 2027 and which would permit development on Belde's land (and other land to be reclaimed) of the first phase of the planned development ('the concession'). The shares in Belde were held as to 95% by Belport Holdings SARL, a company organized under the law of Luxembourg, ('Belport') and as to 5% by the local municipality. The Belport shares were held equally by two Turkish groups, one of which was the group of which Chimichanga is part. In early 2007 certain hedge funds, collectively referred to as 'Ashmore,' entered into arrangements with the then holders of the Belport shares, the upshot of which was that Ashmore came to own 50% of Belport and Chimichanga the remaining 50%. The result was that Ashmore and Chimichanga each had a 47.5% stake in Belde, the remaining 5% being retained by the municipality. A shareholders agreement ('the SHA') was entered into between Ashmore and Chimichanga on 16 January 2007. In June 2009 Ashmore transferred its 47.5% interest in Belport to BDL, which is wholly owned by Ashmore.

[3] The parties fell out and Ashmore/BDL discovered, on 1 April 2010, that Chimichanga had engineered the misappropriation of Belport's shares in Belde. In a partial award on liability, handed down on 13 December 2012, the arbitral tribunal ('the Tribunal') found Chimichanga's conduct to have been a breach of the SHA. In its final award, handed down on 19 June 2013, the Tribunal awarded BDL compensation of US$60.5 million for the loss of the value of its stake in the joint venture, together with a substantial amount by way of costs. For simplicity's sake, I shall refer to the final award as 'the award.' It remains wholly unsatisfied.

[4] The Tribunal's constitution was of great distinction. Its Chairman was the Honourable Marc Lalonde PC, OC, QC. The two other members were Sir Simon Tuckey, a former Lord Justice of Appeal in England and Wales, and Mr Gary Born, author of a well known work on arbitration. The issues in the arbitration were governed by the law of the SHA, which was the law of England, but the seat of the arbitration was Geneva, so that its procedure was governed by the law of Switzerland. There has been no challenge to the award by Chimichanga before the Swiss Supreme Court.

[5] As was to be expected, the hearing on quantum was dominated by the evidence of the experts[2] put forward by the parties on the question of valuation of BDL's interest in the venture. Comprehensive Procedural Orders were made by the Tribunal providing for the taking of that evidence. BDL's first Experts' Reports included a report by its share valuation expert, Mr Manish Gupta, Head of Infrastructure Advisory at Ernst & Young for EMEIA Region ('Mr Gupta'). Mr Gupta's first report was based upon BDL's initial contention that damages should be assessed, not at the date when it discovered the loss

[1] Belde Liman Isetmeleri ve Depoculuk Anonim Sirketi

[2] those experts included experts on matters other than the valuation of shares

(1 April 2010), but so as to include any increase in the value of BDL's interest resulting from events between that date and the date of the hearing, which BDL took to be 15 June 2012.[3] Mr Gupta's valuation, in his first report, of BDL's interest at June 2012 was US$160.8 million.

[6] By 28 August 2012 Chimichanga had discovered, from BDL's disclosure, that Ashmore[4] had maintained what it referred to as a Pricing Methodology Committee ('the Committee'). Minutes of its meetings referred to various third party valuations of Belde which had been provided to the Committee. On 28 August 2012 Chimichanga wrote to BDL asking for disclosure of those documents, which was refused. On 17 September 2012 the Tribunal ordered disclosure of the valuations referred to in minutes of meetings of the Committee held between April 2009 and 22 April 2012. Because of concerns about confidentiality expressed by BDL, the valuations were allowed to be redacted to conceal the identity of the valuers. All that was known was that they had been composed by one or more of 'the large international accounting firms.'

[7] In ordering disclosure of these valuations, so redacted, the Tribunal further ordered that they were for the eyes of Chimichanga's lawyers and valuation and port experts only. They were not to be shown to the client or to the officers of the client. Finally, I should mention that permission was sought by Chimichanga, and given, for its valuation expert, Mr Michael Pilgrem, of FTI Consulting LLP ('Mr Pilgrem'), to quote from the third party valuations in his own report and to discuss his reports, containing any such quotations, with his client and its officers. But neither Chimichanga nor its officers was permitted to read any of the third party valuations themselves. One of the disclosed valuations had been given to AIML on 18 March 2010, valuing BDL's interest in Belde as at 1 March 2010 ('the 18 March 2010 valuation').

[8] In accordance with Procedural Order, No.6, on 5 October 2013 Mr Pilgrem produced a report responsive to that of Mr Gupta, giving his valuation of BDL's interest at June 2012 as either negative (on a development basis) or, at best, US$6.5 million[5] (on a break up basis). In that report Mr Pilgrem commented upon and criticized certain of the conclusions reached in certain of the third party valuation reports, including the 18 March 2010 valuation.

[9] There was a meeting between the two share valuation experts on 15 October 2012 and following that meeting they made a Joint Statement of Experts upon Quantum. Pursuant to Procedural Order No 6, Reply Reports were exchanged simultaneously in November

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[3] the date when BDL's first Experts' Reports were submitted

[4] the actual entity concerned was called Ashmore Investment Management Limited ('AIML')

[5] 47.5% of US$13.7 million. Although the Tribunal referred to Belport's interest on a break up basis as being US$13.7 million, my understanding is that that was Mr Pilgrem's estimate of the break up value of the development as a whole, of which Belport's share would have been 47.5%. It does not matter either way for present purposes

2012. Mr Gupta's Reply Report moved BDL's preferred reference date for the assessment of damages from June 2012 to 1 April 2010. Adoption of this date had significant evidential advantage for BDL, since it excluded from consideration certain post-1 April 2010 events which on any footing had a significantly depressive effect on the valuation of BDL's interest in the project.

[10] Mr Pilgrem's Reply Report stayed with the June 2012 valuation date.

[11] In its award the Tribunal held that the appropriate date at which to take the valuation was 1 April 2010 and that BDL's switch from a valuation date of June 2012 to a valuation date of 1 April 2010 in mid-stream, as it were, had not resulted in unfairness to Chimichanga. The Tribunal noted that Chimichanga had made use of the post-hearing period in order to challenge valuing BDL's interest by reference to the 1 April 2010 date. It is clear that it was a deliberate decision on the part of Chimichanga not to prepare its own report on a valuation as at 1 April 2010, despite the fact that the Tribunal had given a clear indication that it considered an April 2010 valuation date as one of the possible reference dates and that the Tribunal had canvassed the 18 March 2010 valuation during the course of Mr Gupta's evidence.

[12] After the hearing Mr Gupta submitted a third valuation, again directed at a valuation date of 1 April 2010, valuing BDL's loss at US$143 million. Chimichanga's position remained that the project had only a negative or break up value as at June 2012. The differences between the two opposing valuations, as the Tribunal pointed out, turned to a very great extent on the differences in the assumptions used by the two experts in reaching their conclusions.

[13] Referring in its award to this wide discrepancy of opinion, the Tribunal declined to make a decision on quantum on the basis of the reports produced by the parties' experts. It said that it had

> *not accepted the valuations of either Mr Gupta or Mr Pilgrem . . . essentially because the Tribunal has not accepted the assumptions which they have been instructed or decided to make* (paragraph 157 of the award)

and instead decided that

> *it would be preferable to rely on a valuation arrived at by independent experts outside the context of the present dispute and before all the events subsequent to the discovery of the [breach]* (paragraph 134 of the award)

[14] The Tribunal went on to identify the 18 March 2010 valuation as fulfilling these criteria. This valuation, which I was shown, but of which no copy was left with me, gave an upper

and lower limit for the value of BDL's holding, with a mid-point of US$76.7 million (which, when added to the loss of a receivable, would give BDL's claim a mid-point value of US$91.1 million). In its award the Tribunal expressed the view that the methodology and assumptions of the 18 March 2010 valuation represented a fair basis for arriving at a proper valuation of the project as at 1 April 2010 and that it would correspond with BDL's 'legitimate expectation' of such value at that time – in particular, its expectation of the probability that the concession would be extended from 2027 to 2047. This was important because, in the view of the Tribunal, absent an extension to 2047, it would not have been economically viable to develop beyond the envisaged first stage of the project. During the hearing, Mr Gupta had expressed the view that a failure to obtain the extension, and thus to make it worth proceeding beyond the first phase, would require the value of the project to be reduced by a factor of 80%. The Tribunal pointed out that such a reduction, if applied to the mid-point valuation derived from the figures in the 18 March 2010 valuation, would reduce the value of Belport's share in the project from US$76.7 million to US$15.34 million. The Tribunal decided that the two possibilities (extension to 2047 and no extension to 2047) should be split down the middle, giving a figure of US$46 million as the value of BDL's 47.5% share in the project (or US$60.5 million together with the receivable). The latter figure, so arrived at, was the amount of the damages or compensation element of the award.

[15] I should add that the Tribunal drew comfort, in reaching this conclusion, from an email sent by an employee of AIML to one of his colleagues in September 2009, reporting that the view of the owner of Chimichanga was that the project was worth some US$150 million at that time and that that was the basis of the price which AIML was considering putting to a Turkish concern which, as I understand paragraph 153 of the award, was then expressing an interest in investing in the project. I should mention that in its partial award the Tribunal had found that BDL was managed or advised by AIML, so that (although I do not think that the Tribunal expressly found as much) it could properly be taken as representing BDL's directing mind and will.

[16] It is clear that the Tribunal had relied on the 18 March 2010 valuation over the protests of Chimichanga. Chimichanga had disputed the appropriateness of 1 April 2010 as a valuation reference date and complained that although Chimichanga's counsel and experts had been allowed to see the report, they had not been allowed to show it to their clients. Further, the models underlying the valuation had not been disclosed, and nor had the valuer's instructions or the purposes for which the report had been obtained. There were other objections which I do not need to mention, but each was dealt with by the Tribunal in the award, which decided that there was nothing in them.

[17] There is the additional feature that while Chimichanga had objected to reliance upon the part of the Tribunal on the 18 March 2010 valuation, it did not include among the reasons for its objection the fact that Chimichanga could not cross examine its author(s).

Chimichanga's objection to enforceability

[18] Mr Brian Doctor QC, who appeared for Chimichanga on this application, submits that the Tribunal's decision to rely upon the 18 March 2010 valuation as forming the basis for its award rendered Chimichanga unable to present its case. He says that the Procedural Orders pursuant to which the arbitration was conducted required expert witnesses to make themselves available for cross examination (unless excused) and that the Tribunal acted in breach of its own procedures and/or of the ICC Rules in relying upon the evidence of an anonymous and absent expert. He says that it is an obvious breach of the right of a party to defend himself if he is unable to cross examine a witness upon whose evidence a tribunal relies to the exclusion of the expert evidence actually adduced by the parties. The breach of natural justice is so serious, he says, that I have no alternative but to set aside the enforcement order.

[19] Alternatively, Mr Doctor submits that the denial of justice in this case means that to enforce the award would be contrary to the public policy of the Virgin Islands. Mr Doctor relied upon sections 36(2)(c) and 36(3) of the Arbitration Act 1976 ('section 36(2)(c)' and 'section 36(3)').

> 36. (2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves
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> ...
>
> (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case
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> ...
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> 36. (3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.

Discussion

[20] The question, therefore, is whether this mode of proceeding meant that Chimichanga was unable to present its case on quantum. At one level, of course, that is simply incorrect – Chimichanga's case was that the project should be valued as at June 2012 and that at that time it was worthless or less than worthless. It cannot be suggested that Chimichanga was unable to present that case. By 'presenting its case' Mr Doctor really means having the opportunity to challenge the other party's case or witnesses, or the evidence of any witness upon which a tribunal may base its conclusions.

[21] It does not seem to me that Chimichanga was deprived of the opportunity to challenge the evidence of a *witness*. Mr Doctor draws attention to the power, contained in Article 20(4) of the ICC Rules, for a tribunal to appoint its own expert. That power is hedged with the restriction that it may do that only after consulting the parties and only if the parties are permitted to question the tribunal's expert. What the Tribunal did in this case, he submits, was to drive a coach and four through the restrictions of Article 20(4) by relying upon the opinions of an expert (the anonymous author(s) of the 18 March 2010 valuation) selected by the Tribunal alone, without seeking the views of the parties upon its decision to do so and in circumstances where, unless the Tribunal reversed its original stance on anonymity, it was going to be impossible for any party wishing to do so to test the assumptions, methods and materials by reference to which the anonymous report had been assembled by cross examining its makers. Mr Doctor submits that the Tribunal was in effect calling its own expert witness but without ensuring, in compliance with Article 20(4) of the ICC Rules, that the expert was made available for cross examination by the parties, thus depriving them of the opportunity to challenge 'the case' made by the 18 March 2010 valuation The result, Mr Doctor submits, was that Chimichanga was unable to present its case on quantum.

[22] I can see what prompted this superficially attractive submission, but in my judgment it does not accurately describe the approach adopted by the Tribunal. The Tribunal was not introducing a new expert – or the equivalent of a new expert - by a side wind. It took the view that, out of all the evidence which it had admitted, a contemporaneous document was the most reliable starting point for arriving at the value of BDL's interest at the Tribunal's preferred reference date. What the Tribunal found significant, as I read the award, was, first, the unchallengeable fact that only a month before the reference point and before the dispute had arisen, AIML/BDL had been advised that the development was worth in the region of US$150 million.[6] Secondly, the fact, as found by the Tribunal, that AIML/BDL had taken the advice on board, shown by its having been recorded in the minutes[7] and by the other evidence upon which the Tribunal relied 'for comfort.' That was what the Tribunal was clearly referring to when it spoke of BDL's then 'legitimate expectations.'[8] The Tribunal went on to examine the methodology and assumptions upon which the advice rested and was satisfied that they were a fair basis for arriving at a proper valuation.[9] It was obviously entitled to that opinion, because it had been instructed at length on the applicable principles with special reference to the development with which the case was concerned, as to which Chimichanga had had the

[6] paragraph 136 of the award

[7] the Tribunal did not specifically mention in the 'Quantification of Damage' section of the award that the valuation had been minuted , but it was well aware of the fact and, in my judgment, must be taken to have had it in mind

[8] paragraphs 140 and 145 of the award

[9] paragraph 145 of the award

fullest opportunity to address the Tribunal. The Tribunal then adjusted the valuation for the risk factor surrounding the extension of the concession. The same point applies.

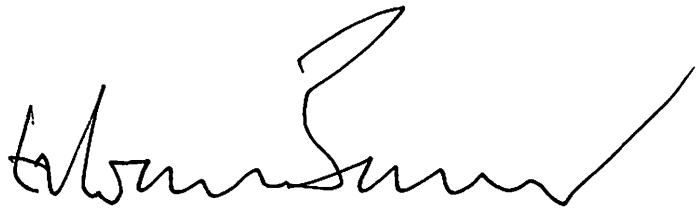
[23] Whether the Tribunal's reasoning was sound is a matter going to the merits of the award, something with which I am not concerned. Chimichanga had had the opportunity to argue that no reliance should be placed upon the 18 March 2010 valuation. The argument was rejected. The fallacy, if I may say so, in Chimichanga's argument on unfairness is to treat the Tribunal's reliance upon the 18 March 2010 valuation as the equivalent of taking evidence in private from its anonymous author(s). As can be seen from the above analysis, that was not the process, or anything like the process, by which the Tribunal reached its conclusion.

[24] In my judgment, therefore, Chimichanga was not deprived of an opportunity to challenge a witness. Nor, in my judgment, was there anything unfair in the manner in which the Tribunal reached its conclusion on quantum. All of the material relied upon by the Tribunal was fairly and squarely in evidence. There was no need for the Tribunal to disclose in advance either the reasoning which it applied to that evidence or the conclusions which it proposed to draw from it.[10] Chimichanga was not in any sense of the term unable to present its case.

[25] In these circumstances it seems to me that neither section 36(2)(c) nor section 36(3) is engaged

Conclusion

[26] This application must therefore be dismissed.



Commercial Court Judge
6 February 2014

[10] **Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd** [2002] 2 Lloyds Rep 681 at 687