

THE REPUBLIC OF TRINIDAD AND TOBAGO IN THE COURT OF APPEAL

Civil Appeal No. P018 of 2023

Claim No. CV2022-01832

IN THE MATTER OF THE ARBITRATION ACT CHAP. 5:01

And

IN THE MATTER OF AN ARBITRATION BETWEEN CONSTRUTORA OAS S.A. AND NATIONAL
INFRASTRUCTURE DEVELOPMENT COMPANY LIMITED, LCIA CASE NO. 163399 (THE
“ARBITRATION”) And IN THE MATTER OF THE DECISION OF JOHN FELLAS, ADAM CONSTABLE QC
AND ANDREW WHITE QC (THE “TRIBUNAL”)

Between

CONSTRUTORA OAS S.A.

Appellant/ Defendant

And

NATIONAL INFRASTRUCTURE DEVELOPMENT COMPANY LIMITED

Respondent/ Claimant

PANEL:

Nolan Bereaux JA

Mark Mohammed JA

Peter Rajkumar JA

APPEARANCES:

Mr. Rolston Nelson S.C, Ms. Ria Mohammed, Mr. Gregory Pantin, Mr. Miguel Vasquez

Ms. Anneliese Day K.C, Mr. Jason Mootoo S.C, Mr. Hugh Saunders, Ms. Marcelle Ferdinand

DATE OF DELIVERY: 24 April 2026

I have read the judgment of Rajkumar JA. I agree with it and I have nothing to add.

.....

Nolan Beraux

Justice of Appeal

I have read the judgment of Rajkumar JA. I also agree with it and I have nothing to add.

.....

Mark Mohammed

Justice of Appeal

JUDGMENT

Background

- [1] This appeal arises out of a decision by the Trial Judge to set aside an arbitral award. The arbitrators were appointed by the London Court of International Arbitration (LCIA) and comprised two Kings Counsel, one nominated by each party and a presiding arbitrator appointed by the LCIA (together referred to as “the panel” or “the Tribunal”). The partial award issued by the arbitrators comprised over two hundred pages. It was detailed and thorough, and the product of days of hearings and evidence from several witnesses, as well as examination of hundreds of documents, by a very experienced panel of arbitrators.
- [2] The law is clear that a court will pay regard to and respect the findings of fact of specialised arbitrators, and would only set aside or interfere with an award by such arbitrators in limited circumstances. That is because the parties have chosen the method of arbitration for the resolution of their disputes. The specialised nature of the subject matter is also better suited to determination by arbitrators and arbitration. In this case considerable time and effort was devoted to addressing the issues referred to them by the parties which might otherwise have overwhelmed the capacity of a court.
- [3] In those circumstances the threshold for interfering with the arbitrators’ award is high. The material considered by the arbitrators was formidable in its extent and complexity. The qualifications of the arbitrators were beyond dispute. The specialised nature of the subject matter was well within their competence. The setting aside of such an award therefore is one which a court should approach with trepidation, mindful of the above matters, and the time, effort, and considerable resources devoted to the production of the arbitral award (the Award).
- [4] The appellant reminded the court that the arbitrators had considerable familiarity with the subject matter of the arbitration, far more so than the Trial Judge who had a much more limited opportunity to consider the material. The court also has to be careful about examining a snapshot of the material out of context, and substituting its own findings for those of the arbitrators. The court does not sit in appeal of an arbitration award but is limited in its role of review to certain limited and defined circumstances.

[5] Nevertheless, as discussed hereunder, the court does have a limited jurisdiction to conduct such a review. That jurisdiction arises both under the local Arbitration Act 1939 Chapter 5:01 and under the court's inherent jurisdiction.

[6] Its jurisdiction to set aside an arbitration award arises in circumstances including the following:

- a) If there is **error on the face of the award**;
- b) If there is **no evidence upon which the arbitrators could have arrived at their findings**, and/or **the award is unsupportable in light of the evidence**; or
- c) If the award is irrational in the sense that **no reasonable arbitrator/arbitrators properly directing himself/their selves could have arrived at the conclusion** that he/they did, provided however that it is not a basis for setting aside an award if a court takes a different view of the evidence from the arbitrator.

[7] On 19 October 2015 OAS issued a notice under clause 16.1 of the Contract to AECOM of an intention to slow down or suspend the works due to non-payment on IPC 50. Payments also remained outstanding on Interim Payment Certificates (IPCs) 51, 52, 53, and 54. The Engineer, AECOM, issued an Interim Payment Certificate 55 on January 14, 2016 for the amount of US negative US\$22,192,265. NIDCO contended that this had the effect of negating NIDCO's indebtedness which then totalled US \$22,151,756.50 to OAS, under IPCs 50-54. OAS contended that IPC 55 was not issued in accordance with the Contract because it purported to value claims by NIDCO which had been waived by it under an addendum agreement dated September 4, 2015 (the Addendum agreement).

[8] NIDCO claimed to be entitled to terminate the Contract under clause 15.2 (b), (abandonment of the works), and issued a notice of termination pursuant to clause 15.2 (b) of the Contract on June 21, 2016. OAS and NIDCO each alleged that the other was in breach of contract, with OAS claiming that NIDCO was in default of its payment obligations and that OAS was therefore entitled to slow down or suspend the works until payment. The parties referred the issues to arbitration.

[9] The arbitrators concluded that OAS had been entitled to slow down or suspend works under clause 16.1 of the Contract and that NIDCO was in breach of contract, having

wrongfully purported to terminate under clauses 15.2 (b) and (e) of the Contract. They accepted the argument of OAS and concluded that IPC 55, which on its face had negated NIDCO's indebtedness under IPCs 50 to 54, was void ab initio because it was wrongfully issued by the Engineer when it failed to take into account the fact that the parties had executed the Addendum agreement under which NIDCO had waived all claims for matters pre-dating its execution.

Issues

- [10] i] Whether as a preliminary issue clause 20 of the arbitration agreement (the no appeal provision) was sufficient to displace the jurisdiction of the court to review the award;
- ii] Whether or not there exists an error on the face of the award in relation to findings which were critical to the decision of the Arbitration Panel (the Panel) including:
- a] Whether as a matter of law the Panel was entitled to find that interim payment certificate 55 was void **ab initio**, having been issued without regard to NIDCO's waiver of claims pre-dating the date of the Addendum agreement;
 - b] Whether as a matter of law clause 16 of the contract entitled OAS to reduce the amount of work performed to the extent that it did especially post January 14, 2016, subsequent to the issue of IPC55, if it did not have the ability to recommence the works immediately;
 - c] If not, whether NIDCO was entitled to issue a notice of termination under clause 15.2 (b) of the Contract on the basis of claimed abandonment of the works by OAS;
 - d] Whether NIDCO was entitled to also terminate the contract under clause 15.2 (e) or whether it was precluded from doing so by clause 5 of Addendum 2.

Conclusion

- [11] i] Clause 20 of the arbitration agreement (the no appeal provision) is null and void and contrary to public policy.
- ii] The Tribunal erred in law in finding that IPC 55 was void ab initio. IPC 55 was provisionally valid unless or until set aside.
- iii] The Tribunal erred in law in finding that OAS was entitled to continue to slow down or suspend works under Clause 16.1 of the Contract on the basis of non-payment by NIDCO after January 14, 2016, the date of IPC 55. That is because after that date NIDCO was not in default of any payment obligation, because IPC 55 remained provisionally valid.

iv] Further and in any event, the Tribunal erred in law in failing to appreciate that Clause 16.1 required that, despite its invocation, a contractor had to be in a position to recommence the works **immediately** and that there was **no evidential basis** for its finding that OAS was in a position to do so. The IPCs for minimal amounts and the renewal of the performance bonds could not provide such an evidential basis. The Tribunal therefore also erred in failing to construe properly or at all the word “**immediately**” in Clause 16.1. Whether or not IPC 55 was void ab initio Clause 16.1 could not therefore provide justification for the conduct of OAS or a defence to the notice of termination by NIDCO under Clause 15.2 (b) of the Contract.

v] Because Clause 16.1 could not be applicable to justify the conduct of OAS, NIDCO was entitled to issue its notice of termination under Clause 15.2 (b) of the Contract on the basis that it did, and it was not in breach of contract by doing so.

vi] The Tribunal could not be faulted in concluding that by clause 5 Addendum 2 NIDCO had waived its right to additionally terminate under Clause 15.2 (e) of the contract.

vii] In the circumstances, notwithstanding the above in relation Clause 15.2 (e), the appeal is dismissed and the orders of the Trial Judge are affirmed.

Orders

[12]

i] The appeal is dismissed.

ii] The orders of trial judge are affirmed. For the sake of clarification, it is confirmed that the remitting of the matter to the Tribunal is for reconsideration in accordance with the findings, conclusions, and reasoning of this court.

Analysis

The Inherent Jurisdiction

[13] The basis of the inherent jurisdiction to set aside an arbitration award is found at section 3 of the local 1939 Arbitration Act Chapter 5:01 which provides as follows:

3. An arbitration agreement, unless a contrary intention is expressed therein, shall be irrevocable except by leave of the Court and shall have the same effect in all respects as if it had been made an order of Court.

[14] Section 3 Chapter 5:01 is in similar terms to section 1 of the 1889 Arbitration Act UK, Chapter 49 which provides as follows:

1. A submission, unless contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or judge, and shall have the same effect in all respects as if it had been made an order of Court.

[15] It may be noted that the 1950 Arbitration Act UK repealed Section 1 of the 1889 Arbitration Act UK so that the equivalent of section 3 of the 1939 Trinidad and Tobago Act no longer applies in the UK. However, that legislative choice was not adopted in this jurisdiction. That legislative history and distinctive context therefore have to be borne in mind especially when considering cases from the UK subsequent to 1950.

[16] Further, section 3 of the 1939 Arbitration Act (TT) was reproduced in the subsequent 2023 Arbitration Act, Trinidad and Tobago by section 47 (5). Section 47 (5) provides as follows:

(5) An award has the same effect between the parties as a final and binding Court judgment.

[17] Although the 2023 Act is not applicable, because the events which occurred pre-dated that Act, it was suggested that the retention of section 47 (5) is an indication of the policy in Trinidad and Tobago with respect to the preservation of the court's inherent jurisdiction to set aside arbitral awards.

[18] The effect of section 3 Chapter 5:01 therefore is that the court's jurisdiction to supervise an arbitration award in the very limited circumstances identified above has been preserved in this jurisdiction, both under the 1939 Arbitration Act and even under the subsequent 2023 Arbitration Act.

[19] For the sake of completeness only it may be noted that the statutory jurisdiction arises under the Arbitration Act, Chap. 5:01 of the Laws of Trinidad and Tobago (the "Act") which provides (inter alia):

"18. (1) In all cases of reference to arbitration the Court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.

19. [...] (2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the Court may set the award aside."

No issue arises under section 19 (2) of the statutory jurisdiction in the instant case.

Section 66(2) of the 2023 Act provides:

“(2) Notwithstanding subsection (1), an arbitration commenced under the former Act and any Court proceedings relating to that arbitration may be continued, completed and enforced as if the former Act were still in force”.

Issue 1 – Preliminary issue

Whether clause 20.10 of the arbitration agreement was sufficient to displace the jurisdiction of the court to review the award

[20] Clause 20.10 of the arbitration agreement provides in so far as relevant the following:

- (ii) ***Unless otherwise agreed by the parties in writing ...the award of the Arbitrators shall be final and binding and not subject to appeal¹.***

[21] By its terms that clause seeks to preclude any appeals by providing that the award shall be final and binding. NIDCO contends that that clause cannot be construed as ousting the jurisdiction of the court. That is because i] a similar term is implied in all arbitration agreements in this jurisdiction but the courts have never found it to have displaced either the statutory or the inherent jurisdiction to supervise arbitration awards, ii] additionally, similar clauses in arbitration agreements have been treated at common law as being void and contrary to public policy because they seek to oust the jurisdiction of the courts.

The first schedule to the Arbitration Act 1939

[22] Section 7 of the first schedule is headed “PROVISIONS TO BE IMPLIED IN ARBITRATION AGREEMENTS” and is as follows:

7. The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.

[23] Notwithstanding the implication of such provision it is not in dispute that section 3 of the Arbitration Act 1939 has been construed as recognising a limited power by the High Court to supervise arbitration awards as discussed below, and that limited power has not been considered to be restricted by the term implied under the first schedule.

¹ Page 5 Award page 1846 record of appeal volume 2A

Whether clause 20.10 was contrary to public policy

[24] In this regard, the Trial Judge considered that the case of **Czarnikow v Roth and Ors**² was authority to ignore clause 20.10 on the basis that it offended against public policy in seeking to exclude the jurisdiction of the court. The appellant contends that **Czarkinow** was limited to its peculiar circumstances where the clause therein sought to exclude the ability of the arbitrators to state a case to the High Court. However, the dicta of two of the Judges in the UK Court of Appeal in that case expressly stated otherwise. Because the parties disagreed so significantly as to the scope and applicability of this decision it is necessary to set out the relevant judgments at some length in order to assess whether the basis of their reasoning was as limited as contended. See for example dicta of Bankes LJ (all emphasis added)

Bankes LJ held (at 484):

“The ground of objection to the rule is that as an agreement it ousts the jurisdiction of the Courts of law, and is consequently against public policy and void. The importance of maintaining in its integrity the rule of law in reference to public policy is in my opinion a matter of considerable importance at the present time. Powerful trade organizations are encouraging, if not compelling, their members and persons who enter into contracts with their members to agree, as far as they can lawfully do so, to abstain from submitting their disputes to the decision of a Court of law. The present case is a case in point. There have been others before the Courts. Among commercial men what are commonly called commercial arbitrations are undoubtedly and deservedly popular. That they will continue their present popularity I entertain no doubt, so long as the law retains sufficient hold over them to prevent and redress any injustice on the part of the arbitrator, and to secure that the law that is administered by an arbitrator is in substance the law of the land and not some homemade law of the particular arbitrator or the particular association. To release real and effective control over commercial arbitrations is to allow the arbitrator, or the Arbitration Tribunal, to be a law unto himself, or themselves, to give him or them a free hand to decide according to law or not according to law as he or they think fit, in other words to be outside the law. At present no individual or association is, so far as I am aware, outside the law except a trade union. To put such associations as the Refined Sugar Association in a similar position would in my opinion be against public policy. Unlimited power does not conduce to reasonableness of view or conduct.”

Bankes LJ went on to hold (at 485-486):

*“If therefore the agreement that **neither party shall apply to the Court to require the arbitrator to state a special case** is to stand, the only hold which the Court can have over the proceedings is, (1.) if the Arbitration Tribunal itself states a case for the*

² [1922] 2 KB 478

opinion of the Court, or states its award in the form of a special case, or (2.) if either party applies to set aside the award for misconduct on the part of the Arbitration Tribunal or upon the ground of error on the face of the award. To hold that under these circumstances the agreement not to apply for a special case is not to oust the jurisdiction of the Court within the meaning of the rule of law as I interpret it is in effect to decide that the Appeal Tribunal is entitled to be a law unto itself, and free to administer any law, or no law, as it pleases. I cannot but think that this is against public policy. I therefore hold that so much of r. 19 as provides that neither party shall apply for a special case, when incorporated into an agreement, is unenforceable and void."

In his concurring judgment, Scrutton LJ held (at 487-488):

*"I am of [the] opinion that r. 19 of the rules of the Refined Sugar Association in so far as it purports to prevent a party to an arbitration before the Association from exercising his right under the Arbitration Act to ask for a special case for the opinion of the Court on a question of law is contrary to public policy and so unenforceable. [...] Arbitrators, unless expressly otherwise authorized, have to apply the laws of England. When they are persons untrained in law, and especially when as in this case they allow persons trained in law to address them on legal points, there is every probability of their going wrong, and for that reason Parliament has provided in the Arbitration Act that, not only may they ask the Courts for guidance and the solution of their legal problems in special cases stated at their own instance, but that the Courts may require them, even if unwilling, to state cases for the opinion of the Court on the application of a party to the arbitration if the Courts think it proper. This is done in order that the Courts may insure the proper administration of the law by inferior tribunals. In my view to allow English citizens to agree to exclude this safeguard for the administration of the law is contrary to public policy. **There must be no Alsatia in England where the King's writ does not run.**"*

Scrutton LJ (at 490):

"I am also of opinion that the latter part of r. 19 is unenforceable, and that parties are entitled in spite of it to apply to the Court, and in a proper case obtain from it a special case on matters of law."

In his concurring judgment, Atkin LJ held (at 491):

*"I think this Court ought to determine the question whether the suggested agreement is valid. In my opinion it is not. **I think that it is still a principle of English law that an agreement to oust the jurisdiction of the Courts is invalid.** [...] The jurisdiction that is ousted in this case is not the common law jurisdiction of the Courts to give a remedy for breaches of contract, but the special statutory jurisdiction of the Court to intervene to compel arbitrators to submit a point of law for determination by the Courts. This appears to me to be a provision of paramount importance in the interests of the public. If it did not exist arbitration clauses making an award a condition precedent would leave lay arbitrators at liberty to adopt any principles of law they pleased. [...] **The policy of the law has given to the High Court large powers over inferior Courts for the very purpose of maintaining a uniform standard of justice and one uniform system of law.** Analogous powers have been possessed by the Court over arbitrators, and have been extended by the provisions of s. 19." See paragraph 45 of the respondent's submissions)*

[25] Although **Czarnikow** was decided on the basis of a provision ousting the jurisdiction to state a special case to the High Court and submit a point of law for determination by it, the basis of that decision and the dicta highlighted above (in particular of Bankes LJ and Atkin LJ), make it clear that its ambit extends to **any** provision that seeks to oust the jurisdiction of the court. It is clear from the judgments of each that the ratio of that case extended beyond merely the restrictions on the arbitrator's ability to state a case. Those dicta included their statements that the court's jurisdiction existed to ensure that the arbitrators administered the law of the land and not some home-made law. The dicta sufficiently emphasised the fact that **Czarkinow** permitted a court to ignore a clause which sought to oust its jurisdiction on the ground that it was contrary to public policy. Accordingly, the instant provision, which purports to do exactly this, would be unenforceable as being against public policy, if **Czarnikow** remains good law in this jurisdiction.

[26] The decision of **Czarnikow** was based on upon the equivalent of section 1 of the 1889 UK Arbitration Act. Notwithstanding the repeal in the UK of that Act **Czarnikow** remains applicable in this jurisdiction because the equivalent thereof in section 3 of the Arbitration Act of Trinidad and Tobago continues to apply both in Chapter 5:01 of the local Arbitration Act and in the subsequent 2023 Arbitration Act.

[27] In **ICS (Grenada) v NH International (Caribbean) Limited**³, Jamadar J as he then was recognised i] the applicability of **Czarnikow** and the court's supervisory jurisdiction, ii] the invalidity of any attempt to oust the jurisdiction of the court as being contrary to public policy, and iii] that any change to that public policy could only be effected by Parliament or a Superior Court, neither of which applied.

[28] Section 47 (5) of the 2023 Arbitration Act expressly provides that "An award has the same effect between the parties as a final and binding court judgment". By that provision the court's supervisory jurisdiction continues to be recognised. The local legislature in the 2023 Arbitration Act preserved section 3 of the 1939 Act and made the legislative choice to preserve the court's supervisory jurisdiction, whereas the opposite choice was made in

³ H.C.A. No. Cv. 1541 of 2002

the United Kingdom by its 1950 Arbitration Act⁴. Accordingly, the 2023 Arbitration Act, (although not applicable to the instant arbitration), did not represent any legislative choice, contrary to **Czarnikow**, to permit ouster of the court's jurisdiction. **Czarnikow** is UK Court of Appeal authority. It takes precedence over UK High Court authority and continues to be recognised as applicable law in this jurisdiction.

[29] Arguments that the principles in **Czarnikow** have been displaced by Trinidad and Tobago's accession to the New York Convention, or by Article 223 of the Revised Treaty of Chaguaramas are simply not persuasive or supportable on examination. Neither displace the applicability of local law or alter it in relation to ouster clauses.

[30] The principles in **Czarkinow** therefore remains applicable in this jurisdiction. To the extent that the Trial Judge referred to and applied it, his reasoning in this regard cannot be faulted. The trial judge was therefore correct in law to find that the no appeals provision was unenforceable, void and contrary to public policy. It was not available as a basis to prevent a challenge to the award on the basis of an error of law on its face or on the ground of irrationality.

The jurisdiction to set aside an arbitral award

[31] The jurisdiction to set aside or interfere with an arbitration award is set out in the undermentioned authorities. See for example **ICS (Grenada) v NH International (Caribbean) Limited**, succinctly set out at page 4 per Jamadar J as he then was as follows:

Power to Set Aside

The courts in Trinidad and Tobago have the power to set aside an award based on either a statutory and/or the inherent jurisdiction. Thus, under section 19(2) of the local Act [see, section 11(2) of the 1889 UK Act and section 15 of the 1934 UK Act] the court has a statutory jurisdiction to set aside an award where an arbitrator has misconducted himself or the proceedings or where an arbitration or award has been improperly procured.

*However, the court **also** has an inherent jurisdiction to set aside an award which was:*

- i. subject to an error on the face of the award;*
- ii. wholly or in part in excess of jurisdiction; or*
- iii. subject to a patent substantive defect.*

It would appear that this inherent jurisdiction could also be exercised where there was an admitted mistake.

⁴ (wherein it abolished section I of the 1889 UK Arbitration Act).

The inherent power of the court to set aside an award was given statutory recognition by section 3 of the local Act (section 1 of the 1889 UK act). The situation is well summarised in Commercial Arbitration by Mustill and Boyd (1989 ed.) at page 447, where the authors state:

As regards the inherent powers of the Court, section 1 of the 1889 Act provided that all submissions should, unless a contrary intention was expressed thereon, take effect as if they had been made an order of court. The effect was thus to bring virtually all references under the direct and continuous supervision of the Court, which would exercise powers by virtue of its own inherent light (sic) of control, quite distinct from the statutory powers to intervene by setting aside and remission.

Thus, all voluntary references to arbitration attracted the court's inherent powers of enforcement and supervision. The decision in Czarnikow v Roth (1922) 2 K.B. 478 is generally cited as an authority for the proposition that it is contrary to public policy for parties to attempt to oust the jurisdiction of the court, by purporting to contract out of same. Any such clause or term in an arbitration contract was often considered to be invalid. In England the statutory recognition of the court's supervisory power over all awards changed when the 1950 UK Act repealed, inter alia, section 1 of their 1889 Act.

Power to Remit

The courts in Trinidad and Tobago have the statutory jurisdiction to remit awards pursuant to section 18 of the local Act (see, section 10(1) UK). On the face if (sic) it the discretion appears unlimited, but through process of judicial interpretation this discretion has been circumscribed. In 1889, the Court of Appeal in England stated the four grounds upon which a matter could be remitted to an arbitrator for reconsideration. There (sic) are where: i. the award was bad on the face of it; ii. there was misconduct on the part of the arbitrator; iii. there had been an admitted mistake by the arbitrator; or iv. fresh evidence had been discovered after the making of the award.

[32] The court's inherent jurisdiction to supervise arbitration awards was also recognised in the case of **National Insurance Property Development Company Limited v NH International (Caribbean) Limited** CA No. 281/2008, where the observations of Jamadar J as he then was in **ICS (Grenada) v NH International (Caribbean) Limited Unreported, H.C.A. No. Cv. 1541 of 2002** at page 4 were cited with approval by the Honourable Beraux JA. See paragraph 39 as follows:

[39] As the judge stated at paragraph 72 of her judgment, the Courts of Trinidad and Tobago have both an inherent jurisdiction and a statutory jurisdiction to set aside an arbitral award. The statutory power to set aside (as set out in section 19(2) of the Act) arises where the arbitrator has misconducted himself or the proceedings, or, where an arbitration or an arbitration award, has been improperly procured. The court's inherent jurisdiction to set aside arises where: (i) there is an error on the face of the award (ii) the award is made in excess of jurisdiction, whether wholly or partly (iii) there is a patent substantive defect.

[33] That jurisdiction was further explained by the Board in **NH International v NIPDEC**⁵, at paragraphs 28, 29, 31 per Lord Neuberger. (All emphasis added)

28. The Arbitrator's conclusion in this connection was one of fact rather than of law. It can be said to be a finding of secondary fact or even the making of a judgment rather than a strict fact-finding exercise, but it is not a resolution of a dispute as to the law. In those circumstances, save (arguably) to the extent that it might be contended that there was simply no evidence on which he could make the finding (or reach the judgment) that he did, or that no reasonable arbitrator could have made that finding (or reached that judgment), it was simply not open to a court to interfere with, or set aside, his conclusions on such an issue.

29. Where parties choose to resolve their disputes through the medium of arbitration, it has long been well established that the courts should respect their choice and properly recognise that the arbitrator's findings of fact, assessments of evidence and formations of judgment should be respected, unless they can be shown to be unsupportable. In particular, the mere fact that a judge takes a different view, even one that is strongly held, from the arbitrator on such an issue is simply no basis for setting aside or varying the award. Of course, different considerations apply when it comes to issues of law, where courts are often more ready, in some jurisdictions much more ready, to step in.

*31. In his judgment in the Court of Appeal, with which Mendonça and Jamadar JJA agreed, Beraux JA relied on the fact that whether the evidence provided under clause 2.4 was "reasonable" was a matter of law. That is only true in the sense that **there would be an error of law** if the Arbitrator had reached a conclusion on this issue which was **unsupportable in the light of the evidence**, or if, which may well be the same thing, it was **irrational**. But, as already explained, such a contention cannot be maintained in this case: there plainly was evidence which justified the Arbitrator's conclusion. In effect, the Court of Appeal took the view that he had applied too high a standard when deciding what constituted "reasonable evidence", but **that approach involved an impermissible substitution of the court's judgment for that of the Arbitrator, in circumstances where the parties had mutually agreed to have the issue determined by an arbitrator.***

The Statutory Jurisdiction

[34] Sections 18 and 19 of the Arbitration Act provides as follows:

18. (1) In all cases of reference to arbitration the Court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire. (2) Where an award is remitted, the arbitrators or umpire shall, unless the order otherwise directs, make their award within three months after the date of the order.

19. (1) Where an arbitrator or umpire has misconducted himself or the proceedings, the Court may remove him, but before making any such order the arbitrator or umpire may, if the Court so directs, be given an opportunity of showing cause against such order.

⁵ [2015] UKPC 37

(2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the Court may set the award aside.

[35] Section 18 and 19 of the Arbitration Act Chapter 5:01 contained a recognition of the court's supervisory jurisdiction over arbitrations. Under clause 18 the court may remit matters to arbitrators for reconsideration. Under clause 19 the court may in circumstances where the arbitrator has misconducted himself, or the arbitration or award was improperly procured, even set it aside. That does not arise in this case.

Whether a specific or general reference was made to the Tribunal

[36] However, there is a limited category of circumstances where a court would not be entitled to review even matters of law. This would be the case where a limited or a specific reference is made to the Tribunal, and where the issue of law is what is specifically referred for determination by the arbitrator. The issue arises therefore whether this, the instant arbitration, could be construed as being such a limited reference.

[37] The terms of reference were not put before this court. However, the Tribunal itself, at paragraphs 4 to 7 of its partial award identified the issue that was referred to it. That issue was stated in general terms namely, *iv] whether or not NIDCO's termination of the contract was valid, v] OAS asserts that NIDCO breached the Contract including most significantly by wrongfully terminating the contract...., vi] NIDCO asserts the termination was valid...*⁶

[38] Although the issue of the validity of termination required examination of, inter alia, clauses 14, 15(2)b and 15(2)e, 16, and 20.10 of the contract, it also necessitated examination of the facts and circumstances surrounding the entire process which led to the termination of the contract.

[39] See also the judgment of the Honourable Bereaux JA in **NIPDEC v NH** (supra) at paragraphs 40 to 43, 47 wherein the applicability of this limited category was explained.

[40] As noted by Jamadar J in ICS:

"The inherent power of the court to set aside an award was given statutory recognition by section 3 of the local Act (section 1 of the 1889 UK act). The situation

⁶ Paragraphs 4-6, pages 1-2 of the award page 1842-1843 record of appeal

is well summarised in *Commercial Arbitration by Mustill and Boyd* (1989 ed.) at page 447, where the authors state: 'As regards the inherent powers of the Court, section 1 of the 1889 Act provided that all submissions should, unless a contrary intention was expressed thereon, take effect as if they had been made an order of court. The effect was thus to bring virtually all references under the direct and continuous supervision of the Court, which would exercise powers by virtue of its own inherent right of control, quite distinct from the statutory powers to intervene by setting aside and remission.'

Thus, all voluntary references to arbitration attracted the court's inherent powers of enforcement and supervision".

The court's discretion to remit or aside (sic) an arbitral award is also circumscribed by the nature of the dispute. The court will refuse to remit or to set aside the award if what is referred is a specific question of factor (sic) or some principle of construction for the determination of the arbitrator. This is so even if the error is clear on the face of the award. Neither will the award be remitted or set aside because the court disagrees with the conclusion to which the arbitrator came, unless of course it is clear on the face of the award that the arbitrator has proceeded illegally. Two leading (sic) cases fall to be considered here. *Kelantan Government v. Duff Development Co.* [1923] A.C. 395 and *F.R. Absalom Ltd. v. Great Western (London) Garden Village Society* [1973] A.C. 592.

[41] In *Kelantan*, ...

The reference, therefore, was a reference as to construction.

If this be so. I think it follows that, unless it appears on the face of the award that the arbitrator has proceeded on principles which were wrong in law, his conclusions as to the construction of the deed must be accepted. No doubt an award may be set aside for an error of law appearing on the face of it; and no doubt a question of construction is (generally speaking) a question of law. But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the Court only because the Court would itself have come to a different conclusion. If it appears by the award that the arbitrator has proceeded illegally - for instance, that he has decided on evidence which in law was not admissible or on principles of construction which the law does not countenance, then there is error in law which may be ground for setting aside the award; but the mere dissent of the Court from the arbitrator's conclusion on construction is not enough for that purpose."

At page 410 he said:

"... To the same effect are the decisions of this House in *Holmes Oil Co. v. Pumpherson Oil Co.* (4) and of the Judicial Committee of the Privy Council in *Attorney-General for Manitoba v. Kelly* (5); and in *In re King and Duveen* (6) Channell J. stated the rule concisely as follows: "It is no doubt a well-established principle of law that if a mistake of law appears on the face of the award of an arbitrator, that makes the award bad, and it can be set aside ..., but it is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its

being set aside. Otherwise it would be futile ever to submit a question of law to an arbitrator.”

[42] Lord Parmoor at page 417 put the issue the other way: **“Where a question of law has not specifically been referred to an umpire, but is material in the decision of matters which have been referred to him, and he makes a mistake, apparent on the face of the award, an award can be set aside on the ground that it contains an error of law apparent on the face of the award”**

*Whether, however, a question of law has been specifically submitted to arbitration, falls in each case to be determined on the terms of the particular submission. If the Court, before which the award is sought to be impeached, comes to the conclusion that the alleged error in law, even if it can be maintained, arises in the decision of **a question of law directly submitted to the arbitrator for his decision** then the principle stated by Channell J. in *In re King and Duveen (2)* applies, and the parties having chosen their tribunal, ... are not in a position to question the award, or to claim to set it aside.”*

[43] *In F.R. Absalom Ltd. v. Great Western (London) Garden Village Society [1993] AC 592..*

[47] *It was held that the construction of clause 30 had not been specifically left to the arbitrator and the award should be set aside for error of law appearing on the face of it because he erred in his construction of clause 30. Lord Russell of Killowen in his speech at page 607 stated:*

*“My Lords, it is, I think, **essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision.** I am not sure that the Court of Appeal has done so. The authorities make a clear distinction between these two cases, and, as they appear to me, they decide that **in the former case the Court can interfere if and when any error of law appears on the face of the award, but that in the latter case no such interference is possible** upon the ground that it so appears that the decision upon the question of law is an erroneous one.”*

*At page 608 he said: “The same distinction appears in the judgment of the Privy Council in the case of *Attorney-General for Manitoba v. Kelly (3)*, in which the following passage occurs: “Where a question of law has not specifically been referred to an umpire, but is material in the decision of matters which have been referred to him, and he makes a mistake, apparent on the face of the award, an award can be set aside on the ground that it contains an error of law apparent on the face of the award.” (All emphasis added)*

[40] In **FR Absalom v Great Western**⁷ at pages 604 to 605 per Lord Russell similarly a] the terms of reference were not available, but b] were ascertainable from the recitals in the award, and c] the reference was to determine disputes with regard to the issue of certificates and

⁷ [1933] A.C. 592

the validity of notices under a term of the contract. This required consideration incidentally as to the applicability of that provision in a factual context to be determined by the arbitrator.

[41] In those circumstances it cannot be concluded that there was any such limited reference in the instant case. Although the Panel had to consider various clauses of the Contract incidental to its determination it was not asked to construe those clauses in a vacuum, but rather to consider their interpretation and application in the context of the facts and evidence that were also put before it.

[42] The jurisdiction therefore exists to examine an award to determine whether, in the very limited circumstances set out above, the high threshold for setting aside an arbitrator's award has been demonstrated by the respondent.

Issue 2 - Whether error on the face of the award

[43] NIDCO's challenge is based primarily upon its assertion that there are patent and obvious errors of law on the face of the award, and that aspects of the award itself are irrational in that no reasonable arbitrators properly directing themselves could have arrived at their conclusions.

[44] The Trial Judge considered that there were grounds for reviewing the award on the basis that:

- a. there was error on the face of the award;
- b. aspects of the award were irrational; and
- c. certain findings of the arbitrators were not based upon **any** evidence.

[45] It is necessary therefore to examine the Panel's reasoning and conclusions on the following issues to ascertain whether they demonstrated any error on the face of the record **sufficient in law to require it to be remitted to them.**

Issue 2 (a) - Whether the Panel was entitled to find that IPC 55 was void ab initio

[46] One of the most critical of its decisions was its conclusion that Interim Payment Certificate 55 (IPC55) dated 14 January 2016 which certified a negative balance of US \$22,192,265 was void **ab initio**.

[47] At paragraph 310 of its award, the Tribunal reasoned⁸:

*310. The Tribunal considers that NIDCO is correct to contend that the Contract contained a regime for the certification and payment of instalments of the Contract Price. By that regime, the Parties agreed that interim payments were to be ascertained and certified by the Engineer in accordance with Clause 14.3. Clause 14.7 of the Contract provides that NIDCO was obliged to pay sums that were certified by the Engineer in interim certificates, subject to any right of set off under Clause 2.5. **The Tribunal accepts NIDCO's submission that, on a proper interpretation of the Contract, interim payment certificates issued by the Engineer in accordance with the Contract are provisionally binding on the Parties.** The binding nature of interim payment certificates is subject to the power of any Tribunal appointed in accordance with Clause 20.10 of the Contract to open up, review and revise any such certificate. Consequently, **unless the Tribunal is satisfied that IPC 55 is invalid, the Parties have agreed that it is binding unless, or until, it is revised by a Tribunal appointed under Clause 20.10.** (Emphasis added)*

At paragraph 310 of its award the Tribunal therefore recognised that “...unless the Tribunal is satisfied that IPC55 is invalid, the parties have agreed that it is binding unless, or until, it is revised by a Tribunal under clause 20.10”.

[48] In the award at paragraph 319 it recognised that certified IPCs were subject to correction or modification in subsequent IPCs and that the Engineer AECOM was empowered to issue negative IPCs⁹.

[49] See also paragraph 322 of the award:

“...subject to the qualification that AECOM was not entitled to make corrections or modifications to previous certificates that had the effect of making adjustments for a claim which had been waived by Addendum 2, the Tribunal accepts NIDCO's submission that AECOM had a wide general power under clause 14.6 to correct or modify any previous Payment Certificate”.¹⁰

⁸ Volume 2A Record of Appeal page 1942, page 101 of the Award

⁹ Page 107 of the award, paragraph 319 sub paragraph 4, page 1948 record of appeal

¹⁰ Page 108 of the award, page 1949 record of appeal volume 2A

[50] The Tribunal came to this conclusion after considering inter alia NIDCO's submission that "the general power for a FIDIC engineer to issue a negative IPC is well established and recognised in leading textbooks as well as dicta in the case of **Rupert Morgan Building Services Limited v Jervis [2004] 1 W.L.R 1867** at [8] per Jacob LJ¹¹.

[51] NIDCO's submission therefore was accepted, (subject to the qualification referred to), that AECOM had a general power to issue a negative IPC where it considered that earlier work had been overvalued, and that in principle, subject to the impact of Addendum 2, a determination made pursuant to subclause 14.6 (a) would not render an IPC invalid if it were subsequently established that AECOM was incorrect in its assessment in the quantification of the deduction¹².

[52] OAS contended however that that IPC 55 which certified that NIDCO was owed by OAS US\$22,192,265, was for an amount which had been waived by virtue of the parties entering into an Addendum agreement on September 4, 2015 and that AECOM's certification of IPC 55 was therefore not in accordance with the Contract.

[53] Clause 5 Addendum 2 of the agreement is set out hereunder:

"The Parties agree to release and discharge each other from all manner of action and actions, cause and causes of actions, claims, debts, sums of money, interest, accounts, costs, extensions of time, damages, liabilities, proceedings, or suits both at law and in equity of whatsoever kind or nature arising (both present and future) from any events that occurred on or before the date of the signing of this Contract Addendum, whether notified or not and whether or not known to the Parties, including in relation to matters which could not with reasonable diligence have been discovered prior to the date of signing of this Contract Addendum. The consideration included in this Contract Addendum is in full and final payment for and settlement of all such matters. For the avoidance of doubt, nothing in the foregoing shall release the Contractor from its liability under the Contract for defective designs or defective works carried out before the date of the signing of this Contract Addendum, but which only becomes apparent after said date, or of its obligation for the repayment of the Advance Payment and payments made under the Letter of Intent."

[54] OAS asserted and NIDCO accepted that i) under the Addendum agreement NIDCO had waived any claims which arose on or before the date of the Addendum agreement, ii) If

¹¹ Paragraph 316 of the award page 104, record of appeal page 1945

¹² Paragraph 319 (ii) page 1946 record of appeal

the Engineer, AECOM, had taken into account the Addendum agreement Interim Payment Certificate 55 would not have been issued. OAS asserted therefore that IPC 55 was issued in error because it failed to take into account the Addendum agreement and was therefore not issued in accordance with the Contract.

[55] IPC 55 was certified by AECOM on January 14, 2016 in the sum of negative US \$22,192,265.16. It extinguished liabilities for outstanding sums under IPC 50, IPC 51, IPC 52, IPC 53, and IPC 54 which totalled US\$22,151,756.50. NIDCO accepts that the deductions in IPC 55 were wrongly certified because they related to matters which were settled by Clause 5 Addendum 2.

[56] NIDCO also does not dispute that clause 5 negated its right to terminate under clause 15.2 (e) of the contract in respect of events **prior to** the date of that agreement.

[57] NIDCO further accepts that OAS issued a valid notice under clause 16.1 to reduce the rate of works based upon amounts outstanding under IPC 50. However, NIDCO contends that as a matter of law the Tribunal was not entitled to find that IPC 55, though wrongly issued, was void ab initio or that it was not issued in accordance with the Contract¹³ and this was an error on the face of the award.

[58] If so it would be a significant error on the face of the award, because it was the basis upon which NIDCO was found to have been not entitled to issue a notice of termination under clause 15.2 (b) of the contract and to therefore have been guilty of a repudiatory breach, as well as the basis upon which OAS was found entitled to exercise its right under clause 16.1 to slow down or suspend work after January 14, 2016.

[59] If IPC 55 were not void **ab initio**, then as at the date of its issue NIDCO would not have been in breach under the contract for failing to pay sums outstanding under IPCs 50 to 54. The respondent contends that even if IPC 55 were erroneous it was to be treated as valid until set aside. It contends that the authorities demonstrate that that is the position in law.

¹³ Paragraph 326

[60] The Tribunal's reasoning is found, inter alia, at paragraph 327 of the award. The Tribunal also ascribed significance to the fact that the Contract did not expressly provide that AECOM's decision as to whether a deduction or correction is permitted is itself provisionally binding. Further, it considered that AECOM had no power because of clause 5 of addendum 2 to take into account matters which had been waived thereunder. The parties could not be taken to have agreed to be bound by any resulting certificate provisionally or finally where AECOM had no such power and the Contract did not expressly so provide, when the parties could have done so.¹⁴ See paragraph 327 hereunder:

*327.The suggestion made by NIDCO is that the process of valuation required AECOM to exercise a judgement as to whether a deduction or adjustment under Clause 14.6 was permissible and whether a matter was mutually waived by Clause 5. If it was mistaken in that judgement then that is a matter that does not affect the provisionally binding nature of IPC 55 but may be reviewed under the dispute resolution procedure contained in Clause 20 of the Contract. The Tribunal considers that the problem with this submission is that it assumes that the question of whether or not a relevant deduction or correction is permitted by Clause 14.6 and whether the deduction relates to a matter which has been waived under Clause 5 of Addendum 2 is a matter for AECOM to decide under the Contract. **Whether this assumption is correct depends upon the proper construction of the Contract.** As a matter of general principle it would have been possible for the Contract to provide that AECOM's decision as to whether a deduction or correction is permitted is itself provisionally (or for that matter finally) binding. In this case the Contract did not so provide. Instead, Clause 14.6 sets out AECOM's power to make deductions from, and adjustments to, Interim Payment Certificates and Clause 5 of Addendum 2 provided for a mutual waiver of claims before 4 September 2014. **The relevant parameters of the AECOM's powers were therefore defined by the Contract.** NIDCO is correct to say AECOM had to exercise a legal judgement as to whether a deduction or adjustment was contractually permissible. However, the fact that such a judgement was required does not mean that the Parties must be taken to have agreed to be bound by any resulting decision or certificate (whether provisionally or finally) where AECOM had no such power. It would have been open to the Parties to have made such an agreement. However, the Contract did not provide that a decision that a deduction or adjustment should be made was binding in all circumstances, including those in which the deduction was not permitted by the parties' agreement. It is improbable that the Parties must be taken to have impliedly agreed that **a decision that AECOM had no power to make was provisionally binding.** In the Tribunal's opinion, if AECOM made deductions or adjustments that are not permitted by Clause 14.6 and/or failed to take into account claims that had been mutually waived under Clause 5 of Addendum 2, then the resulting deduction (and to that extent the IPC) would be invalid on the basis that AECOM had departed from their instructions in a material respect and therefore not performed the task that they were appointed to perform. (Emphasis added)*

¹⁴ See paragraph 327 page 111 of the award - record of appeal 2A page 1952

[61] The arbitrators' conclusion that IPC 55 was void ab initio was based upon acceptance of the position that it had not been issued in accordance with the Contract since it would not have been issued had the arbitrators taken clause 5 Addendum 2 into account.

[62] The Tribunal therefore recognised that the resolution of the issue of the validity of IPC 55 depended upon the proper construction of the Contract (a matter of law). The contract did make provision for the mechanism by which an IPC can be corrected. The Tribunal recognised¹⁵ that the authorities cited including Hudson's Building and Engineering Contracts 13th Ed, paragraph 4-049¹⁶ as well as Campbell v Edwards¹⁷ all establish that the appropriate mechanism for the correction of an IPC is by a subsequent IPC. Overpayment under an IPC can be corrected by a reduced payment under a subsequent IPC. An underpayment under an IPC can similarly be corrected by increased payment under a subsequent IPC. The issue is whether the panel was wrong in law to declare IPC 55 **void ab initio**, when although issued on an erroneous basis, (not having taken Addendum 2 into consideration), it was still correctable under the instant contract by a subsequent IPC. The Tribunal concluded at paragraph 322 as follows:

"...subject to the qualification that AECOM was not entitled to make corrections or modifications to previous certificates that had the effect of making adjustments for a claim which had been waived by Addendum 2, the Tribunal accepts NIDCO's submission that AECOM had a wide general power under clause 14.6 to correct or modify any previous Payment Certificate".

[63] The Tribunal failed to appreciate the inconsistency between its conclusion that IPC 55 was not issued in accordance with the contract and its recognition that the Contract provided the mechanism for correction of an IPC and that an erroneous certificate was still, in law, provisionally binding. The fact that IPC 55 was in respect of claims which had been waived by clause 5 Addendum 2 was, under the Contract, correctable by the mechanism provided thereunder as recognised by the arbitrators. Their conclusion that that certification was not in accordance with the Contract, because it was in respect of claims which had been waived, was not supported by the applicable authorities. See for example, **Beaufort Developments (NI) Ltd v Gilbert-Ash (NI) Ltd** [1999] 1 A.C 266 at 275H-276B, Lord Hoffmann stated:

¹⁵ Paragraph 319 sub paragraph 4 page 107 of the Award.

¹⁶ See paragraph 306

¹⁷ See paragraph 304

*“If the certificates are not conclusive, what purpose do they serve? If one considers the **practicalities** of the construction of a building or other works, it seems to me that parties could reasonably have intended that they should have what might be called a **provisional validity**. Construction contracts may involve substantial work and expenditure over a lengthy period. It is important to have machinery by which the rights and duties of the parties at any given moment can be at least **provisionally determined** with some precision. This machinery is provided by architect’s certificates. If they are not challenged as **inconsistent with the contractual terms** which the parties have agreed, they will determine such matters as when interim payments are due or completion must take place. **This is something which the parties need to know**. No doubt in most cases there will be no challenge.”¹⁸ (All emphasis added)*

[64] See also the principles conveniently summarised by the Respondent at paragraph 83 onwards of its submissions as follows:

(All emphasis added)

*83. The Learned Judge set out the relevant principles in the Judgment at [49]-[59].¹³⁴ The general rule is that **an engineer’s certificate cannot be invalidated simply on the basis that is mistaken or incorrect**. See the following:*

*83.1. Keating on Construction Contracts (12th ed.) at 5-059: “A certificate of the architect intended to be binding and conclusive **cannot be impeached for mere negligence, or mere mistake or mere idleness on the part of the architect**.”*

*83.2. Hudson’s Building and Engineering Contracts (14th ed.) at 4-049: “A certificate in proper form, issued at the correct time, will not be invalidated if the Certifier has arrived at a valuation which is later proved to be incorrect in certain respects. The parties have agreed that either temporarily or permanently the Certifier’s judgment as to the value is the one which will be used under the contract, and they are normally taken to accept that there will be errors which will **either be left uncorrected until a later review or will not be corrected at all**.” (This was cited by the Tribunal at paragraph 306 of its award).*

*83.3. Hudson at 4-068: “In relation to significant and material matters, if there is an error in the certificate which is neither the result of interference by the Employer, nor of the Certifier’s decision to rely on extraneous or inappropriate considerations, or to apply the wrong test, or of any other **unfairness but simply the result of human error**, then **it cannot invalidate the certificate**. It may be **grounds for revising the certificate at a later stage** through a contractual review process or in court. Nevertheless, **in the meantime the certificate will be valid**.”*

*....in Nikko Hotels v MEPC Ltd [1991] 2 EGLR 103.147 In that case, the claimant sought a declaration that **an expert determination under a rent review clause** was a nullity and of no effect on the grounds that the expert misconstrued and misapplied the expression “average room rate” as used in the deed. At 108, Knox J held:*

¹⁸ Paragraph 91.2 of respondent’s submissions

*“The result, in my judgment, is that if parties agree to refer to the final and conclusive judgment of an expert on an issue which either consists of a question of construction or necessarily involves the solution of a question of construction, the expert’s decision will be final and conclusive and, therefore, **not open to review or treatment by the courts as a nullity on the ground that the expert’s decision on construction was erroneous in law**, unless it can be shown that the expert has **not performed** the task assigned to him. **If he has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity.** [...]”*

*Mr Gaunt, who appeared for the tenant before me and indeed before Mr Lawrence, identified, while accepting that **Jones v Sherwood** was the decision that should guide this court, two questions as needing solution. The first was, **what was it that the parties remitted?** And the second was, **what was the mistake?** For this purpose, of course, I assume, in his favour, that the construction which was urged upon Mr Lawrence and me by the tenant is the correct one. He answered those questions as follows: that **the question that was remitted by the parties** to the expert’s decision was the determination of the average room rate, and he accepted that any disputes of interpretation that arose would have to be solved on the way to that determination. He identified the nature of the mistake as one of assessing the average published room rate rather than the average charged room rate, and he submitted in accordance with that that Mr Lawrence had, in effect, done the wrong thing, which was in principle the same as valuing the wrong number of shares, to use the example that Dillon LJ had adopted in his judgment in the Jones case.*

The issue, in my judgment, comes down to whether Mr Lawrence has assessed the wrong subject-matter as a result of the mistake, which I assume for present purposes that he made, or whether he did do the very task which was entrusted to him but reached an erroneous conclusion as a result of that assumed mistake.”

*89.1. In Jones v Sherwood at 286D (extracted above), Dillon LJ made it clear that a valuation could not be impeached simply on the basis that the expert had interpreted the agreement wrongly. That proposition is also supported by Hudson at 4-050: “In construction contracts, Certifiers are often inevitably required to decide matters which may depend on interpreting contractual provisions or deciding questions of law, or the exercise of judgement in selecting and applying a particular principle or approach when making a decision. **Again, provided they are acting within the area of judgement delegated to them by the contract, mistakes in doing so will not invalidate their decision”.***

[65] Cases were cited where an expert’s determination was set aside but they do not deviate from these principles. See for example the respondent’s submissions set out hereunder:

*90.2. In Macro v Thompson [1996] BCC 707, the Court of Appeal overturned a decision to strike out a claim that an expert valuation of shares should be set aside on the basis that the valuer did not do what he had been instructed to do. The valuer was instructed to value the worth of a share in a company using the value of its assets, but in so doing the **valuer used the value of assets of another company**. Thus, it was held*

that the valuer had not attempted to carry out his instructions to certify the worth of a share by reference to the company's assets. At 713E, Aldous LJ held:

*"There is a difference between the task of valuation and that of deciding what to value. An expert acting as a valuer must use his judgment as to how to value and, in so doing, come to a result. That, in my view, is not open to challenge in the courts, but this is a very different case. Here, the valuer was instructed to value the worth of a share in Earliba using the value of its assets and, in so doing, he took the values of the **assets of another company**. Thus he did not attempt to carry out his instructions to certify the worth of a share by reference to the company's assets. No doubt he did that because he was given the judgment of Arden J, which contained a mistake. A valuation produced upon this basis is, in my view, open to challenge and therefore the pleading should not have been struck out."*

[66] The Court therefore drew a distinction between the task of valuation entrusted to the valuer, which in that case was not open to challenge, on the one hand, and on the other a valuation in respect of subject matter which was different from that which was required from his instructions.

Whether AECOM did the right thing in the wrong way

[67] The respondent contends that the test set out in the case of **Nikko** is whether the Engineer did the right thing in the wrong way. If so, then the certificate or IPC produced as a result would be valid until set aside.

[68] The respondent contends that the consequence of AECOM doing the right thing (valuation of works), in the wrong way, (failing to take into account that the claims in respect of those works by NIDCO had been waived under Addendum 2), was that the interim certificate by its nature was provisionally valid. It may have been corrected by a subsequent certificate or not at all (see Hudson's).

[69] As a matter of law the certification, though erroneous, once made in accordance with the contract and the parties' instructions was provisionally valid.

[70] AECOM was acting within its mandate under the contract to certify the value of the works thereunder and that is what it did. Clause 14.6 of the contract required AECOM to conduct that very exercise. The fact that it took into account under IPC 55 claims for works by NIDCO which it had waived by Clause 5 Addendum 2 did not alter the fact that the nature of the exercise that it was conducting **was a valuation in accordance with the contract.**

Therefore, its certificate, though erroneous, was to be treated as provisionally valid. In fact clause 14.6 provides, *“The Engineer may in any payment certificate make any correction or modification that should properly be made to any previous payment certificate.”* The Tribunal erred therefore in ignoring the contractually provided mechanism for correction of IPC errors by the Engineer.

[71] If the law did not provide for IPCs or any other decision entrusted to the Engineer to be provisionally valid, it would be open on an ex post facto examination conducted at an arbitration to reopen and second guess **any** decision of the Engineer by declaring it void ab initio. This would have far reaching consequences, depriving the parties of the confidence that they could rely upon decisions of the Engineer made from time to time in his management of the contract. This would also expose both parties to the contract to a determination of ex post facto liability based upon a reassessment by the arbitrator of the validity of any such decision **ab initio** as has in fact occurred in this case. If that were the law no one could ever rely with confidence on an engineer’s certificate.

[72] NIDCO’s decision to waive claims by virtue of Clause 5 Addendum 2 for works that were the subject of the valuation, did not alter the nature of the exercise, or AECOM’s responsibilities under the Contract entrusted to it by both parties, or the provisionally binding nature of the result of its certification, even if erroneous.

[73] The Engineer was certifying work as he had done under 54 previous IPCs in respect of a contract for which he was responsible and for which his contractual obligation was to evaluate work performed on an ongoing basis. The reason why IPC 55 was issued in error was the extraneous event of NIDCO agreeing by the Addendum agreement to waive all claims against OAS for matters which under the contract it may otherwise have had prior to its execution. The fact that the waiver was incorporated into the contract by the addendum did not alter the Contractual obligation entrusted to the Engineer by the parties.

[74] The Addendum agreement waived claims by NIDCO and meant that the valuation in IPC 55, which provided in effect that OAS owed NIDCO, was erroneous. However, Clause 5 Addendum 2 made no reference to the role of the Engineer, and did not alter his role under clause 14.6 which was to *“Issue to the Employer an Interim Payment Certificate*

which shall state the amount which the Engineer fairly determines to be due...". The fact that the Engineer, performing his contractual duty issued an erroneous certificate could not, on the authorities, render its certificate void ab initio. It was provisionally valid unless or until set aside by a subsequent IPC.

[75] Further, but in any event, the Tribunal made no reference to any evidence that suggested that the Engineer was expressly notified that Clause 5 Addendum 2 constituted an additional instruction to it. In fact, the very valuation of IPC 55 suggests the opposite.

[76] In this case therefore, NIDCO contends that if IPC 55 were issued in error it would, in the normal course of things, and as a matter of law, have been correctable by adjustment to subsequent IPCs in accordance with the practice, procedure, and law identified in inter alia Hudson's. Until then it was provisionally valid ensuring contractual certainty in accordance with construction industry practice. (See **Beaufort Developments (NI) Ltd v Gilbert-Ash**). It contends therefore that there is no authority and no basis in law for the arbitrators' conclusion that IPC 55 was not issued in accordance with the Contract and was therefore void **ab initio**.

[77] The balance of authority therefore is that certificates would generally as a matter of law be provisionally valid, even if the valuer or certifier had made an error in the valuation or certification. Any such error would be correctable and corrected by the mechanism provided under the contract and would be provisionally binding until so corrected. For the sake of certainty, the parties under the contract were required to treat each interim payment certificate as valid unless or until set aside.

[78] The Tribunal's retrospective invalidation of IPC 55 was the basis for its conclusion that NIDCO was in default of payment to OAS as at January 14, 2016 and therefore in breach of contract. This therefore fell within the category of an error on the face of the award because, as a matter of law, the authorities confirmed that an IPC, even if issued in error had to be treated as valid until set aside, and the Tribunal erred in law in concluding otherwise. The Trial Judge so found and his reasoning and conclusion in this regard cannot be faulted.

[79] The courts are less inclined to be hesitant in the review of an arbitration award where the error identified is one of law – see decision of the Judicial Committee in **Attorney General of the Virgin Islands (Respondent) v Global Water Associates Ltd (Appellant) (British Virgin Islands)** [2020] UKPC 18, where the arbitral panel was found to have erred in law on the question of the remoteness of damage, thereby entitling the Board to set aside the award therein.

[80] If in fact, as required by the authorities IPC 55 were provisionally valid:

i] NIDCO would not have been in default of its payment obligation to OAS after the date of its issue (January 14, 2016);

ii] OAS’s conduct, purportedly justified by clause 16.1 of the Contract on the basis of non-payment by NIDCO, could not be so justified. OAS therefore had no right to reduce the rate of work pursuant to clause 16.1 of the contract from that date onwards;

iii] Accordingly, NIDCO was not in breach of contract and its termination notice under clause 15.2 (b) was valid.

Issue 3(b) – Whether clause 16 of the Contract entitled OAS to reduce the amount of work performed to the extent that it did post October 2015

[81]

Clause 16

“If the engineer fails to certify in accordance with Sub-Clause 14.6 [Issue of Interim Payment Certificates] or the employer fails to comply with his obligation to make due and proper payment under Sub-Clause 14.7 [Payment], the Contractor may, after giving not less than 21 days’ notice to the Employer, suspend work (or reduce the rate of work), **so long as such failure** to certify or **pay** (as the case may be) has continued for 28 or more consecutive days. The Contractor may **continue the suspension** unless and **until the Contractor** has **received the Payment Certificate, or payment**, as the case may be and as described in the notice, **at which time the Contractor shall immediately recommence performance of the Works.**” (Emphasis added)

[82] The Arbitration Panel found that OAS was entitled to reduce the amount of work it performed under clause 16 of the contract as a result of deficiency in payments made to it by NIDCO. NIDCO contends that while on a proper construction clause 16 allowed the slow down or suspension of work it also contemplated the immediate recommencement of works if any deficiencies in payments were rectified.

[83] OAS's notice under clause 16.1 was dated 19 October 2015 based upon a failure to pay IPC 50. See paragraph 275 of the award.

275. OAS claims that it provided the requisite notice under Clause 16.1 on 19 October 2015 — a week after NIDCO has failed to pay IPC 50 — when it wrote to AECOM (with a copy to NIDCO) providing “official notification” under Clause 16.1 of the Contract. ...

This was followed by a letter on October 28, 2015 from OAS to NIDCO invoking clause 16.

[84] The Tribunal considered NIDCO's argument that OAS was not permitted under clause 16.1 to abandon the works or demonstrate an intention not to continue performance of its obligations under the Contract but rejected it at paragraph 283 of the award as follows:

283. NIDCO's fourth argument is that “OAS's case is fundamentally misconceived because Clause 16.1, even if validly exercised in response to a payment default in accordance with its terms, only gives the Contractor the right to suspend or reduce the pace of work — it does not entitle the Contractor to abandon the Works or otherwise demonstrate the intention not to continue performance of its obligations under the Contract. This argument fails because the actions taken by OAS after its October 2015 notices were inconsistent with its abandonment of the Project or its demonstration of an intention not to continue the performance of its obligations.

First, OAS did continue to work on the project, as illustrated by the fact that, after its October 2015 notices, it continued to submit IPCs that were certified by AECOM. Thus, on 17 May 2016, AECOM approved and certified IPC 57 for the work that OAS performed between 29 January 2016 to 28 February 2016, IPC 58 for the work that OAS performed between 29 February 2016 to 28 March 2016, and IPC 59 for the work that OAS performed between 29 March 2016 to 28 April 2016. On 12 June 2016, OAS submitted a draft IPC 60 for the work that OAS performed between 29 April 2016 to 28 May 2016. Second, and significantly, OAS renewed its performance bonds in April 2016. These are hardly the actions of a party that had abandoned a project or demonstrated an intent not to continue the performance of its obligations¹⁹.

[85] The Tribunal considered that IPCs 57, 58, 59 and draft IPC 60 which covered work performed between January 29, 2016 and May 28, 2016 together with the renewal by OAS of its performance bonds in April 2016 were “hardly the actions of a party that had abandoned a project or demonstrated an intent not to continue the performance of its obligations”. As discussed below, these were merely two aspects of a pattern of conduct that, had it been considered, were incompatible with the Tribunal's conclusion. The IPCs were for minimal amounts (in two cases for zero amounts), and the renewal of

¹⁹ Page 87 of the Award- page 1928 record of appeal volume 2A

performance bonds could hardly have outweighed the reduction in staff and equipment that put it beyond the ability of OAS to complete over US \$100 million worth of work under the Contract in the time remaining or any realistic extension thereof.

[86] The trial judge correctly recognised that IPC 57 and IPC 58 were for a value of zero. They covered the period 29 January 2016 to 28 March, 2016. The tribunal did not refer to the fact that no work was apparently done in that period. IPC 59 was for US\$803,957.49. Draft IPC 60 was for US\$201,389.65. Those amounts were correctly described by NIDCO as de minimis in the context of the work remaining to be completed in the time remaining before the date of completion. The contractual date for completion remained 28 May 2016.

[87] The trial judge found that the panel misconstrued clause 16.1 in not considering that while it permitted reduction in the pace of work it did not contemplate or permit abandonment of the work or actions that precluded it from being able to “**Immediately recommence** performance of the works upon payment”, ii] that any finding that the conduct of OAS could purportedly be justified under 16.1 of the contract could not rationally have been arrived at on the basis of the evidence and the contract itself.

[88] The Trial Judge found that by the term “immediately” clause 16 required that OAS be in a position to restart work within 24 hours. It is not necessary to determine whether “immediately” means 24 hours, or within a reasonable time, or has any other meaning. What was necessary however was for the arbitrators to determine i] whether OAS’s conduct was in fact permitted under clause 16, in particular whether the evidence demonstrated the ability of OAS to immediately recommence the works or in fact recommence them at all, or rather ii] whether OAS was in fact demobilising from site and making it practically impossible for it to complete the works, either immediately, (whatever that term meant), or at all.

[89] The appellant contends that as a specialised body it was fully entitled to arrive at the conclusions and make the findings that it did which should be respected by a court and accordingly, there was no basis for interfering with the findings of the Tribunal. That would generally be so unless in doing so it misconstrued clause 16 as a matter of law, and the significance of the uncontested evidence demonstrating the inability of OAS to

immediately recommence the works or ii] whether the arbitrators could rationally have arrived at a determination that the evidence demonstrated an intention by OAS to continue performing the Contract.

[90] The Tribunal found at paragraph 283 of its award that the actions of OAS were inconsistent with its abandonment of the project because after October 2015 OAS continued to submit the IPCs referred to above. IPC 57 was for work performed between January 29, 2016 to February 28, 2016, IPC 58 - 29 February 2016 to 28 March 2016, IPC 59 29 March 2016 – 28 April 2016, draft IPC 60 for work between 29 April 2016 to 29 May 2016. Further, the Tribunal found that its actions did not demonstrate an intention not to continue to perform its obligations and also specifically referred to the renewal by OAS of its performance bonds.

[91] The respondent contends that those matters alone could not rationally evince such intention in the face of the overwhelming contrary evidence that demonstrated that OAS was not in a position to complete the works and had taken steps that actually precluded its ability to complete the works, even if or when any payment deficiencies had been rectified.

[92] This is separate from its contention that IPC 55, being provisionally valid, meant that outstanding amounts under IPCs 50 to 54, and particularly IPC 50, under which OAS had issued the clause 16 notice, had removed any indebtedness by NIDCO to OAS after January 14, 2016. This would have required OAS to **immediately** recommence performance of the works and to cease its slow down or suspension.

[93] Even if NIDCO were indebted to OAS, entitling OAS to take action under clause 16, that clause could not properly have been invoked if the uncontested evidence was only consistent rationally with the conclusion that OAS was effectively demobilising from the site and abandoning the works.

[94] NIDCO contends that the arbitrators' reliance on the renewal of the performance bonds or the minimal amounts of works in the IPCs that it referred to could not rationally support its conclusion that OAS intended to perform the Contract when other contrary and

relevant evidence, apparently not considered by the Tribunal, was taken into consideration. They pointed to the following:

- a] The fact that IPCs 57 and 58 were for work for the period between January 29, 2016 to March 28, 2016 of zero value. IPC 59 was only for work done by a sub-contractor and draft IPC 60 was for sums which NIDCO characterised as *de minimis* (draft IPC 60 - US \$201,389.65 and IPC 56 - US \$908,824.79 of which only US \$519,686.10 represented actual construction work. This level of work was in the context of a contract which was valued at US \$669,074,603.00 of which just over US\$468,208,126.45 remained to be performed (as certified in IPC 58) at the end of March 2016, with a contractual date of completion approaching in two months' time;
- b] Correspondence from OAS itself referring to its **demobilizing** from site²⁰, (letter dated March 10, 2016 from OAS to AECOM)²¹;
- c] The fact that OAS was **selling** equipment²²;
- d] The fact that OAS had partially retrenched its workforce²³;
- e] The fact that there were protests by labourers who had apparently not been paid²⁴;
- f] The level of outstanding debt to suppliers and sub-contractors had at the same time increased to US\$54 million at the end of December 2015.

This demonstrated that OAS had completed very little work between September and December 2015, no work at all between the end of January and end of March 2016 and could not have been in a position to achieve completion by May 28, 2016 given that IPC 58 was dated May 28, 2016 and had certified work to the end of March, to the value of US\$468,208,126.45.

[95] These were matters that went to the heart of its contention that the conclusion of the arbitrators was irrational and/or devoid of any underlying evidential foundation in relation to their construction of clause 16.1 of the contract.

[96] The Tribunal failed to address the following matters which were not in dispute (being contained in the Agreed Factual Chronology), in the context of the requirement under

²⁰ See letter dated 9 May 2016 from AECOM – agreed factual chronology page 63-64

²¹ Agreed factual chronology page 51-52

²² Letter dated March 10, 2016 and 6 April 2016 – letter from AECOM – agreed factual chronology page 62

²³ Page 51 agreed factual chronology

²⁴ See letter dated 9 May 2016 from AECOM – agreed factual chronology page 63-64

clause 16 to immediately recommence work, and therefore to be able or to have the capacity to immediately recommence work:

- i] continued accumulation of debt to contractors and suppliers amounting to US \$54 million and the impact of this on its ability to obtain goods and services from suppliers and subcontractors to complete the works,
- ii] its sale of equipment,
- iii] its partial retrenchment of employees,
- iv] correspondence to the Engineer referring to demobilising from the site.

(The matters identified above formed part of the agreed chronology and the correspondence is found in the appendix to the arbitrators' award²⁵).

[97] The respondent contends that by focussing only upon the renewals of performance bonds on 27 April 2016 to 12 March 2016 ²⁶ and ignoring all of the above evidence as to the ability of OAS to immediately recommence the works, far less complete the contract, either by having adequate equipment, or personnel on site, or the ability to order from suppliers (given its accumulated debt) and in the face of its own stated intention to demobilize, the Panel's finding that OAS was performing this contract, or was in a position to immediately recommence works, or was in fact conducting itself within the parameters of clause 16.1, was irrational.

[98] While clause 16.1 permitted a slowdown or reduction in work based upon the employer's non-payment, it also expressly provides for immediate commencement of the work upon payment. Therefore, in considering whether OAS was validly exercising its right to suspend or reduce the rate of work it was also necessary to consider its obligation to immediately recommence the work and the evidence of its ability to do so. Clause 16.1 did not contemplate an abandonment of the works. It contemplated the ability to resume work and complete the contract.

[99] The Tribunal was required therefore to consider: i] the quantum of the IPCs to which it referred, ii] the nature of the works claimed for thereunder, iii] the value of works remaining to be performed under the contract, iv] the time remaining before the

²⁵ From Page 2066 at volume 2B of the Record of Appeal

²⁶ Paragraph 231 of the award

contractual due date for its performance, v] the level of available personnel to complete the contract, vi] the level of equipment remaining on site. These were matters that arose from the construction of clause 16.1 and the very IPCs referred to the arbitrators as demonstrating an intention by OAS to continue to perform its obligations. The value of work that remained to be performed in the context of the time remaining for its performance with its workforce partially retrenched, equipment being sold, and debt to suppliers and subcontractors for US\$54 million could not have led any reasonable arbitrator to rationally conclude that OAS was in a position to immediately recommence the works, as required.

[100] The above demonstrates that a reasonable arbitrator could not have rationally arrived at the conclusion that a renewal of performance bonds, or the minimal work under the IPCs referred to by the Tribunal, could demonstrate an intention to continue to perform the contract. Its reasoning reflected no basis for its ascribing any weight to those matters, without reference to the other matters identified above which, unlike the matters it referred to, directly impacted the ability of OAS to immediately recommence the works or complete the contract. The renewal by OAS of the performance bonds and the minimal amount of work in the IPCs referred to by the Tribunal could not therefore be a rational basis for the Tribunal to conclude that OAS intended to continue to perform and complete its obligations under the contract or was in a position to immediately commence the works.

[101] The Tribunal therefore **erred in law** in its construction of clause 16.1. Further and in any event, it **failed to take into account factors relevant** to the construction of clause 16.1. Had the Tribunal taken into account these relevant matters together with the requirement for OAS under clause 16.1 to **immediately recommence** works upon payment, (or the cessation of payment before it) and therefore to be in a position to do so, a reasonable panel could not have rationally arrived at the conclusion that clause 16.1 permitted the actions of OAS²⁷. Still further, the Tribunal's assessment of the evidence relating to the IPC 56, IPC 57, IPC 58, IPC 59 and draft IPC 60 was **irrational** and one at which no reasonable arbitrator could have arrived.

²⁷ See pages 51-66 of the agreed factual chronology

[102] The invocation by OAS of clause 16 was therefore no answer to NIDCO's notice of termination under clause 15.2 (b). Clause 15(2)(b) (Termination by the Employer), provides as follows:

"The Employer shall be entitled to terminate the Contract if the Contractor: [...] (b) abandons the Works or otherwise plainly demonstrates the intention not to continue performance of his obligations under the Contract".

The Tribunal erred in law in not finding otherwise.

Issue 3 (c) - whether NIDCO was entitled to issue a notice of termination under clause 15.2 (b) of the Contract on the basis of claimed abandonment of the works by OAS

[103] The matters set out above which demonstrated the inability of OAS to immediately recommence the works were the same matters which demonstrated an intention to abandon the works and justified NIDCO's notice of termination under clause 15.2 (b).

[104] NIDCO served notice of termination on 21 June 2016. Clause 15.2 of the Contract provided that NIDCO was entitled to terminate the Contract upon 14 days' notice, inter alia, if OAS:

*(b) **abandons the Works** or otherwise plainly **demonstrates the intention not to continue performance of his obligations under the Contract.***

*(e) becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, **compounds with his creditors**, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events²⁸.*

[105] The Panel addressed termination under clause 15.2 (b) in its award at paragraph 266 as follows:

A. NIDCO's Termination On The Basis Of Clause 15.2(b)

266. In paragraph 103 of its Closing Submission, NIDCO summarizes its case that it validly terminated the Contract under Clause 15.2(b). It states that: [NIDCO's] primary case on liability is clear on the face of the Termination Notice, which states that (among other things), OAS had as at 21 June 2016:

103.1 not been mobilised on site at all since March 2016 (a period of three months);
103.2 completed very little work between September and December 2015 (and nowhere near sufficient work to achieve the contractual completion date of 28 May 2016);

103.3 completed virtually no work since January 2016, with the value of work certified completed in February and March 2016 being nil (and the total value of IPCs certified between January and June 2016 being under US\$2m);

²⁸ Record of Appeal volume 2B

103.4 failed to provide a revised programme despite repeated requests by AECOM that it do so, and allowed the contractual completion date (28 May 2016) to pass by without making any proposal as to when and how the remaining Works were to be completed;

103.5 dismissed practically all of its construction staff (with no approved process to replace them) and had no management or supervisory personnel on site;

103.6 allowed the level of overdue debt to suppliers and subcontractors to rise to US\$54m; and

103.7 removed equipment from the site without NIDCO's or AECOM's consent (contrary to clause 4.17 of the Contract).

[106] To the extent that the Panel concluded that clause 16.1 was properly invoked by OAS it erred for the reasons set out previously. That error also directly led to its further error in concluding that NIDCO was not entitled to terminate the Contract under clause 15.2 (b). It was so entitled because the actions by OAS could not be justified under clause 16.1 because inter alia i] on the undisputed facts OAS was not in a position to immediately recommence the works, ii] IPC 55 had to be treated as provisionally valid unless or until set aside, and that being so, NIDCO was not in default of any payment obligation to OAS after January 14, 2016.

[107] After that date OAS was required to immediately recommence the works. NIDCO was entitled in those circumstances to issue notice of termination under clause 15.2 (b). The Tribunal erred in failing to take account of relevant undisputed evidence that was only consistent with OAS having abandoned the project or demonstrating an intent not to continue to perform its obligations. The renewal of the performance bonds and the submissions of IPCs for minimal amounts, including two for zero amounts could not rationally in that context demonstrate the opposite.

Issue 3 (d) - Whether NIDCO was entitled to terminate the contract under Clause 15.2 (e) or whether it was precluded from doing so by Clause 5 of addendum 2

[108] Clause 15.2 (e) is as follows:

*“The Employer shall be entitled to terminate the Contract if the Contractor:
(e) becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events [...]” “*

[109] The arbitrators concluded that NIDCO was not entitled to terminate under clause 15(2)E, notwithstanding that OAS had been compounding with creditors and had published accounts showing that it was insolvent, because this was a continuation of events which had been in existence on September 4, 2015 and which events had all been waived by clause 5 addendum 2 as follows:

"5. Claims

*The Parties agree to release and discharge each other from all manner of action and actions, claims, debts, sums of money,extensions of time, damages, liabilities, proceedings, or suits both at law and in equity of whatsoever kind or nature arising (both present and future) from any events that occurred on or before the date of the signing of this Contract Addendum whether notified or not and whether or not known to the Parties, including in relation to matters which could not with reasonable diligence have been discovered prior to the date of signing of this Contract Addendum. The consideration included in this Contract Addendum is in full and final payment for and settlement of all such matters. For the avoidance of doubt, nothing in the foregoing shall release the Contractor from its liability under the Contract for defective designs or defective works carried out before the date of the signing of this Contract Addendum, but which only becomes apparent after said date, or of its obligation for the repayment of the Advance Payment and payments made under the Letter of Intent."*²⁹

[110] The Tribunal's reasoning found at paragraphs 258, 259 of the award is as follows:

258. The Tribunal also rejects NIDCO's contention that Addendum 2 left NIDCO's right to terminate unaffected. The words of Clause 5 are extremely broad. Insofar as a right to terminate had arisen at the point of Addendum 2, this falls within (on NIDCO's side) the language of a 'claim ...' and (on OAS's side) a 'liability' 'of whatsoever kind or nature arising... from any events that occurred on or before the date....'.

259. Even if there were any ambiguity in this regard, which there is not, the Tribunal would have regard to the factual matrix evidence in order to construe the words in line with the Parties' intentions. It is not necessary to look beyond the facts stated in the Recitals within Addendum 2 itself to ascertain that the very purpose of the amendment to the Contract was to rebaseline the project specifically in light of — amongst other things — the judicial re-organisation of OAS. It would be absurd to suggest that immediately following the negotiations and re-structuring of the Contract through Addendum 2, NIDCO could terminate the Contract unilaterally on the basis of the pre-existence of OAS' judicial reorganisation.

[111] The Panel's reasoning was that the recitals to Addendum 2 clearly demonstrated the intentions of the parties, the reasons why it was entered into, and what was known to the parties at the time of signing it. See paragraph 177 of the award³⁰ as follows:

²⁹ See paragraph 178 of the Award page 52 of the award, page 1893 vol 2A Record of Appeal

³⁰ Page 51 of the Award, page 1892 record of appeal volume 2A

177. On 4 September 2015, NIDCO and OAS entered into Addendum 2. It is worth quoting some of the recitals to Addendum 2 as they highlight the Parties' contemporaneous understanding of the context in which they entered into this agreement, **explicitly mentioning both the judicial reorganization and the delay of NIDCO in releasing work sites.**

AND WHEREAS The Contractor

c. Has **filed a Judicial Reorganisation process in Sao Paulo Brazil on 31 March 2015 in order to negotiate its debts;**

d. Wishes to remain operational on this Project, provided that some scope and commercial adjustments are implemented;

e. Despite the Judicial Reorganisation process, has been able to maintain its contractual obligations, renew bonds and guarantees, and remain operational on the Project; and

f. Does not wish to remain mobilized after the current contractual completion date of the Works on the **28th May 2016**, (hereinafter referred to as the **'the Contractual Date for Completion'**).

The Employer

a. Wishes to minimize potential risk to the Works **due to the Contractor's Judicial Reorganisation;**

b.

c.

d. ...

e. Expects that such arrangement should not be to the detriment of the Employer or public in terms of financial situation or risk; and

f. ...

The Parties

a. Wish to settle **all claims for all events up to and including the date of signing of this Contract Addendum.** (All emphasis added)

[112] The Arbitrators' conclusion assumed that the judicial re-organisation was one such matter which had been waived and that NIDCO's right to terminate could not therefore be based upon it.

[113] NIDCO however contended that while that agreement referred to a waiver of events which had occurred on or before that date, two matters had occurred after September 4, 2015 (the date of signing Addendum 2 - the relevant date). These included:

- a] OAS compounding with its creditors on January 11, 2016, and
- b] the publication by OAS of audited accounts for year ending 31 December 2015 and year ending 31 December 2016 demonstrating that it was insolvent.

[114] The Tribunal at paragraph 452 of the Award found these were merely a continuum of the same process which had started on 31 March 2015, the date when judicial reorganisation was ordered.

[115] The appellant contends that compounding with creditors was something that was known at the time of entering into the addendum agreement and had been waived. Similarly, the fact that OAS was technically insolvent was known and had been waived. It was therefore part of a continuation of those matters and the arbitrators were entitled to come to that conclusion and find that Clause 15.2 (e) was not applicable as a basis for termination by NIDCO.

[116] The judicial reorganisation recognised in Clause 5 Addendum 2 and waived was, on the evidence, similar to Chapter 11 Bankruptcy. Some level of protection thereunder would be afforded to OAS on the basis that it was technically bankrupt or facing bankruptcy. It was expressly recited that the contractor had filed for judicial reorganisation in order to negotiate its debts. The fact that a company facing bankruptcy could have been unable to pay its debts in full in the short term could not have been a surprise unanticipated by that waiver. Neither could publication of accounts confirming this or the fact that arrangements had to be made with creditors in order to negotiate its debts. Insolvency was not a new matter and neither could published accounts that revealed this have been. Compounding with creditors was to be expected under a judicial reorganisation/Chapter 11/Bankruptcy protection process. The arbitrators' conclusion that those matters were a continuation of the judicial reorganisation, and clearly contemplated by the waiver, could not be faulted as it demonstrates no error of law.

[117] The trial judge erred in concluding otherwise. It was irrelevant that *"the language of the clause made no provision for the consideration of a "continuum of events"'*³¹. He erred in considering that the above matters were unforeseen events or that they were not encompassed within the express language of Clause 5 Addendum 2.

³¹ Paragraph 106 of judgment

Conclusion

- [118] i] Clause 20 of the arbitration agreement (the no appeal provision) is null and void and contrary to public policy.
- ii] The Tribunal erred in law in finding that IPC 55 was void ab initio. IPC 55 was provisionally valid unless or until set aside.
- iii] The Tribunal erred in law in finding that OAS was entitled to continue slow down or suspend works under Clause 16.1 of the Contract on the basis of non-payment by NIDCO after January 14, 2016, the date of IPC 55. That is because after that date NIDCO was not in default of any payment obligation, because IPC 55 remained provisionally valid.
- iv] Further and in any event, the Tribunal erred in law in failing to appreciate that Clause 16.1 required that, despite its invocation, a contractor had to be in a position to recommence the works **immediately** and that there was **no evidential basis** for its finding that OAS was in a position to do so. The IPCs for minimal amounts and the renewal of the performance bonds could not provide such an evidential basis. The Tribunal therefore also erred in failing to construe properly or at all the word “**immediately**” in Clause 16.1. Whether or not IPC 55 was void ab initio Clause 16.1 could not therefore provide justification for the conduct of OAS or a defence to the notice of termination by NIDCO under Clause 15.2 (b) of the Contract.
- v] Because Clause 16.1 could not be applicable to justify the conduct of OAS, NIDCO was entitled to issue its notice of termination under Clause 15.2 (b) of the Contract on the basis that it did, and it was not in breach of contract by doing so.
- vi] The Tribunal could not be faulted in concluding that by Clause 5 Addendum 2 NIDCO had waived its right to additionally terminate under Clause 15.2 (e) of the contract.
- vii] In the circumstances, notwithstanding the above in relation Clause 15.2 (e), the appeal is dismissed and the orders of the Trial Judge are affirmed.

Orders

[119]

- i] The appeal is dismissed.
- ii] The orders of trial judge are affirmed. For the sake of clarification, it is confirmed that the remitting of the matter to the Tribunal is for reconsideration in accordance with the findings, conclusions, and reasoning of this court.

.....

Peter A. Rajkumar
Justice of Appeal