



## LEGAL BRIEFING

### *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd*

[2008] EWHC 427 (TCC), Mr Justice Akenhead

#### ***The Facts***

This case concerned two applications in relation to the First Award of an arbitrator, concerning an EPC (Engineering, Procurement and Construction) contract dated 4 November 2005 between Braes of Doune Wind Farm (Scotland) Ltd as Employer and Alfred McAlpine Business Services Ltd as Contractor, whereby McAlpine agreed to carry out works in connection with the provision of 36 wind turbine generators not far from Stirling, Scotland. The EPC contract was governed by English law and conferred exclusive jurisdiction on the English Courts, subject to arbitration with the Construction Industry Model Arbitration Rules (“CIMAR”).

A dispute arose between the parties as to Braes’ entitlement to liquidated damages for delay to the project caused by McAlpine. The matter was referred to arbitration in accordance with the arbitration agreement contained in the EPC contract. The arbitration agreement provided that the seat of arbitration would be Glasgow, Scotland and that any reference to ‘arbitration’ in the Contract was deemed to be a reference to ‘arbitration’ within the meaning of the Arbitration Act 1996.

The arbitrator found that the liquidated damages provisions within the EPC contract were insufficiently certain and accordingly unenforceable. He found that there was no entitlement to withhold or set off against sums otherwise due to McAlpine and issued an award in favour of McAlpine.

Braes applied for leave to appeal on a point of law. McAlpine applied for (in effect) a declaration that the English courts had no jurisdiction to hear the appeal, on the basis that the seat of the arbitration was Scotland, which meant that the English courts had no jurisdiction to hear Braes’ application for leave to appeal.

#### ***The Issues***

The issues were whether the English courts had jurisdiction:

- (i) to hear an application by either party under section 69 of the Arbitration Act 1996 (English law), which permits and requires a court to hear applications for leave to appeal; and
- (ii) to grant Braes’ appeal in relation to the interpretation of the liquidated damages clause in the EPC contract.

#### ***The Decision***

Mr Justice Akenhead distinguished the case of *C v D* (a case concerning procedural law in arbitration) and held that where in substance the parties agreed that the laws of one country would govern the arbitration, the place where the arbitration was to be heard would not dictate what the governing or controlling law would be. Therefore, because the parties had agreed that the English courts had “exclusive jurisdiction” to settle disputes, an appeal could

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be brought before the English courts, despite the fact that the arbitration itself took place in Scotland. The Court therefore had jurisdiction to hear an application under section 69 of the Arbitration Act 1996.

Having decided that the Court had jurisdiction to hear the application for leave to appeal, Mr Justice Akenhead found that the question of law in the proceedings, which were brought to challenge the arbitrator's decision regarding LADs, was not of general importance: the LADs clause was a "one-off". He also found that the arbitrator's decision was not obviously wrong. Therefore the application for leave to appeal failed and Alfred McAlpine was entitled to enforce the award.

*Comment*

This decision concerns an interesting point of law in relation to jurisdiction. Some may be surprised to see that an arbitration which was conducted in Scotland can actually end up back in the English courts. This is because the parties had expressly given the English courts "exclusive jurisdiction" to resolve disputes arising out of or in connection with the contract.

This decision highlights the importance of determining where disputes are ultimately to be heard if arbitration brought under an arbitration agreement yields an unsatisfactory result.

In many cases, the courts of the country where the arbitration takes place will also have jurisdiction to deal with any disputes arising out of any arbitration. However that is not always the case, especially where there is an international dimension to the contract. It would be sensible to check this before entering into such a contract or before initiating arbitration proceedings to avoid any unfortunate surprises.

Rebecca Saunders  
July 2008

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