Court of Queen's Bench of Alberta

Citation: Ace Bermuda Insurance Ltd. v. Allianz Insurance Company of Canada, 2005 ABQB 975

Date: 20051221
Docket: 0301 19520
Registry: Calgary

Between:

ACE Bermuda Insurance Ltd.

Applicant

- and -

Allianz Insurance Company of Canada, Allianz AG, Lloyd's Underwriters, S J O Catlin & Others Syndicate Nos. 1003 and 2003 @ Lloyd's of London, Wellington Underwriting Syndicate 2020 @ Lloyd's of London, AF Beazley Syndicate No. 623 @ Lloyd's of London, Alleghany Syndicate No. 376@Lloyd's of London, Sackville Syndicate No. 1047 @ Lloyds of London, HG Jago & Others Syndicate No. 205 @ Lloyd's of London, FR White Syndicate No. 190 @ Lloyd's of London, AD Hicks & MH Wheeler & Others Syndicate No 1007 @ Lloyd's of London, MRD Reith & Others Syndicate Nos 861 and 1209 @ Lloyd's of London, DP Mann Syndicate No 435 @ Lloyd's of London, Faraday Syndicate No 435 @ Lloyd's of London, General Cologne Re, General Cologne Re Services UK Limited, General Reinsurance Corporation of Canada, Stephen John Oakley Catlin on his own behalf and on behalf of all other members of S J O Catlin & Others Syndicate Nos 1003 and 2003 @ Lloyd's of London, Rolf Albert Wilhelm Tolle on his own behalf and on behalf of all other members of DP Mann Syndicate No. 435 @ Lloyd's of London, Andrew Frederick Beazley on his own behalf and on behalf of all other members of AF Beazley Syndicate No. 623 @ Lloyd's of London, Charles Christopher O'Kane on his own behalf and on behalf of all other members of Wellington Underwriting Syndicate 2020 @ Lloyd's of London, Jill Anita Loveless on her own behalf and on behalf of all other members of Alleghany Syndicate No. 376 @ Lloyd's of London, Alasdair Graham Bishop on his own behalf and on behalf of all other members of HG Jago & Others Syndicate No. 205 @ Lloyd's of London, Thomas Rokeby Conyngham Corfield on his own behalf and on behalf of all other members of FR White Syndicate No. 190 @ Lloyd's of London, Mark Handley Wheeler on his own behalf on behalf of all other members of AD Hicks & MH Wheeler & Others Syndicate No. 1007 @ Lloyd's of London, John Does 1-3 on their own behalf and on behalf of all other members of Sackville Syndicate No 1047 @ Lloyd's of London and MRD Reith & Others Syndicate Nos. 861 and 1209 @ Lloyd's of London, ACE INA Insurance, Ace Global Markets Limited, Assicurazioni Generali Spa, Independent Insurance Company Limited, Underwriter Insurance Company Ltd., Mitsui Sumitomo Insurance Co., (Europe) Ltd., previously known as Mitusi Marine & Fire Europe Ltd., ERC Frankona Reinsurance Limited, GE Frankona Reinsurance Limited, GE Frankona Ruckversicherungs-Aktiengesellschaft, GE Reinsurance Corporation, Storebrand Skadeforsikring A/S, Storebrand/IF, Western Oil Sands Inc. and Western Oil Sands L.P.

Respondents

Reasons for Judgment
of the
Honourable Mr. Justice G.C. Hawco

INTRODUCTION

[1] ACE Bermuda Insurance Ltd. ("ACE"), as an insurer and Western Oil Sands Inc. and Western Oil Sand L.P. ("Western") as an insured are parties to a policy of insurance no. C.S.8690 ("the policy"). The policy provides that any arbitration in respect of issues arising from the policy shall take place in Calgary, Alberta and the policy shall be governed by and construed in accordance with Alberta law. Western has served ACE with a Notice of Arbitration in respect of certain disputes concerning Section IV of the policy for an arbitration before an arbitral tribunal ("the Tribunal") constituted under the *International Commercial Arbitration Act*, to be held in Calgary, Alberta.

[2] ACE claims its participation in the policy was subject to a special condition for arbitration in London, England. However, ACE did agree that the Tribunal had jurisdiction to hear its application to determine whether it is a necessary and proper party to the arbitration and that this issue would be determined with Alberta law. Following a two-day hearing, the Tribunal held that ACE is a necessary and proper party to the arbitration in Calgary, Alberta as there was no agreement ever reached for an arbitration to take place in London.

[3] ACE has appealed the Tribunal's decision, arguing that the applicable standard of review is correctness. ACE further argues that the decision contains a reviewable error. Western's position is that because ACE agreed that the Tribunal had jurisdiction to hear the issue of whether ACE was a proper party, the Tribunal's decision should be reviewed on the same standard as any other decision given in a consensual international commercial arbitration. In other words, significant deference must be given to its decision.

[4] Western further submits that the decision contains no reviewable error and was correct. Accordingly, Western requests that the ACE's application be dismissed.

FACTS

[5] Western is one of three joint venture partners in a project known as the Athabasca Oil Sands Project ("Project") that was underwritten by ACE and a number of other insurers that are parties to an international arbitration commenced in Calgary, Alberta.

[6] ACE is actually one of 14 underwriters subscribing to Section I-III of the policy and one of 13 underwriters subscribing to Section IV. It has subscribed to a line of 7.5% of the risk.

[7] Each underwriter has a separate contract of insurance with each insured.

[8] The negotiations which led to ACE's involvement in the insurance of the Project began in September of 1999, when it received an initial presentation in Bermuda from representatives of Shell and an insurance broker, Jardine Lloyd Thompson Canada Inc. ("JLT").

[9] JLT acted at all times as the agent of Western, Shell and Chevron from the beginning of the negotiations. There were no direct dealings between ACE and Western at any time.

[10] With respect to Sections I-III, ACE signed and sent to JLT, on April 11, 2000, a slip prepared by JLT and ACE's own binder. With respect to Section IV, ACE signed and sent to JLT, on April 19, 2000, a binder which stated:

> ACE property is pleased to bind the herein contained risk at terms described:
>
> ...
>
> Policy Form: Following in every way, with any exceptions noted under Special Conditions herein, the policy form dated December 2, 1999, issued by Allianz Insurance Company of Canada and submitted by Jardine Insurance Services Canada Inc. Final wording subject to approval.

[11] The special conditions to which ACE referred were set forth as follows:

> Special Condition No. 1: London Arbitration Clause applicable to any dispute arising under or relating to this insurance, or the breach thereof (see attached).

[12] The London arbitration clause was not attached.

[13] A cheque in the amount of the requested premium was paid by JLT and received by ACE on April 20, 2000.

[14] According to the affidavit evidence of Mr. Chaman Aggarwal, ACE's representative, it was the practice of ACE with all business it writes in North America, to insist that a London arbitration clause or Bermuda arbitration clause be included in its insurance contract. According to Mr. Aggarwal, JLT was well aware of this.

[15] On May 30, 2000, a Revised Binder was sent by ACE to JLT increasing ACE's risk from 5% to 7.5%.

[16] On June 14, 2000, Ms. Cindy Simpson of JLT sent Mr. Aggarwal the latest draft of the wording of the policy. That draft provided:

> Any arbitration shall take place in Calgary, Alberta, Canada, unless otherwise agreed.

Mr. Aggarwal did not comment on the draft policy.

[17] On July 12, 2000, Ms. Simpson sent an e-mail to, among others, Western. The subject of the e-mail was: "Jack's comments - Section I, II and III." Close to the end of that e-mail, while speaking of Section V, Ms. Simpson said:

> Section V, clause 20: appraisal: as approved and agreed by all partners this clause was deleted and replaced by the London Arbitration Clause 18.

[18] On July 20, 2000, Ms. Simpson forwarded to Mr. Aggarwal, a memorandum stating, among other things:

> Summary of Amendments Implemented:
>
> - Clause 20 (Appraisal) and 25 (Governing Law) were deleted and replaced by a London Arbitration Clause.
> ...
> - Section IV Arbitration Clause has been amended.
>
> Please review and return one copy signed to acknowledge your acceptance of this policy wording.

[19] It was Mr. Aggarwal's evidence that he knew that these changes had in fact not been made and the policy wording continued to provide for arbitration in Calgary, subject to Alberta law.

[20] Having received the final draft of the policy, Mr. Aggarwal simply attached a note to his copy which said: "need pollution exclusions. London Arbitration." He did not communicate with JLT or Western to express any concerns. He did not return the final draft to JLT.

[21] On October 25, 2000, a copy of the policy containing the same wording as in the final draft was signed by one of the insurers, Allianz Insurance Company of Canada. ACE said that it did not receive a signed copy of the policy at that time, nor did it ever receive a signed copy of the policy.

[22] In the summer of 2001, ACE became aware that there might be a significant claim made under Section IV of the policy. On August 20, 2001, Mr. Aggarwal prepared a draft letter to Ms. Simpson of JLT stating, among other things:

> In accordance with ACE's binder, 19 April 2000 under Section "Policy Form" - **Final wording subject to approval**, I have now reviewed the submitted policy wording (pertaining to Section IV only), and have the following comments:
>
> . . .
>
> 3. Conditions: Section 5 - the arbitration wording should be replaced by the following:
>
> Any dispute arising under or relating to this policy, or the breach thereof, shall be finally and fully determined in London, England...

[23] That letter was not, on the advice of counsel, sent by ACE to JLT.

[24] On August 29, 2001, ACE wrote to JLT claiming, among other things, that the Arbitration provisions under the policy had not been agreed to and on the basis that there no agreement as to wording, he purported to exercise ACE's right of termination.

[25] On November 30, 2001, following discussions between ACE and JLT, Mr. Aggarwal advised that ACE was withdrawing its letter of August 29, 2001 rescinding the policy and indicating that it would side with the rest of the Underwriters.

[26] Between April 2001 and August 2003, JLT sent a series of endorsements of the policy to ACE and requested that ACE sign and return them. ACE did not respond to any of the requests.

[27] Because the project was delayed, the policy had to be extended from June 30, 2003 to October 30, 2003. On June 25, 2003, Ms. Simpson sent an e-mail to Western, among others, wherein she stated:

> With respect to both ACE Bermuda and XL Bermuda, the London Arbitration wording applies.

[28] On August 20, 2003, Western served a notice of intention to arbitrate upon ACE. ACE advised Western on November 3, 2003 that it was entitled to have the arbitration conducted in London.

[29] The hearing on the application of the arbitration clause took place in Calgary on May 16 and 17, 2005. A decision was rendered on August 20, 2005 by the majority of the Tribunal, being Mr. Earl Cherniak, Q.C. and Mr. Robert Grasser, Q.C., wherein the Tribunal declared that ACE and Western had never concluded an agreement for a London arbitration clause and that ACE was therefore bound by the Calgary arbitration clause. Mr. Alan Hunter, Q.C., issued a dissenting award.

[30] Article 16(2) and 16(3) of the Uncitral Model Law on International Commercial Arbitration ("the Model Law"), incorporated in the *International Arbitration Act*, RSA 2000 Ch. I-5 reads as follows:

> 16(2) - A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator...
>
> 16(3) - The arbitral tribunal may rule on a plea referred to paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision may be subject to no appeal; while such a request is pending the arbitral tribunal may continue the arbitral proceedings and make an award.

[31] ACE has filed a notice seeking to set aside the decision of the Tribunal. Western opposes the motion.

STANDARD OF REVIEW

[32] It is ACE's position that I am not to consider the reasonableness of the Tribunal's decision, but rather, I am to review the facts and the law and arrive at my own decision without regard to the Tribunal's decision.

[33] ACE says that in this case we have the unusual situation where the parties have agreed to arbitrate, but they differ as to where they have agreed to arbitrate and they differ as to whether this Tribunal has the jurisdiction to compel them to arbitrate in this Province. Under articles 16(2) and 16(3) of the Model Law, the Tribunal has the jurisdiction to rule, as a preliminary question, on its jurisdiction. That is what has been done in this case. ACE, as entitled to do under 16(3), is requesting this Court "to decide the matter."

[34] ACE argues that the review process in which I am engaged is not in the nature of a judicial review. I do not have to go through the machinations required by the Supreme court of Canada on judicial reviews to determine what the appropriate standard of review is. The Model Law sets out the standard of review. Since I am to "decide the matter" I am not to consider the reasonableness of the Tribunal's decision. Rather, I am to review the facts which the Tribunal considered and the law which it applied and decide whether its decision was correct.

[35] As authority for this position, ACE cites the following excerpt from *Redfern and Hunter on Law and Practice of International Commercial Arbitration*, 4th Ed., 2004, at page 410:

> Under the doctrine of *competence/competence*, the present practice is generally to regard an arbitral tribunal as being empowered to decide for itself whether or not it has jurisdiction over a particular dispute. If its jurisdiction is challenged, the arbitral tribunal may decide the point as a preliminary issue in an interim award, or as part of its award on the merits. In either case, however, the decision of the arbitral tribunal is not necessarily the last word on the subject. That rests with the national court.
>
> . . .
>
> When a national court is called upon to decide on the issue of jurisdiction, it generally needs to review both the facts and the law in order to arrive at its decision.

[36] ACE refers as well to Fouchard, Gaillard, Goldman, on *International Commercial Arbitration*, Kluwer International Law, 1999, page 400:

> 659 - Even today, the competence - competence principal is all to often interpreted as empowering the arbitrators to be the sole judges of their jurisdiction. That would be neither logical nor acceptable. In fact, the real purpose of the rule is in no way to leave the question of the arbitrator's jurisdiction in the hands of the arbitrators alone. Their jurisdiction must instead be reviewed by the Courts if an action is brought to set aside or to enforce the award.

[37] The review which is to take place, ACE maintains, requires that I determine whether the decision was correct, not whether it was reasonable.

[38] Were this a "true" judicial review, in order to determine the appropriate standard of review, I would be required to take what the Supreme Court of Canada, on a number of occasions, has described as the pragmatic or functional approach. That approach requires a reviewing court to consider:

a) the presence or absence of a privative clause;
b) the expertise of the tribunal;
c) the purpose of the particular legislation;
d) the nature of the question before the tribunal.

[39] With respect to a privative clause, Article 5 of the Model Law states that no court can intervene except where so provided in the Model Law. Article 16(3) gives me an unfettered right to consider the Tribunal's decision and further provides that there is no appeal of my decision. Article 34 provides that an arbitral award may be set aside only in certain restricted circumstances. Those circumstances include if a party making an application furnishes proof that a party to the arbitration agreement was under some capacity; or if the agreement was not valid under the law; or if the party making the application was not given proper notice; or if the award deals with a dispute not contemplated by or falling within the terms of the submission to

arbitration, or contains decisions or matters beyond the scope of the submission to the arbitration or if the court were to find that the subject matter of the dispute is not capable of settlement by arbitration under the law of the forum. While Article 34 is not applicable in this case, there still appears to me to be a standard of review of correctness rather than reasonableness under this factor.

[40] With respect to the expertise of the Tribunal, there is no particular expertise in any particular area. The members of the Tribunal are all recognized as experienced and knowledgeable counsel, but to my knowledge, they, as a tribunal, did not claim to have any extraordinary expertise in the matter of international commercial arbitration or in the matter of an arbitral tribunal's jurisdiction. Once again, the standard of review on this item appears to be correctness.

[41] The purpose of the legislation under which the Tribunal acted is to facilitate and resolve disputes subject to international commercial arbitrations. In *Corporacion Transnacional de Inversiones v. STET International* (1999), 45 O.R. (3d) 183 (S.C.J.) at 191, Lax, J. said this:

> The broad deference and respect to be accorded to decisions made by arbitral tribunals pursuant to the Model Law has been recognized in this jurisdiction by the Ontario Court of Appeal in *Automatic Systems Inc. v. Bracknell Corp.* (1994), 18 O.R. (3d) 257 at p. 264, 113 D.L.R. (4th) 449 at p. 456:
>
> > The purpose of the United Nations Conventions and the legislation adopting them is to ensure that the method of resolving disputes in the forum and according to the rules chosen by the parties, is respected. Canadian courts have recognized that predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any international business transaction and facilitates and encourages the pursuit of freer trade on an international scale; *Kaverit Steel & Crane Ltd. v. Kone Corp.* (1992), 87 D.L.R. (4th) 129 at p. 139, 85 Alta. L.R. (2d) 287 (C.A.).

[42] Justice Lax went on to state at page 192:

> An arbitral award is not invalid because, in the opinion of the court hearing the application, the arbitral tribunal wrongly decided a point of fact or law: *Quintette Coal, supra*, at p. 227. Where a tribunal's jurisdiction is called into question as it is here, an applicant must overcome "a powerful presumption" that the arbitral tribunal acted within its powers...

[43] Wittmann, A.C.J. in *Jardine Lloyd Thompson Inc. et al v. Western Oil Sands et al*, 2005 A.B.Q.B. 509 at 66, affirmed that this court must show deference to the decision of an arbitration panel acting within its jurisdiction.

[44] Having regard to the purpose of the legislation, that the standard of review is, at a minimum, reasonableness and at the most a great deal of deference and respect.

[45] Finally, on the nature of the question before the tribunal, it appears to me to be one of mixed law and fact. The tribunal was required to determine the facts and then apply the law. Any application of the law must be reviewed to the standard of correctness. Their consideration of the facts must, in my view, be reviewed on the standard of reasonableness. The primary issue being one of mixed law and fact would require a standard of reasonableness.

[46] Western has referred this Court to a decision of Kelen, J. of the Federal Court in *Canada v. S.D. Myers Inc.*, [2004] 3 F.C.R. 368. That case concerned a review of the decision by an arbitral tribunal convened under the Commercial Arbitration Code, being a schedule to the *Commercial Arbitration Act*, R.S.C. 1985 (2nd. Supp.), c.17. The arbitration tribunal was convened pursuant to a dispute under the North America Free Trade Agreement.

[47] The Commercial Arbitration Code is similar, if not identical, to the Model Law in this case. Article 5 is the same in both. Article 16 is the same in both. Article 34 is the same in both.

[48] In *Myers*, and in the cases referred to by Kelen, J., it was Article 34 which was being considered. To that extent, *Myers* is not particularly helpful, except to indicate the general philosophy in that decision, and in the cases referred to, towards intervention by the Courts in international commercial arbitrations.

[49] Justice Kelen, at para. 36, quotes with approval, the following statement by Tyso, J. in *Mexico v. Metalclad Corp.* (2001), 89 B.C.L.R. (3d) 359 (S.C.):

> I need not determine whether it is appropriate to use the "pragmatic and functional approach" to determine the standard of review under the CAA. With respect to the International CAA, it is my view that the standard of review is set out in ss 5 and 34 of that Act and that it would be an error for me to import into that Act an approach which has been developed as a branch of statutory interpretation in respect of domestic tribunals created by statute. It may be that some of the principles discussed by the Supreme Court of Canada in this line of authorities will be of assistance in applying ss 5 and 34 but the "pragmatic and functional approach" cannot be used to create a standard of review not provided for in the International CAA. I note that since the "Pragmatic and Functional approach" was fully articulated by the Supreme Court of Canada in *Pushpanathan v. Canada*, [1998] 1 S.C.R. 982, the approach has not been utilized in Canadian cases involving international commercial arbitrations (e.g., *Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International, S.p.A.* (1999) 45 O.R. (3d) 183 (Ont. S.C.J.); affirmed (2000) 49 O.R. (3d) 414 and *D.L.T. Holdings Inc. v. Grow Biz International, Inc.* (2000), 194 Nfld. & P.E.I.R. 206 (P.E.I.S.C.T.D.)).

[50] Kelen, J. went on to state at paragraph 39:

> The courts have held that the "pragmatic and functional" approach cannot be used to create a standard of review not provided for in article 34 of the Code. Courts restrain themselves from exercising judicial review with respect to international arbitration tribunals so as to be sensitive to the need of a system for predictability in the resolution of disputes and to preserve the autonomy of the arbitration forum selected by the parties.

[51] Whether I use the pragmatic or functional approach or the deference approach, which seems to be the generally favoured method of reviewing an international commercial arbitration award, the same result would occur in this case. Under the functional and pragmatic approach, there is no particular weight to be assigned to any of the four factors referred to above. Were an equal weight to be given to each of the factors, the standard of review in this case would tend to favour correctness, with a leaning towards reasonableness. In my respectful view, however, the purpose of the legislation should be given a greater weight than the other factors.

[52] The purpose of the legislation in this case is to facilitate and resolve disputes subject to international commercial arbitration legislation. As Kelen, J. said, in paragraph 39, courts should: "... be sensitive to the need of a system for predictability in the resolution of disputes and to preserve the autonomy of the arbitration forum selected by the parties."

[53] Courts are generally reluctant to interfere with decisions of a commercial arbitral tribunal, particularly in a matter involving an international commercial arbitration. That was made clear in *Corporacion Transnacional de Inversiones* (which was upheld by the Ontario Court of Appeal). It was made clear in *Jardine Lloyd Thompson*. Notwithstanding that article 16(3) appears to give the reviewing court wide discretion, I am satisfied that the article does not goes so far as to allow a reviewing in court to substitute its view simply because that court would not have reached the same conclusion. The standard of review ought to be, and I take it to be, one of reasonableness, deference & respect.

IS THERE A REVIEWABLE ERROR

[54] I am satisfied that the contract of insurance between ACE and Bermuda arose when ACE sent its binder to JLT on April 19, 2000 and JLT accepted the binder by payment of the sum of $164,000 on April 20, 2000. The terms of that contract included these provisions; which were referred to earlier.

Policy Form:	Following in every way, with any exceptions noted under Special Conditions herein, the policy form dated December 2, 1999, issued by Allianz Insurance Company of Canada and submitted by Jardine Insurance services Canada Inc. Final wording subject to approval.

. . .

Special Conditions: 1. London arbitration Clause applicable to any dispute arising under or relating to this insurance, or the breach thereof (see attached).

. . .

[55] It is common ground that no arbitration clause was attached.

[56] ACE has argued that JLT, who was clearly Western's agent, was familiar with its London arbitration clause even though the clause was not attached. That was Mr. Aggarwal's evidence. That evidence was unchallenged.

[57] ACE has referred to the English Court of Appeal decision in *British Crane Hire v. Ipswich Plant Hire*, [1974] 1 All ER 1059 and the decision of the House of Lords in *Hardwick Game Farm v. S.A.P.P.A.*, [1969] 2 A.C. 31 which basically stand for the position that where parties are familiar with the conditions habitually imposed in their agreements, such conditions will be deemed incorporated in the agreement even though the agreement was verbal and the usual written conditions were not exchanged at the time the verbal agreement was concluded. ACE went on to argue that if JLT did have any doubts, it should have asked for the clause. It could not simply ignore it. ACE then argues that the Tribunal failed to take these facts and this law into consideration and its decision ought to be set aside.

[58] With respect, it is not entirely correct to say that the Tribunal failed to take these facts into consideration. No specific reference is made to either of the above decisions, but the majority of the Tribunal, in paragraph 59-65 clearly considers the effect of the words used: "London Arbitration Clause (see attached)" and the effect of that clause not having been attached.

[59] The Tribunal refers to two decisions relied upon by ACE as authority for the position that the wording used was sufficient to amount to an enforceable arbitration agreement. Mr. Cherniak says at paragraph 62:

> In my view, the issue at bottom, is one of fact - was there such an agreement?

[60] He goes on to say at paragraph 63:

> The problem for ACE Bermuda is that its binders made it clear that it intended a specific wording for the London arbitration clause which was said to be attached to the binders but it was not attached to either binder it issued, nor was one sent at anytime before the policy was issued. ACE Bermuda, by the terms of the binder, left itself an out, the right to terminate if it was not satisfied with the final wording of the policy. Thus, ACE Bermuda made it clear that it had a specific and detailed London arbitration clause in mind (one which later correspondence makes clear included a New York choice of law clause), and was not satisfied with the simple wording "London Arbitration Clause" as the contract of

arbitration that it proposed. This is demonstrated by the wording of the binders themselves, referring to a form that was said to be attached, and confirmed by the later actions of ACE Bermuda. The case is thus distinguishable form *Hobbs Padgett & Co. v. J.C. Kirland, Ltd.* and *Tritonia Shipping Inc. v. South Nelson Forest Products Corporation, supra,* where the wording, though short, clearly was the complete agreement.

[61] In paragraph 65 Mr. Cherniak concludes:

> It is therefore impossible to conclude on this record that there ever was an agreement for the kind of London arbitration clause that ACE Bermuda proposed. There was neither form nor specificity to the purported agreement that ACE Bermuda now relies on, though the version of what ACE Bermuda actually had in mind was highly specific and detailed, and included a choice of law clause that it never bargained for. Mr. Aggarwal noted the difference between the form provided on July 20, 2000 and the earlier binders, and the inconsistency of that form with the JLT accompanying memorandum. Notwithstanding he noted that difference, he either chose not to, or failed to, object to the policy form that was sent to him, either then or when the final policy was issued in late October. It is impossible to know, on the evidence, whether ACE Bermuda believed, in 2000, that the April and May binders did or did not include its standard New York choice of law clause.
>
> Nor are the subsequent actions of ACE Bermuda consistent with there being a concluded agreement for a London arbitration clause, as opposed to a failure to include in the final policy an exception for ACE Bermuda with respect to the situs of the arbitration. The letter sent to JLT on August 29, 2001 and the unsent draft letter of August 20, 2001 make it clear that ACE Bermuda was alive to the fact that the policy as issued did not contain a London arbitration clause, and that the binder did not describe the London arbitration clause that ACE Bermuda had in mind.

[62] The majority of the Tribunal did not specifically refer to the *Ipswich* and *Hardwick* decisions. Nor did it refer to the fact that JLT was aware of the terms of the London Arbitration Clause. However, it cannot, with respect, be said that either this law or these facts were not taken into consideration when the very inquiry made by the Tribunal was whether it was clear to ACE itself what the terms were and when it concluded on the evidence before it, that not even ACE was aware of the terms of the clause.

[63] The Tribunal did take into consideration the e-mails from Ms. Simpson of JLT which ACE says were evidence that JLT had agreed to a London Arbitration Clause. It also took into consideration the draft letter by Mr. Aggarwal of August 20, 2000 and the actual letter which was sent by Mr. Aggarwal on August 29, 2000. It took into consideration later correspondence from ACE's English solicitors. It took into consideration Mr. Aggarwal's early refusal or

unwillingness to comment on the final draft other than to post a note to himself which obviously queried the absence of the London Arbitration Clause. In the majority of the Tribunal's view, these inactions, proposed actions and actual actions were confirmation to the Tribunal that ACE had never concluded an agreement with respect to the London arbitration clause.

[64] While ACE is correct that there is no document emanating from ACE where it is stated that ACE has agreed to a Calgary arbitration clause, the Tribunal has found that there was never an agreement for "the kind of London Arbitration Clause that ACE Bermuda purposed."

DECISION

[65] I am satisfied that the issue before the Tribunal was one of mixed law and fact. I am satisfied that the standard of review is one of reasonableness and deference. The majority of the Tribunal gave full consideration to the arguments of ACE. It fully reviewed the facts. It analysed the applicable law. It gave reasons for its decision. Those reasons are supportive of its decision.

[66] The application by ACE requesting a declaration that there is an existing and valid London arbitration clause between ACE and Western is denied. The application requesting a declaration that the Tribunal has no jurisdiction over ACE is dismissed.

[67] The parties may speak to me on costs if they so choose. Otherwise Western is entitled to the costs of these proceedings in the appropriate column.

Heard on the 3rd day of November 2005.
Dated at the City of Calgary, Alberta this 21st day of December, 2005.

G.C. Hawco
J.C.Q.B.A.

Appearances:

Laurent Fortier of Stikeman Elliott
for the Applicant

Roger Smith of MacLeod Dixon LLP
for the Respondents