CITATION: Belokon et al. v. The Kyrgyz Republic, 2016 ONSC 5878
COURT FILE NOS.: CV-15-10890-00CL
CV-15-11142-00CL
CV-11-9419-00CL
CV-14-10731-00CL
DATE: 20160929

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: VALERI BELOKON, Applicant ("**Belokon**")

AND**:**

THE KYRGYZ REPUBLIC, KYRGYZALTYN JSC and CENTERRA GOLD INC., Respondents

AND RE: ENTES INDUSTRIAL PLANS CONSTRUCTION & ERECTION CONTRACTING CO. INC., Applicant ("**Entes**")

AND**:**

THE KYRGYZ REPUBLIC, KYRGYZALTYN JSC and CENTERRA GOLD INC., Respondents

AND RE: SISTEM MÜHENDISLIK İNŞAAT SANAYI VETICARET ANONIM SIRKETI, Applicant ("**Sistem**")

AND**:**

THE KYRGYZ REPUBLIC, KYRGYZALTYN JSC and CENTERRA GOLD INC., Respondents

AND RE: STANS ENERGY CORP., Applicant ("**Stans**")

AND**:**

THE KYRGYZ REPUBLIC, KYRGYZALTYN JSC and CENTERRA GOLD INC., Respondents

BEFORE: Conway J.

COUNSEL: *Peter Cavanagh* and *Chloe A. Snider*, for Belokon

Robert Wisner and *Stephen Brown-Okruhlik*, for Entes

Steven G. Frankel, for Sistem

John Terry and *Vitali Berditchevski,* for Stans

Aaron Rubinoff and *John Siwiec,* for The Kyrgyz Republic

Matthew Latella, Christina Doria and *Matt Saunders,* for Kyrgyzaltyn JSC

HEARD: In writing

COSTS ENDORSEMENT

[1] Belokon, Entes, Sistem and Stans (the "**Applicants**") brought applications in Ontario to recognize and enforce arbitral awards in their favour against the Kyrgyz Republic (the "**Republic**"). A common issue in each application was whether the Republic has an ownership interest in shares of Centerra Gold Inc. ("**Centerra**") that are registered in the name of Kyrgyzaltyn JSC ("**Kyrgyzaltyn**"). The Applicants sought a declaration that the ownership interest of the Republic in the Centerra shares was subject to seizure by way of execution under the *Execution Act*, R.S.O. 1990, c. E.24.

[2] The hearing on the common issue for the four applications was held on June 28 and 29, 2016 (the "**Common Issue Hearing**"). For reasons released on July 11, 2016,[1] I dismissed the applications for a declaration that the Republic has an exigible ownership interest in the Centerra shares.

[3] The Republic and Kyrgyzaltyn (the "**Respondents**") now seek their costs.

[4] The Republic seeks a total of **USD$392,292** against the Applicants, on a full indemnity basis, payable jointly and severally by all four Applicants.[2]

[5] Kyrgyzaltyn has settled the issue of costs with Stans. It seeks its costs from the other three Applicants (Entes, Sistem and Belokon) in the amount of **$479,384** on a substantial indemnity basis, payable jointly and severally.[3] It further seeks a total of **$78,513**[4] from those Applicants for other fees incurred in each of the applications.

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[1] *Belokon et al. v. The Kyrgyz Republic*, 2016 ONSC 4506.
[2] USD$92,934 (Belokon); USD$95,501 (Sistem); USD$95,553 (Stans); USD$108,301 (Entes).
[3] $159,134 (Sistem); $157,779 (Belokon); $162,466 (Entes). The three Applicants submit that I should deduct the full amount of the Stans settlement from the overall costs that I would otherwise have awarded to Kyrgyzaltyn. In my view, that would provide a costs windfall to the three Applicants. I prefer Kyrgyzaltyn's approach that I consider costs claimed against the other three Applicants, without reference to the Stans settlement, and determine costs accordingly.
[4] $39,480 (Sistem), $22,229 (Belokon) and $16,804 (Entes).

[6] In addition, Kyrgyzaltyn seeks to recover costs from Sistem in respect of Kyrgyzaltyn's unsuccessful jurisdiction motion in 2012 and appeal in 2013 (the "**Sistem Jurisdiction Motion**"). Kyrgyzaltyn seeks an order that Sistem disgorge the $68,750 previously paid by Kyrgyzaltyn to Sistem, and an order that Sistem pay $134,712 to Kyrgyzaltyn in costs for the Sistem Jurisdiction Motion, for a total of **$203,462**.

Scale of Costs

[7] The Republic has provided no justification or explanation for its claim of full indemnity costs. There is no basis to award costs on anything other than a partial indemnity scale.

[8] Kyrgyzaltyn submits that substantial indemnity costs are warranted against Entes, Sistem and Belokon because earlier *Mareva* orders in favour of those Applicants (freezing the Centerra shares and dividends) have now been set aside. All three orders have now been set aside on consent. There has been no judicial finding that any of the *Mareva* orders was obtained as the result of any non-disclosure on the part of the Applicants.[5] The history of the *Mareva* orders does not provide a basis for an award of substantial indemnity costs for this hearing. Partial indemnity is the appropriate scale.

Joint and Several Liability

[9] I agree with the Applicants that the costs in this case should be payable on a several, not joint and several, basis. The Applicants are unrelated. Each of the Applicants brought a separate recognition application, based on different facts, involving arbitral awards against the Republic.

[10] While each of the applications sought a declaration that the Republic has an ownership interest in the Centerra shares, that issue was adjudicated in one hearing (at the court's direction) solely as a matter of judicial economy and to avoid any inconsistent results. It would be unfair for an Applicant to be liable for the other Applicants' cost awards simply because it cooperated in following the court's direction.

Quantum of Costs

[11] The overriding principle in awarding costs is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant: *Boucher et al. v. Public Accountants Council for the Province of Ontario et al.* (2004), 71 O.R. (3d) 291 (C.A.).

[12] In exercising my discretion under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, I may consider, in addition to the result in the proceeding, the factors in rule 57.01(1).

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[5] See, for example, *Petersen v. Petersen*, 2010 ONSC 2525, at paras. 17-23; *Sparkle Ventures Inc. v. At My Accounting Department Inc*., 2011 ONSC 1972, at para. 6; *Parallel Medical Services Ltd. v. Ward*, [2002] O.J. 1498, at para. 7, 14-28.

[13] A few preliminary points. First, I am only awarding costs with respect to the Common Issue Hearing. I reject Kyrgyzaltyn's submission that its success on the Common Issue Hearing entitles it to a reversal of previous cost awards for the earlier Sistem Jurisdiction Motion. In my view, it does not follow from this court's determination of the Centerra ownership issue that Kyrgyzaltyn should recover its costs for challenging this court's jurisdiction.[6] The cost award for the Common Issue Hearing will cover the costs for that hearing only.

[14] Second, I am only awarding costs with respect to the issue dealt with at the Common Issue Hearing – namely, whether the Centerra shares were an exigible asset of the Republic. To the extent that the Respondents seek costs referable to the Applicants' recognition applications generally, those costs are not properly recoverable at this time.

[15] Third, the Common Issue Hearing was not the first time the Centerra share ownership issue has been determined by this court. There was a hearing in 2014 to determine that issue in the Sistem case (the "**2014 Hearing**"). The Court of Appeal subsequently found that the Republic had not been properly served and directed a rehearing. The Court of Appeal awarded $100,000 in costs for the 2014 Hearing to Kyrgyzaltyn and directed that on the rehearing "the application judge will take into account any duplication in the preparation for the new application in awarding costs of the new application".[7] I have therefore considered the fact that Kyrgyzaltyn has already been partly compensated for materials used at the Common Issue Hearing.

[16] Fourth, there was a degree of overlap on each side at the Common Issue Hearing. The Respondents were aligned in their position (with Kyrgyzaltyn taking the lead role) that under Kyrgyz law, Kyrgyzaltyn was the owner of the Centerra shares. The Applicants were aligned in their position that the Agreement on New Terms for the Kumtor Project, interpreted under New York law, established that the Republic was the owner of the Centerra shares. Each of the parties was able to rely on materials and submissions prepared by others.

[17] In terms of the Rule 57.01(1) factors, this was a fairly complex hearing, involving issues of Ontario, Kyrgyz and New York law. The record was extensive, with six experts, 10 fact witnesses and 12 sets of cross-examination. It was a full two day hearing. The issues were significant and involved the potential seizure of over $215 million of Kyrgyzaltyn's assets.

[18] The Applicants could reasonably have expected to pay significant costs if they were unsuccessful on their applications for declaratory relief. Indeed, the initial cost award to Sistem

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[6] Kyrgyzaltyn argues that it is entitled to its costs of the Sistem Jurisdiction Motion as a result of the Court of Appeal's determination in *Sistem Mühendislik İnşaat Sanayi Ve Ticaret Anomic Sirketi v. Kyrgyz Republic*, 2015 ONCA 666, at para. 52, that the earlier decisions were made *per incuriam*. As I discussed with counsel at a case conference in April 2016, and as set out in my endorsement of April 5, 2016, if Kyrgyzaltyn is making a claim for costs arising as a result of the Court of Appeal's decision (and to the extent that this court has jurisdiction to deal with those cost issues) Kyrgyzaltyn is to proceed by way of motion, which is to be scheduled as between Sistem and Kyrgyzaltyn's counsel.

[7] *Sistem Mühendislik İnşaat Sanayi Ve Ticaret Anomic Sirketi v. Kyrgyz Republic*, 2015 ONCA 666, at para. 5.

for the 2014 Hearing was $200,000. On this Common Issue Hearing, the Applicants' own bills of costs on a partial indemnity basis (fees only) were $205,548 (Belokon), $146,226 (Entes) and $61,295 (Sistem). However, I do not accept the Respondents' submission that because four applications were involved, the Respondents are entitled to proportionately more in costs. While that may have created some additional work for the Respondents, the fact is that there was only one common issue to be determined at the hearing on all four applications.

[19] Considering all of the above factors, I make the following cost awards, all on a partial indemnity basis, inclusive of disbursements and taxes:

- To Kyrgyzaltyn: **$210,000** (Cdn.). Each of Entes, Belokon and Sistem shall pay $70,000 of this award, on a several basis; and

- To the Republic: **$100,000** (Cdn.).[8] Each of Entes, Belokon, Sistem and Stans shall pay $25,000 of this award, on a several basis.

[20] All costs are payable within 30 days.

Conway J.

Date: September 29, 2016

[8] I am awarding all costs in Canadian dollars. I see no reason to award costs to the Republic in U.S. dollars simply because it had an arrangement with counsel to be charged in that currency.