CITATION: Sunlodges Ltd. v. The United Republic of Tanzania, 2020 ONSC 8201
COURT FILE NO.: CV-20-00648370-00CL
DATE: 20201110

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

SUNLODGES LTD and SUNLODGES (T) LIMITED

Applicants (Moving Parties)

- and -

THE UNITED REPUBLIC OF TANZANIA

Respondent (Responding Party)

Case Management ☐ Yes ☒ No by Judge: Koehnen J.

Counsel	Telephone No:	Email/Facsimile No:
Nancy Roberts, Mark Sheeley for Sunlodges		
Thomas N. T. Sutton, Trevor Courtis, Shayan Kamalie the United Republic of Tanzania		

☒ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: _____
☐Time Table approved (as follows):

Date Heard: November 9, 2020

1. This is a motion by the applicant, Sunlodges LTD and Sunlodges (T) Limited to extend an interim Mareva injunction.

2. The issue arises out of an international arbitration award that Sunlodges obtained against the United Republic of Tanzania pursuant to a Bilateral Investment Treaty between Tanzania and Italy, Sunlodges place of domicile.

3. Sunlodges has brought an application to recognize and enforce the arbitral award in Ontario. That application is scheduled to be heard on December 10, 2020.

4. The applicant has discovered that Tanzania has purchased a deHavilland aircraft which is being constructed in Ontario and will be ready for delivery to Tanzania in December.

5. By order dated September27, 2020, Conway J. granted the applicant an interim Mareva injunction to restrain Tanzania from removing the aircraft from Ontario until the application to recognize and enforce the arbitral award had been heard.

6. This was the comeback hearing for the injunction. At the end of the hearing I indicated that I would extend the injunction until the hearing of the application to recognize and enforce the arbitral award with reasons to follow.

7. Tanzania resists the injunction and submits that it should be set aside for the following reasons:

    a. The aircraft is not the property of Tanzania
    b. The applicant failed to make full and fair disclosure before Conway J.
    c. Sovereign immunity precludes the injunction
    d. The applicant has failed to meet the test for a Mareva injunction.

e. Tanzania has not implemented the New York Convention into domestic law.

a. Ownership of the Aircraft

8. Tanzania argues that the state agency with an interest in the aircraft was not a party to the arbitration and that the state agency's property cannot be seized in satisfaction of an arbitral award against Tanzania. I am unable to agree. The party with the interest in the aircraft is the Tanzanian Government Executive Agency. It is an executive agency of the transportation ministry. It is not a separate legal entity but part of the Tanzanian government. Assets in its name are therefore property of the Tanzanian government and can be seized in satisfaction of an award against the Tanzanian government.

b. Full and Fair Disclosure

9. Tanzania argues that the applicant failed to make full and fair disclosure on the Mareva injunction because its factum set out the test for a Mareva injunction before setting out the provisions of the *State Immunity Act*, R.S.C. 1985, s. S-18. Tanzania says this is significant because the *State Immunity Act* creates a threshold jurisdictional issue which must be addressed before the test for a Marva injunction is addressed. I disagree. One of the elements for the court to consider and balance when assessing a Mareva injunction is whether the applicant has a strong prima facie case. One of the issues that goes to the applicant's strong prima facie case is the jurisdictional issue under the *State Immunity Act*. In assessing the request for the injunction, the court must balance the strength of the applicant's case on that issue against other considerations. In my view it was appropriate to position the arguments

as the applicant did in its factum before Conway J. I cannot see any judge being misled by the order of argument.

c. Sovereign Immunity

10. When making submissions about sovereign immunity, counsel for Tanzania first took me to Canadian cases holding that the Crown cannot be enjoined. Tanzania argues that the rules Canadian courts apply to its own state must, as a matter of comity, also be applied to foreign states. While I agree with that principle as a general rule, the scheme underlying bilateral investment treaties pursuant to which the arbitral award was issued modifies that rule. The whole point of bilateral investment treaties is to remove or limit defences of involving sovereign immunity in cases involving nationalization or expropriation. By submitting to a bilateral investment treaty and by entering arbitrations under it, a sovereign state consents to have orders made against it. That is the fundamental quid pro quo for foreign investment. It would not be appropriate for this court to remove that fundamental quid pro quo precisely when it becomes important.

11. Tanzania submits that the concept of sovereign immunity deprives this court of jurisdiction to award a Mareva injunction before it has recognized the arbitral award. Tanzania relies on section 11 (1) of the *State Immunity Act* which provides:

> Subject to subsection (3), no relief by way of an injunction, specific performance or the recovery of land or other property may be granted against a foreign state unless the state consents in writing to that relief

and, where the state so consents, the relief granted shall not be greater than that consented to by the state.

12. Tanzania submits it is never consented to injunctive relief. It points to article 8 of the Bilateral Investment Treaty which provides:

> "At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods."

13. Tanzania submits that the provision limits interim measures to the subject matter of the dispute. All agree that the aircraft in Ontario is not the subject matter of the dispute. I do not, however, think that is the end of the analysis. Article 8 of the Bilateral Investment Treaty also calls for arbitration of any disputes under UNCITRAL rules. That is what the parties did here. Article 32.1 of the UNCITRAL provides:

> 1. In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.

14. By agreeing to the UNCITRAL rules in the Bilateral Investment Treaty, Tanzania also agreed to the possibility of interim or interlocutory awards being made against it.

15. To allow an arbitral tribunal to make interlocutory awards against Tanzania but then deny a court before whom enforcement is sought the power to make interlocutory awards strikes me as being inconsistent with the agreement Tanzania made and strikes me as an unduly narrow interpretation of the *State Immunity Act*.

d. The Test for a Mareva Injunction

16. Tanzania submits that a Mareva injunction is improper here because such injunctions can only be obtained if the plaintiff can establish that the defendant is about to dissipate assets for the purpose of defeating potential creditors: *R. v. Consolidated Fastfrate Transport Inc*., 1995 CanLII 1527 (ON CA) at para. 52; *RBC Dexia Investor Services Trust v. Goran Capital Inc.*, 2016 ONSC 1138 at para. 11(b); *Voysus Connection Experts Inc. v. Shaikh*, 2019 ONSC 6683 at para. 86-97. Although it appears that Tanzania intends to remove the aircraft from Ontario as soon as it is ready for delivery, Tanzania submits that it is removing the aircraft not to defeat creditors but to run its national airline in the ordinary course.

17. Sunlodges on the other hand submits that it is not necessary to demonstrate an intention to defeat creditors to obtain a Mareva injunction. It relies on the concurring but minority opinion of Weiler J.A. in Consolidated Fastfrate to the effect that a moving party need not show an improper purpose for the transfer of assets to obtain a Mareva injunction. In coming to that conclusion, Weiler J.A. relied in part on the opinion of Southin J. (as she then was) in *Gateway Village Investments Ltd. v. Sybra Food Service Ltd*. (1987).

18. More recently, in *Borrelli v. Chan*, 2017 ONSC 1815, the Ontario Divisional Court adopted the view of Weiler J.A. and referred to the elements of Mareva injunctions established in earlier cases as guidelines rather than rules. In addition, the Divisional Court cited the British Columbia Court of Appeal in *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.), where McLachlin J.A. (as she then was) said at p. 346:

> …the judge must not allow himself to become the prisoner of a formula. The fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case. These observations set out above were noted by Weiler J.A. in relation to her finding that in order to obtain a Mareva injunction it is unnecessary to incorporate a requirement that a dissipation or transfer of assets was pursued for an improper purpose.

19. That approach is particularly apposite here. In most cases involving Mareva injunctions, the court is being asked to freeze the assets of a defendant before any adjudication on the merits has occurred. That circumstance warrants additional caution. This case is different. Here, a full adjudication on the merits has occurred in the arbitration. The Mareva injunction here is being sought not to encumber assets before judgment but to enforce an existing arbitral award. Although Tanzania rightly points out that the arbitral award is not yet enforceable in Ontario because it has not yet been recognized by an Ontario court, the recognition hearing is scheduled to occur on December 10, 2020, approximately four weeks from now.

20. The grounds for refusing to recognize an international arbitral award are very narrow. When I asked counsel for the respondent, for the basis on which Tanzania was resisting recognition and enforcement, he was unable to give me a succinct ground. Instead, he focused on a motion that Tanzania was bringing to stay the Ontario enforcement proceeding pending the outcome of proceedings the respondent had taken before the courts of Tanzania. In October 2020, the government of Tanzania obtained an order from the High Court of Tanzania staying any enforcement and recognition proceedings inside or outside of Tanzania pending the outcome of other proceedings in Tanzania. It appears that Tanzania takes the position that the arbitral

award cannot be enforced until it has been recognized and registered in Tanzania. In support of this position, Tanzania appears to rely on article 8.4 of the Bilateral Investment Treaty which provides:

> Recognition and implementation of the arbitration decision in the territory of the Contracting Parties shall be governed by their respective national legislation, in compliance with the relevant international conventions they are parties to.

21. It appears that Tanzanian law requires the registration and recognition of the arbitral award in Tanzania before it can be enforced.

22. While not prejudging Tanzania's motion for stay, it is nevertheless relevant for me to consider it on the Mareva injunction which is before me, because it goes to the degree to which the applicant has established a strong prima facie case or a serious issue to be tried.

23. Resisting recognition in Ontario pending resolution of proceedings in Tanzania raises two fundamental problems for Tanzania.

24. First, article 8.4 of the treaty requires compliance with national legislation in order to enforce the arbitral award in either Italy or Tanzania. It does not require compliance with Tanzanian law in order to enforce the award in other countries.

25. Second, the position of Tanzania undermines the fundamental basis of Bilateral Investment Treaties and international arbitration. The whole point of Bilateral Investment Treaties is to avoid the courts and the law of the host state. That again is the fundamental quid pro quo that states agree to when signing Bilateral Investment Treaties.

26. Whether Ontario will recognize and enforce an international arbitration award turns on Ontario law, not Tanzanian law unless, Tanzanian law is factor that is somehow incorporated into Ontario law by virtue of the manner in which Ontario courts apply the New York Convention, the *International Commercial Arbitration Act* or the case law applicable to the recognition and enforcement of arbitration awards.

27. In my view, the motion for stay does not in any way displace the equities in favour of the applicant. On my balancing of the equities, the injunction should continue at least until this court decides the recognition and enforcement application.

28. The fact that the applicant has obtained an international arbitration award gives it a strong prima facie case for recognition and enforcement of the award, particularly in the absence of any cogent argument from Tanzania for why the award ought not to be recognized and enforced.

29. The balance of convenience clearly favours the applicant. If the aircraft is allowed to leave Ontario, it will suffer more harm than Tanzania will suffer from the continuation of the injunction. At the moment, the aircraft is not even ready to be delivered. It will be ready sometime in December. The recognition and enforcement application will be heard on December 10, 2020. Assuming the aircraft is even ready for delivery on December 1, Tanzania will suffer 10 days of inconvenience. Depending on precisely when the aircraft is ready, Tanzania may suffer no inconvenience at all.

30. The applicant will suffer irreparable harm if the aircraft is allowed to leave Ontario. As I have noted above, the aircraft is an asset of Tanzania. It is readily exigible. The award was issued almost one year ago. Tanzania has not paid anything on account of the award, nor has Tanzania moved to set aside the award in Sweden, the seat of the arbitration. Those circumstances suggest to me, on its face, that Tanzania does

not intend to pay the award voluntarily and that the applicant will be required to enforce the award where it can.

31. By signing a Bilateral Investment Treaty, Tanzania has agreed to subject itself to an investor – state arbitration regime, a fundamental cornerstone of which subjects signatories to Bilateral Investment Treaties to enforcement steps in foreign countries. What the applicant seeks is precisely what Tanzania agreed to in signing the treaty and in submitting to arbitration.

32. Tanzania notes that there are third-party interests at stake because the aircraft is intended to be used to improve air travel in Tanzania. The absence of the aircraft will impede that goal and detrimentally affect those who depend on air travel. While I am sympathetic to what may well amount to serious inconvenience for those members of the public who will not be able to enjoy the benefit of the aircraft, whether the public gets to enjoy the benefit of the aircraft depends entirely on Tanzania. It can ensure that the public enjoys the benefit of the aircraft by paying the award that was rendered against it.

e. Adoption of the New York Convention

33. Tanzania submits that the award is not enforceable in Ontario pursuant to the *International Commercial Arbitration Act* which incorporates into Ontario law the New York Convention because Tanzania has not yet passed legislation that incorporates the New York Convention into the domestic law of Tanzania. This is immaterial. Tanzania's failure to implement the New Your Convention into its domestic law would, at most, mean that enforcement of an international arbitral award in Tanzania is not governed by the New York Convention. Tanzania's failure

to implement the New York Convention has no bearing on Ontario's ability to enforce international arbitration awards pursuant to the *International Arbitration Act*. Tanzania has, however, signed the New York Convention and can therefore be bound by its principles when a party to an arbitration with Tanzania seeks to enforce that arbitral award outside of Tanzania.

34. Moreover, the arbitration in question here occurred in Sweden. Sweden therefore constitutes the seat of the arbitration. Sweden is bound by the New York Convention.

Disposition

35. For the reasons set out above, I extend the Mareva injunction to the completion of the application in Ontario to recognize and enforce the arbitral award.

36. Tanzania also brought a motion to strike the affidavit on which the applicant relied to obtain the injunction. No time was spent on that motion during argument. I have not relied on impugned passages of the affidavit in coming to my conclusion.

37. The applicant is entitled to costs of this motion, including costs of the motion to strike its affidavit. The applicant may make written submissions within 10 days of receiving these reasons with the respondent having 5 business days to respond, and the applicant having a further 3 business days to reply.

November 10, 2020 Koehnen, J.