CITATION: The Russian Federation v. Luxtona Limited, 2018 ONSC 2419
COURT FILE NO.: CV-17-11772-OOCL
DATE: 20180413

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: THE RUSSIAN FEDERATION, Applicant/Responding Party

AND:

LUXTONA LIMITED, Respondent/Moving Party

APPLICATION UNDER the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sched. 5, Articles 16 and 34 of the *UNCITRAL Model Law on International Commercial Arbitration* in Schedule 2 to the *International Commercial Arbitration Act, 2017*, and Rule 14.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

BEFORE: S.F. Dunphy J.

COUNSEL: *John Terry, Myriam Seers and Vitali Berditchevski*, for the Applicant/Responding Party

Lincoln Caylor, Matthew Kronby and Ranjan K. Agarwal, for the Respondent/Moving Party

HEARD at Toronto: March 27, 2018

REASONS FOR DECISION

[1] This is a motion to strike evidence brought by the respondent within an application under the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Schedule 5 to determine the question of jurisdiction for an international arbitration taking place in Toronto.

[2] The arbitral tribunal ruled as a preliminary matter that it has jurisdiction over the dispute. The applicant Russian Federation brought this application pursuant to art. 16(3) and art. 34(2) of the *UNCITRAL Model Law on International Commercial Arbitration* (enacted in Ontario by Schedule 2 of the ICAA) because the arbitration is taking place in Toronto. In connection with that application, the Russian Federation filed evidence that includes, among other things, expert opinions not placed before the arbitral tribunal when it gave its preliminary ruling.

[3] The moving party respondent Luxtona Limited asked me to strike out all evidence from this application that was not part of the record before the arbitral tribunal excepting only evidence that satisfies the test for leave to introduce fresh evidence on appeal.

[4] A hearing under art. 16(3) or art. 34(2) of the *Model Law* is not an appeal and the applicable standard is one of correctness. Whether or not described as a hearing "*de novo*", such a hearing cannot be confined in advance to the record before the tribunal whose ruling on jurisdiction has been challenged. In deciding the matter of jurisdiction under the *Model Law*, it is neither necessary nor appropriate to engage upon the process having excluded in advance evidence that is otherwise relevant and probative – or may be. The court is well able to control its own process to ensure that evidence is strictly confined to the narrow question of jurisdiction without straying into questions of the underlying merits.

[5] I dismissed the application from the bench with reasons to follow. These are those reasons.

Background to motion

[6] This genesis of this case is a dispute between Luxtona (who claims to be a former shareholder of Yukos Oil Company) and the Russian Federation (who is alleged to have violated certain provisions of the *Energy Charter Treaty* relating to the protection of investments including Luxtona's investment in Yukos). The ECT is a treaty providing for long-term co-operation among signatories in a variety of matters relating to the energy field, including the protection of investments.

[7] The ECT was signed by a representative of the Russian government in 1994 but the Russian Duma twice declined to ratify it.

[8] The availability of arbitration to resolve the claim of Luxtona depends in significant measure upon the "Provisional Application" clause in Article 45(1) of the ECT that provides:

> 45(1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.

[9] Without intending to over-simplify matters, a very significant interpretation issue that separates the parties is whether provisional application is an "all or nothing" proposition (as Luxtona advocates) such that the Treaty applies in full unless the constitution, laws or regulations of the signatory prohibit provisional application or whether (as Russia contends) only those parts of the ECT that can be applied without violation of Russia's constitution, laws or regulations can be applied provisionally while

any provisions of it that do violate the constitution, laws or regulations of Russia can only be applied after ratification.

[10] If Luxtona's "all or nothing" interpretation of art. 45(1) holds, the main question at the hearing of the application will be whether Russian law permits provisional application of treaties generally or of this treaty in particular. If the Russian view of art. 45(1) obtains, the main question will be whether subjecting to arbitral review decisions made by Russian courts and tribunals regarding Yukos' tax liabilities and the enforcement of those tax claims in the absence of ratified treaty violates Russian law.

[11] It is to be noted that *both* interpretations will require a determination by this court of the relevant principles of Russia's constitution, laws and regulations as these apply to whichever interpretation of art. 45(1) is determined to be correct. In advancing this summary of the issue, I do not preclude the parties from refining or adding to these issues at the hearing on the merits – I am simply seeking to frame the issues as they relate to the narrow evidentiary question before me.

[12] The determination of foreign law before this court is a matter of fact requiring expert opinion. The parties are in sharp disagreement over the degree to which I am bound by the findings made by the tribunal in relation to Russian law or the degree to which I ought to be restricted to the record before the tribunal. This is not the sole issue between the parties, but it is the issue that the greatest part of the evidence Luxtona asks me to strike from the record addresses.

[13] A further provision of the ECT relevant to this application is art. 17 that reserves to each Contracting Party "the right to deny the advantages of this part to (1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party".

[14] Luxtona is a Cyprus-incorporated entity with no substantial presence in Cyprus. Russia alleges that it is controlled by citizens of the United States (a non-Contracting Party) and that it is therefore entitled to deny Luxtona the benefit of the ECT for that reason as well. Among the interpretation issues relating to art. 17 is the question of when the denial of benefits objection must be raised: must it be raised before the relevant investment that gave rise to the dispute was made, before the commencement of the arbitration or at some other time?

[15] On June 25, 2013, Luxtona delivered a Notice of Arbitration pursuant to article 26 of the ECT. The dispute raised was the alleged failure of Russia to protect Luxtona's investment in Yukos or the alleged expropriation of that investment contrary to the investment protection provisions of Part III of the ECT.

[16] Each side appointed an arbitrator while the President of the arbitral tribunal was appointed by the Secretary-General of the Permanent Court of Arbitration. The Tribunal so constituted then selected Toronto as the seat of the arbitration.

[17] Russia raised three preliminary objections to the jurisdiction of the Tribunal: a) an objection based upon the provisional application provision of the ECT (art. 45(1)) and alleged conflicts with Russian domestic law; b) an objection based upon the "Denial of Benefit" provisions of article 17; and c) an objection based upon the particular nature of Luxtona's "investment" in Yukos. The parties filed extensive evidence in respect of each of these preliminary objections and a hearing was held extending over several days.

[18] On March 22, 2017, the Tribunal delivered a lengthy interim award dismissing the first two of Russia's preliminary objections to jurisdiction and deferring its decision on the third.

[19] Since Ontario is the seat of the arbitration, Russia invoked the jurisdiction of the Superior Court of Ontario pursuant to art. 16(3) and art. 34 of the *UNCITRAL Model Law on Commercial Arbitrations* enacted by the ICAA and asks this court to decide the matter of the jurisdiction of the Tribunal to decide the dispute.

[20] In support of its application, the Russian Federation has filed the record of proceedings before the tribunal (to which no exception is taken by the moving party). It also filed two legal opinions regarding Russian law that were not before the tribunal and an affidavit attaching ECT prepatory work documents. The moving party Luxtona objects to the admission of this additional evidence.

Issues raised

[21] What evidence is admissible when challenging the jurisdiction of an arbitral tribunal pursuant to the art.16(3) or art. 34(2) of the *Model Law*?

Analysis and discussion

[22] Article 16(3) of the *Model Law* provides that if "the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal". The Superior Court of Justice is the court specified in art. 6 where, as here, the arbitration is taking place in Ontario.

[23] There is no dispute that the standard to be applied where the issue is the jurisdiction of the tribunal is that of correctness: *Mexico v. Cargill, Incorporated*, 2011 ONCA 622 (CanLII) at para. 48.

[24] The position of the moving party Luxtona is that even though the standard of correctness applies to this application, Russia ought not to be able to rely on evidence beyond the record before the tribunal and its reasons except with leave and by satisfying the test for admission of fresh evidence on appeal. To hold otherwise, Luxtona submits, amounts to holding a full hearing *de novo* which ought not to be permitted as this would undermine the entire arbitral process. Any concerns about usurping the application judge's discretion to examine relevant evidence are mitigated by the fact that the same judge is hearing the motion to strike evidence and the application itself (I have been assigned to hear this application when it is heard later this year).

[25] Luxtona submits that the fresh evidence filed by Russia– including two expert reports on Russian law not before the tribunal – would not satisfy the fresh evidence test as that evidence was available to the applicant before the arbitration hearing. If the court is permitted to disregard findings of fact made by the tribunal, than the appeal would be without boundaries and the parties would be incented to withhold evidence from a jurisdiction hearing before arbitrators. If the evidence stands, Luxtona will be required to obtain responding evidence and the record before the tribunal is already a large and comprehensive one.

[26] The applicant Russian Federation submits to the contrary that a *de novo* hearing is required. The question to be decided on the application is the very existence of an arbitration agreement. There is no truer jurisdiction question. The *Model Law* confers upon the court the authority to "decide the matter". The applicant relies upon *Cargill* and *Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan*, [2011] 1 A.C. 763 (U.K.S.C.) to urge upon me that the tribunal's own view of its jurisdiction has no legal or evidentiary value when the issue is whether the tribunal has jurisdiction in the first place.

[27] The applicant also points to what it described as a universally followed approach to this same issue in other *Model Law* jurisdictions all of which permit the review of additional evidence and a hearing on the matter of jurisdiction *de novo*.

[28] While Luxtona sought to distinguish a number of these cases, it cited none that took a contrary position. My review of the authorities cited by both parties fully supports the proposition that the international *Model Law* jurisprudence is quite unanimously in line with the approach suggested by *Dallah* and *Cargill* being the application of a correctness standard by a court that is neither bound to defer to the decision of the tribunal on matters of jurisdiction nor explicitly confined to the record before such tribunal.

[29] A partial list of the international authorities cited to me includes:

a. Australia: *TCL Air Conditioner (Zhongshan) Co. Ltd. v. Judges of the Federal Court of Australia*, (2013) 295 ALR 596 (H.C.A.): "arbitrators cannot by their own decision … create or extend the authority conferred upon them" (at para. 12);

b. Australia: *IMC Aviation Solutions Pty Ltd. v. Altain Khuder* LLC (2011) 282 ALR 717 (V.C.A.): court reviewed expert opinions and affidavits and made own determination of applicable Mongolian law (at paras. 113 – 117);

c. New Zealand: *Downer Construction (New Zealand) Limited v. Silverfield Developments Limited*, (2004) CIV 2004-404-4488 (H.C. Auk.): "the proper approach [to an application under art. 16(3)] is to reconsider the issue of jurisdiction de novo since the proceeding is not by way of appeal, and since the issue before me is the threshold issue of jurisdiction" (at para. 56);

d. Ireland: J*ohn G. Burns Limited v. Grange Construction & Roofing Company Limited*, [2013] IEHC 284 (H.C.): "the Court has untrammeled jurisdiction to consider *de novo* the issue whether there is an arbitration agreement which binds the parties" (para. 24).

e. Hong Kong: *S Co. v. B Co*., [2014] 6 HKCFI 1436: "whether the application is made under Article 16(3) or the relevant paragraphs of Article 34, the court's review of the Tribunal's decision on its jurisdiction should be de novo – in the sense that the court must be satisfied that the Tribunal was correct and that it did have jurisdiction" (at para. 50).

[30] Obviously, this court is not bound by the decisions of foreign courts. However, such precedents have a dual force in a case such as this. Such decisions are of course persuasive authority in their own right. Such decisions are also indicative of the consensus international view of the interpretation of the *Model Law*. By enacting the *Model Law* essentially "as is" in the ICAA, the Legislature has expressed a desire that Ontario should be – and be perceived by others internationally as being – a "*Model Law* jurisdiction". An interpretation that enhances rather than undermines the confidence of the international community in Ontario as a venue for such arbitral proceedings is clearly one that is in keeping with the intentions of the Legislature providing the language of the statute itself does not require a contrary result.

[31] The Ontario jurisprudence is quite in keeping with the international consensus. Where the issue is one of pure jurisdiction, the standard of review applicable is correctness, "implying possible consideration of, but no deference to, the decision of the tribunal under review": *Cargill* at para. 35. Further, in making its determination, "the court may have regard to the reasoning and findings of the alleged arbitral tribunal, if

they are helpful, but it is neither bound nor restricted by them": *Dallah* paras. 30-31, quoted with approval in *Cargill* at para. 37.

[32] It is true that *Cargill* did not consider Art. 16(3) of the *Model Law*. The application in that case was to set aside a portion of an award after it was made by reason of an alleged excess of jurisdiction under art. 34(2) of the *Model Law*. Nevertheless, the ratio of *Cargill* is as applicable to questions of jurisdiction arising following a ruling on a preliminary question under art. 16(3) as it is to such questions arising after the tribunal has made an award under art. 34(2).

[33] Art. 34(2) of the *Model Law* permits the court to "set aside" an arbitral award where the applicant "furnishes proof that:…(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration". Art. 16(3) of the *Model Law* permits the court to "decide the matter" where an arbitral tribunal "rules as a preliminary question that it has jurisdiction". Neither of these provisions can be construed as constraining the court to the four corners of the evidentiary record before the tribunal still less to the findings of fact regarding foreign law made by the tribunal. The court is directed to "decide the matter" and not merely to review the decision of a tribunal whose very existence may or may not have been authorized.

[34] I do not find the two options presented to me – review of a the tribunal's decision for correctness confined to the record before it or full hearing *de novo* – to be a very helpful or useful description of the process of hearing an application such as this. While Feldman J.A. found that a hearing *de novo* was similar to or a "variant of applying the correctness standard"[1], she did not find it to be the same thing.

[35] There is no reason why an application to this court under art. 16(3) or art. 34(2) of the *Model Law* need proceed like a runaway freight train. True jurisdiction issues, properly construed, will usually be quite narrow ones. A court hearing an application under either provision (art. 34(2) or art. 16(3)) of the *Model Law* will be alive to the concerns expressed in *Cargil*l that the hearing not descend into a review of the merits of the underlying claim and that our courts "are to be circumspect in their approach to determining whether an error alleged under art. 34(2)(a)(iii) properly falls within that provision and is a true question of jurisdiction": *Cargill* at para. 47.

[36] There were expert opinions before the tribunal when it made its preliminary determination on the question of jurisdiction. The applicant has invited me to find the respondent's expert on Russian law whose evidence was relied upon by the tribunal was unqualified and biased. The applicant's new expert evidence is aimed at

[1] Cargill at para. 38.

persuading me to reach that conclusion. I cannot say now whether such evidence will prove persuasive when the matter is heard. I can say that such evidence is at least likely to be admissible and cannot be excluded in advance of a hearing. The respondent must decide for itself whether it is confident to rest upon the expert evidence already filed before the tribunal or whether it wishes to supplement that evidence in light of the additional evidence filed by the applicant. In making its decision, the respondent must take into account that I am not confined to the findings of fact made in regard to Russian law by the tribunal where these relate to the question of jurisdiction nor am I confined to the record consulted by the tribunal in reaching its own conclusions. This does not mean that those conclusions are not to be examined by me or that they lack persuasive authority. They shall be examined and respectfully so when this application is heard on the merits. The applicant bears the burden of establishing lack of jurisdiction – a conclusion that implies at least *prima facie* authority is to be conferred upon the tribunal's finding.

[37] The application of the standard of correctness does not imply ignoring the work that has been done by the tribunal to date but it does not confine my task to that record either.

[38] I am clothed with all necessary jurisdiction to ensure the hearing of this application will adhere to the principles expressed in *Cargill*. Applications are heard on the basis of a documentary record only. In dismissing the application to strike evidence, I indicated to both parties that "I expect the parties to confine their evidence to the narrow question before me and to have constant reference to *Cargill* in framing the questions they expect to be answered at the hearing and the evidence that is necessary or helpful in that narrow quest".

_____

S.F. Dunphy J.

Date: April 13, 2018