CITATION: Belokon v. The Kyrgyz Republic, 2016, ONSC 1075
COURT FILE NOS.: 529/15 and 530/15
DATE: 20160211

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: VALERI BELOKON, Applicant/ Responding Party

AND:

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

BEFORE: H. Sachs J.

COUNSEL: *R. Aaron Rubinoff* and *John Siwiec*, for the Moving Party, The Kyrgyz Republic

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

Peter Cavanagh and *Chloe A. Snider*, for the Responding Party

HEARD at Toronto: In writing

ENDORSEMENT

[1] On this motion, both moving parties are applying for leave to appeal the Order of Matheson J. striking out the affidavit of Rahat Aiylchieva, sworn June 25, 2015 (the "Affidavit").

[2] The Responding Party brought an application to recognize and enforce a foreign arbitral award made in his favour by an arbitral tribunal seated in Paris (the "Award"). The moving parties opposed that application and, in doing so, sought to rely on the Affidavit. Prior to the hearing of the application, the Responding Party sought to have the Affidavit struck. The motion judge granted that application, finding that the Affidavit was clearly irrelevant to the defences available to the moving parties on the enforcement application and was scandalous.

[3] The Republic is seeking annulment of the Award before the Paris Court of Appeal. The annulment proceeding is pending and has not been stayed. The motion judge did not foreclose the Republic from including a copy of the Affidavit in its materials filed on the enforcement application to support its request for an adjournment of that application pending the disposition of the appeal of the Award by the Paris Court of Appeal.

[4] The test for granting leave to appeal under Rule 62.02(4) is well-settled. It is recognized that leave should not be easily granted and the test to be met is a very strict one. There are

two possible branches upon which leave may be granted. Both branches involve a two-part test and, in each case, both aspects of the two-part test must be met before leave may be granted.

[5] Under Rule 62.02(4)(a), the moving party must establish that there is a conflicting decision of another judge or court in Ontario or elsewhere (but not a lower level court) and that it is, in the opinion of the judge hearing the motion, "desirable that leave to appeal be granted." A "conflicting decision" must be with respect to a matter of principle, not merely a situation in which a different result was reached in respect of particular facts: *Comtrade Petroleum Inc. v. 490300 Ontario Ltd.* (1992), 7 O.R. (3d) 542 (Div. Ct.).

[6] Under Rule 62.02(4)(b), the moving party must establish that there is reason to doubt the correctness of the order in question and that the proposed appeal involves matters of such importance that leave to appeal should be granted. It is not necessary that the judge granting leave be satisfied that the decision in question was actually wrong – that aspect of the test is satisfied if the judge granting leave finds that the correctness of the order is open to "very serious debate": *Nazari v. OTIP/RAEO Insurance Co.*, [2003] O.J. No. 3442 (S.C.J.); *Ash v. Lloyd's Corp*. (1992), 8 O.R. (3d) 282 (Gen. Div.). In addition, the moving party must demonstrate matters of importance that go beyond the interests of the immediate parties and involve questions of general or public importance relevant to the development of the law and administration of justice: *Rankin v. McLeod, Young, Weir Ltd*. (1986), 57 O.R. (2d) 569 (H.C.J.); *Greslik v. Ontario Legal Aid Plan* (1988), 65 O.R. (2d) 110 (Div. Ct.).

[7] The moving parties rely on both branches of the Rule in bringing their motions. First, they submit that the decision at issue conflicts with decisions by other judges in Ontario, and that leave to appeal should be granted because of the importance of "clarifying the exceptional circumstances upon which an affidavit can be struck at an interlocutory stage". In support of their submission on this point, the moving parties assert that the motion judge relied on considerations of delay and expense in making her decision, considerations which other judges have found to be irrelevant.

[8] The motion judge recognized that it is only in exceptional cases that issues regarding the admissibility of an affidavit filed on an application are not left to be dealt with by the judge hearing the application. However, as the Republic recognized in its factum, in those cases where the material is clearly scandalous and where it is clearly irrelevant and impugns the behaviour of a party, it can be struck by a judge prior to the matter going before the application judge.

[9] In this case, the motion judge found that the Affidavit impugned the behaviour of the responding party and was clearly irrelevant. She, therefore, struck the Affidavit. In doing so, she acted in accordance with the principles set out in the case law.

[10] With respect to the assertion that the motion judge improperly relied on considerations of delay and expense, this ignores para. 29 of her Reasons where she states:

> However complicated the process of defending the criminal allegations here may be, the first question that must be addressed on this motion is whether the [Affidavit] is clearly irrelevant to this application. If it is relevant, or not clearly irrelevant, as the Republic contends, it will not be struck at this stage.

[11] For these reasons, I find that there are no conflicting decisions where the conflict concerns matters of principle to be addressed on the proposed appeal.

[12] The moving parties also submit that there is reason to doubt the correctness of the motion judge's decision that the Affidavit is clearly irrelevant to the defences available to the Republic in the recognition and enforcement proceeding. According to the moving parties, the Affidavit is relevant to their defence as to the validity of the arbitration agreement, to their defence that the dispute did not fall within the terms of the submission to arbitration and contained decisions that were outside that scope and to their public policy defence.

[13] The motion judge thoroughly and clearly reviewed each of the moving parties' arguments on the relevance of the Affidavit to their defences to the recognition and enforcement proceeding and found, in essence, that each of these arguments were another way of attempting to say that the defence of criminal activity, which failed before the Arbitral Tribunal, ought to succeed and disentitle the responding party from getting any relief.

[14] It is a well-established principle of Ontario law that the merits of an arbitral decision cannot be reviewed by a recognition and enforcement court.

[15] In my view, there is no good reason to doubt the correctness of motion judge's order.

[16] For these reasons, the motions for leave to appeal are dismissed. As agreed by the parties, the Republic shall pay Mr. Belokon his costs of its motion fixed in the amount of $12,000, all inclusive, and KJSC shall pay to Mr. Belokon his costs of its motion, fixed in the amount of $8,000.

H. SACHS J.

Date: 20160211