CITATION: The Russia Federation v. Luxtona Limited, 2019 ONSC 4503
COURT FILE NO.: CV-17-11772-CL
DATE: 20190729

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: The Russia Federation, Applicant

AND:

Luxtona Limited, Respondent

BEFORE: Penny J.

COUNSEL: *John Terry and Miriam Seers* for the Applicant

Lincoln Caylor and Ranjan K. Agarwal for the Respondent

HEARD: June 3, 2019

ENDORSEMENT

Overview and Issue

[1] In this motion, The Russia Federation seeks to disqualify Professor Stephan from serving as an expert witness on questions of Russian constitutional and statutory law. There are two grounds for the motion:

(1) bias; and

(2) lack of qualifications.

[2] Both sides agree that the admissibility of Prof. Stephan's evidence should be determined now, so that Luxtona Limited may submit evidence from another expert if Prof. Stephan's evidence is excluded.

Background

[3] This case involves a dispute between Luxtona, as a former shareholder of Yukos (an energy company), and Russia, which is alleged to have violated certain provisions of the Energy Charter Treaty relating to the protection of investments, including Luxtona's investment in Yukos.

[4] A Russian government representative signed the Treaty but the draft law that would have ratified the Treaty was never passed. Under Article 45(1) of the Treaty, Russia undertook to apply the Treaty provisionally "to the extent that" such provisional application was "not inconsistent with" Russia's Constitution, laws and regulations.

[5] Luxtona has invoked Article 45(1) of the Treaty to allege that Russia provisionally agreed apply the Treaty in its entirety, including the arbitration provision set out in Article 26. Luxtona claims damages of approximately USD $701 million for alleged breaches of the Treaty.

[6] Russia disagrees that it provisionally agreed to apply the Treaty's arbitration clause and argues that arbitration of this claim is inconsistent with Russian law.

[7] Reserving all rights, Russia participated in the appointment of an arbitral tribunal (comprised of nationals of Italy, Costa Rica and the United States) in compliance with the *competence - competence* principal. The arbitral tribunal was, by common agreement, seated in Toronto, Ontario.

[8] In a lengthy interim award, the arbitral tribunal held that it had jurisdiction to hear Luxtona's claims. This application is brought under Articles 16(3) and 34(2) of the *UNCITRAL Model Law on International Arbitration* (enacted in Ontario by Schedule 2 of the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sched 5. The application seeks to set aside the interim award.

[9] One of the central issues in the application turns on Russian law; whether or not the provisional application of the Treaty, in particular the arbitration provision, is "not inconsistent with" Russian law.

[10] In the first stage of the arbitration, both sides put forward evidence on relevant Russian law. Luxtona relied on the evidence of Prof. Stephan. Russia made no objection to the admissibility of Prof. Stephan's evidence before the arbitral tribunal.

[11] In support of its application, Russia filed new expert evidence on Russian law. Luxtona objected to this evidence being admitted. Dunphy J. was assigned to hear this application. Accordingly, Justice Dunphy heard Luxtona's motion to exclude Russia's new evidence. Relying on Article 16(3) of the *Model Law*, as interpreted in Canadian and foreign courts, Dunphy J. held that Russia was permitted to file new evidence not before the arbitral tribunal (and which would not meet the test for new evidence under Ontario law) on its application to set the interim award aside.

[12] As a result of Dunphy J.'s ruling, Luxtona also filed additional expert evidence on Russian law responding to Russia's new evidence. That evidence came from Prof. Stephan.

[13] It is this new evidence from Prof. Stephan that is now the subject of Russia's motion to strike.

Russia' Objection to the Evidence

[14] Russia's first objection to Prof. Stephan's evidence is the alleged long history of providing strategic advice and expert reports for Yukos and Yukos-related entities in claims against Russia. This objection encompasses a number of specific allegations about Prof. Stephan's role and conduct:

(a) he has acted on behalf of Yukos-related entities in at least 11 matters since 2005;

(b) he has in various publications and public statements indicated that he provided legal advice to Yukos, and made other statements of support for Yukos' cause against Russia;

(c) he has provided assistance to Yukos entities in the enforcement of arbitral awards against Russia;

(d) he has provided extensive advice on Russian tax and bankruptcy law issues to Yukos; and

(e) he has received substantial compensation from Yukos entities in relation to this and his prior engagements.

[15] Russia's second objection to Prof. Stephan's evidence is that he is unqualified to provide expert evidence on Russian law. Among other things, Russia complains that Prof. Stephan:

(a) is not a Russian lawyer, is not qualified to practice law in Russia and has no degrees in Russian law or from any Russian university;

(b) claims expertise in a wide and disparate variety of topics, seemingly in response to whatever was required at the time. This list includes Russian:

(i) constitutional law;

(ii) treaty practice;

(iii) statutory interpretation;

(iv) corporate law;

(v) tax law;

(vi) bankruptcy law;

(vii) law on piercing the corporate veil;

(viii) law on arbitrability of disputes;

(ix) law of limitations;

(x) law of foreign economic transactions; and

(xi) copyright law; and

(c) is not fluent in the Russian language.

Luxtona's Response

[16] Regarding the allegation of bias, Luxtona argues that Prof. Stephan's history of providing evidence in similar cases for other Yukos related entities is no evidence of bias. It cannot be surprising that parties who found his opinion helpful in one case would seek it again in comparable circumstances. Prof. Stephan's accumulated expertise and experience makes him a natural selection as an expert witness.

[17] On the question of qualifications, Luxtona argues that there is no requirement that an expert on foreign law be qualified to practice in the jurisdiction or be a resident of or speak or read the language of the foreign jurisdiction.

[18] Luxtona argues that none of Russia's objections rise to the threshold level of admissibility. To extent that they have any merit, these are matters that should go to weight, not admissibility.

Analysis

[19] The threshold requirement for the admission of expert opinion evidence is that the expert witness possess special knowledge and experience going beyond that of the trier of fact. The admissibility of such evidence does not depend on how the expert's special knowledge and experience were acquired so long as the witness is sufficiently experienced in the subject matter in issue, *R. v. Marquand*, [1990] 4 SCR 223.

[20] Canadian law is now clear that there is a further requirement governing threshold admissibility. An expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another - would the expert's opinion change depending on which party retained him?

[21] The expert, as a result of these principles, has a duty to be fair, objective and non-partisan. The expert's attestation or testimony accepting this duty will generally establish that this threshold is met.

[22] Once the expert attests or testifies on oath to this effect, the burden is on the party opposing admission of the evidence to show there is a realistic concern that the expert's evidence should not be received because the expert and is unable or unwilling to comply with that duty. This potentially engages a shifting burden, depending on whether a *prima facie* valid objection is raised. Ultimately, the question turns on a balance of probabilities. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court, *White Burgess Langille Inman v. Abbott and Haliburton Co*. 2015 SCC 23.

[23] It is common ground that matters of Russian law are beyond the knowledge and experience of the Ontario Superior Court of Justice.

[24] I am not satisfied that Prof. Stephan's history with Yukos-related entities demonstrates any lack of independence. Prof. Stephan has recognized his duty to provide opinion evidence that is fair, objective and non-partisan. The fact that he is being paid, or has been paid on previous occasions by similarly-situated parties, cannot be the basis for finding a lack of independence. There is no evidence Prof. Stephan has any inappropriate or direct financial or personal interest in the arbitration or any stake in any of the parties' success or failure in the litigation.

[25] The fact that he may have become the "go to guy" for entities or shareholders wishing to make claims against Russia in international arbitrations is, again, not evidence of lack of independence. His accumulated expertise makes him a natural selection as an expert witness and his history of providing opinion evidence to Yukos stakeholders does not undermine this lack of independence, *Fairview Sentry Limited v. PwC*, 2017 ONSC 3447.

[26] The test in *White Burgess* requires a finding of actual bias, not merely an appearance of bias. I do not think the record supports the conclusion that Prof. Stephan is parroting Luxtona's views or tailoring his evidence to advance Luxtona's theory of the case.

[27] Prof. Stephan has expressed strong views to be sure. The question, however, is whether Prof. Stephan's opinion is "bought and paid for advocacy" or whether it reflects a genuine belief based on his study, analysis and experience. I tend to agree with Luxtona's counsel that Prof. Stephan's retainer did not lead to his beliefs. It was his beliefs and opinions that led to his retainer.

[28] Russia has pointed to some isolated public statements of Prof. Stephan's which, it argues, show that Prof. Stephan has entered the fray as an advocate and lost objectivity about his role as an expert witness on matters relating to Russia and Russian law. I am not convinced these comments go to the root of his impartiality. Prof. Stephan's evidence has been cited favourably by arbitral tribunals in large international commercial arbitrations on a number of occasions. Arbitral tribunals have, on a number of occasions, made findings consistent with Prof. Stephan's comments. Prof. Stephan is to be forgiven if he has taken what might, in the cold light of the courtroom, appear to be an unseemly pride in his work. Likewise, what he may have said at a seminar, while colloquial and perhaps strident, was said in a context that could not have been further from his role as an expert witness with a duty to be fair, objective and non-partisan.

[29] There is no requirement that foreign law experts acquire their expertise in any particular way. In particular, a foreign law expert need not be entitled to act as a legal practitioner in the foreign jurisdiction. It is sufficient if they are a person with demonstrated knowledge of the relevant law.

[30] Prof. Stephan has an MA in Russian Studies as well as a law degree in the US. He is a professor of law at the University of Virginia Law School. His specialties include post-Soviet law, taxation law, international business transactions and international law. He has written and

lectured extensively on various matters relating to Russian law and Russian public policy. He has been qualified as an expert in Russian law on many occasions before international tribunals and domestic courts in the U.S. and in Europe.

[31] It may well be that Prof. Stephan's lack of facility with the Russian language is a limitation on his abilities, but this does not go to the core of his qualifications.

[32] All of Russia's complaints regarding Prof. Stephan's qualifications, it seems to me, go to the extent of his qualifications, not whether he has any at all.

[33] For all of these reasons, the motion to strike Prof. Stephan's evidence is dismissed.

[34] Luxtona brought a mirror motion for an order that Prof. Stephan's reports be admitted. That motion is allowed.

Other Matters

[35] Dunphy J. was assigned to hear this matter on the merits and it was in that capacity that he made an important preliminary ruling on the admissibility of new evidence not before the arbitral tribunal.

[36] As I am now to be the judge hearing the application, as a purely technical matter, the evidentiary ruling of Dunphy J. is not binding on me.

[37] While I am loathe to create uncertainty in the management and orderly conduct of these proceedings, I confess to having serious doubt about the correctness of Dunphy J.'s ruling. This ruling has produced the peculiar result or possibility that the Court will be deciding the issue of the arbitral tribunal's jurisdiction on a completely different record than the record that was before the arbitral tribunal itself.

[38] As a result, on the argument of the main application the parties are directed to be prepared to reargue the narrow question of whether new evidence, which does not meet the test for new evidence under Ontario law, is admissible on a court review of an arbitral tribunal's jurisdiction under Article 16(3) of the Model Law.

Costs

[39] The parties agreed that costs of $75,000 should be awarded to the successful party. Luxtona shall therefore have costs in that amount inclusive of all fees, disbursements and applicable taxes.

Penny J.

Date: July 29, 2019