COURT OF APPEAL FOR ONTARIO

CITATION: Russian Federation v. Luxtona Limited, 2023 ONCA 393
DATE: 20230602
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2023 ONCA 393 (CanLII)

Fairburn A.C.J.O., MacPherson and Miller JJ.A.

BETWEEN

The Russian Federation

Applicant
(Respondent)

and

Luxtona Limited

Respondent
(Appellant)

Lincoln Caylor, Sabrina A. Bandali, Gannon Beaulne, Sakina Babwani, Shaan Tolani, for the appellant

Jonathan Lotz and Natali Antturi, for the respondent

Heard: April 3, 2023

On appeal from the order of the Divisional Court (Justices Calum U.C. MacLeod R.S.J., David L. Corbett and Freya Kristjanson), dated June 30, 2021, with reasons reported at 2021 ONSC 4604, setting aside the order of Justice Michael A. Penny dated December 13, 2019.

MacPherson J.A.:

A. INTRODUCTION

[1] This appeal is grounded in a contractual dispute between a country, the Russian Federation (“Russia”), and a corporation, Luxtona Limited (“Luxtona”),

incorporated in Cyprus. The dispute arose from a contested arbitral decision on jurisdiction that went in favour of Luxtona. The arbitration was "seated" in Toronto so Ontario courts became involved in the appeals that arose from the initial decision of the arbitral tribunal.

[2] A procedural issue arose almost immediately in the Canadian courts: could Russia file fresh evidence on its appeal of the arbitral tribunal's decision on jurisdiction? Justice Dunphy, a Commercial List judge of the Superior Court, said "Yes".

[3] After Justice Dunphy made this ruling, he left the Commercial List and assumed other judicial duties. Justice Penny was assigned the case. The parties asked Justice Penny to decide additional evidentiary issues respecting the new evidence adduced by Russia. During that inquiry, Justice Penny raised questions about the legal basis for filing the new evidence in the first place.

[4] Justice Penny determined that, as the application judge, he was not bound by Justice Dunphy's prior interlocutory ruling. He concluded that Russia was not entitled as of right to file evidence on the application and could only do so if it could meet the stringent test for admission of fresh evidence on appeal, set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, or bring itself within one of the exceptions to the principle that review of an arbitral decision is based on the record before the tribunal.

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[5] Russia appealed Justice Penny's interlocutory decision declining to admit its proposed fresh evidence to the Divisional Court.

[6] The Divisional Court panel identified the issues: 1) whether Justice Penny erred in revisiting an issue previously decided by Justice Dunphy; and 2) if not, whether Justice Penny erred in finding that Russia is not entitled to adduce evidence that was not before the arbitral tribunal.

[7] The Divisional Court agreed with Justice Penny on the first issue, holding that he had jurisdiction to revisit Justice Dunphy's interlocutory ruling.

[8] The Divisional Court disagreed with Justice Penny on the second issue. It held that jurisdictional set-aside applications are hearings *de novo* and, therefore, the parties can, as of right, introduce evidence that was not before the tribunal.

[9] Luxtona sought and was granted leave to appeal the Divisional Court's decision.

B. FACTS

(1) The parties and events

[10] The appellant Luxtona is a former shareholder of Yukos, an energy company based in Russia. It alleges that the respondent Russia violated provisions of the *Energy Charter Treaty*, 17 December 1994, 2080 U.N.T.S. 95, relating to

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protection of investments, including Luxtona's investment in Yukos. Russia is a signatory to the *Treaty* but has not ratified it.

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[11] Luxtona seeks damages of US $701 million. It contends that, pursuant to article 45(1) of the *Treaty*, Russia agreed provisionally to apply the *Treaty*, including its arbitration provisions, to the extent that this provisional application was not inconsistent with Russia's constitution, laws and regulations.

[12] Russia takes the position that it did not agree to apply the *Treaty* provisionally and that the arbitration provisions of the *Treaty* are inconsistent with Russian law.

[13] The parties appointed an arbitral tribunal seated in Toronto. The tribunal received evidence and heard legal arguments on the jurisdiction issue. Both parties put forward extensive evidence on relevant Russian law. In a lengthy interim award, the arbitral tribunal held that it had jurisdiction to arbitrate Luxtona's claims against Russia.

[14] Russia applied to the Ontario Superior Court to set aside the arbitral tribunal's decision on jurisdiction. It based its application on the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), enacted in Ontario as Schedule 2 to the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5.

[15] In particular, Russia relied on Articles 16(3) and 34(2) of the Model Law. Article 16(3) reads:

> The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. 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; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award. [Emphasis added.]

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[16] Article 34(2) reads, in relevant part:

> An arbitral award may be set aside by the court specified in article 6 only if:
>
> (a) the party making the application furnishes proof that:
>
> (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State.

(2) The three Ontario Superior Court decisions

[17] The Ontario Superior Court rendered three decisions on the jurisdiction issue.

(a) Superior Court – Justice Dunphy

[18] In support of its application to set aside the tribunal's decision on the jurisdiction issue, Russia filed new expert evidence on Russian law. This evidence had not been before the arbitral tribunal. Luxtona objected.

[19] In his ruling, Justice Dunphy held that Russia was entitled as of right to adduce its proposed fresh evidence. He said:

> … 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.
>
> …
>
> 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.

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(b) Superior Court – Justice Penny

[20] When he rendered his decision, Justice Dunphy was a member of the Commercial List of the Superior Court. When he left the Commercial List, Justice Penny was assigned to hear the application.

[21] During argument on the application, Justice Penny expressed some doubt about the correctness of Justice Dunphy's reasoning and decision. In his reasons, Justice Penny explained the situation in this fashion:

> Due to changes in judicial assignments, Dunphy J. left the Commercial List and the application was assigned to me. I was asked to decide a further evidentiary question resulting from the new evidence filed. In the course of the hearing on that issue, I questioned the legal basis for the filing of new evidence in the first place. Not being satisfied with the answer, I directed that the issue of admissibility of the new evidence be re-argued before me. That re-argument took place on October 23, 2019.

[22] Following the re-argument, Justice Penny released reasons that determined that Russia could not introduce its proposed fresh evidence. He concluded:

> For these reasons I conclude that fresh evidence in an application to set aside an arbitral tribunal's award on jurisdiction under Articles 16 and 34 of the Model Law may not be introduced as of right. A party seeking to adduce fresh evidence in this circumstance must show that:
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> 1) the evidence could not have been obtained using reasonable diligence;
>
> 2) the evidence would probably have an important influence on the case;
>
> 3) the evidence must be apparently credible; and
>
> 4) the evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at the hearing, be expected to have affected the result.
>
> Russia has not attempted to justify admission of its fresh evidence under any of these four requirements. Accordingly, Russia's new evidence is not admissible in its application to review the correctness of the arbitral tribunal's award on jurisdiction.

[23] Russia appealed this decision to the Divisional Court.

(c) Superior Court (Divisional Court)

[24] The three-judge panel of the Divisional Court allowed the appeal and set aside Justice Penny's decision. Speaking for the court, Justice D.L. Corbett framed the issues:

> There are two issues for this court to decide:

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a. Did the application judge err in revisiting a previously decided issue?

b. If the answer is no, did the application judge err in finding that Russia is not entitled as of right to adduce evidence that was not before the tribunal?

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[25] On the first issue, the Divisional Court agreed with Justice Penny. Justice Corbett concluded:

> The application judge was satisfied that the prior ruling was in error. He concluded that the error would involve the parties assembling and the court adjudicating upon a substantial additional record that should not be considered on a review of the tribunal's interim award. Thus, he concluded that it was in the interests of justice to revisit the ruling so that the parties and the court would not waste further time and money assembling a potentially extensive record that was not admissible. On this logic this was a sound basis for the application judge to revisit the earlier ruling and he had jurisdiction to enter into this inquiry and to make the ruling that he did.

[26] On the second issue, the Divisional Court disagreed with Justice Penny. Justice Corbett concluded:

> In my view the text of the *Model Law*, adopted in Ontario law, prescribes a *de novo* hearing in a court application "to decide the matter" of the tribunal's jurisdiction. *Mexico v. Cargill* does not say otherwise. *Dallah* is strong authority to the contrary, and although the Court of Appeal decision in *Mexico v. Cargill* does not rule on this point, it does generally approve the reasoning in *Dallah*. *The strong international consensus on this point favours the Dallah approach, and the Model Law itself encourages "uniformity" on such points*. The onus is on the challenging party to set aside a tribunal's preliminary ruling on jurisdiction. But because the court is hearing the jurisdictional issue *de novo*, the parties are entitled as of

> right to adduce evidence, including expert evidence, relevant to the jurisdictional issue. [Emphasis added.]

C. ISSUES

[27] The appellant frames the issues as follows:

(1) Did the Divisional Court properly consider the competence – competence principle when deciding that the words “decide the matter” in Article 16 mean that Russia can file the Fresh Evidence as of right?

(2) Did the Divisional Court err in concluding that there was an “international consensus” that parties may file fresh evidence as of right in jurisdictional set-aside applications?

(3) Did the Divisional Court err in deciding the appeal based only on an interpretation of Article 16 and without regard to Article 34?

D. ANALYSIS

(1) The competence – competence issue

[28] Luxtona argues that the Divisional Court erred in not referring to the competence-competence principle. It says that this principle, which allows an arbitral tribunal to rule on its own jurisdiction, requires that parties be given strong incentives to put as much of the record before the tribunal as possible. Otherwise, in Luxtona’s submission, the tribunal will not truly be able to rule on its own jurisdiction.

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[29] I do not accept this submission.

[30] Article 16(1) of the Model Law provides that an arbitral tribunal may rule on its own jurisdiction. This principle, referred to variously as competence-competence, compétence de la compétence, or Kompetenz-Kompetenz, is fundamental to international commercial arbitration.

[31] Competence-competence serves two primary functions. First, it resolves a legal loophole whereby an arbitral tribunal that finds itself lacking jurisdiction would, *ipso facto*, lose its ability to make a ruling to that effect: see Nigel Blackaby, K.C., Constantine Partasides, K.C., & Alan Redfern, *Redfern and Hunter on International Arbitration*, 7th ed. (Oxford: Oxford University Press, 2023). And second, it promotes efficiency by limiting a party's ability to delay arbitration through court challenges to the tribunal's jurisdiction: see *Uber Technologies Inc. v. Heller*, 2020 SCC 16, at para. 122 (per Brown J., concurring).

[32] Thus, in *Dell Computers v. Union des consommateurs*, 2007 SCC 34, at para. 84, the Supreme Court of Canada set out a "general rule that … a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator."

[33] That is precisely what happened in this case: the tribunal was provided with the first opportunity to resolve Russia's challenge to its jurisdiction.

[34] That is as far as the competence-competence principle goes. It does not require any special deference be paid to an arbitral tribunal's determination of its

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own jurisdiction. Competence-competence is best understood as “a rule of chronological priority” rather than as “empowering the arbitrators to be the sole judge of their jurisdiction”: see Emmanuel Gaillard & John Savage, eds., *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), at paras. 659-60.

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[35] As the Divisional Court correctly noted, the “uniformity principle” set out in Article 2A(1) of the Model Law makes international decisions strongly persuasive in Ontario. The very nature of international arbitration makes it highly desirable that Ontario’s regime should be coherent with those of other countries, especially (but not exclusively) those that have also adopted the Model Law. The weight of international authority shows that the competence-competence principle does not limit the fact-finding power of a court assessing an arbitral tribunal’s jurisdiction.

[36] In *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46, a unanimous decision of the United Kingdom Supreme Court, Lord Collins wrote, at para. 84, that competence-competence “is no doubt a general principle of law.” However, he wrote, “it does not follow that the tribunal has the exclusive power to determine its own jurisdiction … Nor does it follow that the question of jurisdiction may not be reexamined by the supervisory court of the seat in a challenge to the tribunal’s ruling on jurisdiction.”

[37] The U.K. court in *Dallah* referred to the decision of the French Cour de cassation in the *Pyramids* case (*République Arabe d'Egypte c. Southern Pacific Properties Ltd*, Cour de cassation Civ. 1re, 6 January 1987, No. 84-17.274). There, the French court held that the court's role in assessing the tribunal's jurisdiction is [translation] "to examine as a matter of law ***and as a matter of fact*** all circumstances relevant to the alleged defects" [Emphasis added.]

[38] Because the court retains the final say over questions of jurisdiction, it necessarily follows that the court must be, as a Singapore court put it, "unfettered by any principle limiting its fact-finding ability": *AQZ v. ARA*, [2015] SGHC 49, at para. 57.

[39] There are sound policy reasons why this should be the case. As set out in another Singapore decision (*Insigma Technology Co. Ltd. v. Alstom Technology Ltd.*, [2008] SGHC 134, at para. 22, aff'd [2009] SGCA 24):

> First, if the court was limited to a process of review, it might be reviewing the decision of a tribunal that itself had no jurisdiction to make such a finding. Second, the procedure to determine jurisdiction is available to a party that took no part in the arbitral proceedings; if the court was confined to a review of the tribunal's decision this would greatly undermine the ability of the challenging party to make its case. Third, if there is to be a challenge on an issue of fact, the court should not be in a worse position to make an assessment than the tribunal, and should therefore be able to examine witnesses in the usual way.

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[40] For these reasons, as the Singapore court held in *AQZ*, a court assessing an arbitral tribunal's jurisdiction is not limited to the record that was before the tribunal. Put another way, an application to set aside an arbitral award for lack of jurisdiction is a proceeding *de novo*, not a review of or appeal from the tribunal's decision.

[41] However, that comes with a significant caveat. I agree with the following proposition, set out in the English case of *Electrosteel Castings Ltd v. Scan-Trans Shipping and Chartering Sdn Bhd*, [2003] 2 All E.R. (Comm) 1064, at para. 23 (Q.B.), and cited in *AQZ*:

> [N]othing said here should encourage parties to seek two evidential bites of the cherry in disputes as to the jurisdiction of arbitrators, not least because (1) evidence introduced late in the day may well attract a degree of scepticism and (2) the court has ample power to address such matters when dealing with questions of costs.

[42] Accordingly, while there is no need to strictly apply the *Palmer* test, where a party has participated fully in the arbitration, its failure to raise a piece of evidence before the tribunal may be relevant as to the weight the court should assign that evidence.

(2) The "international consensus" issue

[43] The appellant's second submission is that the Divisional Court erred by saying that there was a "strong international consensus" in favour of its conclusion that a *de novo* hearing was appropriate in the circumstances of this case.

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[44] I do not accept this submission. During oral argument, counsel for Luxtona referred to a single Singapore lower-court decision (*Government of the Lao People's Democratic Republic v. Sanum Investments Ltd.*, [2015] SGHC 15) in support of its position. However, the weight of international authority supports the Divisional Court's conclusion. The leading case in this area, specifically relied on by the Divisional Court, is *Dallah*, wherein a five-judge panel of the United Kingdom Supreme Court addressed this issue.

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[45] In his reasons, Lord Mance said, at para. 30:

> The tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the government at all. This is so however full was the evidence before it and however carefully deliberated was its conclusion.

[46] In a similar vein, Lord Collins said, at para. 96:

> The consistent practice of the courts in England has been that they will examine or re-examine for themselves the jurisdiction of arbitrators. This can arise in a variety of contexts, including a challenge to the tribunal's jurisdiction… or in an application to stay judicial proceedings on the ground that the parties have agreed to arbitrate. Thus in *Azov Shipping Co v. Baltic Shipping Co.*… Rix J. decided that where there was a substantial issue of fact as to whether a party had entered into an arbitration agreement, then even if there had been a full hearing before the arbitrator the court, on a challenge… should not be in a worse position than the arbitrator for the purpose of determining the challenge. This decision… is plainly right.

[47] In a third judgment, Lord Saville said, at para. 160:

> In my judgment therefore, the starting point cannot be a review of the decision of the arbitrators that there was an arbitration agreement between the parties. Indeed no question of a review arises at any stage. The starting point in this case must be an independent investigation by the court of the question whether the person challenging the enforcement of the award can prove that he was not a party to the arbitration agreement under which the award was made. The findings of fact made by arbitrators and their view of the law can in no sense bind the court, though of course the court may find it useful to see how the arbitrators dealt with the question. Whether the arbitrators had jurisdiction is a matter that in enforcement proceedings the court must consider for itself.

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[48] Courts in several other countries, including Hong Kong, Singapore and Australia, have explicitly endorsed *Dallah* and followed its reasoning: see, for example, *S Co v. B Co*, [2014] 6 HKC 421; *AQZ v. ARA*, [2015] SGHC 49; *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic*, [2016] SGCA 57; and *Lin Tiger Plastering Pty Ltd. v. Platinum Construction (Vic) Pty Ltd*, [2018] VSC 221.

[49] Based on all of these authorities, I cannot conclude that the Divisional Court erred in determining that there was a "strong international consensus" in favour of a *de novo* hearing in the circumstances of this dispute.

(3) The Article 16/Article 34 issue

[50] The appellant's third submission is that the Divisional Court erred by concentrating on only Article 16 of the Model Law and ignoring Article 34. It was

incumbent on the Divisional Court to consider the appellant's position under both provisions before making a final determination.

[51] I am not persuaded by this submission. In its reasons, the Divisional Court explicitly set out Articles 16 and 34 of the Model Law and considered the leading cases relating to both provisions, including this court's discussion about Article 34 in *Mexico v. Cargill*, 2011 ONCA 622, wherein Feldman J.A. said, at paragraph 48, "when deciding its own jurisdiction, the tribunal has to be correct."

[52] Moreover, I disagree with the appellant that the nature of the court's jurisdiction is any different under Article 34 than it is under Article 16. This issue was not before the court in *Cargill*. The question in that case was whether deference was owed to the tribunal's determination of its own jurisdiction, not whether an application to set aside is a review or a proceeding *de novo*. The nature of a proceeding to set aside an arbitral award is a separate question from the standard to be applied in that proceeding. The Divisional Court correctly interpreted Article 16(3) as providing for a proceeding *de novo*, rather than a review or an appeal. Nothing in the language of Article 34(2)(a)(i) or (iii) suggests the nature of the proceeding under those articles is any different. Indeed, the provisions should be interpreted harmoniously, since the grounds for setting aside a jurisdictional award under Article 34(2)(a)(i) also apply under Article 16(3): see Gary B. Born, *International Commercial Arbitration*, 3rd ed. (The Hague: Kluwer Law International, 2021), at p. 1191.

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E. DISPOSITION

[53] I would dismiss the appeal. Pursuant to the agreement of counsel, the respondent is entitled to its costs of the appeal fixed at $75,000, inclusive of disbursements and HST.

Released: June 2, 2023 “J.M.F”

“J.C. MacPherson J.A.”
“I agree. Fairburn A.C.J.O.”
“I agree. B.W. Miller J.A.”

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