COURT OF APPEAL FOR ONTARIO

CITATION: Vento Motorcycles, Inc. v. United Mexican States, 2024 ONCA 480
DATE: 20240614
DOCKET: M54976 (COA-23-CV-1332)

Fairburn A.C.J.O. (Motion Judge)

BETWEEN

Vento Motorcycles, Inc.

Applicant (Appellant)

and

United Mexican States

Respondent (Respondent in Appeal)

John A. Terry and Myriam Seers, for the appellant

Vincent DeRose, Jennifer Radford, and Stéphanie Desjardins, for the respondent

James Plotkin and Courtney March, for the proposed intervener, The Samuelson-Glushko Internet Policy and Public Interest Clinic

Heard: in writing

ENDORSEMENT

[1] The Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic ("CIPPIC") has brought a motion for leave to intervene as a friend of the court, pursuant to r. 13.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, in an appeal from an order of the decision of Vermette J. (the "Application Judge"),

reported at 2023 ONSC 5964. For the reasons that follow, CIPPIC's request to intervene is dismissed.

[2] By way of background, Vento Motorcycles Inc. ("Vento") commenced an arbitral claim against the United Mexican States ("Mexico") pursuant to Chapter 11 of the North American Free Trade Agreement ("NAFTA"). Briefly stated, the dispute at issue in the arbitration involved Mexico's denial of NAFTA preferential import tariffs to motorcycles assembled by Vento in the United States and exported to Mexico, which Vento submits resulted in substantial business losses and the destruction of its business.

[3] The Tribunal dismissed Vento's claim, and the Application Judge declined to set aside the dismissal. Vento has appealed to this Court, and the appeal is currently listed to be heard on November 4, 2024.

[4] Among other arguments below and on appeal, Vento submits it was denied procedural fairness by the Tribunal and was unable to present its case. These arguments arise from the Tribunal's decision to preclude one of Vento's witnesses from submitting additional evidence or testimony in response to a credibility challenge by Mexico. Vento argues this left it unable to present its case within the meaning of Article 34(2)(a)(ii) of the Model Law.

[5] The Model Law, including Articles 2A(1) and 34(2)(a)(ii), are incorporated into Ontario law under Schedule 2 of the *International Commercial Arbitration Act*, 2017, S.O. 2017, c. 2, Sch. 5 (the "Act").

[6] In considering whether Vento was denied procedural fairness and unable to present its case, the test applied by the Application Judge was whether the Tribunal's conduct was "sufficiently serious to offend our most basic notions of morality and justice" and that judicial intervention for alleged violations of due process under the Model Law are "warranted only when the arbitral tribunal's conduct is so serious that it cannot be condoned under Ontario law": at para. 61, citing *Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.A.*, 2017 ONCA 939, 70 C.L.R. (4th) 5, at para. 65; and *All Communications Network of Canada v. Planet Energy Corp.*, 2023 ONCA 319, at paras. 42 and 48.

[7] On appeal, Vento argues that this legal test has become obsolete with the introduction of Article 2A(1) into the Model Law, which provides: "In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith." Vento argues the correct test was articulated by the Judicial Committee of the Privy Council in *Gol Linhas Aereas SA (formerly VRG Linhas Aereas SA) v. MatlinPatterson Global Opportunities Partners (Cayman) II LP and others*, 2022 UKPC 21, at para. 76: "[T]he court should be seeking to identify and apply basic

minimum requirements which would generally, even if not universally, be regarded throughout the international legal order as essential to a fair hearing."

[8] CIPPIC seeks leave to intervene on the issue of what should be the test for procedural unfairness under the Model Law. It adopts neither the Application Judge's test nor Vento's *Gol Linhas* test, and submits that the proper threshold for setting aside an arbitral award should instead be a "material" procedural fairness violation - i.e., where, but for the procedural fairness violation, the outcome may reasonably have been different.

[9] While Vento consents to CIPPIC's intervention, Mexico opposes.

[10] CIPPIC is a legal clinic based at the University of Ottawa. Its core mandate is "to advocate in the public interest on matters arising at the intersection of law and technology. This includes access to justice concerns arising from standard form contracts and the arbitration and dispute resolution clauses contained in them." It provides legal assistance to under-represented organizations and individuals on law and technology issues.

[11] CIPPIC has intervened at the Supreme Court of Canada in several leading arbitration cases, including *Dell Computer Corp v. Union des consommateurs*, 2007 SCC 34, [2007] S.C.R. 801; *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144; and *Uber Technologies Inc. v. Heller*, 2020 SCC 16, [2020] 2 S.C.R. 188.

[12] In determining motions for leave to intervene as a friend of the court pursuant to r. 13.03(2), the court will generally consider "the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties": *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164 (C.A.), at p. 167; *Foster v. West*, 2021 ONCA 263, 55 R.F.L. (8th) 270, at para. 10; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 29, at para. 8.

[13] This is a private dispute, as opposed to one involving the state. As such, the standard to be met by the proposed intervener is "more onerous or more stringently applied": *Jones v. Tsige*, 106 O.R. (3d) 721 (C.A.), at para. 23.

[14] CIPPIC submits that even though the Vento/Mexico trade dispute is private in nature, the procedural fairness issue on appeal transcends the interests of the parties and has broader implications of public importance. CIPPIC submits that the above SCC cases in which it intervened crystalize CIPPIC's interest in this appeal, to ensure that the courts will intervene to protect vulnerable contracting parties from an award resulting from a materially unfair arbitral process.

[15] In support of its alternative procedural fairness test, CIPPIC proposes to i) canvass the thresholds elaborated by courts in other Model Law jurisdictions, ii) make statutory interpretation arguments, referencing international authority and

the Model Law's *travaux préparatoires*, iii) illustrate the test previously articulated by this Court and applied by the Application Judge conflates Model Law article 34(2)(a)(ii) (procedural fairness set-aside ground) with Article 34(2)(b)(ii) (public policy set aside ground), and iv) canvass procedural fairness protections in other contexts, such as judicial review of administrative action, in support of harmonizing the standard across different areas of law.

[16] However, CIPPIC did not submit a draft factum that it would deliver if permitted to intervene, particularizing these arguments. It also cited no authority, domestic or international, in support of its articulation of the appropriate legal test. While CIPPIC provided a high-level overview of its intended submissions, providing a draft proposed factum would have identified the authorities, arguments, and references to the *travaux préparatoires* upon which CIPPIC would rely, and permit the parties and Court to know CIPPIC's precise position.

[17] In opposing CIPPIC's proposed intervention, Mexico submits i) the appeal does not raise any issues of public importance, ii) CIPPIC's contribution is unlikely to assist the court, as its areas of expertise are not relevant to the issues to be resolved on appeal, iii) Vento and Mexico, in their factums on appeal, have already canvassed applicable case law in support of the appropriate test, such that CIPPIC would not add anything new, and iv) CIPPIC's proposed arguments would introduce new issues on appeal and unfairly prejudice Mexico's response.

[18] While CIPPIC has expertise in its area and undoubtedly does important work, I am not satisfied that its intervention in this case will assist the Court.

[19] First, I am not satisfied that CIPPIC has provided a sufficient link between its expertise and the particular issue upon which it seeks to intervene. CIPPIC has not demonstrated why its advocacy work and mandate align with the arguments it intends to make as an intervener. Unlike CIPPIC's stated mission, this case does not engage law and technology issues, or involve under-represented organizations, individuals, and consumers whose legal rights may be affected by terms in standard form contracts.

[20] CIPPIC also did not explain how its proposed arguments are informed by its unique perspectives on the issues on appeal.

[21] Second, bearing in mind the stricter onus on intervention in a private dispute, the nature of the case does not support CIPPIC's intervention. This case involves two sophisticated parties with capable counsel in a complex international trade dispute. The appeal focuses on narrow, fact-specific issues that turn on particular findings below and certain decisions made during the arbitration process. No access to justice or constitutional issues are engaged.

[22] Mexico and Vento have advanced detailed arguments for and against the test applied by the Application Judge. Particularly without the assistance of a draft factum, I am not persuaded that CIPPIC's intention to provide international

authorities, a statutory interpretation analysis, and broad review of procedural fairness across other areas of law, will further advance the analysis.

[23] Third, I share Mexico's concerns that CIPPIC's intervention runs an unjustified risk of expanding the scope of the appeal, increasing cost and complexity, and causing injustice to the immediate parties. For example, if CIPPIC's intervention "canvasses how procedural fairness protections are addressed in other contexts, such as judicial review of administrative action" and suggests the standard should be harmonized across different areas of Canadian law "in a manner that assures access to justice in the arbitral forum", the issue on appeal will have gone well beyond the question of whether Vento's inability to respond to a credibility challenge left it unable to present its case within the meaning of Article 34(2)(a)(ii) of the Model Law.

[24] Having balanced the nature of this appeal against the nature of CIPPIC's proposed contribution to the issues in dispute, and considered the prejudice that could result from CIPPIC's arguments being advanced on appeal, I conclude that the motion must be dismissed.

[25] CIPPIC, Mexico, and Vento did not seek costs on this motion, and none are awarded.

"Fairburn A.C.J.O."