CITATION: Crystallex International Corporation v. Bolivarian Republic of Venezuela, 2016 ONSC 4693
COURT FILE NO.: CV-16-11340-00CL
DATE: 20160720

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: CRYSTALLEX INTERNATIONAL CORPORATION, Applicant

AND:

BOLIVARIAN REPUBLIC OF VENEZUELA, Respondent

BEFORE: HAINEY J.

COUNSEL: *John A.M. Judge* and *James Doris*, for the Applicant

Douglas Harrison, for the Monitor of Applicant

HEARD: July 11, 2016

ENDORSEMENT

Overview

[1] This is an application by Crystallex International Corporation ("Crystallex") under the *International Commercial Arbitration Act*, R.S.O. 1990, c. 19 ("the *Act*"), for the recognition and enforcement of a final arbitration award against the Bolivarian Republic of Venezuela ("Venezuela").

[2] After hearing argument from counsel for Crystallex on July 11, 2016, no one appearing for Venezuela, though properly served, I made an order for the recognition and enforcement of that arbitration award. I requested that counsel prepare a draft endorsement for my review. I have adopted much of counsel's draft below.

[3] In 2002, Crystallex entered into a contract with a Venezuelan state-run entity, Corporacion Venezuelana de Guyana ("CVG"), to develop and exploit the Las Cristinas gold deposits located in southeastern Venezuela, one of the world's largest undeveloped gold deposits. Crystallex invested hundreds of millions of dollars for the necessary infrastructure in local communities to significantly advance the development of the project.

[4] In April 2008, Venezuela denied certain permits required by Crystallex to commence mining operations. In the fall of 2008, Venezuela announced its intention to nationalize the Las Cristinas mine. In February 2011, CVG unilaterally rescinded the contract with Crystallex for the development of the mine.

[5] As a consequence, Crystallex delivered to Venezuela a Notice of Dispute dated November 24, 2008, and thereafter a Request for Arbitration dated February 16, 2011.

[6] Both the Notice and the Request were delivered pursuant to Article XII of the Agreement between the Government of Canada and the Government of the Republic of Venezuela dated July 1, 1996, which came into force on January 28, 1998 ("BIT").

[7] Crystallex claimed that Venezuela breached its obligations under the BIT by expropriating Crystallex's investment, contrary to Article VII (1) of the BIT, and by failing to accord the investment fair and equitable treatment and full protection and security contrary to Article II (2).

[8] An arbitral tribunal ("Tribunal") was constituted in accordance with Article XII of the BIT under the Additional Facility Rules of the International Centre for the Settlement of Investment Disputes ("ICSID") in Washington, D.C. Venezuela participated fully in that arbitration with Crystallex. Venezuela named one of the three arbitrators as its nominee to the Tribunal, including a replacement arbitrator when its original appointee resigned. Venezuela actively defended the claim throughout. After a full hearing on jurisdiction and the merits, the arbitration proceedings were closed on December 24, 2015.

[9] On April 4, 2016, ICSID delivered to the parties the award of the Tribunal, signed and dated by each of its three members as a unanimous award ("Final Award"). In the 273-page Final Award, the Tribunal awarded Crystallex damages against Venezuela for expropriation and breach of the obligations under the BIT in the amount of US $1.202 billion plus pre and post award interest, all as more specifically described in paragraph 961 of the Final Award.

[10] Crystallex made a demand for payment of the amount due under the Final Award. No payment has been made.

[11] On April 6, 2016, this application was commenced by Crystallex for an Order for the recognition and enforcement of the Final Award.

[12] On April 26, 2016, the Notice of Application was served on Venezuela pursuant to the *State Immunity Act*, R.S.C. 1980, c. S-18 ("*SIA*").

[13] Venezuela has not delivered a Notice of Appearance under the *Rules of Civil Procedure* in response to service of the Notice of Application. Counsel for Crystallex has advised that no lawyer or law firm on behalf of the Respondent has contacted them in relation to this application.

[14] Counsel for Crystallex has also advised the Court, in its factum and orally during the hearing, that on July 5, 2016, Venezuela delivered a motion to vacate the Final Award before the United States Federal District Court for the District of Colombia. This was the jurisdiction where the arbitration was conducted. That motion is still pending. Venezuela did not appear on this application to make any submissions with respect to the impact, if any, of the motion it brought in the United States Federal District Court on this application.

Jurisdiction

[15] I am of the view that this Court has jurisdiction to grant an order to recognize and enforce the Final Award in Ontario.

[16] Under the *Act*, the Ontario Superior Court of Justice is defined as a "competent court" to make any orders in relation to international arbitration matters requested under that *Act*, including the recognition and enforcement of a final award.

[17] The *Act* expressly incorporates as a schedule and adopts as the law, in force in Ontario, the *Model Law on International Commercial Arbitration* ("*Model Law*") adopted by the United Nations Commission on International Trade Law on June 21, 1985. Articles 35 and 36 of the *Model Law* deal specifically with the requirements for the recognition and enforcement of international arbitral awards. Those Articles establish the basis upon which this Court may order the recognition and the enforcement in Ontario of an international arbitral award.

[18] The international arbitration between Crystallex and Venezuela and the Final Award fall within the purview of the *Act.* This was an investment dispute arising under the investment protections of the BIT and involves a commercial relationship for the purposes of the *Act*. As an investor state arbitration conducted in Washington, D.C., the arbitration is also "international" within the requirements of Article 1 of the *Model Law*. Therefore, I am satisfied that this Court has jurisdiction to hear this application for recognition and enforcement of the Final Award.

Issues

[19] The issues I must decide are as follows:

(a) Has service of the Notice of Application been properly effected on Venezuela as required by *SIA*?

(b) Have the requirements of Article 35 of the *Model Law* been met for the recognition and enforcement of the Final Award in Ontario?

The *SIA* and Service of Process

[20] The Respondent is a sovereign state. Crystallex served the Notice of Application pursuant to the *SIA*. The following sections of the *SIA* are applicable:

> 5. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.
>
> …
>
> 9. (1) Service of an originating document on a foreign state, other than on an agency of the foreign state, may be made,
>
> (c) in the manner provided in subsection (2).

> (2) For the purposes of paragraph (1)(c), anyone wishing to serve an originating document on a foreign state may deliver a copy of the document, in person or by registered mail, to the Deputy Minister of Foreign Affairs or a person designated by him for the purpose, who shall transmit it to the foreign state.

The importance of compliance with these provisions for service under the *SIA* was underscored by the Ontario Court of Appeal in *Sistem Muhendislik Insaat Sanayi Ve Ticaret Anoic Sirketi* v. *Kyrgyz Republic*, 2015 ONCA 447. Compliance with these provisions is mandatory.

[21] The Final Award arises out of the investment dispute in connection with the development of the Las Cristinas mining project which is a commercial activity involving Venezuela and Crystallex for the purposes of s. 5 of the *SIA*.

[22] According to the evidence filed by Crystallex in this proceeding, service of the Notice of Application was effected through Canada's Minister of Foreign Affairs, now Global Affairs. The Notice of Application, to which a copy of the Final Award was appended, was delivered by Crystallex to the designated person at Canada's Ministry of Global Affairs which then arranged appropriate service on Venezuela through diplomatic channels.

[23] As contemplated under s. 9 (5) of the *SIA*, a Certificate dated May 3, 2016 was sent by Mr. Roland Legault, Director, Criminal, Security and Diplomatic Law Division, of the Ministry directly to the Ontario Superior Court of Justice. A copy of the May 3 Certificate was also provided to Crystallex and was attached as Exhibit G to the Affidavit of Mr. Fung. Mr. Legault certified to this Court as follows:

> I hereby certify, pursuant to subsection 9 (5) of the *State Immunity Act* that the Notice of Application dated April 6, 2016 was transmitted to the appropriate authority of the Ministry of Foreign Affairs of Venezuela on April 26, 2016.

[24] Under s. 9 (5) of the *SIA*, Mr. Legault's certificate on behalf of the Ministry of Global Affairs of Canada is conclusive evidence of the proof of service of the Notice of Application in accordance with the *SIA* on Venezuela through its transmission to the Venezuelan Ministry of Foreign Affairs. I am satisfied that proper service of the Notice of Application under the *SIA* has, therefore, been established.

The Recognition Requirements of Article 35 of the *Model Law*

[25] Article 35 of the *Model Law* sets out the necessary requirements to be established by an applicant for an order for the recognition and enforcement of an international arbitral award in Ontario. Article 35 provides as follows:

> **Article 35.** Recognition and enforcement
>
> (1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

> (2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.

[26] The use of the term "shall" in Article 35 (1) connotes that recognition of an arbitral award by the court is mandatory if the requirements are met.

[27] Article 35 (2) provides that an applicant shall supply the following documentary evidence: a duly authenticated original award or a duly certified copy thereof; and,

> (a) the original arbitration agreement or a duly certified copy thereof.

Crystallex has satisfied both of these requirements under Article 35 (2).

[28] A copy of the Final Award was annexed to the Notice of Application. In addition, at the hearing of this application, Crystallex filed with the Court a copy of the Final Award, bound and duly certified by ICSID as the administering arbitral institution. The filing of this certified copy met the first requirement of Article 35 (2).

[29] With respect to the second requirement which requires proof of the arbitration agreement, the fact that this is an investor state arbitration requires a more detailed review of the evidence of the arbitration agreement. The BIT sets out the requisite basis for the applicable arbitration agreement. A copy of the BIT was included in the Application Record as Exhibit C. On the hearing of the application, Crystallex also provided the Court with a certified copy of the BIT duly certified by representatives of the Minister of Foreign Affairs for the Government of Canada.

[30] Any arbitration agreement is based on the consent of the contracting parties to refer their disputes to arbitration. Article XII of the BIT sets out the procedure for the settlement of disputes between an investor and a host contracting party, being one of the two states of Canada or Venezuela. Article XII expressly addresses the requirements of consent to arbitrate.

[31] With respect to the consent of Venezuela to arbitrate, Article XII 5. of the BIT provides as follows:

> Each Contracting Party [Canada and Venezuela] hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this article.

I find that by this provision, Venezuela consented to arbitrate.

[32] According to Article XII 3. of the BIT, an investor may submit a dispute to arbitration, but only if "the investor has consented in writing thereto". Crystallex has given that consent to arbitrate in writing in its Notice of Dispute dated November 24, 2008, signed by Mr. Fung on behalf of Crystallex which was attached as Exhibit D to the Affidavit of Robert Fung. In this Notice of Dispute, Crystallex described in detail the investment dispute arising out of certain

measures taken by Venezuela alleged to be in breach of the BIT. The Notice of Dispute invited amicable settlement discussions in accordance with Article XII 2. and then also set out the following on page 3 of the Notice:

> However, if no solution is reached within six months of this notification, Crystallex reserves its right to submit the dispute notified herein to international arbitration to seek appropriate declaratory relief, specific performance and damages. **In this regard, Crystallex hereby expresses its unconditional consent (pursuant to the Treaty and the foreign investment law) to submit the dispute to arbitration** under the Additional Facility Rules of the International Centre for the Settlement of Investment Disputes (ICSID), and to ICSID arbitration should this be available at the time of the filing of a request for arbitration. [Emphasis added]

A Request for Arbitration, found at Exhibit E to the Affidavit of Mr. Fung, was eventually filed by Crystallex on December 16, 2011, requesting arbitration in accordance with the Additional Facility Rules of ICSID.

[33] Based on the Notice of Dispute and the Request for Arbitration, I find that Crystallex has also consented to arbitration with Venezuela as required by the BIT.

[34] The BIT also addressed the formation of an agreement to arbitrate based on these consents in Article XII 6. (a) which provides as follows:

> a. the consent given under paragraph (5) [by Venezuela], together with either the consent given under paragraph (3) [by the Investor], or the consent is given under paragraph (12), shall satisfy the requirements for:
>
> i. written consent of the parties to a dispute for the purposes of Chapter II (jurisdiction of the Centre) of the ICSID Convention and for purposes of the Additional Facility Rules; and
>
> ii. an "agreement in writing" for purposes of Article II of the *United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York, June 10, and 1958 ("New York Convention").

[35] Canada and Venezuela are both parties to the New York Convention. Article 35 of the *Model Law* adopted in the *Act* is based on and derived from Article V of the New York Convention. Likewise, the definition of "arbitration agreement" in Article 7 of the *Model Law* is derived from Article II of the New York Convention.

[36] The provisions of the BIT outlined above, taken together with the consent of Crystallex to arbitrate as set out in its Notice of Dispute and its Request for Arbitration, constitute the arbitration agreement between the parties as required by Article 35 of the *Model Law* for the purposes of recognition and enforcement. I have concluded that the requirement under Article 35 for proof of the arbitration agreement has, therefore, been satisfied.

[37] On the basis of the foregoing, I find that the requirements of Article 35(2) have been met. Therefore, subject only to a consideration of Article 36 of the *Model Law*, Crystallex is entitled under Article 35 to an order that the Final Award shall be recognized as binding and shall be enforced in Ontario.

[38] Article 36 sets out certain grounds for refusing recognition and enforcement of an arbitral award. According to Article 36(1)(a), a party against whom the award is invoked may adduce evidence of certain specified jurisdictional or due process deficiencies with respect to the arbitration. Since Venezuela did not appear on this application, despite proper service, no such grounds have been raised.

[39] Article 36(1)(b) also provides that recognition may be refused if the court finds that:

> (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this State [Ontario]; or,
>
> (ii) the recognition or enforcement of the award would be contrary to the public policy of this State [Ontario].

[40] Based on the foregoing review of the international rights and obligations created under the BIT and of the allegations and findings in the Final Award with respect to the nature of the claims asserted by Crystallex against Venezuela, I am satisfied that the subject matter of this dispute is capable of settlement by arbitration under the laws applicable in Ontario.

[41] Crystallex has also submitted that the recognition and enforcement of the Final Award is consistent with the public policy of Ontario. I agree. The public policy of Ontario is reflected in the legislative enactments of Ontario and of Canada (as applicable in Ontario) which are embodied in the *Act*, the *SIA*, and the adoption by the Government of Canada of the 1958 New York Convention as well as in the BIT itself. Nothing has been brought to my attention to suggest that the recognition and enforcement of this Final Award is or would be contrary to any public policy in Ontario. I am satisfied that there is no basis for me to deny recognition of the Final Award on the ground that recognizing the award would be contrary to any public policy in Ontario.

[42] Based on the foregoing, the necessary conditions for the recognition of the Final Award have been established under Article 35 and there is no basis under Article 36 to refuse recognition and enforcement of the Final Award.

Conclusion

[43] I have concluded, for the reasons outlined above, that Crystallex is entitled to an order for the recognition and enforcement of the Final Award in Ontario as against Venezuela. The order shall provide for the payment by Venezuela to Crystallex of the sum of the Canadian equivalent of US $1.202 billion, plus interest as ordered in paragraph 961 of the Final Award.

[44] Crystallex has also sought costs of this application in the amount of $20,000.00. Having regard to the time spent by Crystallex's counsel in bringing this application, including costs incurred to effect service under the *SIA*, as well as the amounts claimed and the importance of this proceeding, I am satisfied that costs in the amount of $20,000.00 are fair and reasonable. An order shall go for costs in this amount.

HAINEY J.

Date: July 20, 2016