CITATION: Entes v. Kyrgyz Republic, 2016 ONSC 7221
COURT FILE NO.: CV-15-11142-00CL
DATE: 20161116

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Entes Industrial Plants Construction & Erection Contracting Co. Inc.

AND:

The Kyrgyz Republic, et al

BEFORE: Conway J.

COUNSEL: *R. Wisner* and *S. Brown-Okruhlik*, for Entes Industrial Plants Construction & Erection Contracting Co. Inc.

A. Rubinoff and *J. Siwiec,* for The Kyrgyz Republic

HEARD: November 16, 2016

ENDORSEMENT
(HANDWRITTEN REASONS DELIVERED IN COURT)

[1] Entes seeks recognition of an arbitral award against the Republic dated September 29, 2015 (the "**Award**"). The Award is for over $22 million (USD). The arbitration started in January 2009 and related to a construction contract between Entes and the Republic's Ministry of Transport. Ms. Smanalieva and her firm were counsel to the Republic throughout the arbitration.

[2] Entes seeks recognition of the Award pursuant to Article 35 of the Uncitral Model Law of International Commercial Arbitration (the "**Model Law**"). It has supplied the original award and arbitration agreement as required by Article 35(2) of the Model Law. The Republic submits that this court should refuse to recognize the Award. Originally, it relied on two defences in Article 36(1) – it has since abandoned the defence under Article 36(1)(a)(ii) (not able to present its case) and relies on the public policy defence in Article 36(i)(b)(ii) – namely, the recognition of the Award would be contrary to the public policy of Ontario.

[3] The crux of the Republic's argument is that Ms. Smanalieva, the Republic's counsel in the Entes arbitration, also provided expert evidence on Kyrgyz law in the "Sistem case", in which Sistem sought to enforce its own arbitral award against the Republic, against Centerra shares that were registered in the name of the Republic's state owned entity Kyrgyzaltan JSC. Sistem relied on Ms. Smanalieva's evidence to argue that those Centerra shares were actually owned by the Republic under Kyrgyz law and would therefore be exigible assets for enforcement of an arbitral award against the Republic. The Republic argues that Entes sought to avail itself of Ms. Smanalieva's expert evidence (indirectly) in enforcing its Award against the Republic. The

Republic submits that Ms. Smanalieva was in a conflict of interest, breached her duty of loyalty to the Republic and that the Republic did not even become aware of this issue until after the Award was issued, namely on January 6, 2016. It argues that recognizing the Award in Ontario under those circumstances would be contrary to Ontario public policy.

[4] I disagree.

[5] Even accepting the Republic's evidence at its highest, any conflict on the part of Ms. Smanalieva does not rise to the level required to invoke this public policy defence. It is a narrowly construed defence. It must fundamentally offend the most basic and explicit principles of justice and fairness in Ontario or evidence intolerable ignorance or corruption on the part of the Arbitral Tribunal: see *Corporacion Transnacional de Inversiones v. STET International*, [1999] OJ No. 3573 (SCJ), at para 30, aff'd [2000] OJ No. 3408 (C.A.) Examples of public policy grounds for refusing to enforce an arbitral award are fraud, corruption, bribery and similar serious cases – see *Corporacion*, at para 32.

[6] I cannot say that the Republic's lawyer in the arbitration providing expert evidence on Kyrgyz law in the Centerra dispute (even if Entes could somehow indirectly benefit from that expert evidence) is so fundamental to our local principles of justice and fairness that the Award should not be recognized. I also note that the Republic has not tendered any evidence that Ms. Smanalieva's conduct had any impact on the arbitration itself or would have affected the outcome. Moreover, I am not persuaded that Entes should bear the brunt of the Republic's internal communication systems that failed to reveal the situation with Ms. Smanalieva until after the Award was issued. Under the circumstances, I see no basis for refusing to recognize the Award under Article 36(i)(b)(ii). I grant an order recognizing the Award as a judgment of this court.

[7] With respect to costs, I appreciate that this recognition application was a significant threshold matter for Entes and that the amounts in issue were also significant. There were three cross-examinations conducted in connection with this application. The Republic could reasonably have expected that it would have to pay significant costs if it was unsuccessful. That said, this was a two hour application and the legal and factual issues were fairly straightforward. Considering the Rule 57 factors, I conclude that a fair and reasonable cost award is $35,000 (partial indemnity) all in. The Republic shall pay that amount to Entes within 30 days.

Conway J.

Date: November 16, 2016