CITATION: Sociedad Concesionaria Metropolitana De Salud S.A v. Webuild S.P.A.
2024 ONSC 4491
COURT FILE NO.: CV-23-00708039-00CL
DATE: 20241008

ONTARIO

SUPERIOR COURT OF JUSTICE

[Commercial List]

BETWEEN:

SOCIEDAD CONCESIONARIA METROPOLITANA DE SALUD S.A.

Applicant

– and –

WEBUILD S.P.A.

Respondent

BEFORE: Justice Jana Steele **DATE HEARD: June 25 and 26, 2024**

COUNSEL:

Ira Nishisato, Hugh Meighen and Shereen Khalfan, for the applicant

Gordon Capern, Massimo Starnino, Kris Borg-Olivier, and Greta Hoaken, for the respondent

ENDORSEMENT

Overview

[1] This motion is about whether the applicant can proceed with their application to enforce their judgment in Ontario against Webuild S.p.A. ("Webuild"). Courts are frequently called on to enforce foreign judgments and do so in the normal course. However, here the application for recognition and enforcement of the foreign Arbitral Award is not against the judgment debtor, Astaldi S.p.A. ("Astaldi"). And, unlike the leading case of *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, Webuild and Astaldi are not related companies. Webuild purchased certain of Astaldi's assets

and liabilities following a restructuring proceeding in Italy and claims it did not acquire the obligations related to the Arbitral Award. Accordingly, Webuild seeks to stay the recognition and enforcement proceedings in Ontario pending a determination by the Italian courts of whether it acquired such obligations.

[2] The applicant, Sociedad Concesionaria Metropoliana de Salud S.A. ("SCMS"), was the successful party in an arbitration in Chile before Mr. Claudio Undurraga Abbott. The counter party in the arbitration was Astaldi. In the underlying application, SCMS (a Chilean company) seeks recognition and enforcement of the Chilean Arbitral Award in Ontario. However, enforcement is sought not against Astaldi, but against the respondent Webuild, another Italian company. Astaldi is not a named party in the application.

[3] There are numerous complexities in the underlying application arising out of the multiple jurisdictions involved and the multiplicity of proceedings. Webuild says that the threshold issue that needs to be determined is whether Webuild assumed the liabilities of Astaldi related to the arbitration when it purchased certain of Astaldi's operating assets as part of an Italian restructuring proceeding (described as being similar to a proceeding under the *Companies' Creditors Arrangement Act*).

[4] Webuild brings a motion for an order staying or dismissing SCMS's recognition and enforcement proceeding for want of jurisdiction or alternatively on the basis that Ontario is *forum non conveniens.* Webuild's position is that SCMS's application is dependent on the resolution of contested legal issues under Italian law.

[5] SCMS submits that whether Webuild assumed the liabilities of Astaldi related to the arbitration is a question on the merits that ought to be determined by the judge hearing the enforcement application.

[6] SCMS does not address, however, the fact that it has also commenced recognition and enforcement proceedings against Webuild simultaneously in Quebec and Delaware. Accordingly, under the scenario advocated by SCMS, the Courts in each of Ontario, Quebec and Delaware could, simultaneously, be in the unenviable position of trying to determine whether under Italian bankruptcy law one Italian company assumed the liabilities of another Italian company. Given that the Arbitral Award is against Astaldi, not Webuild, and Webuild states that they did not assume Astaldi's liability under the arbitration, a court would presumably have to consider this issue before recognition and enforcement against Webuild could be ordered.

[7] For the reasons set out below, I have determined that these proceedings shall be stayed pending the outcome of the proceedings in Italy. The Ontario proceedings are stayed because Ontario is *forum non conveniens* for the threshold issue of whether Webuild assumed Astaldi's liability under the arbitration such that the Arbitral Award may be enforced against Webuild.

Background

[8] SCMS is a Chilean company engaged in the construction and administration of public work concessions.

[9] Webuild is a large multinational company that specializes in construction and civil engineering projects. Webuild is incorporated under Italian law and is publicly traded on the Milan Stock Exchange. Webuild enters into construction contracts around the world, including in Canada.

[10] Astaldi was an international construction group and engineering company, with its primary centre in Italy. In Chile, Astaldi's operations were carried out through Astaldi Sucursal Chile ("ASC"), which was not a separate corporate entity from Astaldi. ASC was a branch or division of Astaldi.

[11] Astaldi (through ASC) and SCMS entered into a construction contract in July 2015 in connection with ASC's construction of the Felix Bulnes Hospital in Santiago, Chile (the "Construction Contract"). The Construction Contract is governed by Chilean law.

[12] The evidence is that at all material times Webuild and Astaldi: (i) were separate corporate entities; (ii) had separate boards of directors and executive teams; and (iii) were competitors in the construction and civil engineering market, taking into account that from November 2020 up to the Astaldi Transaction (defined below), Webuild temporarily held a 65% stake in Astaldi (this was done as part of Webuild's participation in Astaldi's restructuring effort).

[13] The Arbitration arose following allegations by SCMS that ASC had breached the Construction Contract.

[14] SCMS was successful at the arbitration against ASC and the final award in relation to this arbitral proceeding was rendered on or about December 30, 2021. The total amount awarded (with interest) against ASC as at September 2023 was CAD $188,162,659.94 (the "Arbitral Award").

[15] Starting in September 2018, Astaldi undertook restructuring proceedings in bankruptcy in Italy, under the supervision of the Italian courts. The proceeding Astaldi initiated is called a "*concordato preventivo con continuità aziendale*" (the "*Concordato*"). At the same time, ASC underwent reorganization proceedings before the Chilean Courts. Astaldi's restructuring proceedings were completed in July 2021.

[16] Astaldi's *Concordato* was one of the largest and most complex in Italian history.

[17] Consequent to the completion of Astaldi's restructuring proceedings, Webuild acquired part of Astaldi's operating assets through a Partial Spin-Off Agreement, which is also referred to as the "Demerger Agreement" (the "Astaldi Transaction"). Following the Astaldi Transaction, Astaldi ceased to have operational activity other than managing certain assets. Astaldi changed its name to Astaris S.p.A. ("Astaris"), which is incorporated under the laws of Italy and headquartered in Rome.

[18] As part of the Astaldi Transaction, Astaldi's "Continuing Business" was acquired by Webuild. The operative provision of the Partial Spin-Off Agreement provides:

> As a result of the Spin-Off, all of the Astaldi equity investments, capital Assets, legal relationships (including inter alia, employment relationships) and liabilities (as a result of the debt settlement resulting from the execution of the Arrangement with Creditors) relating solely to the Spun-Off Assets will be assigned to Webuild.

[19] Webuild's position is that Astaldi's liability to SCMS as a result of the Arbitral Award was not transferred to Webuild under the terms of the Partial Spin-Off Agreement. SCMS says that it was.

[20] Webuild has commenced proceedings before the Italian courts seeking a determination on whether Webuild is liable for Astaldi's obligations under the Arbitral Award.

[21] SCMS has commenced similar recognition and enforcement proceedings against Webuild in Delaware and Quebec. These proceedings are currently pending.

Analysis

Should the Court dismiss the application on the basis that Ontario does not have jurisdiction?

[22] Webuild submits that SCMS's application should be dismissed on the basis that Ontario does not have jurisdiction.

[23] Based on the leading cases of *Club Resorts v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, at para. 79, and *Chevron Corp. v. Yaiguage*, 2015 SCC 42, [2015] 3 S.C.R. 69, at para. 82, there are three routes to establish jurisdiction over a responding party: the respondent may consent to the proceedings, the respondent may meet the requirements for "presence" in the jurisdiction, or the court may assume jurisdiction over the respondent because there is a "real and substantial connection" between the subject matter of the litigation and the forum and between the respondent and the forum.

[24] Webuild is not consenting to this jurisdiction. Accordingly, I will consider the other routes to determine whether Ontario has jurisdiction.

[25] As noted by the Supreme Court of Canada in *Chevron*, at para. 83, presence-based jurisdiction is based on the respondent's actual presence in the forum:

> It "is based upon the requirement and sufficiency of personal service of the originating process within the province or territory of the forum (service in juris)." If service is properly effected on a person who is in the forum at the time of the action, the court has

> jurisdiction regardless of the nature of the cause of action. [Citations omitted]

[26] I am satisfied that Webuild has presence-based jurisdiction in Ontario. Although Webuild points to its lack of a bricks and mortar office and its principal place of business in Ontario being the office of its law firm, I find that Webuild carries on significant business in the province. Webuild is currently performing some of the largest public infrastructure projects in Ontario (the Ontario Line and the Hurontario Light Rail Transit project).

[27] Further, Webuild was served in Ontario under Rule 16.02(1)(c) of the *Rules of Civil Procedure*. Under this Rule, personal service of an originating process on a corporation is permitted "by leaving a copy of the document with an officer, director or agent of the corporation." Webuild was served at its registered principal place of business (the law firm) on November 1, 2023.

[28] Because I have determined that Webuild has presence-based jurisdiction in Ontario, it is not necessary for me to consider the other route to finding jurisdiction.

Can Webuild seek a stay against SCMS on the basis of forum non conveniens?

[29] Webuild asks the Court to stay SCMS's application on the basis of *forum non conveniens*. This application by a party, and the full arguments on the issue made before me, distinguish this case from *Chevron*, where the Court's decision to conduct a *forum non conveniens* analysis on its own motion and without full argument from the parties was overturned on appeal. Specifically, Webuild asks the Court to stay SCMS's enforcement application pending the determination of whether Webuild is liable for Astaldi's debt under the Arbitral Award. Webuild says this issue needs to first be determined in Italy.

[30] SCMS argued that *forum non conveniens* is not applicable because Webuild's motion was not brought under Rule 17.06. I disagree.

[31] A *forum non conveniens* analysis can arise without the operation of Rule 17.06.

[32] First, the language of Rule 17.06 does not preclude a *forum non conveniens* analysis arising in other situations.

[33] Second, in *Frymer v. Brettschneider (1994)*, 19 O.R. (3d) 60 (C.A.), the Court of Appeal determined that a *forum non conveniens* motion could be brought where service was made in Ontario and the defendant takes the position that another jurisdiction is the appropriate one. Arbour J.A., writing for the majority, held:

> This analysis reveals that the link between service ex juris and forum non conveniens is only superficially addressed by r. 17.06. That rule does not purport to deal with all instances where a motion is made

> for a stay of Ontario proceedings on the basis that Ontario is not the appropriate forum for the hearing of the proceedings. Such a motion can obviously be brought in a case where service on the defendant was effected in Ontario and the defendant contends that a foreign jurisdiction is the appropriate forum. In such a case, there is no opportunity for the defendant to invoke r. 17.06, which deals only with service ex juris, in order to rely on the doctrine of forum non conveniens; yet that doctrine can be invoked solely on the basis of s. 106 of the *Courts of Justice Act* and the body of law upon which the doctrine of forum non conveniens is based. [Emphasis added]

[34] The Court in *AMJ Campbell Inc. v. Moore*, [2004] O.J. No. 2134 (S.C.), leave to appeal refused, [2004] O.J. No. 2390 (Div Ct.), noted that "the law of *forum [non] conveniens* is derived not only from rule 17.06…but also from the "jurisprudence" which has evolved over the years:" at para. 12.

[35] I am satisfied that Webuild can seek a temporary stay against SCMS on the basis of *forum non conveniens.*

Should the application be stayed on the basis that Ontario is not the most convenient forum?

[36] I am satisfied that the application should be stayed pending the outcome of the proceedings in Italy.

[37] Webuild has raised *forum non conveniens* and has the burden to show why the Court in Ontario should decline to exercise its jurisdiction in favour of the Italian Court: *Van Breda*, at para. 103. The Supreme Court of Canada in *Van Breda*, stated, at para. 103:

> If a defendant raises an issue of *forum non conveniens*, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action. The defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum, what connections this alternative forum has with the subject matter of the litigation. Finally, the party asking for a stay on the basis of *forum non conveniens* must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate.

[38] Generally, *forum non conveniens* will not apply in a recognition and enforcement application because there is no other jurisdiction that can enforce against Ontario assets. However,

as noted by Webuild, SCMS's underlying application is not a standard recognition and enforcement matter. This is because SCMS seeks to enforce against a third party to the Arbitral Award (Webuild) instead of against the judgement debtor (Astaldi). Whether Webuild is liable for Astaldi's debts under the Arbitral Award must be determined before the award can be enforced against Webuild. This is a severable issue from the issue of enforcement of the Arbitral Award in Ontario.

[39] In *Van Breda*, at para. 105, the Supreme Court of Canada explained that there is not an exhaustive list of factors when the court is considering an application for a stay based on *forum non conveniens*. In addition, the Supreme Court stated: "In essence, the doctrine focuses on the contexts of individual cases, and its purpose is to ensure that both parties are treated fairly and that the process for resolving their litigation is efficient."

[40] Italy is the more appropriate forum to determine the threshold issues of whether Astaldi's debt to SCMS survived the *Concordato* and whether Webuild assumed Astaldi's liabilities and obligations as part of the Astaldi Transaction. SCMS has started an enforcement proceeding in Ontario against Webuild. Webuild was not a party to the Arbitration in Chile. Webuild purchased the continuing operations of Astaldi but asserts that the obligations to SCMS pursuant to the Arbitral Award were unsecured debts of Astaldi encompassed within the *Concordato* and were not assumed as part of the Astaldi Transaction. While generally enforcement of a foreign Arbitral Award in Ontario is straightforward, that is not the case here. There is a threshold issue that needs to be determined. Webuild is of the view that this threshold issue ought to be determined in Italy, not here. I agree.

[41] The Astaldi Transaction was part of a complicated restructuring proceeding under Italian law.

[42] Both parties filed expert reports on the motion. Webuild delivered two expert reports by Professor Emauele Rimini. Professor Rimini is a full professor of corporate law at the Law School of the University of Milan, a position he has held since 2005. Among other things, Professor Rimini's report states:

> a. The reading of the Demerger Deed makes it clear that it is a demerger (in Italian "*scissione*") [...] and in no way a merger (in Italian "*fusion*").
>
> b. [T]he Astaldi demerger was a partial demerger (*scissione parziale*), implying that only certain assets were transferred to the beneficiary company, in this case Webuild.
>
> c. [T]he Agreement is a demerger transaction through which (only) certain assets of Astaldi which were considered 'in continuity' (the "Continuity Business") after the execution of the *Concordato* were transferred to Webuild (being the beneficiary of the demerger), and net of the debt settlement resulting from the *Concordato*.

d. The Demerger Deed represented the final step of a restructuring procedure (the *Concordato*) to which it is therefore strictly connected. The Demerger Deed cannot be understood without analyzing the scope and effects of the *Concordato* ...

e. The *Concordato* Plan provided the different types of claims to be satisfied in different ways – *i.e.*, pre-deductible and privileged claims in full and in cash, unsecured claims through the allocation of financial instruments.

f. As a result of the *Concordato* Plan and the following Agreement, it cannot be generally argued that Webuild "stands in the shoes" of Astaldi as its successor-in-interest in the Continuity Business, let alone in respect to the Final Award. Such conclusion could only be reached after the complex analysis [...and...] does not seem to be a foregone conclusion at present.

g. [I]t is necessary to understand the nature of any single claim in the Final Award and therefore, to identify the causal root of the relationship that originated the debt in order to assess its nature as pre-deductible, privileged or unsecured.

h. [T]he Italian Courts have full jurisdiction to hear the case.

[43] SCMS delivered an expert report from Professor Marco Ventoruzzo. Professor Ventoruzzo is a Full Professor and past Head of the Department of Legal Studies at Bocconi University Law School in Milan. Among other things, Professor Ventoruzzo's report states:

a. [T]he difference between merger and demerger is not relevant in the case at hand since the differences do not inform the analysis undertaken either by Professor Rimini or me on whether Astaldi's interests and liabilities arising from the EPC Contract, including Astaldi's liability under the Award, are transferred to Webuild as Astaldi's successor-in-interest.

b. [W]hile it is true that there is factual complexity to the reorganization of the Astaldi Group and the *Concordato* pursued by Astaldi, the specific issue of Webuild's liability to SCMS for the damages granted by the Award (as modified by the judgment of the Court of Appeal) is actually quite straightforward.

c. [T]he EPC Contract was not terminated by Astaldi as part of the *Concordato* and therefore forms part of the business continuity. Accordingly, SCMS' claims arising from the EPC Contract that post-date the commencement of the *Concordato* would be predeductible.

d. [In response to Professor Remini's statement that "it is necessary to understand the nature of any single claim in the Final Award...]: This observation suggests or implies the difficulty or impossibility to determine the nature and foundation of SCMS' claims and their legal classification. In my opinion, this issue is not so complex.

e. There is no choice of forum, exclusive or otherwise, specified in the Demerger deed. The fact that Astaldi and Webuild are Italian companies and that the Demerger Deed is governed by Italian law may suggest exclusive jurisdiction in a dispute between the parties to the Demerger Deed. However, even if Italian law applies and Italian courts have jurisdiction over Italian parties, this jurisdiction is not exclusive when the dispute involves foreign third parties to the agreement such as SCMS (a third party to the Demerger Deed).

[44] While there is divergence between the two experts on the complexity of the Italian bankruptcy issues, among other things, it is clear that the following will need to be determined:

a. Whether Astaldi's liabilities related to the Arbitral Award are unsecured debts or pre-deductible debts under Italian bankruptcy law.

b. If they are pre-deductible debts, did Webuild assume these liabilities contractually?

[45] The Partial Spin-Off Agreement is a contract that was made in Italy between two Italian companies and is governed by Italian law. Furthermore, most of the relevant documents are in Italian, not English. As noted by Webuild, because Astaldi and Webuild are both Italian companies many of the witnesses from whom Webuild would lead factual evidence are in Italy and do not speak English fluently. Accordingly, substantial resources would be needed to provide translation services, among other things.

[46] Although staying the enforcement proceeding in Ontario pending the outcome of the Italian proceedings will delay enforcement in Ontario, Italy is the more appropriate forum to decide this issue. Proceedings have been commenced by Webuild in Italy. Furthermore, all the relevant parties (Webuild, SCMS, and Astaris) have been named in the Italian proceeding.

[47] If the Ontario Court were to determine the threshold issues on the merits as part of the recognition and enforcement proceedings, and this is also done by the courts in Delaware and Quebec as part of the enforcement proceedings in those jurisdictions, and then in Italy, there is a significant risk of conflicting judgments. Further, there would be a multiplicity of proceedings. In my view the threshold issue of whether Webuild assumed the liabilities and obligations related to the SCMS Arbitral Award should be determined in a single proceeding in Italy.

[48] I recognize that the granting of a stay is an extraordinary remedy: *TransAsia Private Capital Inc. et al. v. Export Development Canada*, 2021 ONSC 4902, at para. 44. The Court of Appeal in *Hester v. Canada*, 2008 ONCA 634, 234 O.A.C. 184, in contemplating a temporary stay, noted, at para. 15:

> The fact is that s. 106 gives the court a broad discretion to stay proceedings, unfettered by any specific test. Stays have been granted in many cases ... any subject only to the overriding constraint that the circumstances must be extraordinary.

[49] While the threshold for a temporary stay is lower than a permanent stay, it is still considered extraordinary. The test for granting a temporary stay pending the resolution of another proceeding was established in *Hollinger International Inc. v. Hollinger Inc.*, 2004 CanLII 7352 (Ont. S.C.); leave to appeal refused, 2005 CanLII 4582 (Ont. Div. Ct.). The test considers four primary factors: (1) whether there is substantial overlap of issues in the two proceedings; (2) whether the two cases share the same factual background; (3) whether issuing a temporary stay will prevent unnecessary and costly duplication of judicial and legal resources; and (4) whether the temporary stay will result in an injustice to the party resisting the stay.

[50] I am satisfied that this is an appropriate case for granting a temporary stay. There is obvious overlap between the Ontario proceedings and the Italian proceedings on the threshold issue of whether the liabilities related to the arbitration with SCMS were assumed by Webuild in the Astaldi Transaction. The factual background is the same. A temporary stay will certainly prevent unnecessary and costly duplication of judicial and legal resources. Finally, although there will be a delay in SCMS's ability to enforce in Ontario, this could be compensated for if SCMS is successful in the Italian proceedings.

Disposition and Costs

[51] SCMS's application is stayed pending the outcome of the proceedings in Italy.

[52] The parties agreed that costs of $200,000 (inclusive of taxes and disbursements) would be paid to the successful party. Accordingly, SCMS shall pay Webuild's costs in the amount of $200,000. The parties did not agree on the timing of the payment of costs. SCMS took the position that payment of any costs owed by SCMS should be deferred until the determination of the ultimate question of liability. I disagree. Webuild was successful on the motion and is entitled to its costs payable forthwith.

J. Steele J.

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