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Powerex Corp. v. Alcan Inc., 2004 BCSC 876 (CanLII)

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  Powerex Corp. v. Alcan Inc., 2003 BCSC 1096 (CanLII) - 2003-07-10

Legislation cited (available on CanLII)

- Foreign Arbitral Awards Act, R.S.B.C., 1996, c. 154
- International Commercial Arbitration Act, R.S.B.C., 1996, c. 233

Decisions cited

- Voth Bros. Const. (1974) Ltd. v. Nat. Bank of Can., 1987 CanLII 2716 (BC CA) — 12 BCLR (2d) 43

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Powerex Corp. v. Alcan Inc.,***
2004 BCSC 876

Date: 20040630

Docket: L030449

Registry: Vancouver

Between:

Powerex Corp., formerly British Columbia

Power Exchange Corportation

Petitioner

And

Alcan Inc., formerly Alcan Aluminum Limited

Respondent

Before: The Honourable Madam Justice Brown

Reasons for Judgment

Counsel for the Petitioner:	G.W. Ghikas, Q.C. R.J.C. Deane
Counsel for the Respondent:	S. Margolis C.E. Jones
Date and Place of Hearing:	April 6 & 7, 2004 Vancouver, B.C.

[1] Powerex Corp. seeks an order recognizing and enforcing an arbitration award made in Portland, Oregon on January 17, 2003 in its favour and against Alcan Inc. Alcan has applied in the United States to have the arbitration award set aside. The issue is whether this court should enforce the arbitration award, even though the United States proceedings are not yet concluded, or should adjourn this matter, pending completion of the United States proceedings, with appropriate security to Powerex.

BACKGROUND

[2] In 1997 Alcan was required to supply a certain amount of power to B.C. Hydro. Alcan wished to designate a third party to supply a portion of that electricity. Alcan designated Enron Power Marketing Inc. as the supplier. Alcan remained liable for full and proper performance of its obligations and those of Enron, limited to $100,000,000 USD. When Enron became bankrupt and no longer able to fulfil its obligations, Powerex, the B.C. Hydro subsidiary, took the position that the agreement was terminated. Powerex argued that it was entitled to a termination payment from Enron pursuant to the agreement and that Alcan was obliged to pay Powerex $100,000,000 USD. Powerex made demand for payment from Alcan; Alcan did not make payment.

[3] In April 2002, Powerex started arbitration proceedings, as provided in the agreement. The parties selected Thomas J. Brewer of Seattle, Washington as the sole arbitrator. The arbitration took place in Portland, Oregon over ten days in December 2002. In January 2003, the arbitrator issued his decision and ordered that Alcan pay Powerex $100,000,000 USD.

[4] Alcan applied to set aside the award. Motions came on for hearing before United States Magistrate Judge John Jelderks. On September 18, 2003, Judge Jelderks issued his findings and recommendations. He recommended that Powerex's motion for judgment be granted and that Alcan's motion to set aside the award be denied. Judge Jelderks' findings and recommendations were reviewed by the Honourable Judge Garr M. King of the District Court in

December 2003. Judge King ordered that Alcan's Oregon action be dismissed, refusing to set aside the award.

[5] Accordingly, the award has been reviewed by a magistrate and a judge of the District Court and both concluded that the award should be upheld.

[6] Alcan has filed a Notice of Appeal from the order of Judge King. The appeal is not likely to be heard before April 2005. No decision is likely until mid-to-late 2005.

[7] Alcan takes the position that this court should not act until the award's validity is finally determined by the United States' courts. Powerex says that the award has been upheld by the courts, that it is highly unlikely that Alcan's appeal will succeed, and that further delay is not appropriate and is not consistent with the policy objectives of international arbitrations: the expeditious enforcement of international arbitral awards.

STATUTORY FRAMEWORK

[8] Powerex applies pursuant to the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233 ("*ICAA*") and the British Columbia *Foreign Arbitral Awards Act*, R.S.B.C. 1996, c. 154 ("*FAAA*").

[9] The *ICAA* implements in British Columbia the 1985 *UNCITRAL Model Law on International Commercial Arbitration* (the "Model Law"). The *FAAA* implements in British Columbia the 1958 *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the "New York Convention").

[10] The Model Law and the New York Convention both promote the expeditious enforcement of international arbitral awards. Both provide that the award is binding and immediately enforceable. The court may refuse enforcement or set aside the award on limited grounds.

[11] Alcan asks for an adjournment of this matter pursuant to s. 36(2) of the *ICAA*. That section provides that the court may adjourn an application for enforcement if an application to set aside the award has been made to a competent court. Also, the court may order the party who seeks to avoid the

arbitral award to provide appropriate security. Article VI of the *FAAA* contains a similar provision.

[12] The grounds for resisting enforcement of an arbitral award are limited. They are set out in s. 36(1) of the *ICAA.* Article V of the *FAAA* contains similar grounds for resisting enforcement.

[13] In the United States action, Alcan asked to have the award set aside on the following grounds: (1) the arbitrator lacked jurisdiction; (2) the award deals with a matter not contemplated by or falling within the terms of the submission to arbitration; (3) the award decides matters beyond the scope of the submission to arbitration; (4) Alcan was not able to present its case during the arbitration because the arbitrator refused Alcan's applications for discovery; (5) the arbitral procedure did not accord with the agreement of the parties; (6) the arbitral procedure did not accord with the laws of Oregon and the United States; and (7) the award was plainly wrong in law and therefore in excess of the arbitrator's authority and jurisdiction.

[14] Alcan does not ask this court to refuse to enforce the award and does not attempt to establish these matters in this proceeding. Rather, Alcan says that this court should adjourn this hearing pending resolution of these matters in the United States.

[15] Powerex says that it has met the requirements for enforcement and that this court should therefore proceed. Specifically, it says that the only requirements to have the award enforced are a duly authenticated original award and a duly authenticated original arbitration agreement. Both have been provided.

[16] I am satisfied that Powerex has met these conditions. The issue before this court is whether this matter should be adjourned pending conclusion of the appeal process in the United States.

BASIS FOR ADJOURNMENT

[17] I am advised by counsel that there are no decisions in British Columbia with respect to the approach to be taken by the court in determining whether an adjournment should be granted. Counsel have provided a thorough review of the

decisions of other jurisdictions with respect to granting an adjournment in these circumstances.

[18] The courts in these jurisdictions have taken a similar approach to the question, with some differences in shading and emphasis.

[19] In Ontario, in *Europcar Italia S.p.A. v. Alba Tours International Inc.*, [1997] O.J. No. 133 at para. 22 (Ct. J. (Gen Div.)) (QL), Dilks J. applied the three-part test for stay applications: "the main test is that of the balance of convenience, with consideration as well for principles of irreparable harm and whether there is a serious issue to be tried. ...Special weight should be given to the fact that an adjudication on the merits has already taken place."

[20] In the U.K., the Court of Appeal in *Soleh Boneh International Ltd. v. Goernment of the Republic of Uganda,* [1993] 2 Lloyd's L.R. 208 at 212 (C.A.) said:

In my judgment two important factors must be considered on such an application, although I do not mean to say that there may not be others. The first is the strength of the argument that the award is invalid, as perceived on a brief consideration by the Court which is asked to enforce the award while proceedings to set it aside are pending elsewhere. If the award is manifestly invalid, there should be an adjournment and no order for security; if it is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security. In between there will be various degrees of plausibility in the argument for invalidity; and the Judge must be guided by his preliminary conclusion on the point.

The second point is that the Court must consider the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult, for example, by movement of assets or by improvident trading, if enforcement is delayed. If that is likely to occur, the case for security is stronger; if, on the other hand, there are and always will be sufficient assets within the jurisdiction, the case for security must necessarily be weakened.

[21] In Australia in *Toyo Engineering Corp. and John Holland Pty. Ltd.* [2000] VSC 553, the court considered that the application to set aside the award was not unarguable, the adjournment would be for a relatively short time, and refused to pre-empt the application.

[22] In the United States, the Court of Appeals considered the test to be applied in determining whether to adjourn an application to enforce an arbitral award in *Europcar Italia S.p.A. v. Maiellano Tours Inc.*, 156 F. 3d 310 (2d Cir. 1998). The Court listed the following factors to consider in granting an adjournment at 317-18:

(1) the general objectives of arbitration-the expeditious resolution of disputes and the avoidance of protracted and expensive litigation;

(2) the status of the foreign proceedings and the estimated time for those proceedings to be resolved;

(3) whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review;

(4) the characteristics of the foreign proceedings including:

- (i) whether they were brought to enforce an award (which would tend to weigh in favor of a stay) or to set the award aside (which would tend to weigh in favor of enforcement);
- (ii) whether they were initiated before the underlying enforcement proceeding so as to raise concerns of international comity;
- (iii) whether they were initiated by the party now seeking to enforce the award in federal court; and
- (iv) whether they were initiated under circumstances indicating an intent to hinder or delay resolution of the dispute;

(5) a balance of the possible hardships to each of the parties, keeping in mind that if enforcement is postponed ... the party seeking enforcement may receive "suitable security" and that ... an award should not be enforced if it is set aside or suspended in the originating country ...; and

(6) any other circumstances that could tend to shift the balance in favor of or against adjournment...

The Court said that particular emphasis was to be given to the general objectives of arbitration. Since this decision was rendered in 1998, United States courts appear to have applied these factors in determining whether an adjournment should be granted.

[23] In Hong Kong, the High Court considered the approach to be taken in *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd;,* [1996] 3 HKC 725. There, the Court said:

The burden must be on the defendant in this case to show that the application has been made to the Chinese court and that it is a *bona fide* application, not made only with a view to delaying payment. If it appears that the application is hopeless and bound to fail, this court will not grant an adjournment. It is for the defendant to show that it has some reasonably arguable grounds which afford some prospect of success. I think it is going too far to say that the defendant must show that he is likely to succeed. ...

[24] To my mind, the courts in the various jurisdictions have taken an approach similar to Justice Dilks in Ontario. In some jurisdictions, however, the factors to be considered in weighing the balance of convenience are set out in greater detail. In other words, the party seeking an adjournment must meet the threshold test of establishing that there is a serious issue to be tried. Then the court weighs the balance of convenience and irreparable harm. The remedy is discretionary. The applicant must show that proceedings to set aside the award have been commenced in the appropriate court of the originating jurisdiction.

[25] In weighing the balance of convenience and irreparable harm, the court will give heed to judicial comity and the possibility of inconsistent judgments. The court will recognize that a party seeking to enforce the arbitration award will necessarily be prejudiced by delay. Also, there is a potential prejudice to the

party seeking the adjournment should the court refuse the adjournment and enforce the award, only to have the original jurisdiction set aside the award.

[26] In assessing the balance of convenience, the court will consider a number of factors, including the estimated time to complete the case in the originating jurisdiction; whether the party opposing enforcement is merely delaying the inevitable; whether a court in the originating jurisdiction has already refused to set aside the award; the availability of security and the possibility of asset removal prior to enforcement; and the willingness of the party resisting enforcement to undertake diligent prosecution of the action in the originating jurisdiction.

ANALYSIS AND CONCLUSION

[27] Here, both parties have filed affidavits to establish the likelihood of Alcan succeeding on the appeal. Alcan has filed affidavit material from an eminent jurist in the United States indicating that the appeal has some prospect of success. Powerex has filed affidavits of two experienced jurists indicating that Alcan's appeal has very little prospect of success. As a result, I cannot conclude that Alcan's action has no prospect of success. I conclude that there is an issue to be tried. I am mindful, however, that Alcan's argument has already been rejected by a magistrate and a judge of the United States District Court. Therefore, it cannot be said that Alcan's appeal has more than a chance of success.

[28] Powerex has been and will continue to be prejudiced by delay in payment of the award. Although the award accrues interest, Powerex is unable to use the proceeds which have been awarded to it and confirmed by the U.S. District Court.

[29] Alcan appears to have proceeded expeditiously; it has advised the court that it will continue to do so and that it is not pursuing the appeal as a delaying tactic. No decision on the appeal is likely until mid-to-late 2005.

[30] Alcan is a very substantial entity and is well able to pay the outstanding award.

[31] In my view, it is appropriate that this matter be adjourned, on Alcan posting security in a manner that will allow Powerex use of the funds pending conclusion of these matters in the United States. The security will be similar to that ordered in *Voth Brothers Construction (1974) Ltd. v. National Bank of Canada* 1987 CanLII 2716 (BC CA), (1987), 12 B.C.L.R. (2d) 43 (C.A.): Alcan will pay the amount of the award, together with accrued interest to Powerex's solicitors, in trust. Powerex will then have access to these funds on the following conditions: (1) should Alcan succeed in its appeal in the United States, Powerex will immediately repay all the monies which it has received, together with interest at the rate currently accruing on the award; and (2) Powerex will provide security satisfactory to Alcan to secure repayment of all monies, including interest, to Alcan.

[32] In light of the large amount of the award and the related interest, these matters should be timed so that security is immediately available and the monies can be immediately paid to Powerex, rather than continuing to accrue interest at Alcan's expense while they are held in trust. Any interest earned while the monies are held in trust should be applied to Alcan's benefit, reducing the interest that accrues on the award.

[33] The cost to Powerex of obtaining the security will be a disbursement in these proceedings which Powerex can recover from Alcan, should Alcan not succeed in having the award in the United States set aside.

[34] The parties shall have liberty to apply for further directions respecting the form of security, if necessary. Costs are reserved, pending outcome of the United States proceedings.

"B.J. Brown, J."

The Honourable Madam Justice B.J. Brown

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