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I. ZNAMENSKY SELEKCIONNO-GIBRIDNY CENTER LLC V. DONALDSON INTERNATIONAL LIVESTOCK LTD., 2009 CANLII 51197 (ON S.C.)

Print: PDF Format
Date: 2009-09-29
Docket: CV-09-376953
URL: http://www.canlii.org/en/on/onsc/doc/2009/2009canlii51197/2009canlii51197.html
Noteup: Search for decisions citing this decision
Reflex Record (related decisions, legislation cited and decisions cited)

A. LEGISLATION CITED (AVAILABLE ON CANLII)

- International Commercial Arbitration Act, R.S.O., 1990, c. I.9

B. DECISIONS CITED

- Donaldson International Livestock Ltd. v. Znamensky Selekcionno-Gibridny Center LLC, 2008 ONCA 872 (CanLII)
- Z.I. Pompey Industrie v. ECU-Line N.V., 2003 SCC 27 (CanLII) — [2003] 1 S.C.R. 450 • 224 D.L.R. (4th) 577 • 240 F.T.R. 318

COURT FILE NO.: CV-09-376953
DATE: 20090929

C. SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Znamensky Selekcionno-Gibridny Center LLC, Applicant

Donaldson International Livestock Ltd., Respondent

BEFORE: Justice Romain Pitt

COUNSEL: *Christopher D. Bredt/Markus Kremer*, for the Applicant

Malcolm Ruby/Sonja Popovic, for the Respondent

DATE HEARD: September 21, 2009

(i) ***ENDORSEMENT***

[1] The application is for an order recognizing and enforcing as a judgment of this court, two awards made in favour of ZnamenskySelekcionno-Gibridny Center LLC ("Znamensky") against Donaldson International Livestock Ltd. ("Donaldson") by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (the "ICAC") on March 6, 2008 and May 6, 2008 in Moscow, Russia.

[2] There is also a motion brought by Donaldson for an order under rule 38.10(3)(b) of the *Rules of Civil Procedure* that the application proceed to trial with such directions as are just, or in the alternative, an order granting leave to Donaldson under rule 39.03(4) to call witnesses at the hearing of the application.

[3] Because of the unusual history of the case outlined hereafter, I heard the applicant first but afforded the respondent the right (as moving party) to reply.

[4] Since the substance of this proceeding has already been to the Court of Appeal, I shall, out of an abundance of caution, recite the facts verbatim from the Reasons for Judgment of Armstrong J.A. speaking for that Court, rendered on December 23, 2008[1].

> [1] The appellant, a Canadian pig producer, agreed to sell 8,505 pigs to the respondent corporation, a Russian agro-industrial company. A dispute arose as to the health of the pigs. The respondent corporation invoked the arbitration clause in the contract of purchase and sale which provided for an arbitration to proceed in Moscow. The appellant refused to participate in the arbitration on the ground that the chief executive officer of the Russian company had threatened to kill the appellant's chief operating officer who, as a result, was unwilling to travel to Moscow – as were the appellant's witnesses.
>
> [2] The appellant commenced an action in Ontario against the respondents and sought an anti-suit injunction against the respondent company to stop the arbitration from proceeding in Moscow. The respondents sought an order staying the action. The motion judge dismissed the motion for an anti-suit injunction and granted a stay of the Ontario action.
>
> **THE FACTS**

[4] The appellant, Donaldson International Livestock Ltd. ("Donaldson"), is a leading Canadian exporter of purebred pigs. It has exported pigs to more than 45 countries around the world. James Donaldson is the major shareholder and chief operating officer of Donaldson.

[5] The respondent, Znamensky Selekcionno-Gibridny Center LLC ("Znamensky"), is a Russian corporation which was created in 2006 to produce purebred animals. The respondent, Nikolay Demin, is the chief executive officer of Znamensky.

[6] In August 2006, Znamensky agreed to purchase from Donaldson 8,505 purebred pigs for U.S. $7,338,496. The contract provided that the pigs should be tested and quarantined prior to export to Russia pursuant to the requirements of the Canadian Food Inspection Agency ("CFIA") and pursuant to an international agreement between Russia and Canada.

[7] The contract contained an arbitration clause as follows:

> 12. Arbitration
>
> Any dispute, controversy or claim, which may arise out of or in connection with the present contract (agreement), or the execution, breach, termination or invalidity thereof, shall be settled by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, in accordance with its Rules and Regulations. The Contract is governed and construed in accordance with the material law of Russian Federation.
>
> The place of arbitration shall be Moscow, Russia. The language to be used in the arbitral proceedings shall be Russian.
>
> The Contract shall be subject to the Law of Russian Federation.

[8] The pigs were placed into pre-export quarantine in three lots and were inspected by veterinarians from CFIA and private veterinarians who were retained by Donaldson. The veterinarians were satisfied that the pigs in Quarantine No. 1 were fit for export. However, in accordance with the provisions of the contract, a veterinarian from Russia, Dr. Pisarev, inspected the quarantined pigs and concluded that the pigs in Quarantine No. 1 were not healthy. Dr. Hambleton, another veterinarian from the CFIA, who had not inspected the pigs, gave an opinion that there was a risk the pigs in Quarantine No. 1 would not be approved for export. A further opinion was obtained from a swine specialist at the CFIA who concluded that the pigs were suitable for export.

[9] On November 17, 2006 at about 5:00 a.m., Mr. Donaldson was awakened by a telephone call from Mr. Demin in Russia. Mr. Demin spoke in Russian and his colleague, Andrey Bodin, was on the line and acted as the interpreter for the call.

[10] A heated discussion followed. Mr. Demin had apparently just seen a report from Dr. Pisarev and Dr. Hambleton concerning the health of the pigs in Quarantine No. 1 and demanded that Donaldson provide new pigs to satisfy the terms of the contract. Mr. Donaldson refused. The conversation became increasingly hostile and, according to Mr. Donaldson, Mr. Demin shouted, "what happens to people that cross me," followed by "I will kill you" – uttered twice. The call ended with these threats.

[11] In the next few months, efforts were made to resolve the dispute through correspondence in which Mr. Demin denied that he had made the alleged threats.

[12] Znamensky continued to refuse to accept the delivery of the pigs from Quarantine No. 1, although it took delivery of 291 pigs from Quarantine No. 2 and Quarantine No. 3. Znamensky demanded that Donaldson return its advanced payment of U.S. $1,666,113.

[13] On March 17, 2007, a meeting took place in Ottawa between Mr. Donaldson, Mr. Demin and others in a futile attempt to resolve the dispute. During the course of this meeting, Mr. Demin made certain comments that Mr. Donaldson took as a further threat. He subsequently reported the alleged threats to the police.

[14] On July 20, 2007, Donaldson was served with a claim for arbitration of the dispute before the International Commercial Arbitration Court ("ICAC") pursuant to the arbitration clause in the contract. On August 15, 2007, Donaldson commenced this action in the Superior Court in which it claimed *inter alia*:

(i) a declaration that the arbitration clause in the contract is null and void;

(ii) a declaration that the recognition or enforcement of any arbitration award would be contrary to public policy; and

(iii) interim, interlocutory and permanent injunctions prohibiting Znamensky from seeking any remedy against Donaldson in an arbitration or other proceeding conducted in Russia.

THE INJUNCTION PROCEEDINGS

[15] By notice of motion dated August 16, 2007, Donaldson moved for an interim and interlocutory injunction prohibiting Znamensky from proceeding with the arbitration before the ICAC in Moscow.

[16] The basis for the injunction was that the individuals who were involved with the quarantine and inspection of the pigs in Canada were aware of the death threats made against Mr. Donaldson and refused to appear as witnesses in Moscow for the arbitration, which rendered the proceeding unfair to Donaldson.

[17] Prior to the injunction motion proceeding to court, Znamensky advised Donaldson that it was prepared to consent to Mr. Donaldson and his witnesses testifying by telephone, video conference or other means to avoid their having to travel to Moscow. Alternatively, Znamensky was prepared to agree to a mutually acceptable location outside of Russia for the holding of the arbitration. These suggestions were made on the basis that Donaldson would pay for any increased costs.

[18] Donaldson declined the proposal to pursue alternative means of proceeding with the arbitration. Znamensky brought a cross-motion for a stay of the action.

[19] The motion judge began his analysis by referring to article 8 of the *International Commercial Arbitration Act*, R.S.O. 1990, Chapter I.9 which provides:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

[20] The motion judge then considered the evidence of the alleged threats to kill Mr. Donaldson and, applying the "strong cause" test, articulated by the Supreme Court of Canada in *Z. I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27 (CanLII), [2003] 1 S.C.R. 450 at para. 20, he concluded:

> I have considered the Plaintiff's evidence of threats in and of itself and in light of the evidence proffered by the defendants by way of traversal. I am not persuaded that the Plaintiff has established the background of threats, even on a balance of probabilities. More importantly, I am of the view that this issue can hardly be resolved summarily, but, must proceed to be determined after a *viva voce* hearing, if it even becomes relevant in the Arbitration proceedings for reasons, at this moment in time, which are beyond my contemplation.
>
> That said, I am not persuaded that a strong cause has been made out on the facts as contained in the material now provided to me. Nor has the Plaintiff satisfied me that the

> test described in Article 8, just described [*sic*] of the International Commercial Arbitration Act has been satisfied and that the subject agreement is either inoperative or incapable of being performed.

[21] The motion judge expressed the view that, if he erred in his conclusion that the "strong cause" test had not been satisfied, the proposal of Znamensky to conduct part of the proceeding electronically or to move the arbitration out of Russia altogether had the effect of eliminating or minimizing the alleged threats and thereby undercutting the basis upon which the injunction was sought.

[22] The motion judge dismissed the motion, without prejudice to Donaldson's right to renew the motion if the respondents do not honour their undertaking to consent to an application pursuant to article 22 of the ICAC rules for a change of venue, or should any unforeseen events arise, including substantiated threats.

[23] The motion judge granted Znamensky's order for a stay of the action.

THE ARBITRATION

[24] Although Donaldson had served and filed its notice of appeal from the order of the motion judge at the end of December 2007 and requested the ICAC to adjourn the arbitration pending the appeal, the arbitration proceeded in Moscow on January 17, 2008 and April 17, 2008. Donaldson did not participate. On March 6, 2008, the ICAC panel awardedZnamensky judgment in the amount of U.S. $1,234,416.65 in damages and U.S. $26,205.28 as compensation for the arbitration fee. On May 13, 2008, the ICAC panel awarded Znamensky a second judgment against Donaldson for U.S. $424,732.94 in damages and U.S. $9,006.21 as compensation for the arbitration fee paid by Znamensky.

[5] Donaldson raised the following issues in the appeal:

> (i) Did the motion judge err in failing to find that the death threats constituted strong cause to vitiate the arbitration clause?
>
> (ii) Did the motion judge err in failing to order a viva voce hearing to determine if the death threats had been made?
>
> (iii) Did the motion judge err in permanently staying the action, including the claim for a declaration that any arbitral award ought not to be recognized or enforced in Ontario, and claims for damages against Demin personally?

(iv) Did the motion judge err in effectively ordering the appellant to apply and pay for a change of venue of the arbitration?

[6] The relief sought in the Court of Appeal was as follows:

(i) a trial of the issue of the death threats;

(ii) an interim injunction prohibiting any steps to enforce the arbitral awards granted by the ICAC as against Donaldson; and

(iii) the stay of the action to be set aside.

[7] The Court of Appeal in commenting on the relief sought made the following observations:

> [26] In view of the fact that the arbitration has already been held, and the arbitration panel has issued two separate awards, it seems to me that the appeal from the order dismissing the motion for an injunction prohibiting Znamensky from proceeding with the arbitration is moot. Issues (i), (ii) and (iv) relate to the dismissal of the anti-suit injunction. Donaldson appears to accept that its appeal from the order dismissing the anti-suit injunction is moot by reason of the relief it now seeks on this appeal. Donaldson no longer seeks an injunction restraining Znamensky from proceeding with the arbitration.

[8] The Court of Appeal posed to itself the following questions and rendered the following answers.

(i) Should the Court order the trial of the issue of death threats?

[9] It's answer is of critical importance to this proceeding and is recited here verbatim:

> [28] In my view, the time to have requested the trial of the issue concerning the death threats was when the parties were before the motion judge. The case was argued on the basis of a paper record and the motion judge found that it fell short of establishing that the threats against Mr. Donaldson were made. The motion judge's reference to a *viva voce* hearing related to the arbitration hearing, which Donaldson chose not to attend. It was not up to the trial judge to order that *viva voce*evidence be tendered before him in the absence of a request from counsel. It is the counsel who presents the case, not the trial judge.

(ii) Should the Court grant an interim injunction prohibiting any steps to enforce the arbitral awards granted by the ICAD as against Donaldson?

[10] Its answer is also of importance to this proceeding and is also recited here verbatim:

> [28] In my view, it is not appropriate for this court to deal with the request to prohibit the enforcement of the arbitration award. Although the request is

included in the statement of claim, this was not a claim made before the motion judge, and he made no order in respect of it.

[29] Should Znamensky take steps to enforce its arbitral awards against Donaldson in the Ontario courts, then it would seem to me that Donaldson should be free to resist the enforcement of those awards on whatever basis it chooses, subject to the ruling of the presiding judge. In my view, the issue of enforcement must, at this stage, be dealt with at first instance and not in this court.

(iii) Should the stay of the action be set aside?

[11] The Court of Appeal said:

[31] Counsel for Donaldson submits that the motion judge erred in granting a stay of the action because the statement of claim requests relief that is beyond the scope of the arbitration clause in the contract of purchase and sale. In particular, he alleges that the following claims are beyond the jurisdiction of an arbitration panel established under the arbitration clause: (i) a declaration that an arbitral award should not be recognized or enforced in Ontario due to the misconduct of the respondent; and (ii) damages for the tort of intimidation. Although counsel, in his factum, did not include the additional claim for the tort of intentional interference with economic relations and injurious falsehood by causing Donaldson to be "blacklisted" in Russia, I assume this was an oversight.

[32] The request in (i) above for a declaration that an arbitral award not be recognized in Ontario is beyond the scope of the arbitration clause. However, this issue will more properly arise when steps are taken to enforce the award in Ontario. The fact that the claim is included in the statement of claim is not a basis for lifting the stay.

[33] Counsel for Donaldson argues that the arbitration clause in the agreement is restricted to contractual disputes between the parties and does not apply to the tort claims against Znamensky. He further submits that the arbitration clause does not apply to the tort claim of intimidation against Mr. Demin who is not a party to the agreement.

[12] After a discussion of the case law, the Court of Appeal said:

[36} In this case, the arbitration clause is extremely broad – it includes any "dispute, controversy or claim, which may arise out of or in connection with the present contract …" Given the direction that the courts have been taking in respect of the approach to arbitration clauses, I am satisfied that this clause is broad enough to include virtually all of the claims advanced in the statement of claim. The fact that one of the claims is against a non-party to the agreement, Mr. Demin, is not sufficient to oust the ICAC and Moscow from hearing these matters when the entire focus of the action relates to issues arising out of the contractual relations of the principal parties.

[13] The Court of Appeal dismissed the appeal and awarded costs against the respondents on a partial indemnity scale.

Analysis

[14] Notwithstanding the many and careful arguments of both counsel, it seems to me that the real issue to be decided on this motion and application is the practical significance of the Court of Appeal's observations in its reasons that:

> [30] Should Znamensky take steps to enforce its arbitral awards against Donaldson in the Ontario courts, then it would seem to me that Donaldson should be free to resist the enforcement of those awards on whatever basis it chooses, subject to the ruling of the presiding judge. In my view, the issue of enforcement must, at this stage, be dealt with at first instance and not in this court.
>
> [32] The request in (i) above for a declaration that an arbitral award not be recognized in Ontario is beyond the scope of the arbitration clause. However, this issue will more properly arise when steps are taken to enforce the award in Ontario.

[15] Donaldson uses these observations to bolster its argument that nothing that has transpired in the prior proceedings fetters the discretion of this Court to revisit the issue of the alleged threats and any other issue, in determining whether the award should be enforced in Ontario. He cites some provisions of Article 36 of the *Model Law of the International Commercial Arbitration Act* R.S.O. 1990, C.I. 9that provides:

> Article 36. Grounds for refusing recognition or enforcement
>
> (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
>
> (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
>
> (i) a party to the arbitration agreement… was under some incapacity; or
>
> (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> (b) if the court finds that:
>
> (ii) the recognition or enforcement of the award would be contrary to the public policy of this State;

and submits that those grounds set the parameters for the Courts inquiry.

[16] In response to Znamensky's argument that Issue Estoppel applies to the threat issue, Donaldson submits that the first two preconditions for Issue Estoppel have not been met since the issue of whether there was a threat has never been decided and the decision made by Gans J. was not a final decision. He also argues that courts have exercised a discretion not to apply Issue Estoppel where a failure to exercise such discretion will work a real injustice, e.g. in situations of procedural unfairness akin to fraud, underhanded or improper conduct,

circumstances akin to a denial of natural justice, and unfairness deserving of special considerations.

[17] I agree with the submissions of Znamensky that the raising of the issue of the threats is prohibited by the doctrine of Issue Estoppel, and what is more a contrary finding would be in the nature of an affront to the hierarchical structure of the Ontario courts.

By isolating the Court of Appeal's observations in paragraph 30 and 32 of its reasons [paragraph 11 of these reasons] Donaldson disregards the most fundamental aspects of the Court of Appeal's reasons. The Court of Appeal said:

> The time for Donaldson to have requested a *viva voce* hearing with respect to the alleged threats was when the parties were before Gans J.

To introduce the subject now would be to fly in the face of the rule in *Henderson v. Henderson* which prohibits the raising of issues that were properly the subject of earlier litigation between the parties.

The Court of Appeal also said that the proper jurisdiction in which to raise the issue of the alleged threats was before the ICAC in the Russian arbitrations.

The Court of Appeal made it clear that the exclusive jurisdiction for the determination of Donaldson's tort claim against Mr. Demin with regard to the alleged threats was the ICAC.

[18] I also agree with the submissions of Znamensky that the earlier mentioned paragraphs 30 and 32 of the Court of Appeal's decision meant no more than that the proceeding to enforce an arbitral award must commence in the trial division of the Court, and not in the Court of Appeal, and will be subject to all laws and regulations governing proceedings at first instance.

[19] Finally, Donaldson has failed to recognize the significance of the finding of Gans J., endorsed inferentially by the Court of Appeal, that the offer made by Znamensky prior to the injunction motion proceeding, for an alternate site for the arbitration, and for special accommodation for witness testimony, virtually eliminated the alleged threats as a ground for vitiating the arbitral proceeding. This finding by itself is sufficient to dispose of this proceeding in favour of Donaldson.

[20] Since the alleged threats are the only real issue in this proceeding, I can see no basis for granting the relief sought by Donaldson in its motion. Donaldson's motion is dismissed.

[21] The application of Znamensky is granted.

Costs

[22] Subject to any agreement between the parties, brief written submissions on costs are to be made within thirty (30) days of the release of these reasons.

Pitt J.

DATE: September 29, 2009

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[1] *Donaldson International Livestock Ltd. v. Znamensky Selekcionno-Gibridny Center LLC*, 2008 ONCA 872 (CanLII), 2008 ONCA 872