Assam Company India Limited v. Canoro Resources Ltd., 2014 BCSC 370 (CanLII)

Date: 2014-03-07 (Docket: S127853)

Citation: Assam Company India Limited v. Canoro Resources Ltd., 2014 BCSC 370 (CanLII), <http://canlii.ca/t/g637l> retrieved on 2014-04-24

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Assam Company India Limited v. Canoro Resources Ltd.,* 2014 BCSC 370

Date: 20140307

Docket: S127853

Registry: Vancouver

In the Matter of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 233

Between:

Assam Company India Limited

Petitioner

And

Canoro Resources Ltd.

Respondent

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

Counsel for the Petitioner:	C. Veinotte
	C. Dafoe
Counsel for the Respondent:	J. Groia
	T. Okun
Place and Date of Trial/Hearing:	Vancouver, B.C.
	January 13 and 14, 2014
Written Submissions:	January 27 and February 11, 2014
Place and Date of Judgment:	Vancouver, B.C.
	March 7, 2014

Introduction

[1] Pursuant to s. 35 of the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233 ("*ICAA*") the petitioner seeks recognition and enforcement of a certain arbitration award dated November 21, 2011 issued by a three-member arbitral tribunal in India and involving the parties presently before the Court.

[2] The respondent opposes the petition on various grounds set forth in s. 36 of the *ICAA* but also applies pursuant to R. 22–1(7)(d) to have the proceeding transferred to the trial list so that certain asserted triable issues might be more fully subject to discovery and thereafter adjudicated at a full trial.

[3] For the reasons that follow, I have decided to grant the petition, albeit on terms, and to dismiss the application for transfer to the trial list.

Relevant Provisions of the *ICAA*

[4] The relevant provisions of the *ICAA* provide as follows:

Recognition and enforcement

> **35** (1) Subject to this section and section 36, an arbitral award, irrespective of the state in which it was made, must be recognized as binding and, on application to the Supreme Court, must be enforced.
>
> (2) Unless the court orders otherwise, the party relying on an arbitral award or applying for its enforcement must supply
>
> > (a) the duly authenticated original arbitral award or a duly certified copy of it, and
> >
> > (b) the original arbitration agreement or a duly certified copy of it.
>
> (3) If the arbitral award or arbitration agreement is not made in an official language of Canada, the party must supply a duly certified translation of it into an official language.

Grounds for refusing recognition or enforcement

> **36** (1) Recognition or enforcement of an arbitral award, irrespective of the state 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,

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made,

(iii) the party against whom the arbitral 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 the party's case,

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the arbitral award which contains decisions on matters submitted to arbitration may be recognized and enforced,

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement, was not in accordance with the law of the state where the arbitration took place, or

(vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made, or

(b) if the court finds that

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of British Columbia, or

(ii) the recognition or enforcement of the arbitral award would be contrary to the public policy in British Columbia.

(2) If an application for setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1) (a) (vi), the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.

[5] It will be noted that s. 35 of the *ICAA* is couched in mandatory terms. The award must be recognized and must be enforced, subject to the procedural requirements of s. 35(2). Recognition or enforcement can only be refused on the limited grounds set out in s. 36(1) of the *ICAA*.

[6] At this hearing both parties agreed there has been compliance with the threshold procedural requirements of s. 35(1). However, the parties disagree with respect to the merits of the grounds asserted under s. 36 for refusing recognition or enforcement in this case. As well, the parties disagree about the onus of proof pertaining to the "public policy" ground specified in s. 36(1)(b)(ii) of the *ICAA*.

[7] In any event, the respondent argues there are contentious issues of fact relating to the s. 36 issues which warrant further discovery and thereafter a full trial.

Factual Background

[8] The factual background is convoluted. Fortunately, much of it is described in detail in the award that is the subject matter of the petition and which, of course, was put into evidence before me.

[9] On February 23, 2001 the petitioner ("Assam") entered into a "production sharing contract" with the Indian government with respect to a potential oilfield known as Amguri. In November 2003 Assam was granted an oil lease of the Amguri field by the State of Assam.

[10] In May 2004 Assam and the respondent ("Canoro") entered into a joint operating agreement ("JOA") with respect to the Amguri field. Canoro's assigned "participating interest" was 60%. Assam's "participating interest" was 40%. The JOA appointed Canoro as the "operator" of the project until such time as, among other things, it ceased to hold a "participating interest".

[11] Article 13 of the JOA addressed the sale, transfer or assignment of either party's "participating interest" and provided for the other party to have a right of first refusal. This right was said to apply "to any sale or assignment of the stock of a Party other than to an Affiliate hereto where the principal or sole asset of such party at the time of such sale is its Participating Interest under the Contract".

[12] Article 18 of the JOA provided for arbitration of any disputes between the parties. That article read as follows:

> 18.1. The Parties shall use their best efforts to settle amicably all disputes, differences or claims arising out of or in connection with any of the terms and conditions of this Agreement or converning the interpretation or performance thereof.
>
> 18.2. Any dispute, difference or claim arising between the Parties hereunder which cannot be settled amicably may, subject to Article 18.11, be submitterd by any Party to arbitration pursuant to Article 18.3.

18.3. Subject to the provisions herein, the Parties hereby agree that any unresolved dispute, difference or claim which cannot be settle amicably within a reasonable time may; except for those referred to in Article 18.11, be submitted to an arbitral tribunals for final decision as hereinafter provided.

18.4. The Arbitral tribunal shall consist of three arbritators. The Party or Parties insttiluting the arbitration shall appoint one arbitrator and the Party or Parties repsonding shall appoint another arbitrator and both Parties shall so advise the other Parties. The two arbitrators appointed by the Parties shall appoint the third arbitrator.

18.5. Any Party may, after appointing an arbitrator, request the other Party(ies) in writing to appoint the second arbitrator. If such other Party fails to appoint an arbitrator withint forty-five (45) days of receipt of the written request to do so, such arbitrator may, at the request of the first Party, be appointed in accordance with the Arbitration and conciliation Act 1996 from amongst persons who are not nationals of the country of any of the Parties to the arbitration proceedings.

18.6. If the two arbitrators appointed by the Parties fail to agree on the appointment of the third arbitrator within thirty (30) days of the appointment of the second arbitrator and if the Parties do not otherwise agree, under the Arbitration and Conciliation Act 1996, the first Paty may appoint the third arbitrator who shall not be a national of the country of any Party.

18.7. If any of the arbitrators fails or is unable to act, his successor shall be appointed in the manner set out in this Article as if he was the first appointment.

18.8. The decision of the arbitral tribunal, and, in the case of difference among the arbitrators, the decision of the majority, shall be final and binding upon the Parties.

18.9. Arbitration proceedings shall be conducted in accordance with the Arbitration and Conciliation Act 1996 except that in the event of any conflict between these Act and the provisions of this Article 18, the provisions of this Article 18 shall govern.

18.10. The right to arbitrate disputes and claims under this Agreement shall survive the termination of this Agreement.

18.11. Prior to submitting a dispute to arbitration, a party may submit the matter for conciliation under the Arbitration and Conciliation Act 1996 as amended or re-enacted from time to time by conciliators) to be appointed by mutual agreement fo the Parties. If the Parties fail to agree on a conciliator (or conciliators) in accordance with the said rules, the matter may be submitted for arbitration. No arbitration proceedings shall be instituted while conciliation proceedings are pending.

18.12. The venue of conciliation or arbitration proceedings pursuant to this Article, unless the Parties otherwise agree, shall be in New Delhi and shall be conducted in the English Language. Insofar as practicable, the Parties shall continue to implement the terms of this Agreement notwithstanding the initiation of arbitral proceedings and any pending claim or dispute.

18.13. The fees and expenses of conciliator(s) appointed by the Parties shall be borne equally by the contending Parties. Assessment of the costs of arbitration including incidental expenses and liability for the payment thereof shall be at the discretion of the arbitrators.

[13] At that time, Canoro was a public company whose shares were traded on the TSX Venture Exchange.

[14] In April 2010 Canoro entered into an investment agreement with Mass Financial Corp. pursuant to which the latter acquired approximately 18% of the common shares of the former. In July 2010 Mass Financial Corp. acquired further common shares from Canoro thereby bringing its total shareholdings to approximately 53% of the total outstanding shares of Canoro.

[15] On April 28, 2010 Assam filed a petition in the High Court of Delhi seeking to restrain Canoro from proceeding with the Mass Financial transactions and claiming that those transactions had resulted or would result in a breach of the production sharing agreement. Canoro's Indian counsel appeared before the court to oppose the petition. On May 18, 2010 the High Court refused to grant the injunction requested by Assam but did issue a *lis pendens* order which allowed the Mass transactions to proceed subject to the findings of an arbitration tribunal should arbitration be pursued by Assam.

[16] On August 19, 2010 Assam invoked the arbitration clause (Article 18) of the JOA and named retired Justice J.K. Mehra as its nominee arbitrator. Canoro nominated its arbitrator, retired Justice A.P. Shah, on September 22, 2010, 34 days after Assam's nomination and within the 45-day requirement stipulated in Article 18.5 of the JOA.

[17] Purporting to invoke its rights under Article 18.6 of the JOA, Assam appointed Mr. Lim Kim Jim as the third and presiding arbitrator. That individual is a senior Malaysian barrister based in Kuala Lumpur.

[18] In the meantime, citing a breach of the production sharing contract, on August 27, 2010 the Indian government terminated Canoro's participating interest in the Amguri field. Canoro promptly filed a petition with the High Court of Delhi on August 29, 2010 seeking to restrain that termination, and on August 31, 2010 the High Court granted an interim order restraining the Indian government from terminating or transferring Canoro's interest in the Amguri field.

[19] Canoro disputed the validity of Mr. Lim's appointment as the presiding arbitrator and on December 21, 2010 filed a petition in the Supreme Court of India seeking relief under section 11(6) of that country's *Arbitration & Conciliation Act*, 1996 ("the *Indian Arbitration Act*"). That section (discussed further below) provides that where a party fails to act as required under an

arbitration appointment procedure agreed upon by the parties, the other party may request the Chief Justice of India to take "the necessary measure".

[20] The petition filed in the Supreme Court of India sets out in detail the basis for Canoro's objection to the validity of Mr. Lim's appointment. It asserts noncompliance with the procedure contemplated by Article 18.6 of the JOA, at least insofar as Canoro's interpretation of that article was concerned.

[21] The petition claimed "a plain reading of the article makes it abundantly clear that if the two nominee arbitrators failed to agree on the third presiding arbitrator, the parties may first consult with each other and if after such mutual consultations the parties are still unable to resolve the matter," then a petition to the Chief Justice of India is the next step. It claimed that any entitlement Assam may have had to unilaterally appoint the third arbitrator was "intended to be a last resort" and one not exercisable "unless the alternative procedure contained in the said article is first explored and exhausted". The petition also claimed "deliberate and malicious intent" on Assam's part in refusing to consult with Canoro before "arbitrarily and unilaterally" appointing Mr. Lim.

[22] When the petition first came on for hearing before the Supreme Court of India, the matter was adjourned to permit counsel for the petitioner to circulate a number of judgments which were intended to be cited as part of Canoro's submissions. When the hearing resumed on April 29, 2011, no one appeared on behalf of Canoro. The court issued an order saying, among other things, that dismissing the petition in default would serve no purpose as it would defeat the very purpose of these proceedings for speedy disposal of the matter. However, in the interest of justice, one last adjournment was granted. It was made clear that on the next date of hearing, the matter shall be decided on merits irrespective of whether any of the Counsel or any of the parties are present. The matter was then adjourned to May 6, 2011.

[23] On May 6, 2011, counsel appeared for Canoro. Instead of arguing the merits of the case at that time, however, Canoro's counsel made a request to withdraw the petition. The request was granted and the Supreme Court issued an order that "the arbitration petition is dismissed as withdrawn".

[24] In the meantime, the arbitral tribunal was attempting to move matters forward. Canoro had initially protested the validity of Mr. Lim's appointment by letter dated December 6, 2010 and it continued to repeat this objection in its ensuing correspondence to both counsel for Assam as well as the tribunal itself. In one such letter dated May 13, 2011 counsel for Canoro requested that the tribunal "please issue fresh procedural directions after considering the convenience of all concerned, as is the norm. We further request the tribunal to first consider hearing of the 'preliminary issue' and to grant a proper and valid opportunity to our client to be heard in this matter".

[25] The "preliminary issue" referred to, as the letter itself identified, was "the hearing of the question of the validity of the appointment of Mr. Lim as the presiding arbitrator".

[26] On July 28, 2011 a new procedural timetable was issued by the tribunal. Among other things, the timetable imposed deadlines in August for the filing of written submissions respecting the "preliminary issues" and scheduled a hearing of those issues for September 13 and 14, 2011.

[27] On July 26, 2011 Canoro's counsel wrote a letter to the tribunal advising that they "are no longer going to be representing Canoro Resources Limited in the matter". No reason was given. From that point forward no one appeared on behalf of Canoro in the arbitration proceedings.

[28] The tribunal ordered Assam to take out ads in two New Delhi newspapers advising Canoro of, among other things, the hearing scheduled for September 13 and 14, 2011. It also ordered Assam to serve such notice on Canoro at its offices in Canada and India. All of these steps were taken.

[29] The hearing of the "preliminary issues" proceeded on September 13, 2011 in the absence of Canoro. The tribunal decided that Mr. Lim's appointment had been "in strict compliance with the provisions of Article 18.6 of the JOA". The decision was unanimous.

[30] On October 24 and 25, 2011, the tribunal held hearings on the merits of Assam's substantive claims in the arbitration. Witnesses were called and oral submissions were made. Further written submissions were ordered and submitted.

[31] On November 21, 2011 the arbitral tribunal issued its final award. It comprised 86 pages and 229 paragraphs of text. Again, it was an unanimous award signed by all three arbitrators including the Canoro appointee.

[32] The award granted damages to Assam under seven of the ten heads of damages claimed and dismissed three of the claims. Paragraph 228 of the award sets out the relief granted and reads as follows:

> 228. In view of the above, we grant ACIL, the claimant, the following relief as claimed under the Amended Heads of Claim and the application for interim award:
>
> (i) If is hereby declared that CRL was in breach of Article 13.3 of the JOA and that it failed to act as a prudent and/or responsible Operator but acted in a manner which was either grossly negligent or which amounted to deliberate misconduct in various operations referred to and carried out at the Amguri Field;
>
> (ii) If is further declared that the current value of CRL's 60% Participating Interest is not more than USD 4.16 Million;
>
> (iii) It is hereby declared that ACIL is entitled to transfer/assignment of all rights, title and interest that CRL has in respect of the said 60% Participating Interest in satisfaction or and in adjustment of USD 4.16 Million out of the total damages awarded to ACIL such that ACIL is placed in a position that

it would have been had CRL not breached its obligations under the JOA and to step -in rights in relation to the said Participating Interest;

(iv) It is hereby declared that ACIL is assignee of CRL's rights, tittle and interest of the 60% Participating Interest under the terms of the JOA such that ACIL is placed in a position that it would have been had CRL not breached its obligations under the JOA and for which ACIL may approach the GOI to recognize the assignment and to grant consent as may be required in terms of the PSC;

(v) It is hereby declared that this Award shall constitue the Deed of Assignment of the 60% Participating Interest pursuant to the JOA in the Amguri Field from CRL to ACIL on the consent of the Union of India under the PSC being obtained;

(vi) It is declared that ACIL is entitled to acquire and we hereby direct the transfer of 52.9% shares of CRL in favour of ACIL which were sold to Mass at a total cost payable of USD 2.2071 Million which amount has been adjusted from the damages awarded;

(vii) ACIL is entitled to recover a sum of USD 32,748,085 after having adjusted USD 6.3671 Million towards the other reliefs granted. This amount shall be paid within 120 days of this Award, failing which it shall carry interest @ 12% annum till the date of payment or recovery, as the case may be.

[33] It is this award ('the Award") that Assam now seeks to have recognized and enforced in British Columbia pursuant to s. 35 of the *ICAA*.

The Parties' Positions

[34] As indicated above, both parties agree that the preconditions set forth in s. 35(2) of the *ICAA* (supply of the arbitral award and the arbitration agreement in the appropriate format) have been met. The real dispute between the parties is whether recognition or enforcement of the arbitral award should be refused on one or more of the grounds set forth in s. 36 of the *ICAA*.

[35] In particular, Canoro invokes subsections 36(1)(a)(iii) and (v) respecting the appointment of Mr. Lim, the "inability to present their case", and the "improper" composition of the arbitral tribunal. In addition, Canoro asserts that all of these things taken together also support refusing recognition or enforcement of the Award as being contrary to the public policy in British Columbia.

[36] In its written submissions Canoro identifies "serious grounds" for refusing recognition/enforcement of the Award as follows:

- Canoro was not given an opportunity to be heard contrary to the basic principles of natural justice and procedural fairness. … Although Canoro initially participated in the arbitration, they were "forced to withdraw as, given the circumstances surrounding the arbitration, it had no or little chance to receive a fair hearing by the arbitral tribunal";

- the composition of the arbitral tribunal was not in accordance with the agreement of the parties. … Assam did not consult as required pursuant to s. 18.6 of the JOA but rather unilaterally appointed the third arbitrator (Mr. Lim) thereby "stacking the deck" in Assam's favor;

- the arbitral proceeding in India therefore lacked impartiality and fairness; and

- the Award thus made would be contrary to the public policy in British Columbia.

[37] In addition, Canoro says that the conflicting affidavit evidence filed on behalf of the parties "raises serious and disputed issues of fact and law" warranting a trial including the following:

- the interpretation of Article 18.6 of the JOA which provides for the process of instituting an arbitration proceeding and constitution of an arbitral tribunal;

- the interpretation of the *Indian Arbitration Act* as applied to Canoro's objections to the process and constitution of the arbitral tribunal in India;

- unilateral appointment of the third presiding arbitrator by Assam despite Canoro's objections;

- the independence and impartiality of the arbitral tribunal;

- Canoro's incapacity to present its case before the arbitral tribunal.

[38] Assam's "key points" in reply to Canoro's various objections are that:

- Canoro voluntarily walked away from both the arbitration and its own legal proceeding before the Supreme Court of India, where all of the above questions were put squarely in issue, and therefore it is not open for them to assert a lack of procedural fairness or, indeed, to re-litigate the same issues in British Columbia;

- If Canoro is permitted to abandon the arbitration process in India and later raise and re-litigate in another forum (British Columbia) procedural fairness objections to recognition and enforcement of the arbitration award, it would undermine principles of international comity and the very enforcement code prescribed by the 1985 UNCITRAL Model Law on International Commercial Arbitration.

The Applicable Law

[39] A recent judgment of this Court, *CE International Resources Holdings LLC v. Yeap Soon Sit*, 2013 BCSC 1804 (CanLII), 2013 BCSC 1804 ("*International Resources*"), has helpfully addressed many of the principles applicable to the application at bar. The court commented:

Recognition and enforcement

[14] In this application, CEIR seeks an order under s. 35 of the *ICAA* recognizing and enforcing the Final Award. It also relies on the *FAAA*, which includes as a schedule the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention).

[15] Section 35(1)of the *ICAA* provides:

> (1) Subject to this section and section 36, an arbitral award, irrespective of the state in which it was made, must be recognized as binding and, on application to the Supreme Court, must be enforced.

[16] Section 35(2) requires CEIR as the party applying for enforcement to supply either the duly authenticated original arbitral award or a duly certified copy of it, and the original arbitration agreement or a duly certified copy of it. There is no dispute that these requirements have been met by CEIR.

[17] Section 36(1) of the *ICAA* sets out the grounds on which a court may refuse to recognize or enforce a foreign arbitral award:

> (1) Recognition or enforcement of an arbitral award, irrespective of the state 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,
> > >
> > > (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made,
> > >
> > > (iii) the party against whom the arbitral 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 the party's case,
> > >
> > > (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission

> to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the arbitral award which contains decisions on matters submitted to arbitration may be recognized and enforced,
>
> (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement, was not in accordance with the law of the state where the arbitration took place, or
>
> (vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made, or
>
> (b) if the court finds that
>
> (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of British Columbia, or
>
> (ii) the recognition or enforcement of the arbitral award would be contrary to the public policy in British Columbia.

[18] Similar provisions are found in Articles IV and V of the Convention.

[19] The *ICAA* implements in British Columbia the 1985 UNCITRAL Model Law on International Arbitration (the Model Law). It is well known that a high degree of deference is to be given to decisions of arbitrators in international arbitrations. This is based on "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" as discussed in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 US 614 at 629 (1985) and adopted by the BC Court of Appeal in *Quintette Coal Limited v Nippon Steel Corporation*, [1990] BCJ No 2241 (CA). The court held that these principles in *Mitsubishi* "are as compelling in this jurisdiction as they are in the United States or elsewhere", and concluded, at 229:

> It is meet, therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia. That is the standard to be followed in this case.

[20] In *Corp Transnacional de Inversiones v STET International*, [1999] OJ No 3573 at 190 (Sup Ct), aff'd [2000] OJ No 3408 (CA), leave to appeal refused, [2000] SCCA No 581, the court discussed the governing principals of the Model Law:

> The Model Law is a collaborative effort among nations to facilitate the resolution of international commercial disputes through the arbitral process. It is in force in

> numerous jurisdictions around the world... Article 5 of the Model Law expressly limits the scope for judicial intervention except by application to set aside the award or to resist enforcement of an award under one or more of the limited grounds specified in Articles 34 or 36. Under Article 34 of the Model Law, the applicants bear the onus of proving that the awards should be set aside. If the applicants fail to satisfy this onus, Articles 35 and 36 of the Model Law expressly require this court to recognize and enforce the awards.
>
> The broad deference and respect to be accorded to decisions made by arbitral tribunals pursuant to the Model Law has been recognized in this jurisdiction by the Ontario Court of Appeal in *Automatic Systems Inc. v. Bracknell Corp.* 1994 CanLII 1871 (ON CA), (1994), 18 O.R. (3d) 257 at p. 264, 113 D.L.R. (4th) 449 at p. 456:
>
> > The purpose of the United Nations Conventions and the legislation adopting them is to ensure that the method of resolving disputes in the forum and according to the rules chosen by the parties, is respected. Canadian courts have recognized that predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any international business transaction and facilitates and encourages the pursuit of freer trade on an international scale: *Kaverit Steel & Crane Ltd. v. Kone Corp.* 1992 ABCA 7 (CanLII), (1992), 87 D.L.R. (4th) 129 at p. 139, 85 Alta. L.R. (2d) 287 (C.A.).

[21] While *Quintette Coal* and *Corp Transnacional* involved applications to set aside foreign arbitral awards, *Adamas Management & Services Inc v Aurado Energy Inc*, 2004 NBQB 342 (CanLII), 2004 NBQB 342, involved an application to recognize and enforce one. In applying the legislation in New Brunswick (which is equivalent to the *ICAA*), the court held at para. 18:

> Recognition and enforcement of the Award in New Brunswick is consistent with the objects and purposes of the ICAA, namely to give effect to parties' contractual intentions to refer matters to arbitration, as well as achieve consistency among jurisdictions and predictability in the resolution of international commercial disputes. By achieving such consistency and predictability, the ICAA encourages use of international arbitration as a means of alternative dispute resolution, thereby facilitation [sic] and promoting international trade and commerce. [citations omitted].

[22] These authorities clearly establish that under the *ICAA* (and the *FAAA*) the court is required to recognize and enforce foreign arbitral awards unless the party opposing recognition satisfies the onus of proving that one or more of the grounds set out in s. 36(1)(a) or (b) apply.

[underline emphasis added]

[40] The last paragraph of the above extract from the *International Resources* decision addresses the onus of proof. It is therefore clear that Canoro has the onus of proof not only with respect to objections under s. 39(1)(a) but also under s. 39(1)(b) of the *ICAA*.

[41] One of the key questions underlying the *International Resources* case was whether the individual, Mr. Yeap, was a party to the arbitration agreements in issue and whether the arbitration tribunal had any jurisdiction over Mr. Yeap. The court held:

[31] Mr. Lunny submits that CEIR's position ignores the statutory framework governing applications to enforce foreign arbitral awards, which necessarily involves this Court's review over the issue of jurisdiction and whether an arbitral award could be enforced in British Columbia. He also challenges whether the arbitrator actually made a finding that Mr. Yeap was a party to the arbitration agreements and submits that the reference in the Final Award on this point "is a finding wholly unfounded" by his reasons in the Interim Award.

[32] I cannot accept Mr. Lunny's submission. It assumes that the identity of the parties is an issue for the court to consider *de novo* on an application to recognize an arbitral award, that the arbitrator's decision that Mr. Yeap was a party to the arbitration agreements is not binding on this court, and that the court is empowered to scrutinize the arbitrator's findings of jurisdiction. The court must accept the arbitrator's decision on its face and cannot go behind it. This is what the court did in *Javor* by accepting the arbitrator's finding that Mr. Francoeur was a party to the arbitration proceeding but not the arbitration agreement.

…

[36] The issue of the arbitrator's jurisdiction and Mr. Yeap's status as a party was a matter for the arbitrator to decide. The arbitration agreements provided that the proceedings were to be governed by the International Dispute Resolution Procedures of the American Arbitration Association. Article 15(1) of those rules provides that the arbitrator has the power to rule on his own jurisdiction, "including any objections with respect to the existence, scope or validity of the arbitration agreement". In my opinion, it is not the role of this Court on such an application to consider the merits of a substantive issue that was the arbitrator's to decide.

[37] Nor is it proper for Mr. Yeap to re-litigate such an issue here. Mr. Yeap was represented in the arbitration by experienced U.S. counsel. If he wanted to further challenge the arbitrator's jurisdiction to determine his party status, or to challenge the decision on its merits, he ought to have taken steps to do so in another forum. Instead, he chose only to challenge this issue within the arbitration itself. He took no steps to raise this issue during any of the proceedings taken in this jurisdiction and elsewhere to freeze his assets and to recognize the Interim Award, and he took no steps to do so before the Final Award was confirmed in the District Court of New York.

[38] The fact that Mr. Yeap was unsuccessful on this issue before the arbitrator does not give rise to a basis for refusing recognition under s. 36(1)(a)(v) of the *ICAA*, as the procedure followed in the arbitration was in accordance with the arbitration agreements. …

[39] Further, I see no basis to refuse recognition under s. 36(1)(b)(i) or (ii).

[40] Section 36(1)(b)(i) applies where "the subject matter of the dispute is not capable of settlement by arbitration under the law of British Columbia". Mr. Lunny submits that Mr. Yeap could not be the subject of an arbitral award in British Columbia because was not a signatory to the arbitration agreements in his personal capacity. He relies on *Javor* at para. 30, where the court held that the jurisdiction of arbitrators in British Columbia is confined to jurisdiction over parties to arbitration agreements. In the circumstances of this case, where Mr. Yeap was determined to be a party to the agreements, this is a circular argument.

[41] Section 36(1)(b)(ii) applies where recognition or enforcement would be contrary to public policy in British Columbia. This ground is to be narrowly construed. In *Corp Transnacional,* the court referred at 192 to this passage from *Schreter v Gasmac Inc*, [1992] OJ No 257 (Gen Div) at 623:

> The concept of imposing our public policy on foreign awards is to guard against enforcement of an award which offends our local principles of justice and fairness in a fundamental way, and in a way which the parties could attribute to the fact that the award was made in another jurisdiction where the procedural or substantive rules diverge markedly from our own, or where there was ignorance or corruption on the part of the tribunal which could not be seen to be tolerated or condoned by our courts.

[42] There is nothing in the arbitrator's determination on the issue of Mr. Yeap's status as a party that can be said to offend our local principles of justice and fairness.

[underline emphasis added]

[42] Some of the points raised in these extracts (including the ones I have underlined) apply here, namely, that

1. Broad deference and respect is to be accorded to international arbitration tribunals;

2. This Court is generally not empowered to scrutinize the arbitrator's findings on matters of jurisdiction but rather it should accept the arbitrator's decision on its face and ought not go behind it;

3. It is not the role of the court on this type of application to consider the merits of a substantive issue that was the arbitrators' to decide;

4. Nor is it proper for the respondent to try and re-litigate these issues here; if the respondent wanted to challenge the jurisdiction or composition of the arbitral tribunal or any of its decisions on the merits, the respondent ought to have taken steps to do so in another forum;

5. The fact that the respondent's initial objections to the jurisdiction, composition or procedures of the arbitral tribunal were unsuccessful does not give rise to a basis for refusing recognition or enforcement of the arbitral award in this jurisdiction;

6. The “contrary to public policy” ground for refusing recognition or enforcement is to be narrowly construed and requires fundamental breaches of justice and fairness and conduct of a sort that could not be tolerated or condoned by our courts.

The *Indian Arbitration Act* and Legal Proceedings

[43] Canoro had serious objections to the composition of the arbitral tribunal and to what it perceived as being procedural unfairness that resulted. But it was not without a remedy. Indeed, various avenues were available to challenge the correctness of both the process and any awards arising from same. These included:

1. Section 11(6) of the *Indian Arbitration Act* permits a party who alleges noncompliance with arbitrator appointment procedures to petition the Chief Justice of India “to take the necessary measure”. The decision of any such petition is deemed to be final pursuant to s. 11(7) of the *Act*;

2. Section 13 of the *Indian Arbitration Act* sets forth a procedure for challenging an arbitrator for lack of qualifications or for justifiable doubts as to his independence or impartiality. That section specifies that the arbitral tribunal shall decide on the challenge, and if the challenge is not successful, then the arbitral tribunal shall continue the proceedings and make an arbitral award. The section expressly preserves the right of the complaining party to raise the issue as a basis for any later court application to set aside the award under s. 34 of the *Act*;

3. Section 16 of the *Indian Arbitration Act* grants the tribunal competence to rule on its own jurisdiction. That section also specifies that following any unsuccessful jurisdictional challenge, the tribunal will continue the proceedings and make an arbitral award. Again, that section expressly preserves the right of the complaining party to raise the issue as a basis for any later court application to set aside the will award under s. 34 of the *Act*.

[44] In the case at bar Canoro actually initiated two alternative procedures to seek a remedy for its complaints respecting the appointment of Mr. Lim and the composition of the arbitral tribunal generally. In particular,

1. it filed a petition to the Supreme Court of India under s. 11 of the *Indian Arbitration Act* asserting noncompliance with the arbitrator appointment procedures specified by the JOA, indeed, accusing Assam of “deliberate and malicious” impropriety; and

2. it sought determination by the arbitral tribunal itself of a “preliminary issue”, namely, the validity of the appointment of Mr. Lim as the presiding arbitrator.

[45] Both procedures afforded Canoro an opportunity to fully argue its various objections respecting due process. One of the procedures, the petition to the Supreme Court, involved access to the most senior and respected jurist in the land.

[46] Rather than pursue the procedures it had itself initiated, Canoro simply abandoned the field. It offered no reason for doing so to either the Supreme Court or to the arbitral panel. In the first case, it sought to withdraw the petition and the same was "dismissed as withdrawn" (a final order). In the second case, Canoro's counsel wrote a letter advising they were no longer representing Canoro in the matter and Canoro itself failed to attend or participate in any subsequent proceedings in the arbitration.

[47] One of the affidavits filed in this matter was that of Mr. Sampath Kumar made on January 10, 2013. Paragraph 24 that affidavit contains the following statement:

Canoro had decided that given all of the circumstances surrounding the arbitration and constitution of the tribunal, it would not receive any fair dealing in the arbitral process and, accordingly, Canoro instructed its solicitors not to appear.

[48] No excuse is proffered anywhere in the affidavit material for the abandonment of the Supreme Court petition.

Analysis and Conclusion on Recognition and Enforcement

[49] The "preliminary issue" regarding the propriety of the appointment of Mr. Lim was decided by the tribunal in Assam's favor. It was a unanimous decision, endorsed by Canoro's own nominee arbitrator (a retired justice).

[50] The final award later ensued, again a unanimous decision endorsed by Canoro's own nominee arbitrator.

[51] On this application Canoro suggested that the "deck had been stacked" against Canoro. However, no evidence of any sort was adduced challenging the probity of the two retired justices appointed to the panel. Nor, for that matter, was any meaningful evidence adduced challenging the qualifications or probity of Mr. Lim, a senior barrister from Kuala Lumpur.

[52] I have set out above in paragraph 42 of this judgment six principles which govern the consideration of objections to the recognition and enforcement in British Columbia of international arbitration awards. Each principle squarely applies to the facts of this case and each strongly militates in favor of granting Assam's petition.

[53] Canoro took a high risk strategic decision when it opted to abandon both its petition to the Supreme Court of India and its further participation in the arbitration. Having done so, it now seeks to re-litigate before this Court the same objections raised in India, labeling them as "triable

issues" of the sort that warrant rejection of Assam's petition in favor of further discovery and ultimately a full trial here in British Columbia.

[54] I find, however, that in accordance with the legal principles articulated above, Canoro is not entitled to re-litigate its case in British Columbia. It could have and should have pursued the procedural and legal options available to it in India. It did not do so and it must live with the consequences.

[55] I therefore dismiss Canoro's application pursuant to R. 22–1(7)(d) to have the proceeding transferred to the trial list and I grant Assam's petition for an order recognizing the Award and enforcing the same to the extent that it is possible under the laws of British Columbia.

Dissolution of Canoro and Effect on Enforcement

[56] On the second day on the hearing of this petition, Counsel for Canoro discovered the British Columbia Registrar of Companies had dissolved Canoro on December 9, 2013, for failure to file annual reports.

[57] The question, therefore, arose what effect such dissolution might have upon these recognition and enforcement proceedings. Since neither party was prepared to argue the point, both were invited to make written submissions and judgment was reserved on this as well as the substantive issues raised in the petition.

[58] The petitioner submits:

1. Dissolution is not one of the limited grounds set out in s. 36 of the *ICAA* for refusing recognition and enforcement of an international arbitration award;

2. The British Columbia *Business Corporations Act*, S.B.C. 2002, c. 57 ("BC *BCA*") expressly contemplates continuation of litigation and the granting of judgments against dissolved companies;

3. and hence the dissolution of Canoro should have no impact on the recognition or enforcement of the arbitration award in this Province.

[59] For its part, Canoro submits:

1. Proper interpretation of the BC *BCA* would indeed allow litigation to continue against a dissolved corporation, as well as to allow the latter to defend such proceedings (presumably on instructions of the board of directors as constituted prior to dissolution);

2. However, enforcement of any judgment cannot be effected unless and until the corporation is restored; and

3. No enforcement is possible until Canoro's assets and liabilities have been ascertained following restoration and the appropriate enforcement mechanics assessed.

[60] Canoro further submits that these enforcement difficulties militate in favour of transferring the proceeding to the trial list for court's normal pre-trial and trial mechanisms.

[61] Neither party can produce, and I have been unable to find, any authority which expressly addresses recognition and enforcement under the *ICAA* of an arbitration award made against a corporation that has been dissolved and which, pursuant to s. 344(1) of the BC *BCA* has "ceased to exist for any purpose".

[62] There is, however, no doubt that section 346(1) of the BC *BCA* expressly contemplates continuation of litigation issued before dissolution. Section 348(3) of the BC *BCA* expressly contemplates judgment being obtained against a dissolved company and the pursuit of shareholders in certain circumstances. Section 349(2) of the BC *BCA* expressly contemplates a judgment creditor applying for recovery against the dissolved company's assets. Of course, under s. 356 of the BC *BCA*, such a judgment creditor can itself apply to the Registrar to restore the dissolved company.

[63] At common law, dissolution meant the company ceased to exist. However, modern statutory schemes create a very different scenario. Kevin McGuinness (*Canadian Business Corporations Law*, 2nd ed.; Markham: LexisNexis, 2007 at 1608) sums up the effect of dissolution as follows:

[A] corporation dissolved for lack of regulatory compliance is not so much a dead company as one that is in a state of suspended animation, since the corporation may be revived with retroactive effect upon its revival.

[64] This characterization of the effect of dissolution for lack of regulatory compliance is consistent with *Attorney General of British Columbia v. Royal Bank of Canada*, 1937 CanLII 23 (SCC), [1937] S.C.R. 459 at 473-4. The Supreme Court of Canada considered the British Columbia statutory scheme for the dissolution and restoration of companies. The court said a company, while dissolved,

cannot be taken to be dead for all purposes when, by the very Part of the Act that refers to dissolution, provision is also made for an order of revivor, with the consequence that the company is deemed to have continued in existence as if it had not been struck off.

[65] In *Saini v. Grand Forks (City)*, 2011 BCSC 320 (CanLII), 2011 BCSC 320 at paragraph 14 Fenlon J. of this Court confirmed *Attorney General v. Royal Bank* remains the law in British Columbia:

… [W]hile a dissolved corporation has been compared to a dead person, the analogy is not entirely apt: short of the miraculous, a man once dead remains so, while a corporation once dissolved is routinely revived.

[66] On the basis of both the provisions of the BC *BCA* and the authorities cited above, it is clear that dissolution of Canoro does not prevent the court from issuing an order that recognizes and enforces the arbitration award issued in India, at least to the extent that such enforcement is possible.

[67] The relief granted in the arbitration award is set out in paragraph 32 of these reasons. Most of the relief is declaratory in nature and its recognition in British Columbia poses no practical obstacle. However, at least two aspects of the relief granted are substantive in nature, namely:

- the granting of judgment in the amount of USD $32,748,085, together with 12% interest thereon per annum until the date or payment or recovery; and

- a "direction" that there be a "transfer of 52.9% shares of [Canoro] in favour of [Assam] which were sold to Mass".

[68] There is no difficulty in issuing a judgment which can be entered as a judgment of the Supreme Court of British Columbia, for the financial portion of the arbitration award. That portion, including the accrued interest thereon to the date of the judgment in the present proceedings, can be converted into Canadian currency pursuant to the provisions of the *Foreign Money Claims Act*, R.S.B.C. 1996, c. 155 and the *Foreign Money Claims Regulation*, B.C. Reg. 165/96.

[69] There are, however, practical and substantive obstacles to the enforcement of any direction that Canoro shares be transferred to Assam. Title to the shares has already passed to Mass. Canoro's shares were listed and traded on the TSX Venture Exchange but, on August 9, 2011, a cease trade order was issued by the British Columbia Securities Commission and remains in force. Further, since Canoro has been dissolved and does not exist, it is not presently susceptible to an order in the nature of a mandatory injunction.

[70] In the result, while I am prepared to issue an order generally recognizing and enforcing the arbitration award made in India, I am not prepared to issue a formal direction that Canoro (or Mass) transfer shares to Assam at this time. Rather, if the parties are unable to themselves determine a mechanism for enforcement of this aspect of the Award (assuming it is even pursued), leave is granted to Assam to make further application to this Court for approval of alternative mechanisms by which enforcement of that aspect of the Award might be accomplished.

Order Granted

[71] In the result, I make the following order:

1. Except for the transfer of shares directed pursuant to Article 228(vi) of same, the award of Mr. Lim Kim Jim, Presiding Arbitrator, retired Justice J.K. Mehra, Arbitrator, and retired

Justice A.P.Shar, Arbitrator, made in New Delhi, India, on November 21, 2011 (the "Award") shall be recognized as binding and enforceable in British Columbia;

2. The monetary portion of the Award shall carry interest of 12% per annum commencing March 20, 2012 and continuing until the date of payment or recovery as the case may be;

3. The monetary portion of the Award and accrued interest from March 20, 2012 to the date of judgment shall be converted into Canadian currency pursuant to the provisions of the *Foreign Money Claims Act*, R.S.B.C. 1996, c. 155 and the *Foreign Money Claims Regulation*, B.C. Reg. 165/96;

4. Judgment based on the Award shall be signed and entered as a judgment of the Supreme Court of British Columbia and is enforceable in British Columbia in the same manner as any other British Columbia judgment of the same effect;

5. If pursuit of the share transfer directed pursuant to Article 228(vi) of the Award is desired and the parties are unable to agree on the mechanism for accomplishing same, Assam may make further application to this Court for approval of alternative mechanisms by which enforcement of this aspect of Award might be accomplished.

[72] If there are any matters that need to be brought to my attention in respect of awarding costs, the parties are at liberty to do so. Otherwise costs of these proceedings will follow the event and are awarded to Assam to be assessed under Scale B.

"N.P. Kent J."
The Honourable Mr. Justice N. Kent