CITATION: Vento Motorcycles, Inc. v. United Mexican States, 2021 ONSC 7913
COURT FILE NO.: CV-20-00649664-0000
DATE: 20211201

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: VENTO MOTORCYCLES, INC.

AND:

UNITED MEXICAN STATES

BEFORE: VERMETTE J.

COUNSEL: *Myriam Seers, John Terry and Jake Babad*, for the Applicant

Vincent DeRose, Jennifer Radford and Umair Azam, for the Respondent

HEARD: September 8, 2021

ENDORSEMENT

[1] The Applicant, Vento Motorcycles, Inc. ("**Vento**"), has brought an application to set aside an award dated July 6, 2020 ("**Award**") rendered by an arbitral tribunal ("**Tribunal**") in an arbitration administered by the International Centre for Settlement of Investment Disputes ("**ICSID**") pursuant to the ICSID Arbitration (Additional Facility) Rules ("**ICSID Rules**").

[2] Vento's Application Record contains a number of affidavits, three of which are in issue on this motion brought by the Respondent, United Mexican States ("**Mexico**"). Mexico requests the following relief:

a. an order prohibiting the filing of the Affidavits of Eduardo De La Vara Brown ("**Brown Affidavit**") and José Alberto Ortúzar Cárcova ("**Ortúzar Affidavit**") in their entirety or, in the alternative, an order striking both affidavits from the Application Record; and

b. an order striking certain paragraphs of the Affidavit of Todd Jeffrey Weiler ("**Weiler Affidavit**").

FACTUAL BACKGROUND

a. The arbitration, the Tribunal and Procedural Order No. 1

[3] Vento is a U.S.-based manufacturer of motorcycles. It brought its arbitration claim pursuant to Chapter 11 of the North American Free Trade Agreement ("**NAFTA**"). The dispute between the parties is described as follows in the Award:

> The dispute relates to Mexico's denial of NAFTA preferential *ad valorem* import tariffs to motorcycles assembled by [Vento] in the United States and exported to Mexico, which allegedly culminated in the impairment and ultimate destruction of [Vento's] business under a joint venture agreement that it entered into with MotorBike, S.A. […] for the sale and marketing of motorcycles in Mexico on 1 October 2002 […].

[4] In accordance with Article 1123 of NAFTA, the Tribunal was comprised of three arbitrators: one arbitrator appointed by each of the parties, and the third arbitrator – the presiding arbitrator – appointed by agreement of the parties.

[5] Vento appointed Professor David Gantz, a national of the United States of America, as arbitrator. Mexico appointed Mr. Hugo Perezcano, a national of Mexico, as arbitrator. Dr. Andrés Rigo Sureda, a national of Spain, was appointed as the President of the Tribunal. The Tribunal was constituted on January 19, 2018.

[6] On April 2, 2018, the Tribunal issued Procedural Order No. 1. ("**P.O. #1**") recording the agreement of the parties on procedural matters and the decision of the Tribunal on disputed issues. P.O. #1 provided, among other things, that:

a. Toronto was going to be the place of arbitration.

b. The arbitration proceedings were to be conducted in accordance with the ICSID Rules in force as of April 10, 2006, except to the extent that they were modified by Section B of NAFTA Chapter 11.

c. Direct examination was to be given in the form of witness statements and expert reports.

d. Witness statements, expert reports and their supporting documentation were to be filed as exhibits to the parties' pleadings.

e. There would be two rounds of pleadings, with the following sequence: Vento's Memorial, Mexico's Counter-Memorial, Vento's Reply and Mexico's Rejoinder.

f. Neither party would be permitted to submit additional or responsive documents after the filing of its respective last written submission, unless the Tribunal were to determine that exceptional circumstances existed based on a reasoned written request followed by observations from the other party.

g. A party may be called upon by the opposing party to produce at the hearing for cross-examination any factual or expert witness whose written testimony was advanced with the pleadings. A party was to notify the opposing party with respect to which witnesses and experts it intended to call for cross-examination within four weeks after the completion of the written procedure.

[7] Pursuant to Article 41(1) of the ICSID Rules, "[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value."

[8] On July 23, 2018, Vento filed its Memorial, accompanied by 38 exhibits, 106 legal authorities, 5 witness statements and 3 expert reports.

[9] On November 12, 2018, Mexico filed its Counter-Memorial, accompanied by 84 exhibits, 34 legal authorities, 3 witness statements and 2 expert reports.

[10] On March 15, 2019, Vento filed its Reply, accompanied by 22 exhibits, 52 legal authorities, 4 second witness statements, 6 additional witness statements, 2 second expert reports and 3 additional expert reports. One of the additional witness statements was from Mr. José Alberto Ortúzar. Mr. Ortúzar is a former official in Mexico's Tax Administration Service. He was the team leader of the audit team that carried out the verifications of origin for Vento.

[11] On March 19, 2019, Vento transmitted two additional witness statements.

[12] On August 2, 2019, Mexico filed its Rejoinder, accompanied by 64 exhibits, 11 legal authorities, 3 second witness statements, 3 additional witness statements, 2 second expert reports and one additional expert report. One of the additional witness statements was from Ms. Itzel Ivón Martínez Hernández. This witness statement attached a recording of a telephone conversation that Ms. Martínez and others had with Mr. Ortúzar ("**Recording**") and a transcription of the Recording. In its Rejoinder, Mexico took the position that Mr. Ortúzar's credibility was undermined by the Recording.

b. Vento's motion to strike the Recording and related evidence

[13] On August 28, 2019, Vento filed a request to strike the Recording and its transcription from the record, as well as references to the Recording in Ms. Martínez's witness statement and in the body of Mexico's Rejoinder memorial. In the alternative, Vento requested that Mr. Ortúzar be allowed to testify further. Vento's submissions in support of its request included the following paragraphs:

> 3. Mr. Ortúzar did not consent to the recording of this conversation. Indeed, at no time did Ms. Martínez, or any other MoE [Ministry of Economy] official listening to or participating in the call, inform Mr. Ortúzar that it was being recorded. Moreover, not only has Respondent only submitted an unauthenticated copy of this surreptitious recording, the copy submitted is obviously not a faithful recording of the entirety of the conversation held by Ms. Martínez, Mr. Pacheco, and Mr. Ortúzar on that day.
>
> […]

Respondent Is Attempting to Use Illicitly Obtained Evidence in These Proceedings

5. At paragraph 12 of her witness statement, Ms. Itzel Ivón Martínez Hernández states that she and Francisco Diego Pacheco Román (whom she has identified as an Area Director for the same government agency that is responsible for defending Respondent in this proceeding) recorded a telephone conversation that they held with Mr. José Alberto Ortúzar on 31 October 2018. Mr. Ortúzar is a former SAT [Tax Administration Service – *Servicio de Administracion Tributaria*] official who would subsequently provide a sworn witness statement in these proceedings on 5 March 2019, a copy of which was attached to Claimant's Reply Memorial. Crucially, however, Ms. Martínez omits to mention the fact that the recording was made without the knowledge or consent of Mr. Ortúzar.

[…]

7. As a preliminary matter, Claimant notes how the recording and accompanying transcript do not constitute the entirety of the conversation Ms. Martínez and Mr. Pacheco had with Mr. Ortúzar that day. This is obvious from the fact that neither the recording nor transcript contain an opening salutation. Rather, the transcript and recording begin in the middle of an ongoing conversation.

8. Moreover, at numerous points throughout the conversation, Ms. Martínez and/or Mr. Pacheco evidently placed the call on mute so that they could speak about Mr. Ortúzar without his knowledge, including an exchange about their apparent desire to "brainwash" him. This is demonstrated by their repeated referrals to Mr. Ortúzar in the second person. In addition, the transcript appears to indicate a belief, on the part of the transcriber, that other unnamed individuals also surreptitiously listened-in on the conversation.

[…]

11. The surreptitiously recorded but incomplete audio file and transcript that Ms. Martínez attached to her witness statement should be considered inadmissible in these proceedings because:

    i. Allowing these documents - and any references to them - to remain in the record would be contrary to international public policy protecting Mr. Ortúzar's right to privacy;

ii. These documents were obtained in a manner inconsistent both with applicable ethical rules and with Respondent's obligation to conduct itself in good faith; and

iii. Respondent has failed to authenticate what it claims to be a complete recording of the conversation with Mr. Ortúzar.

[…]

32. In the further alternative, should the Tribunal determine that Respondent's incomplete recording of Mr. Ortúzar's telephone conversation with Mr. Pacheco and Ms. Martínez may remain on the record, the principles of procedural fairness and equality of arms require - at a minimum - that Mr. Ortúzar be afforded an opportunity to appear before the Tribunal and address Respondent's allegations based on that partial recording of him in conversation with its counsel.

iii. No Presumption of Authenticity

33. In its Memorial, through Ms. Martínez's witness statement, and in communications with opposing counsel, Respondent purports to have placed the entire conversation that Mr. Pacheco and Ms. Martínez had with Mr. Ortúzar on 31 October 2018 into the record. It has failed to provide any expert evidence validating the claimed authenticity of the copy of Ms. Martínez's recording (and transcript) it has submitted on the record. Moreover, as noted above, on its face the recording Respondent has [sic] submitted simply does not reflect the entirety of the conversation.

34. As the *EDF* Tribunal observed in very similar circumstances:

> 29. The lack of authenticity of the New Evidence constitutes by itself sufficient ground for rejecting Claimant's request. Considering that today's sophisticated technology may permit easy manipulation of audio recordings, proven authenticity is in fact an essential condition for the admissibility of this kind of evidence. As mentioned by Mr. Koenig, Respondent's expert in conducting forensic examination of audio and video media to authenticate recordings, "[r]*ecordings cannot be authenticated without the original medium and sometimes the original recorder*" ... In the presence of Respondent's challenge there is no presumption of authenticity of the audio recording, with the burden of proving such authenticity thus being Claimant's responsibility.
>
> . . .

> 35. The absence in the recording of a substantial part of the conversation between Mr. Katz and Ms. Iacob and the possibility that the recorded part was manipulated make the audio file unreliable in the absence of its authentication through the original recording. An obvious condition for the admissibility of evidence is its reliability and authenticity. It would be a waste of time and money to admit evidence that is not and cannot be authenticated. As mentioned before (at para. 29), Claimant had the burden of satisfying Respondent's legitimate request for the production of the original audio recording. Having failed to do so, it must bear the consequences.
>
> 35. In this case, Respondent has made no attempt to provide Claimant with the original audio file, which would presumably have remained resident on Ms. Martínez's cellular phone. As the EDF Tribunal observed, access to the original source for a recording is necessary for any expert analysis of its authenticity. Moreover, Respondent has made no attempt to have the authenticity of the recording it has proffered professionally verified by a qualified expert, nor has it provided any explanation as to why a recording of ***the entire conversation*** was not provided.
>
> 36. Claimant submits that, having failed to provide a professionally-authenticated recording of the entire telephone conversation held between Mr. Pacheco, Ms. Martínez, and Mr. Ortúzar, as well as access to the original medium used to record it, Respondent must bear the same consequences as did the claimant in EDF v. Romania - viz. the proffered recording, the transcript, and all references to them should be struck from the record of these proceedings. [Emphasis in the original.]

[14] Together with its motion to strike, Vento submitted a short witness statement from Mr. Ortúzar in which he confirmed that the Recording had been made without his knowledge or consent, and that the Recording was a partial recording of the telephone conversation. Mr. Ortúzar expressed the hope that he would have the opportunity to appear before the Tribunal "to clarify and timely contextualize" his testimony and answer any questions that the Tribunal may have.

[15] Mexico filed responding submissions on September 12, 2019. They included the following paragraphs, among others:

> 6. In Mexico, the recording of telephone conversations by a person participating in such a conversation is legal. […]
>
> 10. The Claimant is an entity in Texas, U.S.A. Texas law permits a person participating in a call to record it. U.S. federal law also permits a person

participating in a call to record it, i.e., in no case can a recording that is disclosed by one of the participants be considered unlawful.

11. The law of Canada, under which one of Claimant's counsel practices, also authorizes a person participating in a call to record the call.

12. It is absurd to suggest, as Claimant does, that activities that are expressly lawful under all three NAFTA parties are somehow inconsistent with "international public policy" or ethical rules.

[…]

28. In view of the foregoing, the recording provided by Lic. Martínez, as it contains information about Mr. Ortúzar's performance of his duties as a public official of the SAT and in particular about his direct actions in the verifications of origin carried out to Vento and AED, is not part of the private sphere of the witness, but is part of the public sphere of Mr. Ortúzar's life. This can be verified by reviewing the recording of the call and the transcript of the call, as well as the narrative made by Lic. Martínez in paragraph 73 of her Witness Statement.

29. Therefore, the disclosure of the content of Mr. Ortúzar's phone call with Lic. Martínez does not violate Mr. Ortúzar's right to privacy.

V. Authenticity of the recording

30. Respondent emphasizes that the entire recording was submitted in Annex IIM- 0005; no part is missing. Respondent did not modify or manipulate the recording as Claimant infers in its submission. Claimant's allegations lack any evidence whatsoever.

31. The testimony of Lic. Martínez provides authenticity of the recording. Moreover, Mr. Ortúzar does not argue that the recording does not contain his words, but merely claims that it was taken out of context. The Tribunal can judge for itself the weight to be given to the evidence, specifically after reviewing the associated emails and text messages submitted by the Lic. Estrada together with her Witness Statement.

32. In terms of Article 41 of the ICSID Additional Facility Rules, "[t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value." The Tribunal has broad discretion to determine the probative value of the evidence presented by both parties.

VI. Request to Testify

33. Claimant requests that Mr. Ortúzar be permitted to testify before the Tribunal to clarify "*Respondent's allegations based on that partial recording of him in conversation with its counsel*". That is not permitted under the procedures governing this arbitration. If every witness that has been aggrieved by being contradicted were given the right to testify, the parties would be deprived of control over the presentation of their own positions.

34. Additionally, it is significant that Claimant waited until the Reply stage to submit Mr. Ortúzar's Witness Statement. That was its choice, so its claims relating to the impossibility of submitting an additional rebuttal to the Witness Statement of Lic. Martínez are unwarranted. [Emphasis in the original.]

c. <u>Tribunal's Procedural Order No. 7</u>

[16] On October 2, 2019, the Tribunal ruled on Vento's motion to strike evidence in its Procedural Order No. 7 ("**P.O. #7**"). P.O. #7 is short and is reproduced in its entirety below:

I. Introduction

1. Whereas,

2. On August 28, 2019, the Claimant requested that the Tribunal strike from the record in this arbitration Annexes 4 and 5 of the Witness Statement of Itzel Ivón Martínez Hernández; paragraph 13 of the Witness statement of Itzel Ivón Martínez Hernández; and paragraphs 169, 176 and 182 of Respondent's Rejoinder Memorial.

3. The Claimant alleged that Ms. Martínez Hernández had recorded a telephone conversation that she and others had with Mr. Ortúzar, a witness for the Claimant, without his knowledge and consent, which was illegal and contrary to international public order because it infringed on Mr. Ortúzar's right to privacy. The Claimant also questioned the authenticity of the recording. The Claimant added that, therefore, the Respondent had not acted in good faith in submitting the evidence in question. The Claimant requested, in the alternative, that Mr. Ortúzar be allowed to testify further in order to respond to the Respondent's allegations.

4. On September 12, 2019, the Respondent requested that Claimant's request be denied because in Mexico the recording of a conversation by a person who participated in that conversation is not illegal and does not infringe on the right to privacy, which does not apply as between persons participating in a conversation, even if some of the participating parties are public officials, Mr. Ortúzar does not question the correctness of what he said but that it was taken

out of context, and the request for further testimony of Mr. Ortúzar is not permissible in this proceeding.

II. Analysis

5. The Tribunal observes that the conversation took place in Mexico and according to the evidence provided by the Respondent, recording a conversation in Mexico by one of the participating parties is not prohibited or otherwise illegal, even if the recording was made without other participating parties' knowledge.

6. The Tribunal is persuaded by the Respondent's explanation of why the recording was made and why it saw a need to seek testimony from Ms. Martínez regarding what Mr. Ortúzar had told her and to provide her testimony, the recording and the transcript as evidence.

7. Ms. Martínez herself testified that she participated in the conversation and recorded it.

8. Therefore, the Tribunal has decided as follows.

III. Order

9. To deny the Claimant's request to strike Annexes 4 and 5 of the Witness Statement of Itzel Ivón Martínez Hernández, paragraph 13 of the Witness statement of Itzel Ivón Martínez Hernández, and paragraphs 169, 176 and 182 of the Respondent's Rejoinder.

10. To deny the request for an additional witness statement of Mr. Ortúzar.

d. The Tribunal's Award

[17] The hearing of the arbitration took place on November 18-22, 2019 in Washington, D.C. Thirteen witnesses were examined during the hearing. Vento elected not to call Ms. Martínez for cross-examination and Mexico elected not to call Mr. Ortúzar for cross-examination.

[18] The Tribunal issued its Award on July 6, 2020. The Award contains 340 paragraphs and is more than 100 pages long. The Tribunal found, among other things, that Mexico did not breach its obligations under NAFTA and it dismissed Vento's claims on the merits.

e. Vento's Application to set aside the Award and the affidavits in issue

[19] In its Notice of Application, Vento alleges that the Award should be set aside on the following grounds:

a. Vento was prevented from presenting its case, and treated unequally, by being prohibited from presenting Mr. Ortúzar's evidence responding to the Recording;

b. Vento was prevented from presenting its case, and treated unequally, because the Tribunal accepted into evidence, and considered, the Recording, which had been altered to remove some of the content of the conversation it purported to capture;

c. the arbitral procedure was not in accordance with the parties' agreement, which required that Vento be allowed to present further evidence from Mr. Ortúzar given the exceptional circumstance that Mexico purported to impeach his testimony based on the Recording, which in addition to having been taken without consent, was also altered;

d. the arbitral procedure was not in accordance with the parties' agreement, which required that witnesses be examined before the Tribunal, in accordance with Article 42 of the [ICSID Rules], incorporated by reference into the arbitration agreement; and

e. the composition of the [Tribunal] was not in accordance with the parties' agreement, because Mr. Perezcano's undisclosed *ex parte* communications with Mexico's counsel while the Tribunal's deliberations were taking place raise justifiable doubts as to Mr. Perezcano's impartiality and independence.

[20] As stated above, Vento's Application Record contains a number of affidavits, three of which are in issue on this motion.

[21] The Brown Affidavit contains an expert opinion as to whether the Recording was manipulated or altered. Mr. Brown's "professional profile" attached to his affidavit indicates that he is a "Music & Technology Specialist". Mr. Brown concludes that the original Recording has been altered "[b]ecause of the lack of continuity and word cuts that occur multiple times in this audio file, along with all the inconsistencies in the presented waveforms".

[22] The Ortúzar Affidavit sets out: (a) Mr. Ortúzar's contacts with the parties and what led him to accept the invitation to participate in the arbitration as a witness for Vento; (b) his comments on the Recording; and (c) the testimony he would have given, had he been permitted to do so by the Tribunal, about the context of the recorded telephone call and in response to the points made in Mexico's Rejoinder.

[23] The Weiler Affidavit is affirmed by one of Vento's co-counsel in the arbitration and does not purport to be an expert affidavit. The Weiler Affidavit sets out the arbitration's procedural background and Mr. Weiler's comments on a number of points, including Mr. Ortúzar's evidence, the Recording and the apportionment of the Tribunal's work. The Weiler Affidavit also includes information regarding: (a) the notice issued by Mexico four days before the Award was transmitted to the parties, which notice named Mr. Perezcano as one of the persons that Mexico had designated to serve on the roster of panelists to hear disputes under Chapter 31 of the treaty intended to replace

NAFTA, i.e. the USMCA; and (b) enquiries made by Vento and its counsel into the circumstances surrounding Mr. Perezcano's appointment to Mexico's USMCA Chapter 31 roster. In this part of his affidavit, Mr. Weiler expresses views on points related to Mr. Perezcano's appointment, including the view that the roster appointment granted to Mr. Perezcano was a "highly sought" one.

DISCUSSION

a. Applicable test on the Application

[24] Vento's Application to set aside the Award is made pursuant to Article 34 of the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**"), which is Schedule 2 to the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sched. 5.

[25] Article 34(2) of the Model Law reads as follows:

> An arbitral award may be set aside by the court specified in article 6 only if:
>
> (a) the party making the application furnishes proof that:
>
> (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
>
> (ii) the party making the application 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
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or 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, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
>
> (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
>
> (b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

[26] Vento also relies on Article 18 of the Model Law which provides that the parties to arbitral proceedings "shall be treated with equality and each party shall be given a full opportunity of presenting his case."

[27] Reviewing courts must accord a high degree of deference to the awards of international arbitral tribunals under the Model Law. They cannot set aside an international arbitral award simply because they believe that the arbitral tribunal wrongly decided a point of fact or law. See *Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.A.*, 2017 ONCA 939 at paras. 23-24; application for leave to appeal dismissed: 2018 CanLII 99661 (S.C.C.) ("***Consolidated Contractors***"). The standard to be applied by a reviewing court depends on the specific Model Law grounds on which the application is based: see *Consolidated Contractors* at para. 25.

[28] The parties in this case agree on the standard to be applied under article 34(2)(a)(ii) of the Model Law. To justify setting aside an award under that provision for reasons of fairness or natural justice, the conduct of the Tribunal must be sufficiently serious to offend our most basic notions of morality and justice. Judicial intervention for alleged violations of the due process requirements of the Model Law will be warranted only when the Tribunal's conduct is so serious that it cannot be condoned under Ontario law. See *Consolidated Contractors* at para. 65.

b. Test applicable to the admission of fresh evidence

[29] While the parties agree on the applicable test on the Application to set aside the Award, they do not agree on the test applicable to the admission of fresh evidence in the context of this Application. No cases directly on point were brought to my attention.

(i) Mexico's submissions and the Palmer *test*

[30] Mexico submits that the admissibility of fresh evidence is governed by the principles set out by the Supreme Court of Canada in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 ("***Palmer***") at 775 with respect to the admission of fresh evidence on appeals:

a. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases.

b. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

c. The evidence must be credible in the sense that it is reasonably capable of belief.

d. The evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[31] In support of its position that the *Palmer* test applies, Mexico relies on the decision of Justice Penny in *The Russia Federation v. Luxtona Limited*, 2019 ONSC 7558 ("***Russia Federation***"). In that case, Russia applied to set aside an interim arbitral award on the ground that the tribunal did not have jurisdiction to hear the claims. The fairness of the hearing was not in question (see para. 64). Russia filed new expert evidence on the application. Justice Penny stated the following on the issue of the admissibility of the fresh evidence:

> [65] What I am saying is that in such a case, a party proposing to file new evidence ought to have to advance some reasonable explanation for why new evidence is necessary, including why that evidence was not or could not have been tendered in the first place, and that, in the absence of a sufficient explanation, fresh evidence ought not to be admitted.
>
> [66] The test in *R. v. Palmer* was cited earlier in these reasons. It is a test which is well known and understood. It has been accepted and applied in countless situations. It has been applied in contexts other than just appeals, including applications for judicial review, *D.D.S. Investments Ltd. v. Toronto (City)*, 2010 ONSC 1393 at para 55. The *Palmer* test has been adapted where necessary; for example, to set slightly different standards to accommodate different applications and circumstances.
>
> [67] Underlying the *Palmer* test are significant policy concerns involving order, finality and the integrity of the adjudicative process. Order and finality are said to be "essential" to the integrity of the adjudicative process. Both order and finality concerns are founded on the assumption that the parties are putting their "best foot forward" during the hearing at first instance. The process is structured so that the issue of jurisdiction is first heard by the trier of fact (trial court or tribunal) and then by the court on the correctness of the tribunal's decision. It is inconsistent with order and finality that the court, in an appeal or review, would routinely receive an augmented evidentiary record whenever the parties, with the benefit of hindsight and now knowing the result, felt like it, *R. v. M. (P.S.)*, 1992 CanLII 2785 (ON CA), 1992, 77C.C.C. (3d) 402 (Ont. C.A.) at p. 411; *Iroquois Falls Power Corp. v. Ontario Electricity Financial Corp.*, 2016 ONCA 271 at para. 49.
>
> [68] There is no reason why these underlying policy objectives are any less applicable in the context of an application to set aside an arbitral tribunal's award on jurisdiction under Articles 16 and 34 of the Model Law.

[32] Justice Penny's decision was reversed by the Divisional Court: 2021 ONSC 4604. The Divisional Court held that the Model Law prescribes a *de novo* hearing with respect to

jurisdictional issues and that, as a result, the parties are entitled as of right to adduce new evidence relevant to the jurisdictional issue: see para. 38.

[33] Neither Justice Penny nor the Divisional Court expressed any views with respect to the test applicable to the admissibility of fresh evidence on applications to set aside arbitral awards on grounds other than jurisdiction. Further, I note the following: (a) while Justice Penny states that the *Palmer* test has been applied in the context of applications for judicial review, the recent case law discussed below shows that the *Palmer* test does not apply in that context; and (b) Justice Penny's main concerns appeared to be with respect to order, finality and the integrity of the adjudicative process, and he recognized that the *Palmer* test could be adapted and modified where necessary in order to accommodate different applications and circumstances.

[34] Mexico also relies on decisions of the Singapore High Court and the Court of Appeal of the Republic of Singapore in *Government of the Lao People's Democratic Republic v. Sanum Investments Ltd.*, [2015] SGHC 15; rev'd by [2016] SGCA 57. Like the *Russia Federation* case, this case concerned an issue related to the arbitral tribunal's jurisdiction. Both levels of court applied a test similar to the *Palmer* test with respect to the issue of the admissibility of fresh evidence.

(ii) Vento's submissions and the test applicable on an application for judicial review

[35] Vento, for its part, submits that the appropriate test for admitting new evidence that goes to procedural fairness is the test that applies in the context of judicial review applications. It argues that this court's role on the Application is akin to the role of the court in an application for judicial review on breach of procedural fairness grounds, and not akin to an appeal to an appellate court from a trial judge's decision.

[36] Vento refers to the Divisional Court's decision in *Durham Regional Police Service v. The Ontario Civilian Police Commission*, 2021 ONSC 2065 ("***Durham***"), where the Court ruled on a motion to admit fresh evidence on an application for judicial review. Justice Patillo stated the following at para. 45:

> [45] The DPRS' reliance on the *Palmer* test is misplaced. It is directed to the admission of fresh evidence on an appeal. In this case, however, the evidence is sought to be relied on as part of the record on judicial review. Generally, the record on judicial review is restricted to what was before the decision-maker. There are, however, limited circumstances where the record may be supplemented: e.g., to show the absence of evidence on an essential point, to disclose a breach of natural justice that cannot be proven by reference to the record or to provide general background that might assist the court in

> understanding the underlying issues: *Keeprite*; *Scott v. Toronto (City)*, 2021 ONSC 858 at paras. 19-20.

[37] In *Scott v. Toronto (City)*, 2021 ONSC 858, referred to in *Durham*, the Divisional Court stated the following at paras. 18-20 with respect to the admissibility of fresh evidence on an application for judicial review:

> [18] Generally, the record on judicial review is restricted to what was before the decision-maker: *Bernard v. Canada Revenue Agency*, 2015 FCA 263, para. 13. That is because this court's function is to review the decision below, not to hear the case *de novo*.
>
> [19] There are exceptions to the general rule. […]
>
> [20] Another exception is for evidence relevant to natural justice, procedural fairness, improper purpose or fraud that is not contained in the tribunal's record, and that could not have been raised before the decision-maker (*Bernard*, para. 25). If a party knew of the issue at the time, this should be on the record. If a party failed to object before the decision-maker, it generally cannot raise an objection for first time on judicial review (*Bernard*, paras. 26-30).

[38] In *Bernard v. Canada Revenue Agency*, 2015 FCA 263 ("***Bernard***") at paras. 13-28, Justice Stratas set out the principles governing the admission of new evidence on an application for judicial review. He outlined the following principles with respect to the exception that applies to evidence relevant to an issue of procedural fairness:

> [25] The third recognized exception concerns evidence relevant to an issue of natural justice, procedural fairness, improper purpose or fraud that could not have been placed before the administrative decision-maker and that does not interfere with the role of the administrative decision-maker as merits-decider: see *Keeprite* and *Access Copyright*, both above; see also *Mr. Shredding Waste Management Ltd. v. New Brunswick (Minister of Environment and Local Government)*, 2004 NBCA 69, 274 N.B.R. (2d) 340 (improper purpose); *St. John's Transportation Commission v. Amalgamated Transit Union, Local 1662* (1998), 1998 CanLII 18670 (NL SC), 161 Nfld. & P.E.I.R. 199 (fraud). To illustrate this exception, suppose that after an administrative decision was made and the decision-maker has become *functus* a party discovers that the decision was prompted by a bribe. Also suppose that the party introduces into its notice of application the ground of the failure of natural justice resulting from the bribe. The evidence of the bribe is admissible by way of an affidavit filed with the reviewing court.

> [26] I note parenthetically that if the evidence of natural justice, procedural fairness, improper purpose or fraud were available at the time of the administrative proceedings, the aggrieved party would have to object and adduce the evidence supporting the objection before the administrative decision-maker. Where the party could reasonably be taken to have had the capacity to object before the administrative decision-maker and does not do so, the objection cannot be made later on judicial review: *Zündel v. Canada (Human Rights Commission)*, (2000), 2000 CanLII 16575 (FCA), 195 D.L.R. (4th) 399; 264 N.R. 174; *In re Human Rights Tribunal and Atomic Energy of Canada Limited*, [1986] 1 F.C. 103 (C.A.).
>
> [27] The third recognized exception is entirely consistent with the rationale behind the general rule and administrative law values more generally. The evidence in issue could not have been raised before the merits-decider and so in no way does it interfere with the role of the administrative decision-maker as merits-decider. It also facilitates this court's ability to review the administrative decision-maker on a permissible ground of review (*i.e.*, this Court's task of applying rule of law standards).

[39] Vento argues that new evidence directed at explaining the impact of the breach of procedural fairness is also admissible on an application for judicial review. It cites the decision of the Divisional Court in *Nation Rise Wind Farm v. Ontario*, 2020 ONSC 1153 ("***Nation Rise Wind Farm***") in support of this position.[1] In that case, the applicant filed evidence that was not before the decision-maker, the Minister of the Environment, Conservation and Parks, including a report addressing the existence of maternal bat colonies proximate to and potentially at risk from the wind farm project in issue. Vento relies on the following passage in this decision:

> [20] The applicants have not moved to adduce this evidence as fresh evidence. They say it is admissible under two exceptions to the principles against fresh evidence on appeal:
>
> (a) It is relevant to the issue of procedural fairness. The applicant says that it was not given notice that maternal bat colonies were an issue that needed to be addressed before the Minister, and on this basis they did not provide evidence that is inconsistent with the Minister's findings. They place the evidence before the court to make it clear

[1] Vento also refers to the cases *Queensway Excavating & Landscaping Ltd v. Toronto (City)*, 2019 ONSC 5860 at paras. 49, 56 and *30 Bay ORC Holdings Inc. et al. v. City of Toronto*, 2021 ONSC 251 at para. 117.

> that the procedural fairness argument is not academic: the applicant was in possession of dispositive evidence on the issue, which it did not file with the Minister – and the reason that it did not file this evidence was that it was unaware the issue needed to be addressed. This argument is buttressed by the record of evidence apparently relied on by the Minister: it appears to be in a report that was not, itself, before the Environmental Review Tribunal. The applicant understood that the case it had to meet was based solely on the record before the Tribunal – a further reason why it had no reason to believe that the question of maternal bat colonies was before the Minister.
>
> […]
>
> [21] I wish to be clear, however, that the impugned evidence filed by the applicant is not going in "for the truth of its contents", to establish facts inconsistent with the Minister's decision. It is admitted solely for the two purposes identified by the applicant as exceptions to the principle against fresh evidence, as described above. Responding parties are entitled to respond to this evidence, but only on the basis on which the evidence has been submitted.

[40] Vento also relies on a few cases decided under the *Arbitration Act*, S.O. 1991, c. 17.[2] While fresh evidence dealing with procedural fairness was considered by the court in these cases, the reasons do not address nor discuss the question of the admissibility of the new evidence, with respect to which there appears to have been no objection. Consequently, I am of the view that no general principles can be derived from these cases, especially given the different context in which they were decided (domestic arbitral awards in the family law context) and the fact that they involved self-represented litigants.

[41] Finally, Vento relies on the case *Canada v. Granitile Inc.*, 2008 CanLII 63568 (Ont. S.C.J.) ("***Granitile***") for the proposition that new evidence that goes to evidence tampering is admissible and need not be "new" to be admissible. Based on *Granitile*, Vento submits that "fraud unravels everything" and that a failure to exercise due diligence where fraud or evidence tampering might otherwise have been discovered is not enough to sustain a judgment which resulted from fraud or evidence tampering. I discuss the *Granitile* case in more detail below.

(iii) Conclusion on the applicable test

[42] As stated above, no cases directly on point – i.e. dealing with the admissibility of fresh evidence on an application to set aside an international arbitral award based on procedural fairness

[2] *Kucyi v. Kucyi*, 2007 ONCA 758 and *Lockman v Rancourt*, 2017 ONSC 2274.

grounds – were brought to my attention. While Mexico referred to a few cases dealing with the admission of fresh evidence on an application to set aside an international arbitral award with respect to jurisdictional issues, procedural fairness grounds are conceptually distinct from jurisdictional grounds. Further, as stated above, the standard to be applied by a reviewing court on an application to set aside depends on the specific Model Law grounds on which the application is based. I also note that the rulings in the cases cited by Mexico are not all consistent.

[43] The review of the case law above shows that the two competing tests are, in the end, very similar, and that the policy concerns referred to by Justice Penny in *Russia Federation* regarding order, finality and the integrity of the decision-making process underlie both the *Palmer* test and the test applicable to the admission of fresh evidence on an applicable for judicial review.

[44] While the differences between the two tests are minor, I am of the view that the test applicable on an application for judicial review is the most appropriate one to apply in this case, i.e. an application to set aside an international arbitral award on procedural fairness grounds. Given the very limited grounds on which an international arbitral award can be set aside, I agree with Vento that an application to set aside such an award is much closer in nature to an application for judicial review than to an appeal. This is particularly the case when the application to set aside is based on procedural fairness, which is a common ground in applications for judicial review, but not in appeals. Further, as noted by Justice Stratas in *Bernard* at para. 27, the exception applicable to the admissibility of fresh evidence relevant to procedural fairness on an application for judicial review is structured so as not to interfere with the role of the administrative decision-maker as the merits-decider. This is consistent with the high degree of deference owed to international arbitral tribunals and the very strict limits imposed on judicial intervention.

[45] In my view, the *Granitile* decision relied upon by Vento adds little to the test that applies to the admission of fresh evidence on an application for judicial review with respect to an issue of natural justice, procedural fairness, improper purpose or fraud, and I decline to apply a different test with respect to alleged evidence tampering.

[46] *Granitile* was a decision of Lederer J. on a motion to set aside a judgment of this court on the ground of fraud pursuant to Rule 59.06(2)(a) of the *Rules of Civil Procedure*. The motion was converted to the trial of an issue. Lederer J. held that the determination of whether fraud was present and whether a decision of the court should, on that basis, be set aside was founded on a four-prong test, with the second prong being the following: "The party must not have had knowledge of the fraud and the evidence necessary to prove the fraud at the time of the initial trial."

[47] According to Lederer J., it was not enough to say that with due diligence the fraud could have been discovered at the trial as this would create the unacceptable situation where the fraud could be admitted but the perpetrator able to argue: "Too bad you should have found me out earlier". Lederer J. stated that to allow for a decision to stand in the face of fraud, the party seeking to set aside the judgment must have had knowledge of the fraud. See *Granitile* at paras. 467-469. On the issue of when a party can be said to have the requisite knowledge of fraud to allow for a

decision to stand, Lederer J. referred, among others, to the decision of Osborne J. (as he then was) in *International Corona Resources Ltd. v. LAC Minerals Ltd.*, 1988 CanLII 4534 (Ont. H.C.J.) ("***LAC Minerals***"). One of the propositions set out by Osborne J. in that case was that the party asserting that a judgment was procured by fraud must show that there has been a new discovery of something material, in the sense that fresh facts have been found, in order to provide a reason for setting aside the judgment. Lederer J. expressed the view that Osborne J.'s decision in *LAC Minerals* "broadens our understanding of that test [i.e. knowledge test] and acknowledges that there will be flexibility in how it is applied." See *Granitile* at para. 312.

[48] The cases discussed by Justice Lederer in his reasons show that the views expressed in the case law on the issue of the requisite knowledge of fraud, and whether some diligence was required, were not clear and uniform. Further, Justice Lederer agreed that there was flexibility in how the "knowledge test" was applied. Simply saying that "fraud unravels everything", no matter what the other party knew and could have done at the relevant time, is too simplistic an approach. Given the nature of the issues raised in an application to set aside a judgment for fraud and the competing objectives of finality and integrity, it is trite that the specific factual circumstances of each case will play an important role in the application of the test.

[49] I note that the Court of Appeal stated in a case decided a few years after *Granitile* that the test under Rule 59.06(2)(a) of the *Rules of Civil Procedure* (i.e. the Rule in issue in *Granitile*) required the moving party to show that the new evidence could not have been put forward by the exercise of reasonable diligence at the original proceedings: see *Mehedi v. 2057161 Ontario Inc.*, 2015 ONCA 670 at para. 13. The new evidence in issue in that case related to the veracity of the testimony of the respondents. In addition, it is clear from the recent case law reviewed above that, even in cases of fraud, courts require a certain degree of diligence before admitting fresh evidence on an application for judicial review.

[50] In light of the foregoing, it is my view that reasonable diligence is an appropriate consideration on this motion, as it is in the context of the admission of fresh evidence on an application for judicial review. Requiring a certain degree of diligence by the parties before the Tribunal is consistent with the high degree of deference that must be accorded to awards of international arbitral tribunals under the Model Law. Diligence should be assessed in light of all the circumstances and what was known at the relevant time.

c. <u>Application to this case</u>

[51] In my view, neither the Brown Affidavit nor the Ortúzar Affidavit meet the test for the admission of fresh evidence. Further, some paragraphs of the Weiler Affidavit are not proper affidavit evidence and should be struck.

(i) Brown Affidavit

[52] In its motion to strike evidence before the Tribunal, Vento raised the issue of the authenticity of the Recording and argued that the copy submitted "is obviously not a faithful

recording of the entirety of the conversation". Vento also surmised that Ms. Martínez had placed the call on mute at numerous points throughout the conversation (which is not mentioned in the Brown Affidavit). Despite these allegations, Vento did not adduce expert evidence regarding the Recording in support of its motion to strike evidence, and it chose not to cross-examine Ms. Martínez at the hearing.

[53] The Brown Affidavit refers to the following, among other things:

a. A few instances were "all audio is cut".

b. There is no continuity between the beginning of a certain sentence and how the sentence concludes.

c. At some point in the Recording, Speaker 1 "disappears and eventually reappears" with an incomplete expression ("*decir*" instead of "*es decir*").

d. At some other point, Speaker 1 refers to a rule, "then cuts out for one second", and "reappears out of context" one second later "with a fragmented word that does not match with the pause that came after mentioning the [rule]."

[54] All of these points should have been apparent to Vento (and the Tribunal) from the Recording and/or the transcript of the Recording. There is no explanation as to why Ms. Martínez was not cross-examined with respect to them and why Vento did not adduce evidence regarding the authenticity and integrity of the Recording on its motion to strike evidence. Given that: (a) the issues raised in the Brown Affidavit could have been raised before the Tribunal, and (b) Vento specifically raised a number of issues with respect to the Recording (including its authenticity, faithfulness and partial nature) before the Tribunal but chose not to adduce evidence in support of its objections, the Brown Affidavit does not meet the test for admission of fresh evidence.

[55] Even if I had found that the test set out in *Granitile* had any relevance on this motion, I would conclude that it was not met and/or "triggered" in this case. The test was not met as Vento had the requisite knowledge of the alleged "fraud" in this case. Mr. Brown's evidence is not based on a "new discovery of something material" or any fresh facts that were not available at the time of the arbitration proceedings, as required in *LAC Minerals* and discussed in *Granitile*. Vento knew and argued that there were issues with the faithfulness of the Recording. Further, it knew that words were cut off and it had access to a participant in the recorded conversation whose words were allegedly cut off, i.e. Mr. Ortúzar. As stated above, Mr. Ortúzar provided a witness statement in support of Vento's motion to strike evidence.

[56] I also find that the evidence before me is insufficient to trigger any special test applicable to fraud. The expert credentials of Mr. Brown are weak. In addition, he does not address the fact that the conversation in issue was recorded using a cellular phone. In fact, there is no evidence that he has any expertise with respect to recordings made using a cellular phone. Mr. Brown does not address or exclude any potential causes for the issues that he identifies with respect to the audio file, such as whether or not there are technical issues related to the particular mode of recording in

this case (i.e. cellular phone) that could lead to the audio being periodically cut off for short periods. Thus, Mr. Brown's conclusion that the Recording has been altered is far from being based on a cogent analysis.

(ii) Ortúzar Affidavit

[57] In my view, the breaches of procedural fairness that Vento alleges with respect to being prohibited from presenting Mr. Ortúzar's evidence in response to the Recording can be argued by reference to the record before the Tribunal. Vento raised the issue before the Tribunal, made submissions and filed a witness statement of Mr. Ortúzar in support of its position. There is no reason to supplement the record at this time for the purpose of the Application. Nothing new has been discovered.

[58] I reject Vento's submission that the Ortúzar Affidavit is admissible to explain the impact of the alleged breach of procedural fairness. All the cases cited by Vento to support this proposition are easily distinguishable. Among other things, none of the cases cited by Vento deal with a situation where the tribunal issued a specific ruling regarding the admissibility of the evidence in issue. In addition, none of them support the proposition that the specific evidence that a party was prohibited from adducing before a tribunal is admissible on a motion to set aside the tribunal's decision. As stated above, the procedural fairness grounds raised by Vento can be argued by reference to the record before the Tribunal. Vento does not need any evidence to show that the procedural fairness issues are not academic, as argued in *Nation Rise Wind Farm*. In this case, there is a specific ruling by the Tribunal rejecting Vento's request to adduce further evidence by Mr. Ortúzar to respond to the Recording.

(iii) Weiler Affidavit

[59] Mexico asks that the following be struck in the Weiler Affidavit: paragraphs 18, 20, 26, the last sentence of paragraph 28, paragraphs 32, 33, 36, 41, 42 and 43. I will not discuss the impugned paragraphs of this affidavit in great detail as the parties' focus on this motion was on the other two affidavits.

[60] Before turning to the specific paragraphs in issue, I note that another exception to the general principle that the record on judicial review is restricted to what was before the decision-maker is the exception that relates to background information, which can cover affidavit evidence setting out a neutral summary of procedures, summarizing or identifying key evidence before the decision-maker below, and evidence that otherwise facilitates the court's reviewing task and does not invade the administrative decision-maker's role as fact-finder and merits-decider: see *Scott v. Toronto (City)*, 2021 ONSC 858 at para. 19. In my view, this exception generally applies in the context of an application to set aside an international arbitral award, and many paragraphs of the Weiler Affidavit – to which there is no objection – provide this kind of "background information".

[61] I also wish to refer to the following comments made by Justice Penny in relation to an objection that certain affidavit evidence was "speculative, irrelevant, non-expert 'opinion',

'summary' in nature or legal argument", which I find apposite in the context of the objections raised regarding the Weiler Affidavit:

> As to the City's other complaints, I would say with some regret that it seems to be the rare affidavit these days that strictly adheres to the facts; attempts at argument, summarizing, spinning the facts, and drawing inferences is not at all uncommon. While in no way condoning this trend, the court is well aware of the difference between fact and argument and that the drawing of inferences is for the lawyers to argue and the court to decide, not the witnesses. While there is something to be said for the City's concerns, the new evidence which falls into this category was not such as to have any material impact on the outcome. In the circumstances, I would treat the City's objections under the second ground as going more to weight than admissibility. [*30 Bay ORC Holdings Inc. et al. v. City of Toronto*, 2021 ONSC 251 at para. 118]

[62] In light of the foregoing, I decline to strike paragraphs 18, 20, 26, and the last sentence of paragraph 28, which all relate to the evidence of Mr Ortúzar, the Recording and P.O. #7. While these paragraphs may stray a bit from a "neutral summary of procedures", they do not contain new facts or positions. The fact that they may arguably contain argument or inferences, or be self-serving and based on hindsight will go to weight. In my view, they state obvious and expected positions/inferences on the part of Vento, which are largely based on the record that was before the Tribunal.

[63] The other paragraphs in issue, i.e. paragraphs 32, 33, 36, 41, 42 and 43, relate to Vento's allegations regarding Mr. Perezcano's impartiality and independence. Because this ground arose after the Award was released, these paragraphs do not contain general information about the arbitration proceeding and they do not fall under the "background information" exception. Many other paragraphs of the Weiler Affidavit contain information and evidence about this ground, but only the paragraphs listed above are objected to by Mexico, mostly on the basis that they contain opinion evidence on matters related to the field of investment treaty arbitration requiring specialized skill and knowledge.

[64] In my view, the first sentence of paragraph 32 and paragraphs 33, 36, 41, 42 and 43 should be struck. These paragraphs contain opinion evidence, as well as speculation and argument. Given that the ground related to Mr. Perezcano's impartiality and independence is, generally speaking, not based on the record that was before the Tribunal, proper evidence is required, and opinion evidence should be adduced through an independent expert. Inferences and arguments can be made in Vento's Factum.

COSTS

[65] After the hearing of the motion, I was advised by counsel that the parties had reached the following agreement on the issue of costs:

a. The costs of the motion will be fixed at $40,000; and

b. The costs of the motion will be payable at the time that the costs of the main Application are payable. As such, the costs of the motion in the amount of $40,000 will either be added to or set off against, the costs of the Application.

[66] While the amount agreed upon appears high to me for this kind of motion, I see no valid reason to reject the parties' agreement.

CONCLUSION

[67] Accordingly, I order that the Brown Affidavit and the Ortúzar Affidavit be struck from the Application Record. In addition, I order that the first sentence of paragraph 32 and paragraphs 33, 36, 41, 42 and 43 of the Weiler Affidavit be struck.

[68] Given Mexico's success on its motion, it is entitled to costs. In accordance with the parties' agreement, I fix Mexico's costs of this motion at $40,000, and I order that these costs be payable by Vento to Mexico at the time that the costs of the main Application are payable.

Vermette J.

Date: December 1, 2021