IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

Citation: *TMR Energy Ltd. v. State Property Fund of Ukraine et al.*, 2004 NLSCTD 198

Filing Date: 2004 10 26
Docket: 2003 01T 3328

BETWEEN:	**TMR Energy Ltd., a duly constituted legal person incorporated under the laws of Cyprus**	**APPLICANT**
AND:	**State Property Fund of Ukraine, an organ of the State of Ukraine**	**RESPONDENT**
AND:	**Aviation Scientific Technical Complex named after OK Antonov (ANTK Antonov), a State Enterprise duly constituted as a legal person under the laws of Ukraine**	**INTENDED INTERVENOR**
AND:	**State of Ukraine**	**INTERVENOR**

Before: The Honourable Mr. Justice Robert Hall

Place of Hearing: St. John's, Newfoundland and Labrador

Dates of Hearing: October 21 and 22, 2004

Appearances: Augustus Lilly, Q.C., Richard Desgagnés, Azim Hussain and Brenda Horrigan for TMR Energy Ltd.
Paul McDonald and George Pollack for State Property Fund.
Thomas Heintzman, O.C., Q.C., Peter Browne and Reagan O'Dea for ANTK Antonov.
Frank Newbould, Q.C., Thomas Kendell, Q.C., Stacey O'Dea for State of Ukraine.

2004 NLSCTD 198 (CanLII)

Reasons for judgment on intervenor application of Intended Intervenor ("Antonov").

2004 NLSCTD 198 (CanLII)

Authorities Cited:

Case Considered: Reference Re Workers' Compensation Act (Nfld.) (1989), 76 Nfld. & P.E.I.R. 185 (S.C.C.)

Statutes and Rules Considered: *International Commercial Arbitration Act*, RSNL 1990, c. I; *Judgment Enforcement Act*, RSNL 1990, c. J-1.1; *State Immunity Act*, RSC 1985, c. S-18; *Federal Court Rules, 1998; Rules of the Supreme Court, 1986*

REASONS FOR JUDGMENT

Hall, J:

Background.

[1] This matter arises out of an originating application (*ex parte*) made by the Applicant ("TMR") to have a foreign arbitral award made in favour of TMR against State Property Fund of Ukraine ("SPF") recognized and enforced pursuant to the Convention on the Recognition and Enforcement of Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in New York on June 10, 1958 (the "New York Convention") which Convention applies in this Province pursuant to the provisions of the *International Commercial Arbitration Act*, RSNL 1990, c. I-15.

[2] TMR has claimed before this Court that SPF is an organ of the Intervenor State of Ukraine ("Ukraine") and is in essence an alter ego of Ukraine. What logically follows from this argument is that the property of Ukraine is the property of SPF and vice versa,

[3] The position of TMR set out in para. 2 is an important one as it led to the seizure of a large cargo plane which had landed at the airport in Goose Bay, Labrador, while in the course of performing a contract between Antonov and the State of Italy whereby certain military equipment of the Italian Air Force was being transported to Goose Bay from Italy to be used by the Italian Air

Force in low level flying exercises in Labrador. TMR asserted, firstly in the Federal Court of Canada and subsequently to the Sheriff of Newfoundland, that the aircraft of Antonov (the "Aircraft") was property of Ukraine and therefore because SPF and Ukraine were alter egos of each other and the Aircraft was the property of Ukraine, the Aircraft was available to satisfy the recognized foreign Arbitral Award in favour of TMR against SPF. This seizure led to a series of applications and hearings before both the Federal Court of Canada and this Court dealing with:

(1) intervention of Antonov to contest the seizure;

(2) applications by Ukraine and SPF to contest the validity of purported recognition Orders in both Courts;

(3) state immunity issues and service issues related thereto;

(4) comity issues;

(5) *res judicata* by reason of Federal Court decisions;

(6) abuse of process arguments;

(7) whether the Orders of Dunn, J. and Thompson, J. constituted recognition and enforcement of the Arbitral Award and therefore were final Orders on this aspect, reviewable only on appeal to the Court of Appeal; and

(8) whether the Orders of Dunn, J. and Thompson were money judgments under the JEA entitling execution thereon.

[4] The hereinbefore recited brief description of this matter is nonetheless not sufficient to convey an adequate flavour of the numerous and complicated proceedings which have surrounded the seizure of this Aircraft. I will therefore set out in Schedule "A" to these reasons a somewhat more lengthy (but nonetheless still very condensed) history of the proceedings to provide a more adequate background to facilitate a better understanding of the reasons for judgment in this matter.

2004 NLSCTD 198 (CanLII)

Relief Sought by Antonov.

[5] On October 30, 2003 Antonov had filed in this Court an amended interlocutory application (*inter partes*) seeking the following relief:

(a) standing as an intervenor pursuant to Rule 7.05 of the *Rules of the Supreme Court*, 1986, as amended;

(b) the right to call evidence and conduct cross-examination of the "Respondents" in respect of the proper identity of the judgment debtor and its legal relationship to Antonov (It is to be noted here that it is not quite clear as to whom Antonov is referring in its reference to the "Respondents". In the title of its application there is only one party named as a "respondent", that being SPF.);

(c) the right to make oral and written submission in respect of the proper identity of the judgment debtor and its legal relationship to Antonov.

(d) the right to participate in the determination of the factual and legal basis upon which TMR intends to seize the Aircraft as part of any enforcement of its Arbitral Award;

(e) the adjudication of any claim(s) by Antonov arising from any request(s) for seizure of the Aircraft by TMR including, but not limited to, a stay of proceedings, security for costs and general and specific damages;

(f) an immediate setting aside of or an immediate granting of a stay of the *ex parte* Interim Order of Madam Justice Dunn dated August 28, 2003 pursuant to Rule 29.13 of the *Rules of the Supreme Court*, 1986.

[6] As would be noted from the Schedule "A" history of the proceedings in this matter, the intervenor application of Antonov was adjourned *sine die* by Thompson, J. on November 3, 2003. Subsequently, on October 5, 2004 Antonov filed another interlocutory application (*inter partes*) seeking mostly the same relief expressed as follows:

(a) standing as an intervenor pursuant to Rule 7.05 of the *Rules of the Supreme Court, 1989*, as amended, in all proceedings before this

2004 NLSCTD 198 (CanLII)

Honourable Court in relationship to the recognition and enforcement of the Arbitral Award;

(b) the adjudication of any claim(s) by Antonov arising from the seizure of the Aircraft by TMR, including, but not limited to, a stay of proceedings, security for costs and general and specific damages;

(c) an immediate setting aside of or an immediate granting of a stay of the *ex parte* Interim Order of Madam Justice Dunn dated August 23, 2003 pursuant to Rule 29.13 of the *Rules of the Supreme Court, 1986*, and s. 11.2(a),(b), (c), (d), (h) and (j) of the *JEA*;

(d) a declaration that the Interim Order of Madam Justice Dunn dated August 28, 2003 and continued by Mr. Justice Thompson on November 3, 2003 is not a money judgment capable of registration under the JEA and an immediate setting aside of the said Interim Order; and

(e) an order releasing the Aircraft currently held under Notice of Seizure dated September 24, 2004.

[7] The claims for relief sought in the second interlocutory application of Antonov are in most cases a mere restatement of its earlier application. However, ground (a) is expanded to include an application for intervenor status in "all proceedings before this Court in relation to the recognition and enforcement of the Arbitral Award". In this sense it is clear that Antonov seeks intervenor status on the fullest of bases which would give it an ability to argue against the recognition and enforcement of the Arbitral Award and not merely issues relating to execution pursuant to the recognized Arbitral Award. Additionally, in ground (d) it seeks a declaration that the Interim Order of Justice Dunn continued by Justice Thompson is not a money judgment capable of registration under the *JEA* and seeking an immediate setting aside of that registration. In most other respects the relief sought is the same.

[8] Rule 7.05 of the *Rules of the Supreme Court*, 1986, dealing with applications for intervenor status, states:

"(1) Any person may, with leave of the court, intervene in a proceeding and become a party thereto if

2004 NLSCTD 198 (CanLII)

> (a) that person claims an interest in the subject matter of the proceeding, including any property seized or attached in the proceeding, whether as an incident to the relief claimed, enforcement of the order therein, or otherwise;
>
> (b) that person's claim or defence and the proceeding have a question of law or fact in common; or
>
> (c) that person has a right to intervene under a statute or rule.
>
> (2) The application for leave to intervene shall be supported by an affidavit containing the grounds thereof and shall have attached thereto, when practical, a pleading setting forth the claim or defence for which intervention is sought.
>
> (3) On the application, the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the parties to the proceeding and it may grant such order as it thinks just."

[9] Antonov submits that it possesses, uses and disposes of the Aircraft pursuant to a form of property right under Ukranian law and as such has a significant interest in the Aircraft. Antonov argues that TMR is seeking recognition of the Arbitral Award under Newfoundland law for the primary purpose of seizing the Aircraft and has in fact done so pursuant to the judgment enforcement procedures of this Province. Antonov claims therefore that the subject matter of the proceeding is in effect the seizure of the Aircraft and that as such Antonov is entitled to intervene based on its interest in the property, this being a stated ground to support intervention under Rule 7.05(1)(a).

[10] Similarly, Antonov claims under Rule 7.05(1)(b) that its claim of an interest in the Aircraft shares common questions of fact and law with the TMR application to have the Arbitral Award recognized for the purpose of seizure and judgment enforcement against the interests of SPF. Further, Antonov argues that under Rule 7.05(1)(c) it has a right to intervene under statute by virtue of ss. 11(1) and (2) of the *JEA* which allow an interested person to apply to the Court for directions or to determine a matter or issue that arrises out of enforcement proceedings. It additionally argues that under Rule 51.02(1)(c), (e), and (g) of the *Rules of Supreme Court*, 1986, it, as an interested party, is permitted to apply to Court claiming that enforcement proceedings have been wrongfully initiated or executed.

2004 NLSCTD 198 (CanLII)

2004 NLSCTD 198 (CanLII)

TMR's Position Re Antonov's Intervenor Status.

[11] TMR argues that Antonov was not a party to the arbitration proceedings which resulted in the Arbitral Award, nor was it a party to TMR's originating application (*ex parte)* for recognition and enforcement of the Arbitral Award as against SPF (as an organ of the State of Ukraine). TMR points out that Antonov asserts that it is not part of SPF nor the State of Ukraine. TMR states that it is not alleging that Antonov is personally liable for the payment of the Arbitral Award. TMR argues that the Aircraft is the property of Ukraine and thus is liable to execution as Ukraine and SPF are, in effect, alter egos of each other.

[12] In support of its argument against giving Antonov full intervenor status in this matter, TMR points to the provisions of Article V of the New York Convention which state:

> "Article V
>
> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (a) The parties to the agreement referred to in article II where, under the law applicable to them, 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 the country where the award was made; or
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (c) The award deals with a difference 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 award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
>
> (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
>
> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country."

[13] TMR states that it logically follows that only those who participated in the arbitration and against whom the award is sought to be recognized have standing to contest it, not those who might somehow become indirectly affected at a later stage. TMR argues that the only interest of Antonov is with respect to property which was seized subsequent to the issue of the Interlocutory Order of Mr. Justice Thompson on November 3, 2003. TMR claims that this is an issue of execution and as such is a distinct proceeding from the application of TMR seeking recognition and enforcement of the Arbitral Award.

[14] Thus, TMR's position is that Antonov's only remedies lie within the post execution provisions of JEA and it points out that in fact Antonov has already begun proceedings under the JEA in that they have filed a notice of objection with the High Sheriff objecting to the seizure of the Aircraft. TMR does not object to Antonov's participation in proceedings further to the application of the High Sheriff provided that Antonov's participation is limited to issues pertaining to the exigibility of the Aircraft. TMR therefore states that the question for the Court when determining whether Antonov should have standing is a simple one: Could Antonov have intervened before TMR seized the Aircraft? TMR states obviously the answer to this question is "No". TMR argues that any standing which is given to Antonov would be given in relation to the seizure of the Aircraft and should not be given so as to permit Antonov

2004 NLSCTD 198 (CanLII)

to question the validity of the recognition and enforcement order as it is a stranger to these proceedings. It claims that Antonov is confusing the required legal interest in the recognition proceedings with the indirect benefit that it would get from setting aside the recognition of the Arbitral Award. To give Antonov standing to argue the recognition of the Arbitral Award would expand the meaning of the phrase "party against which the award is invoked" found in Article V of the New York Convention. TMR contends that a reading of Articles V and VI as a whole make it clear that the "party" referred to is the one that was the party to the arbitration agreement.

2004 NLSCTD 198 (CanLII)

Discussion.

[15] Article III of the New York Convention states:

> "Article III
>
> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."
>
> [Emphasis added.]

[16] The question arises whether, in Article III of the New York Convention the words "in accordance with the rules of procedure of the territory where the award is relied upon" are intended to apply only to the obligation of the contracting state to "enforce" arbitral awards or whether these words also apply to the obligation of the contracting state to "recognize" arbitral awards. In my view, these words are applicable to both the recognition function required in Article III and the enforcement function but both the recognition function and the enforcement function are to be done "under the conditions laid down in the following Articles". The "following Articles" include Article V(2)(a) which provides that recognition and enforcement of an arbitral award may be refused where the competent authority in the country where recognition and enforcement is sought finds that "the recognition or enforcement of the award would be contrary to the public policy of that country."

[17] It is difficult to conceive that the statute law of this Province or the subordinate legislation made thereunder would not constitute part of the "public policy" of this Province. Therefore I have no difficulty in concluding that notwithstanding the limited wording of who may apply under Article V of the New York Convention to contest recognition and enforcement of a foreign arbitral award, those rights are further expanded by Rule 7.05 of the *Rules of Court, 1986*, said Rules being an expression of the public policy of this Province. I therefore conclude that Rule 7.05, applying as it does to every stage of a proceeding before this Court, permits the application of Antonov as an intervenor in the enforcement and recognition application of TMR. Nonetheless this Court is not obliged to permit the intervention of Antonov in the recognition and enforcement application of TMR at all. This is clear from Rule 7.05(3) where the fact that the Court has a discretionary power is evidenced by the wording "... and it (i.e. the Court) may grant such order as it thinks just." In conclusion, therefore, on this particular aspect of the matter, the right of this Court to permit the intervention of Antonov in the recognition and enforcement portion of the TMR application is not constrained by Article V of the New York Convention and this Court may allow such intervention "as it thinks just".

Analysis of whether it is just to allow intervention.

[18] Antonov claims it has an interest in the subject matter of the proceedings, i.e. the recognition and enforcement of the foreign Arbitral Award. Additionally Antonov argues that of course it has also an interest in the property which has been seized, namely the Aircraft. It therefore seeks a full status to argue all of the merits of the recognition and enforcement application relating to the foreign Arbitral Award as well as issues of ownership of the Aircraft.

[19] TMR's position simply is that Antonov was not a party to the arbitration proceeding, has no status to argue issues of recognition and enforcement under the New York Convention and its rights are limited only to the right to present evidence and argument to the Court to the effect that the Aircraft should not be seized pursuant to the recognized foreign Arbitral Award because Antonov is the owner thereof.

[20] It should be noted however that one of the arguments put forward by TMR in support of seizing the Aircraft in the first instance is that the Aircraft is in fact owned by the State of Ukraine and that while Antonov may have particular

2004 NLSCTD 198 (CanLII)

rights to use the Aircraft, lease it, etc. and to make a profit thereon, nonetheless the beneficial ownership of the Aircraft is vested in the State of Ukraine and SPF and the State of Ukraine being alter egos, the Aircraft is liable to seizure pursuant to the foreign Arbitral Award registered as against SPF. The argument that SPF and the State of Ukraine are one and the same, of course, brings into play issues of state immunity under the *State Immunity Act*. This is a live issue in this proceeding as between TMR on the one hand and SPF and the State of Ukraine on the other. If TMR's right to seize the Aircraft is based upon the argument that the Aircraft is not the property of Antonov but is in fact the property of the State of Ukraine, it seems logical that in addition to merely being permitted to argue its own ownership interest in the Aircraft, Antonov has an interest in the subject matter of the proceeding, i.e. the recognition and enforcement of a foreign Arbitral Award against the State of Ukraine. If the Aircraft belongs to Ukraine subject to some rights of use only vested in Antonov then issues of state immunity are intertwined with issues of Antonov's property rights and thus should be arguable by Antonov.

[21] Antonov has argued that if it has an interest in both the subject matter of the proceedings and in the property seized, there is no logical reason why Antonov's status as an intervenor ought to be constrained or limited by any conditions imposed by this Court in permitting it an intervenor status. In effect, Antonov is arguing that it has an absolute right to full intervenor status in the proceeding. This argument, however, if accepted, would effectively emasculate the discretion of the Court to grant intervenor status as set out in Rule 7.05(3). Therefore, notwithstanding Antonov's argument and its seductive appeal, it is nonetheless necessary to consider whether the Court ought to exercise its discretion in favour of Antonov.

[22] While I am satisfied that Antonov does in fact have an interest in the subject matter of the proceedings and in the property seized, its application for intervenor status still needs to be considered on the issues of whether the intervention will unduly delay or prejudice the adjudication of the rights of the parties to the proceeding. In that sense, therefore, it is necessary to consider whether Antonov will bring any useful or different submissions to the Court. Sopinka, J. in **Reference Re Workers' Compensation Act (Nfld.)** (1989), 76 Nfld. & P.E.I.R. 185 (S.C.C.) concluded that the *Supreme Court Rules* for intervention required that the submissions of an intended intervenor be useful and different from those of other parties. In that case, Sopinka, J. allowed the

2004 NLSCTD 198 (CanLII)

intervention because the intended intervenor was found to have an expertise which could shed fresh light or provide new information on the matter. In my view, the possibility exists that Antonov may be able to bring a fresh perspective to this matter in the sense that it may be able to shed light on the inter-relationship of various entities within the Ukranian system of government and that its perspective thereon may differ from that of the State of Ukraine and/or SPF.

[23] That turns us to a consideration as to whether or not the intervention unduly delays or prejudices the adjudication of the rights of the parties to the proceeding. On the issue of undue delay, I am not satisfied that there will be any undue delay caused by admitting Antonov to full intervenor status in this matter. The Sheriff has made an application pursuant to s. 11 of the *JEA* to have the rights of Antonov as a purported owner of this Aircraft determined. In that proceeding it is reasonable to expect that Antonov will make the same argument with respect to the Sheriff's application as it will make if it were granted a full unrestricted intervenor status. These include the arguments that the matter is *res judicata* having been considered by the Federal Court of Canada. Additionally, argument can be expected from Antonov on the principle of comity between the Federal Court of Canada and this Court. Additionally, Antonov will argue that TMR's bringing of its application in this Court is an abuse of process where the matters have already been considered by the Federal Court. Perhaps the only area where there may be some overlap with the argument of SPF and the State of Ukraine is in the area where Antonov wishes to argue that the Orders of Madam Justice Dunn and Mr. Justice Thompson are void *ab initio* and ineffective or at least were interim in nature. Antonov brings to the argument the new perspective that the purported Order of Thompson, J. continuing the Order of Dunn, J. is not a money judgment under the *JEA* which is capable of recognition. I am satisfied that Antonov has the right to make most of the above stipulated arguments before this Court. The application of the Sheriff is already a part of this proceeding. Therefore, whether Antonov argues these issues during a section of the proceeding more logically connected with the Sheriff's application or whether it argues it at a time contemporaneous with the arguments of SPF and the State of Ukraine, the timing of the argument will not unduly delay the proceeding. It is only the volume or duplicative nature of the argument which can have that effect. This matter has been ongoing in the Federal Court of Canada for more than a year and a half. It is difficult to conceive that the intervention by Antonov on the

2004 NLSCTD 198 (CanLII)

issues of recognition and enforcement of the foreign Arbitral Award can be considered as being capable of causing an undue delay in that context. Therefore, delay is not a factor in denying Antonov full intervenor status. It is Antonov who wants the Aircraft released. It is hard to conceive of any motivation on its part to prolong any delay.

[24] Turning then to the issue of prejudice, conceivably there may be some degree of prejudice to TMR in Antonov being granted full intervenor status. The extent of that prejudice cannot, in the context of these lengthy proceedings be considered to be of relatively great consequence. If such prejudice does exist it can be dealt with by an award of costs if appropriate. That is an issue which can only be determined upon completion of the hearing and ought not to stand as a barrier to Antonov's intervenor application.

Disposition.

[24] In summary, Antonov is granted status as an intervenor without condition.

Justice

2004 NLSCTD 198 (CanLII)

SCHEDULE "A"

Concise History of Proceedings.

[1] TMR was issued a Foreign Final Arbitral Award dated May 30, 2002 (the "Final Arbitral Award") by the Arbitration Institute of the Stockholm Chamber of Commerce of Stockholm, Sweden, in a dispute between TMR and SPF. TMR and SPF were the named parties in the Arbitral Award.

[2] On January 15, 2003 TMR filed a Notice of Application for Registration of Foreign Arbitral Award (the "Notice of Application") in the Federal Court of Canada ("Federal Court") pursuant to Rules 327 and 328 of the *Federal Court Rules, 1998.*

[3] On January 17, 2003 the Federal Court registered and recognized the Final Arbitral Award by Order issued in File No. T-60-03 (the "Order"). The Order stated the Final Arbitral Award against SPF "... is hereby registered, recognized and shall be enforceable as any other judgment of this Court." The Order stated, "unless otherwise ordered, execution shall not be issued for 60 days following service of the Order".

[4] The Order further provided that SPF was to pay to TMR a total amount of $62,260,697.99 Cdn. plus interest.

[5] On March 4, 2003 the Order was personally served on SPF pursuant to Rule 333 of the *Federal Court Rules, 1998.*

[6] On June 11, 2003 following the 60 day stay of execution referred to in the Order, the Federal Court issued a Writ of Seizure and Sale dated June 11, 2003 (the "Writ of Seizure and Sale") in favour of TMR against "the Respondent" pursuant to Rules 425(a) and 433 of the *Federal Court Rules, 1998.*

[7] The Writ of Seizure and Sale directed seizure and sale of, *inter alia*, personal property and movables of "the Respondent" for the amount of the Federal Court Order, plus interest and fees and expenses.

[8] Rule 448 of the *Federal Court Rules, 1998* provides that "... in seizing, advertising for sale or selling property, the sheriff shall, except as otherwise

2004 NLSCTD 198 (CanLII)

provided ... following the laws applicable to the execution of similar writs issued by a superior court of the province in which the property was seized".

[9] On June 27, 2003 the High Sheriff of Newfoundland and Labrador (the "High Sheriff") was instructed by counsel for TMR to seize and sell the Aircraft.

[10] On June 28, 2003 the High Sheriff effected seizure of the Aircraft in accordance with the requirements of the *Judgment Enforcement Act, RSNL 1990, c. J-1.1* (the "*JEA*").

[11] Pursuant to s. 75(2) of the *JEA* the High Sheriff was required to serve the Enforcement Documents on SPF as judgment debtor "as soon after seizing that property as is practicable".

[12] On July 9, 2003 the High Sheriff effected service of the Enforcement Documents on SPF by telecopy to the Ukranian Embassy in Ottawa and further on July 10, 2003 via agents in Kiev, Ukraine, by delivery to the offices of SPF, all in accordance with a July 8, 2003 Order of this Court respecting service.

[13] The High Sheriff received the following notices pursuant to s. 159 and s. 161 of the *JEA*:

(a) correspondence dated July 4, 2003 from SPF;

(b) notice of objection dated July 11, 2003 from Antonov;

(c) notice of third party interest dated July 11, 2003 from Antonov.

[14] On July 17, 2003 the High Sheriff issued a letter wherein he gave notice:

(a) he considered the correspondence from SPF dated July 11, 2003 [sic] as Notice of Objection filed by SPF on July 11, 2003;

(b) he considered the Notice of Third Party Interest from Antonov dated July 11, 2003 as a Notice of Third Party Claim filed on July 11, 2003;

2004 NLSCTD 198 (CanLII)

(c) based on review of the Notice of Objection and Notice of Third Party Claim, and the relevant provisions of the *JEA*, he found both the Notice of Objection and Notice of Third Party Claim to be effective;

(d) in accordance with s. 163(2)(b) of the *JEA*, a creditor may apply to a court of competent jurisdiction to dispute an objection or a claim within 15 days after service of the notice;

(e) if no such application to a court of competent jurisdiction is made within this period, then the property shall be released from seizure.

[15] On July 18, 2003 Antonov filed a Motion in the Federal Court in File No. T-60-03 for an Order to set aside the seizure effected by the High Sheriff.

[16] On July 30, 2003 Antonov was granted by the Federal Court intervenor status for the limited purpose of contesting the seizure of the Aircraft.

[17] On August 1, 2003 TMR applied to the Federal Court by Notice of Motion in File No. T-60-03 naming SPF as Respondent and Antonov as Intervenor to dispute the Notice of Objection and Notice of Third Party Claim in accordance with s. 163 of the *JEA*.

[18] On August 1, 2003 TMR also applied to this Court by Originating Application (*inter partes*) in File No. 2003 No. 01T 3136 naming SPF and Antonov as Respondents to dispute the Notice of Objection and Notice of Third Party Claim in accordance with s. 163 of the *JEA*.

[19] On August 8, 2003 SPF applied to the Federal Court by Notice of Motion in File No. T-60-03 for an order setting aside the Order registering and recognizing the Final Arbitral Award on the ground, *inter alia*, that the Federal Court lacked jurisdiction *ratione materiae*.

[20] On August 26, 2003 TMR issued an Originating Application (*ex parte)* in this Court in File No. 2003 01T 3328 pursuant to s. 4 of the *International Commercial Arbitration Act*, RSNL 1990, c. I-15, seeking an order for the recognition and enforcement of the Final Arbitral Award issued by the Arbitration Institute of the Stockholm Chamber of Commerce of Stockholm, Sweden. This Application was taken as a precautionary measure in the event

2004 NLSCTD 198 (CanLII)

the Federal Court determined it did not have jurisdiction, as SPF has raised a challenge to the Order in Federal Court based on separation of powers between Canada and the Provinces under the *Constitution Act, 1867*.

[21] On August 28, 2003 the Originating Application (*ex parte*) was heard by the Hon. Madam Justice Maureen A. Dunn who issued an Interim Order on Application (*ex parte*) (the "Interim Order") on the same date, providing, among other things, that "The award be recognized and enforced in the Province in the same manner as any other judgment of this Court and that SPF must pay to TMR the following sums ...".

[22] In addition, Madam Justice Dunn ordered that the Interim Order and the Originating Application be served on SPF by any one of the means set out therein and that the matter be returned to the Court on November 3, 2003 for an *inter partes* hearing before the judge then presiding in Chambers.

[23] Further to the Interim Order, TMR caused SPF to be served in Canada at the Embassy of the State of Ukraine in Ottawa, Ontario, on September 8, 2003 and at SPF's head offices in Kiev, Ukraine on September 10, 2003 with: (i) a court certified copy of the Interim Order dated August 28, 2003; (ii) a copy of the Originating Application *(ex parte*) dated August 26, 2003 with verifying Affidavit of Mr. Azim Hussain affirmed on August 25, 2003; and (iii) a copy of the Affidavit of Ms. Sarah Maxtone-Graham Francois-Poncet affirmed on August 21, 2003.

[24] On September 5, 2003 TMR registered the Final Arbitral Award in the Judgment Enforcement Registry for Newfoundland as No. 2003 004 042.

[25] On September 24, 2003 TMR forwarded the above documentation to Mr. Keith Morrill, Director, Criminal, Security, and Treaty Law Division, Department of Foreign Affairs and International Trade, Government of Canada, to be served on the State of Ukraine pursuant to s. 9 of the *State Immunity Act*, RSC 1995, c. S-18.

[26] On October 17, 2003 this documentation was transmitted to the appropriate authority of the State of Ukraine in accordance with s. 9 of the *State Immunity Act*.

2004 NLSCTD 198 (CanLII)

[27] On August 27-29 and September 5, 10, 15 and 17, 2003 the Motions of TMR and Antonov were heard by the Federal Court in Montreal and Ottawa. TMR, SPF and Antonov were parties to the Motions. Additionally, counsel for the State of Ukraine made representations in relation to issues of state immunity.

[28] On November 3, 2003 and as ordered by Madam Justice Dunn, TMR returned to this Court on an *inter partes* basis before Hon. Justice Carl R. Thompson seeking a final order for the recognition and enforcement of the award pursuant to s. 4 of the *International Commercial Arbitration Act*.

[29] SPF filed its submissions in advance of the hearing on November 3, 2003 and was represented by counsel at that hearing. Antonov made an application for intervention prior to the hearing and was represented by counsel at the hearing. Mr. Justice Thompson made an Interlocutory Order (*inter partes*) that:

(a) the Interim Order issued herein on August 28, 2003 on the direction of Hon. Madam Justice Dunn shall be continued until the further Order of this Court; and

(b) the Interlocutory Application of ANTK Antonov shall be adjourned without day.

[30] The Interlocutory Order (*inter partes*) granted by Mr. Justice Thompson (the "Interlocutory Order") was signed and filed in the Registry of the Supreme Court of Newfoundland and Labrador on November 12, 2003 and copies were served on the solicitors for SPF and the intended intervenor, Antonov.

[31] No Appeal or Application for Leave to Appeal from the Interlocutory Order granted by Mr. Justice Thompson was filed with the Court of Appeal within the time limited by the *Rules of the Supreme Court* or at all. Nor was any application brought at any time prior to the *inter partes* hearing on November 3, 2003 to set aside the Interim Order granted by Madam Justice Dunn.

[32] On December 23, 2003 Prothonotary Tabib issued the Order and Reasons for Order of the Federal Court in File No. T-60-03. Prothonotary Tabib held that:

(a) The Order of the Federal Court dated January 17, 2003 is executory as an order againt Ukraine.

2004 NLSCTD 198 (CanLII)

(b) The Aircraft is subject to execution as the property of Ukraine.

(c) There is no impediment under the *State Immunity Act*, RSC 1985, c. S-18, to the execution of the Writ of Seizure and Sale against the Aircraft.

(d) The Notice of Seizure was validly issued and the seizure performed pursuant to the Writ of Seizure and Sale is good and valid.

(e) The Notices of Opposition and of Third Party Claim are dismissed.

(f) The Intervenors motion to set aside the Notice of Seizure is dismissed.

(g) The Sheriff shall carry out the appraisal and sale of the Aircraft process in accordance with the law applicable in the Province of Newfoundland and Labrador and the proceeds of sales shall be paid to the Applicant in accordance with the Order of the Federal Court dated January 17, 2003.

(h) With Costs.

[33] On March 24, 2004, each of SPF, Ukraine and Antonov filed a Notice of Motion, *inter alia*, to declare the Order of Prothonotary Morneau dated January 17, 2003, which Order initially recognized the Foreign Arbitral Award under the New York Convention, void and of no effect or, in the alternative, to set aside the Order.

[34] On September 22, 2004 Justice Martineau issued an Order in file No. T-60-03 whereby the Motions of SPF, Antonov and Ukraine were granted and the Order of January 17, 2003 of Prothonotary Morneau set aside, and all related proceedings before the Federal Court to enforce same or to contest any seizure to be immediately vacated.

[35] On September 24, 2004 counsel for TMR instructed the High Sheriff to seize the Aircraft pursuant to the Interim Order issued *ex parte* by Madam Justice Dunn as continued by the Interlocutory Order of Mr. Justice Thompson *inter partes* in File No. 2003-01T-3328.

[36] On September 24, 2004 the High Sheriff effected seizure of the Aircraft pursuant to the Interim Order as continued by the Interlocutory Order.

2004 NLSCTD 198 (CanLII)

[37] On September 24, 2004 TMR filed in the Federal Court in File No. A-497-04 and No. 496-04 a Notice of Appeal in respect of the Orders of Justice Martineau referred to above.

[38] On September 27, 2004 the High Sheriff filed an Interlocutory Application (*inter partes*) with this Court in File No. 2003 01T 3328 pursuant to s. 11 of the *JEA* seeking a determination on the issues which have arisen out of the enforcement proceedings in this matter and giving direction to the High Sheriff as to the proper conduct thereof.

[39] On October 14, 2004, TMR filed with the Federal Court of Appeal, Notices of Motion to stay the Orders of Justice Martineau to be heard as soon as practicable which Notices of Motion counsel have advised this Court were heard on Monday, October 25, 2004. Naturally counsel were unable to advise this Court as to when the Federal Court of Appeal would decide on these motions. It is therefore the intention of all parties to proceed with the present applications before this Court until such time as the Federal Court of Appeal files its judgment on the Notices of Motion to stay the Orders of Justice Martineau.

2004 NLSCTD 198 (CanLII)