

Adamas Management & Services v. Aurado Energy, 2004 NBQB 342

S/M/57/04

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

BETWEEN:

ADAMAS MANAGEMENT & SERVICES INC.

APPLICANT

-and-

AURADO ENERGY INC.

RESPONDENT

BEFORE: Justice Peter S. Glennie

HEARING HELD: Saint John

DATE OF HEARING: July 14, 2004

DATE OF DECISION: July 28, 2004

COUNSEL:

**Stephen J. Hutchison and Jeffrey R. Parker on behalf of Adamas
Management & Services Inc.**

Ann Marie McDonald on behalf of Aurado Energy Inc.

DECISION

GLENNIE, J. (Orally)

[1] Adamas Management & Services Inc. ("Adamas") has applied pursuant to the ***International Commercial Arbitration Act*** (the "ICAA") and Rule 16.04 of the New Brunswick ***Rules of Court*** for an order recognizing as binding and enforceable an Award Sentence (the "Award") dated January 14, 2004 of a sole arbitrator of the International Court of Arbitration of the International Chamber of Commerce and permitting the enforcement of the Award in New Brunswick. The Respondent, Aurado Energy Inc. ("Aurado") has to date refused to comply with the Award and opposes this application.

Overview

[2] Adamas is a corporation organized under the laws of the British Virgin Islands. Aurado is a corporation incorporated by virtue of the laws of the Province of New Brunswick maintaining its registered office in the City of Fredericton. Its place of operation is in Switzerland. It is an oil and gas exploration and production company with assets in Canada and Kazakhstan.

[3] In 20002, Adamas, Aurado and a third company, Oil Capital Ltd., entered into various investment agreements, one of which consisted of a Second Amended and Restated Agreement dated October 19/21, 2002 (the "Second Agreement"). The Second Agreement resulted from an amendment to an earlier agreement among the same parties dated March 26, 2002.

[4] Article 20 of the Second Agreement required that any disputes arising out of the Second Agreement be referred to arbitration before a sole arbitrator in Zurich, Switzerland in accordance with the ***Arbitration Rules*** of the International Chamber of Commerce (the "ICC"). Specifically, Article 20 provides as follows:

"Any dispute, controversy or claim arising under, out of or relating to this contract and any subsequent amendments of this contract, including without limitation, its formation, validity, binding effect, interpretation, performance or breach, as well as non-contractual claims, shall be referred to and finally determined by arbitration in accordance with the Arbitration Rules of the International Chamber of Commerce. The arbitral tribunal shall consist of one arbitrator. The place of arbitration shall be Zurich, Switzerland. The dispute, controversy or claim shall be decided by the arbitrator ex aequo et bona."

[5] In 2002, a commercial dispute arose between Adamas and Aurado as to whether Adamas was entitled to the issuance of 9,853,000 common shares of Aurado pursuant to the terms of the Second Agreement (the "Commission Shares").

[6] The parties agreed that they would refer the dispute over the issuance of the Commission Shares to arbitration pursuant to Article 20 of the Second Agreement. On June 13, 2003, Adamas filed a Request for Arbitration with the Secretariat of the International Court of Arbitration of the ICC in which it claimed that it was entitled to the issuance of the Commission Shares.

[7] On July 14, 2003, Adamas and Aurado agreed that Dr. Hansjörg Stutzer, a Swiss lawyer and arbitrator, would act as sole arbitrator for the dispute over the issuance of the Commission Shares (the "Sole Arbitrator").

[8] In its Answer to Request for Arbitration dated July 14, 2003, Aurado confirmed its agreement on the choice of Sole Arbitrator. In Terms of Reference dated August 27, 2003, Aurado confirmed the appointment of the Sole Arbitrator, the validity of Article 20 of the Second Agreement and the Sole Arbitrator's jurisdiction over the issue of the Commission Shares.

[9] On November 17, 2003, the parties arbitrated the dispute over the issuance of the Commission Shares before the Sole Arbitrator in Zurich, Switzerland pursuant to Article 20 of the Second Agreement (the "Arbitration Proceedings"). As part of the Arbitration Proceedings, the parties filed documentary evidence and examined and cross-examined witnesses. At the close of the Arbitration Proceedings, Aurado confirmed for the record that it had no reservation as to the way in which the proceedings were conducted and that it had pleaded its case in full.

[10] On January 14, 2004, the Sole Arbitrator issued the Award in favour of Adamus which provided as follows:

"1. Respondent is herewith ordered to issue to the order of Claimant 9'853'000 common shares of Respondent.

2. It is taken note that the claim of Claimant against Respondent admitted in these proceedings is only a partial claim and Claimant is reserved the right to claim in another procedure for damages for breach of contract and/or to request the delivery of further shares of Respondent due to a dilution of Claimant's interest in Respondent in case of a breach of Claimant's preemptive rights.

3. Respondent is herewith ordered to reimburse Claimant all costs, expenses and administrative fees of this arbitration in the amount of USD 60'000, as assessed by the ICC International Court of Arbitration, and to compensate Claimant for its costs and expenses incurred in this arbitration in the amount of CHF 86'195.20 and, finally, to compensate the costs of Claimant for its share in the fees of the court reporter in the amount of GBP 1'203.90."

[11] Pursuant to the Swiss ***Private International Law Act***, Aurado was entitled to apply to the Swiss Federal Tribunal for an order setting aside the Award within 30 days after being notified of the Award on January 20, 2004. It

could have made this application on various grounds but did not apply to the Swiss Federal Tribunal for an order setting aside the Award.

[12] Despite repeated requests by Adamas, Aurado has neglected or refused to comply with the Award, resulting in Adamas seeking enforcement of the Award in Canada.

[13] Adamas now seeks an order recognizing the Award and permitting the enforcement of the Award in New Brunswick by allowing judgment based on the Award to be signed and entered as a judgment of this Court.

Analysis

The Law

[14] Article III of the ***Convention on the Recognition and Enforcement of Foreign Arbitral Awards*** (New York, 10 June 1958) 330 UNTS 3, Can. T.S. 1986 No. 43, entered into force in June of 1959 (the "New York Convention") provides as follows:

"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."

[15] The New York Convention is incorporated into the law of New Brunswick by virtue of ss. 2(1) of the ICAA which provides as follows:

"2(1) Subject to this Act, the Convention [New York Convention] applies in New Brunswick."

[16] The ICAA also incorporates into the law of New Brunswick the ***Model Law on International Commercial Arbitration*** (adopted by the United Nations Commission on International Trade Law on June 21, 1985) 24 ILM 1302 (the "Model Law") which is broader in scope than the New York Convention but which also contains provisions for the recognition and enforcement of "international arbitral awards." Article 35(1) of the Model Law provides as follows:

"(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36."

[17] The Model Law is incorporated into the law of New Brunswick by virtue of ss. 4(1) of the ICAA which provides as follows:

"4(1) Subject to this Act, the International Law [Model Law] applies in New Brunswick."

[18] Recognition and enforcement of the Award in New Brunswick is consistent with the objects and purposes of the ICAA, namely to give effect to parties' contractual intentions to refer matters to arbitration, as well as achieve consistency among jurisdictions and predictability in the resolution of international commercial disputes. By achieving such consistency and predictability, the ICAA encourages use of international arbitration as a means of alternative dispute resolution, thereby facilitation and promoting international trade and commerce. See: ***BWV Investments Ltd. v. Saskferco Products Inc.***, [1995] 2 W.W.R. 1 (Sask.C.A.) at paras. 20 and 24; ***Corporacion Transnacional de Inversiones v. STET International*** (1999), 45 O.R. (3rd) 183 (S.C.) at pp. 190 to 191, aff'd (2000), 49 O.R. (3d) 414 (C.A.), leave to appeal refused, [2000] S.C.C.A. No. 581.

[19] IN ***BWV Investments Ltd. v. Saskferco Products Inc.***, *supra*, Gerwing, J.A. described the objectives of the Saskatchewan equivalent of the ICAA and the manner in such legislation should be applied as follows at paras. 28 and 32:

In addition to holding parties to their contractual intentions, courts must be mindful of the need for consistency between jurisdictions in enforcing international commercial agreements... Uniformity will foster predictability and in turn international commercial activity within each jurisdiction.

. . .

... The objectives behind the ICAA/EFAA legislative schemes that have arisen in each province can be succinctly stated:

- 1. to give effect to the intentions of the parties in choosing to submit to arbitration;*
- 2. to facilitate predictability in the resolution of international commercial disputes;*
- 3. to foster consistency between jurisdictions in the resolution of international commercial disputes; and*
- 4. by encouraging the use of international commercial arbitration as a dispute resolution alternative, to encourage international commercial activity.*

[20] Article V of the ICAA provides as follows:

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 were, 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.

Application of the Law to this Case

[21] Since the Award was issued on January 14, 2004, Adamas has requested repeatedly that Aurado comply with the terms of the Award by issuing the Commission Shares to Adamas and by reimbursing Adamas for its costs, expenses and fees as awarded to it by the sole Arbitrator.

[22] The Swiss counsel for Adamas wrote to the Swiss counsel for Aurado on January 26, 2004 requesting that he tender the common shares of Aurado ordered to be issued to the order of Adamas pursuant to the Award and to reimburse the costs awarded by February 5, 2004. The request was not complied with.

[23] On March 8, 2004, Ontario Counsel for Adamas wrote to the then CEO of Aurado, David R. Robinson, advising him as follows:

"Unless Aurado complies immediately with the Award by the issuance of shares and payment of costs as ordered, we will be taking legal proceedings in Canada and will be looking to Aurado for the additional costs of enforcement resulting from non-compliance, as well as any resulting damages."

[24] Counsel for Adamas says that at all material times, Aurado represented to it and to the Sole Arbitrator that its registered office was in Toronto and Adamas says it only learned that Aurado had relocated its registered office to Fredericton while preparing for the enforcement of the Award in Canada.

[25] According to a news release issued by Aurado on May 25, 2004, Mr. Robinson resigned as CEO and was replaced by Aurado's Executive Vice President, Mirko Wojcik.

[26] Aurado says that on November 18, 2002, the holders of common shares of Aurado approved a resolution authorizing the issuance of 200,000,000 common shares and that "*before issuing any additional common shares as set forth in the Arbitration Award*", Aurado will require the approval of the Toronto Stock Exchange ("TSX") under the terms of Aurado's listing agreement with the TSX. Aurado says it expects the TSX will make the approval of the issuance of an additional 9,853,000 common shares of Aurado pursuant to the Arbitration Award subject to conditions which may include a requirement that the holders of

common shares modify a shareholders' resolution which was approved on November 18, 2002 in order to provide for the issuance of the additional common shares.

[27] The President and CEO of Aurado says the calling and holding of a shareholders' meeting to approve a modification of the November 18, 2002 shareholders' resolution would require a period of 10 to 12 weeks. As well, he says the TSX generally requires that the recipients of shares of a listed company who receive their shares other than by way of a public offering undertake not to trade their shares for a period of at least four months. It should be noted that this four month period should not cause a delay with respect to the issuance of the shares, but only relates to Adamas' ability to trade in the shares after it receives them.

[28] Counsel for Aurado argues that this is not a straightforward enforcement case. Counsel asserts that the order of the Arbitrator is to issue 9,853,000 common shares to the order of Adamas. There is no indication, she says, as to whether they are existing shares or new shares. Counsel for Aurado says it is her client's view that this type of order is not in proper context for an order.

[29] Counsel for Aurado argues that if reference is made to Rule 61 of the New Brunswick ***Rules of Court***, that Rule outlines the types of orders that are recognized and enforced in New Brunswick.

[30] Counsel for Aurado goes on to say that there is provision for a judgment for the payment of money; judgments for the delivery of personal property and judgments for the doing or restraining of doing any act.

[31] It is Aurado's position that the first paragraph of the Award, that is the order to issue to the Order of Adamas 9,853,000 common shares of Aurado does

not fall within any of the categories of the recognition of judgments and orders in New Brunswick and that accordingly it is impossible for this Court to enforce the Award. I disagree. In my opinion, the order to issue shares to Adamas is the doing an act as contemplated by Rule 61.02(1)(d). Counsel for Aurado also argues that all the cases relied upon by counsel for Adamas are judgments for money. In this regard, I would point out that the DLT Holdings case involved the enforcement of an arbitral award for more than just money. It ordered specific performance of various acts flowing from a franchise agreement.

[32] Aurado says an order can not issue from this Court requiring it to do something that it does not have control over, because it says it has to obtain the approval of TSX.

[33] Aurado says that if an order were to issue from this Court requiring Aurado to issue shares to Adamas there is a distinct possibility that Aurado could be held in contempt of that order through no fault of its own.

[34] Aurado is a publicly traded company listed on the TSX. In order for it to issue new shares, it says it has to seek the approval of the TSX and that approval may be conditional on it seeking a shareholders' resolution allowing the issuance of further shares.

[35] Since those conditions are not in the control of Aurado it argues that it could be in contempt of this Court order enforcing the Award through no fault of Aurado. This, argues Counsel for Aurado, would be contrary to public policy and accordingly the enforcement of the Award ought to be refused pursuant to Article V, Section 2(b) of the ICAA.

[36] I reject Aurado's argument in this regard. In my opinion, the fact that Aurado may have to obtain regulatory approval to issue the shares and as a

consequence may possibly be in contempt of a court order to enforce the Award is not contrary to public policy. If there are steps to be taken by Aurado to comply with the Award then it should proceed with dispatch to obtain the necessary regulatory approval. It could have commenced that process months ago. It did not need to wait for an order of this Court to obey the Award. There is also the issue of Aurado calling on Vela Financial for shares pursuant to the indemnity agreement. However, counsel for Aurado has advised this Court that this is not possible without litigation. I will deal with the TSX approval process later in this decision.

[37] Aurado also takes issue with paragraph 2 of the Award. It says paragraph 2 does not have proper content for a judgment or award. Counsel for Aurado argues that at best paragraph two is a 'take notice' provision.

[38] I am satisfied that the ICAA is not limited to the enforcement of monetary awards. The legislation does not so provide and in my opinion, had the New Brunswick Legislative Assembly intended to so restrict the legislation it would have done so.

[39] I am satisfied that this Court has the authority to recognize and enforce the Award.

[40] Rule 61.02 sets forth the manner by which judgments may be enforced by enforcement orders in New Brunswick including requiring the doing or abstaining from doing of any act [Rule 61.02(1)(d)]. Here we are dealing with the act of a corporation issuing shares in its capital stock. In my opinion, that is clearly within the ambit of Rule 61.02.

[41] Specific performance is often awarded to enforce contracts for the purchase and sale of shares in corporations. See: ***Injunctions and Specific***

Performance, Looseleaf Edition by the Hon. Robert J. Sharpe, Canada Law Book Inc. at ¶8.520.

[42] In my opinion, to accept Aurado's assertions would place New Brunswick in the unique position where it would be incapable of enforcing an international arbitration award notwithstanding the clear wording of the ICAA.

[43] I am satisfied that Adamas has fulfilled the requirements under the ICAA for obtaining recognition and enforcement of the Award by supplying this Court with duly certified copies of the Award and Second Agreement.

[44] Since Adamas has fulfilled the only requirements under the ICAA for obtaining recognition and enforcement of the Award, it is entitled to recognition and enforcement unless Aurado can establish one of the limited grounds for refusal contained in Article V of the New York Convention. See: **M.A. Industries Inc. v. Maritime Battery Ltd.** (1991), 118 N.B.R. (2d) 127 (Q.B.), aff'd (1991), 123 N.B.R. (2d) 305 (C.A.). See also: **Schiff Food Products Inc. v. Naber Seed & Grain Co. Ltd.**, [1996] S.J. No. 565 (Q.B.), and also **Kanto Yakin v. Can-Eng Manufacturing Ltd.** (1992), 7 O.R. (3d) 779 (Gen.Div.), aff'd (1992), 7 O.R. (3d) 779 (C.A.), **Dunhill Personnel System, Inc. v. Dunhill Temps Edmonton Ltd.**, [1993] A.J. No. 716 (Q.B.), **Food Services of America Inc. (c.o.b. Amerifresh) v. Pan Pacific**, [1997] B.C.J. No. 1921 (S.C.), **Corporacion Transnacional de Inversiones v. STET International**, *supra*, and **D.L.T. Holdings Inc. v. Grow Biz International, Inc.**, [2001] P.E.I.J. No. 29 (S.C.) in which courts ordered the recognition and enforcement of foreign or international arbitral awards.

[45] As mentioned, it should be noted that D.L.T. involved more than a monetary arbitral award. The Court in that case ordered the recognition and enforcement of an arbitration award from Minnesota, U.S.A., which included an

order to cease competition within a certain radius of a franchised store location, the return of various operations manuals, the removal of franchise signs, names, marks and other specific performance orders.

[46] After Adamas supplied this Court with duly certified copies of the Award and Second Agreement, the onus then shifted to Aurado to furnish proof that recognition and enforcement of the Award should be refused on one of the limited grounds contained in Article V of the New York Convention. See: Article V of the New York Convention; Redfern, Alan and Martin Hunter, ***Law and Practice of International Arbitration***, 3rd ed. (London: Sweet & Maxwell, 1999) at p. 459, para. 10-30 and ***Corporacion Transnacional de Inversiones, S.A. de C. V. v. STET International***, *supra*, at p. 191.

[47] The grounds for refusal prescribed by Article V of the New York Convention should be given a narrow and limited construction. See: ***Corporacion Transnacional de Inversiones, S.A. de C. V. v. STET International***, *supra*, at p. 192 citing A.J. Van der Berg, *New York Convention of 1958 Consolidated Commentary*, cited in Yearbook Comm. Arb. XXI (1996) at pp. 477-509.

[48] Adamas has supplied the documents required by Article IV of the New York Convention and, in my opinion, Aurado has failed to satisfy the burden of proving that this case falls into one of the limited circumstances in which recognition and enforcement should be refused. In the result, I allow the application. In doing so, I recognize that the next step in the process is for Aurado to seek and obtain the approval of the TSX under the terms of Aurado's listing agreement with the TSX and that TSX approval may be subject to conditions which may include a requirement that the holder's of common shares modify the November 18, 2002 Shareholders' Resolution. In other words, it is acknowledged that Aurado will require a reasonable period of time to obtain TSX approval and to fulfill any requisite conditions as may be set by the TSX before it can comply with the order

contained in the Award requiring Aurado to issue to the order of Adamas 9,853,000 common shares of Aurado. This acknowledgement is subject to the condition that Aurado will proceed with utmost dispatch and good faith to obtain the requisite TSX approval and to fulfill any conditions established by the TSX. The other option would have been for Aurado to obtain the shares from Vela Financial from which corporation Aurado holds an indemnity. However, counsel for Aurado has advised this Court that Aurado has attempted to obtain the shares through Vela but Vela is not prepared to transfer the shares without litigation. In any event, how Aurado satisfies the judgment of this Court with respect to the issuance of the shares is up to it. It should be noted that Aurado could have commenced this process months ago. It did not require an order of this Court to carry out the terms of the Award. The Award was final and binding and is expressed in clear and unambiguous terms. In any event, these comments relate to the enforcement of the judgment of this Court which is not to be dealt with at this point in time. It is mentioned simply to address the contempt issue raised by Aurado's counsel.

[49] Counsel for Adamas has asked for costs to be awarded to his client with respect to this application on a solicitor-client basis because Aurado has deliberately refused to comply with the terms of the Award.

[50] Our Court of Appeal has stated that an award of solicitor-client costs is called for only in exceptional and special circumstances. See: **St. Laurent v. Sun Life Assurance Co. of Canada** (1988), 90 N.B.R. (2d) 282 (N.B.C.A.)

[51] I am not satisfied that this is such an exceptional case as to warrant solicitor and client costs.

[52] The exchange rate to be applied to the monetary amounts granted to Adamas in the Award should be those prevailing as of today's date. See:

Dunhill Personnel System, Inv. v. Dunhill Temps Edmonton Ltd. [1993],
A.J. No. 716 at ¶11.

[53] The monetary amounts granted to Adamas are to be recognized and enforced by being entered as a judgment of this Court in Canadian money at the Bank of Canada exchange rate prevailing today.

[54] Accordingly, it is ordered that:

(a) The Award of Dr. Hansjörg Stutzer, Sole Arbitrator of the International Court of Arbitration of the International Chamber of Commerce, dated January 14, 2004 under ICC Case No. 12772/EC shall be recognized and enforced in New Brunswick;

(b) Judgment based on the Award shall be signed and entered as a Judgment of the Court of Queen's Bench of New Brunswick;

(c) The Award is enforceable in New Brunswick in the same manner as any other New Brunswick judgment to the same effect, in particular, pursuant to Rule 61 of the ***Rules of Court***,

(d) The amounts of USD 60'000, 86'195.20 and GBP 1'203.90 awarded in the Award shall be converted into Canadian currency and expressed using the exchange rates as of today's date. Adamas Management & Services Inc. is entitled to costs on this

application in the all inclusive amount of \$4,500.00 payable forthwith by Aurado.

Peter S. Glennie
A Judge of the Court of Queen's Bench
of New Brunswick