CITATION: The Russia Federation v. Luxtona Limited, 2019 ONSC 7558
COURT FILE NO.: CV-17-11772-CL
DATE: 20191213

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: The Russia Federation, Applicant

AND:

Luxtona Limited, Respondent

BEFORE: Penny J.

COUNSEL: *John Terry, Miriam Seers and Emily Sherkey* for the Applicant

Lincoln Caylor, Ranjan K. Agarwal and S. Bandali for the Respondent

HEARD: October 23, 2019

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ENDORSEMENT

Overview and Issues

[1] This case involves a dispute between Luxtona Limited, as a former shareholder of Yukos (an energy company), and The Russia Federation, which is alleged to have violated certain provisions of the Energy Charter Treaty relating to the protection of investments, including Luxtona's investment in Yukos.

[2] A Russian government representative signed the Treaty but the draft law that would have ratified the Treaty was never passed. Under Article 45(1) of the Treaty, Russia undertook to apply the Treaty provisionally "to the extent that" such provisional application was "not inconsistent with" Russia's Constitution, laws and regulations.

[3] Luxtona has invoked Article 45(1) of the Treaty to allege that Russia provisionally agreed to apply the Treaty in its entirety, including the arbitration provision set out in Article 26. Luxtona claims damages of approximately USD$701 million for alleged breaches of the Treaty.

[4] Russia disagrees that it provisionally agreed to apply the Treaty's arbitration clause and argues that arbitration of this claim is inconsistent with Russian law.

[5] Reserving all rights, Russia participated in the appointment of an arbitral tribunal (comprised of nationals of Italy, Costa Rica and the United States) in compliance with the *competence-competence* principal. The arbitral tribunal was "seated" in Toronto, Ontario.

[6] One of the central issues turns on Russian law: whether or not the provisional application of the Treaty, in particular the arbitration provision, is "not inconsistent with" Russian law. Both

sides put forward extensive expert evidence on relevant Russian law. In a lengthy interim award, the arbitral tribunal held that it had jurisdiction to hear Luxtona's claims. This application is brought by Russia under Articles 16(3) and 34(2) of the *UNCITRAL Model Law on International Arbitration* (enacted in Ontario by Schedule 2 of the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sched. 5). The application seeks to set aside the tribunal's interim award.

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[7] In support of its application, Russia filed new expert evidence on Russian law. Luxtona objected to this evidence being admitted. Dunphy J. was assigned to hear this application. Accordingly, in advance of the hearing, at the request of the parties Justice Dunphy heard Luxtona's motion to exclude Russia's new evidence. Relying on Article 16(3) of the *Model Law*, as interpreted in Canadian and foreign courts, Dunphy J. held that Russia was permitted to file new evidence as of right.

[8] Due to changes in judicial assignments, Dunphy J. left the Commercial List and the application was assigned to me. I was asked to decide a further evidentiary question resulting from the new evidence filed. In the course of the hearing on that issue, I questioned the legal basis for the filing of new evidence in the first place. Not being satisfied with the answer, I directed that the issue of admissibility of the new evidence be re-argued before me. That re-argument took place on October 23, 2019.

[9] There are two basic issues:

(1) do I, as the judge assigned to hear Russia's application, have the jurisdiction to change a prior evidentiary ruling by a judge who will no longer be hearing the application; and, if so, in what circumstances may I make a different ruling? and

(2) should new evidence be admitted in the circumstances?[1]

[10] For the reasons that follow I conclude:

(1) that I have the authority to reconsider the prior interlocutory ruling of a judge concerning the admissibility of evidence in a matter for which I am the hearing judge; and

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[1] It should be noted that the applicant does not seek to file new evidence under the test for fresh evidence articulated in *R. v. Palmer*, [1980] 1 S.C.R. 759. That test has four components: (1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial; (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial; (3) the evidence must be credible in the sense that it is reasonably capable of belief; and (4) 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. The applicant concedes that it would not meet this test or any variant of the test. Rather, the applicant argues that a review of jurisdiction under Articles 16 and 34 of the Model Law is a trial *de novo* and that new evidence may be filed as of right.

(2) a party to a challenge of the jurisdiction of an arbitral tribunal under Articles 16 and 34 of the Model Law may not file fresh evidence as of right but must obtain leave to do so by providing a reasonable explanation for why new evidence is necessary, including why that evidence was not, or could not have been, put before the tribunal in the first place.

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Analysis

Issue 1: Revisiting the Earlier Evidentiary Ruling

[11] Counsel for Russia argues that my power to diverge from the earlier ruling of Dunphy J. is limited to circumstances where "the circumstances that were present at the time the order was made have materially changed." A change, to be material, must relate to a matter that justified the making of the order in the first place, *R. v. Adams*, 1995 Carswell Alta 733 para 31.

[12] This case and others that had followed it, however, do not deal with the circumstance where, in effect, an interlocutory ruling on the admissibility of evidence in a civil case is made by one judge and the "trial" judge feels the need to revisit the matter.

[13] Even assuming the "material change" requirement applies to an interlocutory ruling on admissibility in a civil case, *R. v. R.V.*, 2018 ONCA 547 (C.A.); rev'd on other grounds 2019 SCC 41, supports my view. In this case, the anticipated trial judge made a ruling about the scope of cross-examination in a sexual assault case. That judge declared herself unable to continue with the trial. Another judged assumed carriage. The accused immediately asked the second judge to revisit the earlier ruling. The trial judge declined to do so, considering the early judge's ruling was binding on him.

[14] The Court of Appeal found that the earlier ruling was not binding on the trial judge. Acknowledging the general rule requiring material change, the court went on to observe that there are many circumstances that might qualify for "material change" including misunderstandings, being unaware of relevant evidence and correcting a decision made in error (para. 103).[2]

[15] Counsel for Russia also submits that the issue should not be revisited because, in reliance upon the earlier ruling of Dunphy J., the parties have incurred expense in responding to and cross-examining on the new evidence. The broader circumstances of how the new evidence came about will be reviewed in greater detail below. I will only say that the force of this argument is significantly undermined by the fact that, on Russia's theory of the court's role in a review of jurisdiction under Article 16(3) of the Model Law and the admission of new evidence as of right, the entire process and hearing before the tribunal, conducted at much greater expense, is also rendered somewhat superfluous.

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[2] The SCC did not disagree with any of this.

[16] It seems to me axiomatic that a trial or hearing judge should not decide a case on the basis of evidence which he or she believes was incorrectly admitted by an interlocutory ruling of different judge. For this reason, I conclude that I have the authority to revisit the earlier evidentiary ruling to satisfy myself that it was correct and, if I conclude that it was not correct, to make a different ruling.

Issue 2: Should New Evidence Be Admitted in the Circumstances?

Background and Positions

[17] Under the direction of the Tribunal, the parties spent over 16 months engaged in the process of pleading, evidence gathering, disclosure and trial of the preliminary issues raised by Russia's jurisdictional objections:

(a) the Tribunal set out the procedural timetable for the arbitration and the procedure for disclosure and submission of pleadings and evidence;

(b) Russia filed its Memorial on jurisdiction in October 2014. This Memorial included 77 factual exhibits, 111 legal authorities and an expert report from Professor Asoskov (with a further 70 exhibits);

(c) Luxtona filed its Counter-Memorial on jurisdiction in February 2015. Luxtona's Counter-Memorial included 43 factual exhibits, 62 legal authorities, an expert report from Professor Willems (with a further seven exhibits), an expert report from Professor Stephan (with a further 24 exhibits) and a witness statement from Mr. Misamore;

(d) in March 2015, the parties submitted requests that the Tribunal order the production of documents;

(e) in April 2015, the Tribunal issued its decision on the document requests, granting certain requests and denying others;

(f) in May 2015, the parties confirmed their availability in January 2016 for the hearing on jurisdiction;

(g) in June 2015, Russia filed its Reply on Jurisdiction. Russia's Reply included 94 factual exhibits, 143 legal authorities, another expert report from Professor Asoskov (with a further 65 exhibits) and an expert report from Professor Tjittes (with an additional 22 exhibits);

(h) Luxtona filed its Rejoinder on Jurisdiction in October 2015. Luxtona's Rejoinder included 29 factual exhibits, 28 legal authorities, an expert report from Dr. Epstein (with a further five exhibits), a second expert report from Professor Willems (with a further 13 exhibits), a second expert report from Professor

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Stephan (with nine further exhibits) and a second witness statement from Mr. Misamore;

(i) in total, Russia and Luxtona filed approximately 700 exhibits, eight expert reports, two fact witness statements and approximately 530 pages of submissions;

(j) the hearing was held over five days in January 2016 in London, United Kingdom. There were five witnesses, all of whom testified before the Tribunal: Misamore, a fact witness; and four expert witnesses (Stephan, Willems, Asoskov and Tjittes);

(k) Luxtona was represented by five lawyers associated with the London office of Gibson, Dunn & Crutcher LLP. Russia was represented by eight lawyers associated with the London office of Debevoise & Plimpton LLP. These counsel had great expertise and experience in international arbitration;

(l) there were three objections raised by Russia to the Tribunal's jurisdiction: (1) the provisional application of the arbitration provision of the Treaty is inconsistent with Russian law; (2) Russia is entitled to deny Luxtona the benefits of the Treaty; and (3) Luxtona did not make a qualifying "investment" under the Treaty;

(m) on March 22, 2017, the Tribunal issued a 146 page interim award in which the Tribunal unanimously dismissed Russia's first and second objections. The Tribunal deferred its decision on the third objection; and

(n) although costs were not finally determined (due to the deferral of the Tribunal's decision on the third issue), I was advised that the cost submissions were in the order of approximately $7 million for Luxtona and approximately $8 million for Russia.

[18] In April 2017, Russia applied to the Ontario Superior Court of Justice in Toronto to set aside the interim award under Articles 16 and 34 of the Model Law. Russia seeks to set aside the interim award on the basis that the Tribunal wrongly decided Russia's first two objections.

[19] In addition to material filed before the tribunal, Russia filed:

(a) expert reports from Professors Avtonomov and Marochkin (who did not file expert reports or appear before the Tribunal) and

(b) a number of documents not filed before the Tribunal.

[20] According to counsel for Luxtona, the additional evidence falls into six categories:

(1) documents that existed before the arbitration that relate factual findings made by the Tribunal based on the record that Russia presented;

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(2) documents that Russia withheld from the Tribunal on grounds of privilege/state secrecy;

(3) documents that Russia attempted to file late in the arbitration in which the Tribunal deemed inadmissible;

(4) documents related to issues in separate proceedings, not the subject of the arbitration;

(5) pre-existing fact documents and legal authorities that Russia had access to and chose not to raise during the arbitration to support its argument; and

(6) new fact documents and legal authorities that Russia obtained after the arbitration.

[21] Luxtona objected to the filing of this evidence, which lead to the hearing before Dunphy J., discussed above.

[22] Russia argues that as the evidence before the Tribunal developed, one of the key issues was how the Russian constitutional principle of hierarchy of norms applied in the case of a provisionally applied treaty. This issue was addressed only in reply reports. Russia says that the Tribunal concluded that Professor Asoskov's opinion did not make clear how the hierarchy of legal acts relates to the specific manner of provisional application and decided to rely on its own reading of Russian case law and executive decisions. The Tribunal relied on Resolution 8-P of the Russian Constitutional Court but did not refer to a lower court ruling that gave rise to Resolution 8-P which was "not available" at the time the Tribunal made its decision.

[23] Russia's argument goes on to explain that Professor Avtonomov's expert evidence (the new evidence) "responds to these incorrect findings" of the Tribunal. It "explains why the tribunal's determinations of Russian constitutional law are incorrect." Professor Avtonomov's evidence addresses how the hierarchy of norms applies to the situation of provisional application and provides evidence about the executive decisions on which the Tribunal relied. Among other things, his evidence explains why the Tribunal's conclusion that "an unratified treaty being provisionally applied supplants inconsistent provisions of domestic law" is incorrect and contrary to the constitutional principles, the separation of powers and the hierarchy of norms. He also maintains that the Tribunal was "also incorrect" to conclude that the provisional application of the Treaty is not inconsistent with Russian federal statutes on the basis that its ratification may not have required amending other legislation, since it is ratification by the Federal Assembly that would have elevated the Treaty to the same level as federal statutes in the hierarchy of norms. Professor Avtonomov explains why the Constitutional Court's Resolution 8-P does not support the Tribunal's conclusion that an unratified treaty being provisionally applied "supplants" inconsistent provisions of domestic law.

[24] Russia argues that Professor Marochkin's evidence addresses statutory interpretation arguments that were before the Tribunal "to a limited extent," but evolved "following the hearing in response to positions asserted by Professor Stephan in reports submitted to the Hague Court of Appeal" in a different case. Russia submits that because Luxtona is likely to adopt the same

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position in this application as the complainant in the Hague Court of Appeal case is taking, Russia seeks to provide the Court with evidence necessary to address this issue.

Analysis

Ontario's Model Law

[25] Article 16 adopts the important principle that it is initially and primarily for the arbitral tribunal itself to determine whether it has jurisdiction, subject to ultimate court control. Paragraph (1) grants the arbitral tribunal the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. This power, referred to as the *competence-competence* principal, is an essential and widely accepted feature of modern international arbitration.

[26] If the arbitral tribunal rules, as a preliminary question, that it has jurisdiction, any party may request the court of the "seat*"* (in this case Toronto) *to decide the matter* and the decision of the court is subject to no appeal.

[27] Article 16 of the Model Law provides:

> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
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> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
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> (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

[28] Under Article 34 of the Model Law, recourse to the court must be brought by way of application to set aside the award. The applicant bears the burden of proof. And, the applicant must establish that the agreement was not valid, deals with a dispute not falling within the terms

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of the submission or contains a decision on matters beyond the scope of the submission to arbitration.

[29] Article 34 provides, in relevant part:

> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
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> (2) An arbitral award may be set aside by the court specified in Article 6 only if:
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> (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
>
> …
>
> (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.

Judicial Precedent

[30] The starting point for consideration of Articles 16 and 34 of the Model Law in Canada is the decision of the Court of Appeal for Ontario in *United Mexican States v. Cargill Inc.*, 2011 ONCA 622. The issue before the court was the standard of review by a court on an application to challenge jurisdiction under Article 34(2) of the Model Law.

[31] In the course of its analysis, the Court of Appeal considered the decision of the UK Supreme Court in *Dhalla Real Estate and Tourism Holding Company v. Pakistan*, [2010] UKSC 46, which concerned s. 103(2)(b) of the 1996 Act/Article V1(a) of the New York Convention. The Supreme Court held that when the issue is initial consent to arbitration, the court must determine for itself whether or not the objecting party actually consented. The objecting party has the burden of proof, which it may seek to discharge as it sees fit. In making its determination, the court may have regard to the reasoning and findings of the alleged arbitral tribunal, if they are helpful, but it is neither bound nor restricted by them. The Court of Appeal observed that the UK Supreme Court's approach was to address the issue *de novo* but concluded this approach was "a variant of applying the correctness standard."

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[32] The Court of Appeal found that, in a challenge to jurisdiction under the Model Law, the standard of review is correctness: the tribunal had to be correct in its determination that it had the ability to make the decision it made. The court's reasons establish four clarifying principles:

(1) in hearing an application to set aside an arbitral decision for lack of jurisdiction the court is performing a *review* of the decision;

(2) the onus is on the party challenging the award;

(3) the court must be satisfied that the challenge raises a "true question of jurisdiction"; but once that criterion is satisfied,

(4) the tribunal has to be correct in its assumption of jurisdiction and it is up to the reviewing court to determine, without deference, whether it was.

[33] The Court of Appeal's conclusion *Cargill* is consistent with the approach of the U.S. Federal Court of Appeal, Third Circuit, in *China Minmetals Materials Imp & Exp Co. Ltd. v. Chi Mei Corp.* 334 F. 3d 274 (2003).

[34] The issue of what constitutes the "record" for this review, and in what circumstances it could include fresh evidence, however, did not come up in *Cargill*. There is in fact no case in Canada dealing with this issue.

[35] Russia cited a decision of the British Columbia Superior Court in *Tanzanian Goldfields Company v. East Africa Metals Inc.*, 2018 BCSC 1511. This was a case involving alleged bias on the part of the arbitrator. Russia relies on this case to support its argument that a new record is permissible under a challenge to the arbitrator under the Model Law. I cannot agree.

[36] In *Tanzanian Goldfields* there was an ongoing hearing before the arbitrator. In the course of the arbitration, the petitioner raised the issue of arbitrator bias. There was a hearing before the arbitrator to consider the allegation of bias. The arbitrator declined to recuse himself. The petitioner brought application before the BCSC to have the arbitrator's decision overturned. The petitioner sought to put before the court additional material that was not specifically referred to during the recusal motion. The BCSC held that it was appropriate to "have access to the entire record regardless of whether particular portions of the record were put to the arbitrator at the initial recusal hearing." The reference in this decision to the "entire record" is, however, not a reference to fresh evidence. It is a reference to the totality of material that was already before the arbitrator on the arbitration, as distinct from the material that was referred to by the petitioner in its submissions during the recusal motion. *Tanzanian Goldfields* has no application to the circumstances or the issue before the Court in this case.

[37] Russia also relies on a number of cases from other jurisdictions which have admitted new evidence in a court challenge to an arbitral tribunal's findings on jurisdiction. All of these authorities at least stand for the proposition that no deference is owed to an arbitral tribunal's findings on jurisdiction, be it factual or legal, and that the reviewing court must decide for itself whether the tribunal had or did not have the requisite jurisdiction.

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[38] This is not the issue in dispute on this motion however. Standard of review is a separate question from the format of the review itself. One does not necessarily dictate the other, *Ford v. Toronto (City)*, 2012 ONCJ 92. In other words, the standard of review involving correctness, no deference and the reviewing court deciding for itself the question of jurisdiction, does not necessarily result in the conclusion that fresh evidence may be filed as of right. The issue on this motion is a narrow one – may parties to a challenge of an arbitral tribunal's award on jurisdiction under Articles 16 and 34 of the Model Law file new evidence on the review as of right? Or, as Luxtona maintains, must the party seeking to adduce new evidence on an Article 16/34 application in Ontario demonstrate that the new evidence meets the test articulated in *R. v. Palmer*, or some appropriate variant of this test?

[39] Some of the authorities relied on by Russia deal with circumstances where it is clear new evidence would be admitted under widely recognized principles of attornment/non-attendance (where, for example, the issue of jurisdiction is addressed in substance for the first time in the context of enforcement proceedings). In these cases, the party challenging jurisdiction has not participated in the earlier proceedings but is entitled to do so in defence of enforcement of the arbitral award including challenging the jurisdiction of the arbitrator. In such cases, that party's evidence is, by definition, "new" and is admitted because natural justice requires it.[3] Other authorities deal with circumstances where a *Palmer*- like test clearly has been met. Thus, for example, in *IMC Aviation Solutions Pty Ltd. v. Altain Khuder LLC* (2011) 282 ALR 717 (SCV – CA), the new evidence put before the reviewing court related to circumstances which arose after the arbitral award had been made.

[40] It cannot be denied, however, that there remains a body of law, almost all of which emanates from the London Commercial Court in charter party cases, which takes the view that, under s. 67 of the U.K. *Arbitration Act* (which is not based on the Model Law), a challenge to arbitral jurisdiction in the London Commercial Court is a trial *de novo*, in which the parties are at liberty to advance whatever evidence they deem appropriate and is otherwise admissible, regardless of the procedures followed, the evidence filed or the issues raised before the arbitral tribunal itself.

[41] I will deal with two or three of these cases in order to explore the basis upon which a number of judges of the London Commercial Court take this view. I will then consider how the reasoning in these cases lines up with applications under Articles 16 and 34 of the Model Law and the reasoning of the Court of Appeal for Ontario in *Cargill*.

[42] In *Electrosteel Castings Ltd. v. Scan-Trans Shipping & Chartering Sdn Bhd*, [2002] EWHC 1993 (Comm), Gross J. considered a challenge under s. 67 of the UK Arbitration Act to an arbitrator's ruling as to jurisdiction. Gross J. concluded that a court challenge to jurisdiction involved a rehearing rather than a simple review. He then turned to the question of whether the

[3] This appears to have been the case, for example in *Dhalla Real Estate and Tourism Holding Company v. Pakistan*, [2010] UKSC 46.

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> evidence on the rehearing should be confined to that adduced before the arbitrator. Both parties sought to adduce such evidence (there is no indication that this issue was seriously in dispute). Gross J. found the evidence on the rehearing was not so restricted for two reasons. First, there was no provision (in the UK Arbitration Act) restricting the introduction of additional evidence on the rehearing. Second, he relied on the decision of Colman J. in *Kalmneft JSC v. Glencore International AG,* [2001] EWHC QB 461. In *Kalmneft*, however, it also seems that the question of whether to admit new evidence on a s. 67 challenge was not a disputed issue resolved by the court. Gross J. also qualified his conclusion with the observation that "nothing said here should encourage parties to seek two evidentiary bites of the cherry in disputes as to the jurisdiction of arbitrators, not least because (1) evidence introduced late in the day may well attract a degree of scepticism and (2) the court has ample power to address such matters when dealing with costs."

[43] In *People's Insurance Company of China, Hebei Branch v. Vysanthi Shipping Co. Ltd.; The Joanna V,* [2003] EWHC 1655 (Comm), Thomas J. held that the court's duty on a challenge to jurisdiction is to rehear the matter. The party challenging the jurisdiction of the arbitrator is entitled to adduce such evidence as it considers necessary to show that the arbitrator has no jurisdiction. The court, he found, is not in any way bound or limited to the findings made in the award *or to the evidence adduced before the arbitrator*; it does not review the decision of the arbitrator but makes its own decision on the evidence before it.

[44] In *Central Trading & Imports Ltd. v Fioralba Shipping Company; The Kalisti,* [2014] EWHC 2397 (Comm), Males J. summarized the relevant case law under s. 67 of the UK Arbitration Act and concluded that, in general, a party is entitled to adduce evidence in a s. 67 challenge which was not before the arbitrator. He went on to say that the admission of new evidence is subject to the control of the court but, speaking generally, the court will not normally exclude evidence which is relevant and admissible. A s. 67 challenge is no different from other contested applications where the court has to determine disputed questions of fact and/or law. Males J. explained his reasoning in this way. A challenge to arbitral jurisdiction is a full judicial determination on evidence. It is, in general, up to the parties to determine the evidence on which they wish to rely and that evidence is not limited to whatever evidence was before the arbitrator. There is no unfettered discretion to exclude evidence on the ground that it may cause prejudice to the other side.

[45] The decisions of the London Commercial Court are not universally of this view however. Contrary opinions have been advanced in *Ranko Group v Antarctic Maritime SA, The Robin*, [1988] LMLN 492 and in *Primetrade AG v The Ythan Ltd*., [2005] EWHC 2399 (Comm). In the latter case, Aikens J. held that while there is no statutory limitation on adducing new evidence in s. 67 challenges, they are *rehearings*, not a completely fresh start as if there had been no previous challenge to the jurisdiction of the arbitrator. A party must, so far as possible, bring forward all its evidence at the hearing before the arbitrator. Anyone seeking to admit new evidence must, he held, seek leave of the court before doing so.

[46] There are no appellate decisions on this issue in the UK. The UK Supreme Court in *Dallah, supra,* did not address the matter of new evidence on the court challenge.

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[47] The UK is not a Model Law jurisdiction. To further support its position, therefore, Russia cites decisions from courts in jurisdictions which, like Canada, have adopted the Model Law. In particular, Russia relies on a decision of the High Court of Singapore in *Insigma Technology Co. Ltd. v. Alstom Technology Ltd.*, [2008] SGHC 134. There, Prakash J., citing a UK text, *Jurisdiction and Arbitration Agreements and their Enforcement*, concluded that the court's jurisdiction is an original jurisdiction, not limited to reviewing for error but involving a rehearing including, if necessary, the calling of witnesses *already heard by the tribunal*. The court, she said, echoing the words of the London Commercial Court, should not be in a worse position to make the assessment than the tribunal. Strictly speaking, this case does address the admission of "new" evidence.

[48] In a more recent decision, however, the Singapore High Court concluded that new evidence should not be admitted on the review of a tribunal's jurisdiction without leave, which should only be granted on the basis of a *Palmer*-like test. Leow J. held in *Government of the Lao People's Democratic Republic v. Sanum Investment Ltd.*, [2015] SGHC 15, that a party does not have a full, unconditional power to adduce fresh evidence at will on a challenge brought to a tribunal's jurisdiction. He applied a "modified" approach to the test for fresh evidence on appeal:

> (1) the party seeking to admit the evidence must demonstrate sufficiently strong reasons why the evidence was not adduced at the arbitration hearing;
>
> (2) the evidence if admitted would probably have an important influence on the result; and
>
> (3) the evidence is apparently credible, though it need not be incontrovertible.

[49] On appeal, the Court of Appeal of the Republic of Singapore ([2016] SGCA 57, at para. 27) held that the standard test in *Ladd v. Marshall* applied (*Ladd v. Marshall* is the UK equivalent, adopted in Singapore, to Canada's *R. v. Palmer*). That test is: 1) the evidence could not have been obtained using reasonable diligence; 2) the evidence would probably have an important influence on the case; and 3) the evidence must be apparently credible.

<u>The UK is not a Model Law Jurisdiction</u>

[50] The UK Arbitration Act governs challenges to a tribunal's jurisdiction. The UK legislation, however, is not based on and differs in material respects from the Model Law embodied in Ontario's *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch 5.

[51] That said, the UK Arbitration Act recognizes the principle of *competence-competence* (s. 30). The UK Arbitration Act grants the court the authority to "determine any questions as to the substantive jurisdiction of the tribunal" (s. 32). Section 67 of the Arbitration Act, as noted above, allows a party to apply to the court to challenge any award of an arbitral tribunal "as to its substantive jurisdiction." These provisions are all substantially similar to provisions in the Model Law.

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[52] Unlike the Model Law, however, an appeal lies from the UK court's decision under s. 67 (challenge to substantive jurisdiction) with leave. Under the Model Law there is no appeal from the court's decision under Articles 16 and 34 (see s. 11 of the *International Commercial Arbitration Act*, *supra*).

[53] Section 68 of the UK legislation also provides for an additional, entirely different, ground of challenge. This ground for challenge is said to be on the basis of "serious irregularity" affecting the tribunal, the proceedings or the award. There is no provision of comparable scope in the Model Law granting a basis to challenge the award of an arbitral tribunal. Under the UK Arbitration Act, an appeal also lies from the court's decision on any question of law, with leave (s. 69).

[54] Thus, while there are some similar provisions in the UK Arbitration Act and Ontario's Model Law, there are also some differences. And, while these differences are not dispositive of, for example, the applicability of the London Commercial Court's views of the admissibility of new evidence on a jurisdictional challenge, they offer insight into a significant difference in emphasis and scope for court intervention in the decisions of arbitral tribunals between the two statutory regimes.

[55] The fact that the London Commercial Court's decisions on this issue stem from the application of a legislative regime which differs materially from Ontario's Model Law, therefore, requires that these decisions, and the underlying reasoning behind these decisions, be scrutinized with care before being adopted as the law of Ontario, notwithstanding the London Commercial Court's unquestioned status, experience and expertise in the adjudication of complex international commercial disputes.

[56] I am also mindful of the fact that UK courts have a history of international maritime law and dispute adjudication unparalleled in the modern world. This history and depth of experience likewise suggests that the UK could be considered differently situated when analyzing the meaning and intent of Ontario's Model Law and the scope of the hearing to challenge a tribunal's jurisdiction.

The UK Approach is not Consistent with *Cargill*

[57] In *Cargill,* our Court of Appeal carefully delineated an important, but narrow, role for court intervention under Articles 16 and 34 of the Model Law. In a jurisdictional challenge, the court must exercise care to ensure that the issue in the challenge characterized as "jurisdictional" is, in fact, an issue of "true" jurisdiction. (There is no question in this case that what we are dealing with is an issue of "true" jurisdiction.)

[58] The Court of Appeal also very clearly described what the court is doing on a jurisdictional challenge under the Model Law as a "review." On a true jurisdictional challenge, it is a review on correctness, without any deference, in which the court must come to its own conclusion on whether the tribunal had jurisdiction, but a "review" nevertheless. This is a profoundly different approach from that propounded by the cases from the London Commercial

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Court, which generally describe the court's role on a challenge under s. 67 of the UK Arbitration Act as a trial *de novo*.

[59] The decision of the Court of Appeal for Ontario is binding on me; the decisions of the London Commercial Court are not.

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The UK Approach Undermines the *Competence-Competence* Principle

[60] Giving effect to the *competence-competence* principal requires that parties to an arbitration, where jurisdiction is challenged, have strong incentives to bring forward, to the extent possible, all of their evidence at the hearing before the tribunal. Here, the fresh expert evidence, prepared with the benefit of hindsight and knowing the tribunal's decision, is specifically directed at attacking the reasons of the tribunal to show why it was wrong. The evidence, therefore, is quite explicitly seeking to shore up or bolster the jurisdictional case which Russia lost at the tribunal.

[61] If parties can adduce fresh evidence at will, both parties to the jurisdictional challenge will have an incentive, knowing what the tribunal's decision now is, to file new evidence providing further support for their position and why the tribunal was right or wrong in its determination. This, it seems to me, will result in such evidence being routinely filed and the court routinely conducting a trial *de novo* on jurisdiction. This will have the further result that the record put before the court will routinely be materially different than that put before the tribunal. The tribunal, in that scenario, will not have, as Article 16(1) requires, the ability to "rule on its own jurisdiction including *any* objections with respect to the existence or validity of the arbitral agreement" [my emphasis].

[62] I do not believe this is what the Legislature had in mind when it enacted the *International Commercial Arbitration Act, 2017* or what the Court of Appeal for Ontario had in mind when it decided, in *Cargill*, that the court hearing a challenge to the tribunal's jurisdiction must, without deference, apply the standard of correctness and decide the question of jurisdiction for itself. Given the care taken by the Court of Appeal in *Cargill* to support the integrity of the arbitration process, it would seem a strange result that the losing party could, on a jurisdictional review by the court, effectively replace or substantially amend the record it put before the tribunal and proceed with its jurisdictional challenge to the court on the basis of entirely different evidence.

When New Evidence May be Admitted

[63] This is not to say, obviously, that new evidence could never be admitted or that the parties are necessarily bound by the evidence put before, or the evidentiary rulings of, the tribunal whose jurisdiction is being challenged.

[64] In this case, there has been a robust process, with full opportunity to advance each side's evidence and arguments and to confront and challenge the evidence and arguments of the other side. Both parties were well represented by experienced counsel before an expert tribunal. There was a lengthy hearing. The fairness of that hearing is not in question. On the basis of that robust process, the tribunal rendered a lengthy and detailed decision.

[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, 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.

Conclusion

[69] For these reasons I conclude that fresh evidence in an application to set aside an arbitral tribunal's award on jurisdiction under Articles 16 and 34 of the Model Law may not be introduced as of right. A party seeking to adduce fresh evidence in this circumstance must show that:

1) the evidence could not have been obtained using reasonable diligence;

2) the evidence would probably have an important influence on the case;

3) the evidence must be apparently credible; and

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

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[70] Russia has not attempted to justify admission of its fresh evidence under any of these four requirements. Accordingly, Russia's new evidence is not admissible in its application to review the correctness of the arbitral tribunal's award on jurisdiction.

Costs

[71] A party seeking costs shall do so by filing a brief written submission, not to exceed three typed double-spaced pages, together with the bill of costs. Party responding to such a request shall also file the bill of costs it would have filed had it been seeking costs, together with a brief written submission of no more than three typed double-spaced pages.

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Penny J.

Date: December 13, 2019

CITATION: The Russia Federation v. Luxtona Limited, 2019 ONSC 7558
COURT FILE NO.: CV-17-11772-CL
DATE: 20191220

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: The Russia Federation, Applicant

AND:

Luxtona Limited, Respondent

BEFORE: Penny J.

COUNSEL: *John Terry, Miriam Seers and Emily Sherkey* for the Applicant

Lincoln Caylor, Ranjan K. Agarwal and S. Bandali for the Respondent

HEARD: October 23, 2019

ADDENDUM TO ENDORSEMENT OF DECEMBER 13, 2019

[1] In my Endorsement in this matter of December 13, 2019, I stated:

> (c) in a footnote on p. 2 that, with respect to the *R. v. Palmer* test for the introduction of new evidence, that the applicant, The Russia Federation "concedes that it would not meet this test or any variant of the test"; and
>
> (d) in para. 70, that The Russia Federation had "not attempted to justify admission of its fresh evidence under any of" the four requirements under the test in *R. v. Palmer*, and, as a result, "Russia's new evidence is not admissible in its application to review the correctness of the arbitral tribunal's award on jurisdiction."

[2] As a result of a miscommunication between counsel and the Court, these two statements are not correct. Counsel and the Court are in agreement that this error was not the "fault" of anyone in particular but the result of a misunderstanding about how the parties intended that the issue of admissibility be dealt with, both before Dunphy J. and before me, in the event of a ruling that the new evidence proffered by Russia was not admissible as of right.

[3] The parties agreed that the original motion, and my rehearing of that motion, would deal with the "threshold" issue of whether, on a court challenge to arbitral jurisdiction under Articles 16(3) and 34(2) of the Model Law, fresh evidence is admissible as of right. If the answer to that question was "No", however, then the parties agreed that Russia would have the ability to seek leave to introduce certain of that evidence under the test in *R. v. Palmer* (or an appropriate variant of that test).

[4] I was advised of this understanding in a chambers appointment on December 18, 2019 and, of course, agreed to give effect to that understanding between the parties. We then proceeded to schedule a further motion for leave, yet to be argued, on this basis.

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[5] Accordingly, the last two sentences of the footnote on p. 2, and the entirety of para. 70 of my Endorsement, should be excised from those reasons, and my Endorsement read in conjunction with this Addendum for a proper understanding of the result of the motion heard by me on October 23, 2019.

Penny J.

Date: December 20, 2019

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