

SUPERIOR COURT
(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-056231-190

DATE: March 10, 2020

BY THE HONOURABLE MARIE-ANNE PAQUETTE, J.S.C.

METSO MINERALS CANADA INC.

and

METSO MINERALS INDUSTRIES INC.

Applicants

v.

ARCELORMITTAL EXPLOITATION MINIÈRE CANADA

and

ARCELORMITTAL CANADA INC.

Respondents

and

SNC LAVALIN INC.

Intervener

JUDGMENT

ON THE AMENDED APPLICATION FOR THE RECOGNITION OF AN ARBITRATION
AWARD MADE OUTSIDE QUEBEC (SEQ. 18)
AND ON THE *DEMANDE EN IRRECEVABILITÉ ET EN REJET D'ACTION* FILED
AGAINST THE APPLICATION

OVERVIEW

[1] Metso Minerals Canada Inc. and Metso Minerals Industries Inc. (**Metso**) beg the Court to recognize the international arbitration award (**Award**¹) issued after an arbitration held in New York, pursuant to an Arbitration Agreement² between Metso and ArcelorMittal Exploitation Minière Canada and AcelorMittal Canada Inc. (**ArcelorMittal**) and to the Arbitration Rules of the *International Chamber of Commerce* (**ICC Rules**).

[2] The Award rules on the dispute between Metso and ArcelorMittal for damages allegedly caused by a defective grinding mill (**AG Mill**) and by defective vibrating feeders which Metso sold to ArcelorMittal.

[3] The conclusions of the Award read as follows:

ON THE BASIS OF THE ABOVE THE ARBITRAL TRIBUNAL DECIDES BY MAJORITY AS FOLLOWS:

1. [ArcelorMittal]'s claim as to the payment by [Metso] of sums resulting from the AG Mill's defects dismissed;
2. [ArcelorMittal] must bear 80% and [Metso] 20 % of the Fees and Expenses of the Arbitrators and of the ICC's Administrative Expenses fixed by the ICC International Court of Arbitration at USD 863,000.00. [ArcelorMittal are consequently ordered to pay [Metso] USD 258,900;
3. [ArcelorMittal] must bear 80% of the reasonable Legal Costs incurred by [Metso] as determined by the Arbitral Tribunal, plus the full amount relating to the Vibrating Feeders Claim i.e. USD 4,503,797.32 and are consequently ordered to pay that amount to [Metso];
4. All other requests and claims from the Parties [(Metso and ArcelorMittal)] are dismissed.

[Emphasis added]

[4] The New York Court confirmed the Award, after dismissing ArcelorMittal's objection to Metso's Petition to recognize it³.

[5] ArcelorMittal thereafter honoured the monetary conclusions (conclusions 2 and 3 above) of the Award and a Declaration of Satisfaction of Judgment was filed in the record of the New York Court⁴.

¹ Exhibit R-3.

² Exhibit R-2.

³ Exhibits R-9, R-10, R-11.

⁴ Exhibit R-12.

[6] Metso now seeks to have the Award recognized and declared to have the same force and effect as a judgment of the Superior Court of Québec, pursuant to Section 652 of the *Quebec Code of Civil Procedure*.

[7] Given that ArcelorMittal satisfied the monetary conclusions of the Award and that a Declaration of Satisfaction of Judgment was filed, should the Quebec Superior Court hold that Metso's Application for recognition is theoretical and refuse to recognize the Award for this reason?

[8] The Court answers in the negative and grants an order recognizing the Award.

ANALYSIS

[9] Metso's Amended Application for Recognition of the Award is made pursuant to article 652 of the *Code of Civil Procedure* :

CHAPTER IX

RECOGNITION AND ENFORCEMENT OF ARBITRATION AWARDS MADE OUTSIDE QUEBEC

652. CCP An arbitration award made outside Québec, whether or not confirmed by a competent authority, may be recognized and declared to have the same force and effect as a judgment of the court if the subject matter of the dispute is one which could be submitted to arbitration in Québec and if recognition and enforcement of the award are not contrary to public order. The same applies for a provisional or safeguard measure.

[Emphasis added]

[10] When dealing with such an application, the Quebec courts shall consider⁵ the **New York Convention**⁶ and the **UNCITRAL Model Law**⁷, which stipulate the following regarding the recognition and the enforcement of arbitration awards:

New York Convention

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

⁵ CCP, art. 652(3).

⁶ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* adopted by the United Nations Conference on International Commercial Arbitration at New York on June 10, 1958.

⁷ *Model Law on International Commercial Arbitration* 1985 (United Nations Commission on International Trade Law [UNCITRAL]), coming into force 21 June 1985, UN Doc A/40/17 Annex I and A/61/17, Annex I.

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.

UNCITRAL Model Law

Article 35. Recognition and enforcement

- (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.

[Emphasis added]

[11] No one disputes that the conditions of article 652(1) of the *Code of Civil Procedure*, which Metso has the burden to establish, are met:

- 11.1. The subject matter of the dispute is one which could be submitted to arbitration in Quebec;
- 11.2. The recognition and enforcement of the award is not contrary to public order.

[12] ArcelorMittal also acknowledges that none of the exceptions to the recognition and enforcement of international arbitration awards, which are listed in article 653(2) of the *Code of Civil Procedure*, apply in the case at hand. These exceptions are:

- 12.1. If one of the parties did not have the capacity to enter into the arbitration agreement (CCP, art. 653(2), sub par. 1);
- 12.2. If the arbitration agreement is invalid under the law chosen by the parties or, failing any indication in that regard, under the law of the place where the award was made or the measure decided (CCP, art. 653(2), sub par. 2);
- 12.3. If the procedure for the appointment of an arbitrator or the arbitration procedure was not in accordance with the arbitration agreement or, failing such agreement, with the law of the place where the arbitration proceedings were held (CCP, art. 653(2), sub par. 3);
- 12.4. If the party against which the award or the measure is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings, or it was for another reason impossible for that party to present its case (CCP, art. 653(2), sub par. 4);
- 12.5. If the award pertains to a dispute referred to in or covered by the

arbitration agreement, or contains a conclusion on matters beyond the scope of the agreement, in which case only the irregular provision is not recognized and declared enforceable if it can be dissociated from the rest (CCP, art. 653(2), sub par. 5);

12.6. If the award or measure has not yet become binding on the parties or has been annulled or stayed by a competent authority of the place where or under whose law the arbitration award was made or the measure decided (CCP, art. 653(2), sub par. 6);

12.7. In the case of a provisional or safeguard measure, if the arbitrator's decision to require a suretyship was not complied with, if the arbitrator revoked or stayed such measure or if the measure is incompatible with the powers conferred on the court (CCP, art. 653(3)).

[13] We shall bear in mind that recognition and enforcement are refused only in exceptional cases. The New York Convention indeed promotes the stability of international commercial interests by facilitating the recognition and fluency of arbitration awards with uniform grounds of opposition applicable to foreign arbitration.⁸

[14] Are we dealing here with an exceptional case where recognition should be refused?

[15] ArcelorMittal argues that the recognition of the Award would serve no purpose, as it has been fully executed. According to ArcelorMittal, the Court should use its discretion and refuse to issue an order on a theoretical question.

[16] The Court holds that such opposition to the recognition of the Award is ill-founded for the following reasons.

[17] Metso only now pursues the recognition of the Award. After ArcelorMittal honored the monetary conclusions of the Award, Metso amended the present application and removed the conclusions seeking the enforcement of the Award.

[18] All the above-quoted provisions refer to the recognition and to the enforcement of an award, which are two distinct aspects of such proceedings.

[19] The first aspect, the recognition of an award, refers to its authority or binding effect. Recognition makes the award binding and gives it the same legal weight and authority as any other judgment of the Court.

⁸ Patrick FERLAND and Marie-Josée HOGUE, *LegisPratique – Guide de l'arbitrage*, LexisNexis Canada, 2014, pp. 350-351, par. 10-8 and 10-9, citing *Automatic Systems Inc. v. Bracknell Corp.*, (1994) 113 D.L.R. (4th) 449, 456 (Ont. C.A.).

[20] The second aspect, the enforcement of an award, goes a step further. It ensures that the award is carried out, that it is executed.⁹

[21] Hence, “recognition” and “enforcement” are distinguishable and independent terms. Although an award will not be enforced if it is not recognized, it can be recognized without being enforced. As exposed at length below, the recognition can be sought independently from the execution of an award:

Article 35 [of the UNCITRAL Model Law] draws a useful distinction between recognition and enforcement in that it takes into account that recognition not only constitutes a necessary condition for enforcement but also may be standing alone, e.g. where an award is relied on in other proceedings.¹⁰

It is necessary to distinguish recognition from enforcement. The terms are sometimes used as though they are always inextricably linked. For example, the New York Convention itself speaks of ‘recognition and enforcement’ of foreign arbitral awards. The terms are, however, distinct. On this point, the 1927 Geneva Convention was more precise, when it spoke of ‘recognition or enforcement’. An award may be recognised without being enforced. However, if it is enforced, then it is necessarily recognised by the court that orders its enforcement. The precise distinction, in other words, is between ‘recognition’ and ‘recognition and enforcement’.¹¹

[...]

Recognition on its own is generally a defensive process. It will usually arise when a court is asked to grant a remedy in respect to a dispute that has been the subject of previous arbitral proceedings. The party in whose favour the award was made will object that the dispute has already been determined. To prove this, it will seek to produce the award to the court, and will ask the court to recognise it as valid and binding upon the parties in respect of the issues with which it dealt. [...] ¹²

The use of recognition on its own may be illustrated by considering the example of a company that is made a defendant in legal proceedings by a foreign supplier for goods sold and delivered, but allegedly not paid for. Suppose that the dispute between the company and the foreign supplier has already been submitted to arbitration, and that an award has been made, in which the foreign supplier’s claim was dismissed. In these circumstances, the company will ask the court to

⁹ Patrick FERLAND and Marie-Josée HOGUE, *LegisPratique – Guide de l’arbitrage*, LexisNexis Canada, 2014, p. 352, par. 10-10.

¹⁰ *Analytical Commentary on the Draft Text of the Model Law on International Commercial Arbitration* contained in the *Report of the Secretary General to the eighteenth session of the United Nations Commission on International Trade Law (the Analytical Commentary)*, 3 - 21 June 1985, Article 35, para. 4.

¹¹ Alan REDFERN and Martin HUNTER, *Redfern and Hunter on International Arbitration*, 6th edition, New York, Oxford University Press, 2015, para.11.19.

¹² *Ibid.*, para.11.20.

recognize the award as a valid defence to the foreign supplier's new claim. If the court is prepared to do this, the claim is dismissed. The legal force and effect of the foreign award will have been recognized, but the award itself has not been enforced.¹³

As the example shows, the purpose of recognition on its own is generally to act as a shield. Recognition is used to block any attempt to raise in fresh proceedings issues that have already been decided in the arbitration that gave rise to the award of which recognition is sought.¹⁴

[Emphasis added]

[22] ArcelorMittal's submission that the recognition of the Award would be theoretical and of no use is untenable.

[23] Metso and ArcelorMittal are currently parties to two pending cases before the Superior Court of Quebec relating to the performance of the same AG Mill at issue in the arbitration.¹⁵ Metso intends to invoke the Award in its defence in the context of these two other cases. The determination as to whether or not the Award actually settles a live controversy between the parties or has a practical effect on the claims of the parties in these two Quebec Superior Court case shall be made in the context of these two cases.

[24] Until these questions are addressed and decided, the Court cannot rule on the practical utility of the Award. However, this debate does not belong to the recognition of the Award under article 652 of the *Code of Civil Procedure* and shall be addressed in the proper context, in the two above-mentioned Superior Court cases. Hence, the doctrine of mootness does not preclude recognition of the Award.

WHEREFORE, THE COURT:

[25] **RECOGNIZES** in the Province of Québec the Arbitral Award issued on March 20, 2019 by the *International Court of Arbitration of the International Chamber of Commerce*, in New York, New York, United States of America (ICC case n° 22034/RD), of which the conclusions read:

ON THE BASIS OF THE ABOVE THE ARBITRAL TRIBUNAL DECIDES BY MAJORITY AS FOLLOWS:

1. Claimant's claim as to the payment by Respondents of sums resulting from the AG Mill's defects dismissed;

¹³ Alan REDFERN and Martin HUNTER, *Redfern and Hunter on International Arbitration*, 6th edition, New York, Oxford University Press, 2015, para.11.21.

¹⁴ *Ibid.*, para.11.23.

¹⁵ 500-17-093641-168 and 500-17-083593-148.

2. Claimants must bear 80% and Respondents 20% of the Fees and Expenses of the Arbitrators and of the ICC's Administrative Expenses fixed by the ICC International Court of Arbitration at USD 863,000.00. Claimants are consequently ordered to pay Respondents USD 258,900;
3. Claimants must bear 80% of the reasonable Legal Costs incurred by Respondents as determined by the Arbitral Tribunal, plus the full amount relating to the Vibrating Feeders Claim i.e. USD 4,503,797.32 and are consequently ordered to pay that amount to Respondents;
4. All other requests and claims from the Parties are dismissed.

[Emphasis added]

[26] **DECLARES** the Arbitral Award dated March 20, 2019 (ICC case n° 22034/RD) to have the same force and effect as a judgment of the Superior Court of Québec;

[27] **LEGAL COSTS TO FOLLOW.**

MARIE-ANNE PAQUETTE, J.S.C.

Me Élisabeth Neelin
Me Katherine Loranger
Me Guillaume Leahy
Me Bernard Jolin
LANGLOIS AVOCATS s.e.n.c.r.l.
Attorneys for the Applicants

Me Stephan H. Trihey
Me Guy Gilain
Me Lucie Lactuit
MILLER THOMSON SENCRL
Attorneys for the Respondents

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