



FRASER MILNER CASGRAIN LLP

Letters of Request From a Private Arbitral Tribunal

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Introduction

In *BF Jones Logistics Inc v Rolko* (1) the Ontario Superior Court of Justice held that it did not have jurisdiction to enforce a letter of request from a foreign private arbitral tribunal. The applicants were involved in an arbitration with Ryder Integrated Logistics Inc in Florida, United States, regarding an asset purchase agreement between the parties. BF Jones Logistics Inc sought to enforce a purported letter of request issued by the arbitral tribunal to examine a non-party witness. Ryder strenuously opposed the issuance of an order giving effect to this request.

The court found that Section 60 of the Ontario Evidence Act was ambiguous as to the enforcement of such letters of request from private arbitrators, and that there was no precedent in Ontario for their enforcement under that act, although effect is commonly given to requests issued by foreign courts. The Ontario court then considered the terms of the Ontario International Commercial Arbitration Act 1990, which was adopted under the UN Commission on International Trade Law Model Law on International Commercial Arbitration 1985. It concluded that letters of request issued by private arbitrators outside Ontario are not to be enforced by the Ontario courts.

Background

The Ontario Superior Court of Justice's reasons for the decision provide little information about the Florida arbitration proceeding between BF Jones and Ryder, other than that it involved an arbitration over an asset purchase agreement. The proposed witness, a resident of Ontario, was willing to give evidence in court, but his employer had a policy of allowing employees to participate in third-party disputes only when legally obligated to do so. Therefore, the witness and his employer took no position in the application. Ryder strongly opposed the application, which was for an order giving effect to a letter of request issued by the private arbitrator in Florida.

Decision

Section 60 of the Ontario Evidence Act governs the enforcement in Ontario of foreign letters of request. There is also a comparable provision in the federal statute. Section 60 covers the due authorization by commission, order or other process of a letter of request by "a court or tribunal of competent jurisdiction in a foreign country". It further refers to the issue of an order giving effect to such a request "for a purpose for which a letter of request could be issued under the rules of court". In essence, the act is permissive and grants an Ontario judge the discretion to decline to enforce a letter of request even if the pre-conditions set out in the statute have been

met. Where the court orders the examination of the witness and/or the production of writings or documents mentioned in the order, such an examination would proceed in Ontario in the same way as if it were an Ontario court proceeding.

Justice Lissaman concluded that:

"the courts should not be put in the position of having to judge from afar the legitimacy and procedures of a foreign private body. The overriding principle of comity does not mandate states assisting private bodies in this way."

More particularly, and after referring to the provisions of the International Commercial Arbitration Act, the court concluded that the requesting private arbitral tribunal would not have the ability to reciprocate. As reciprocity is a manifestation of the international comity between friendly nations, and the rationale behind the power to order the taking of commission evidence, in the absence of reciprocity the court concluded that it was inappropriate to enforce the Florida arbitral tribunal's letter of request.

The court considered the scope of Article 27 of the model law, and construed this as assistance by the Ontario court to Ontario arbitral tribunals in taking evidence by limiting it to court assistance within the territory in which the arbitration is taking place. By omitting reference to tribunals outside Ontario, the court concluded that the intention was to not provide for the enforcement of such extra-jurisdiction private arbitral letters of request.

The court also considered the commercial dispute resolution procedures of the American Arbitration Association, and concluded that there was nothing within those procedures that authorized a tribunal governed by the association to issue letters of request. The procedures were seen as allowing only for the issuance of subpoenas in their own jurisdiction.

The court also followed precedent set by the Ontario Court of Appeal when it refused to enforce a letter of request issued by the US Securities and Exchange Commission, concluding that the commission did not have the jurisdiction to issue letters of request. The appeal court found that under the Ontario Evidence Act the Ontario courts may enforce letters of request issued only by "a court of law or equity", and that the commission did not fall into this category. (2)

In the present case the court also found that there was precedent for holding that an Ontario arbitration tribunal could not compel the testimony of an offshore witness by issuing a letter of request. It concluded that the International Commercial Arbitration Act authorized only requests for assistance in taking evidence being made to the courts within the state where the arbitration is being conducted.(3)

Lissaman denied the application to enforce the letters of request issued by the private Florida arbitral tribunal. He concluded by stating that "the proper procedure possibly is for the applicant to seek the assistance of a Florida court to issue a letter of request to this court".

Comment

This decision is consistent with several major precedent decisions in Canada that discuss the nature of letters of request, and the jurisdiction and practice for the enforcement of such letters based on international comity. The decision of *France (Republic) v DeHavilland Aircraft of Canada Ltd*⁽⁴⁾ was properly cited by Lissaman. As the Court of Appeal stated in that decision, the exercise of a court's discretion requires the balancing of two broad considerations: the impact of the proposed order on Canadian sovereignty and whether justice requires that the taking of commission evidence be ordered.

In the case of *Zingre v R*,⁽⁵⁾ a decision of the Supreme Court of Canada, the court concluded that "the granting of an order for examination, being discretionary, will depend on the facts and particular circumstances of the individual case". Faced with an application for the enforcement of a letter of request, the court or judge "must balance the possible infringement of Canadian sovereignty with a natural desire to assist the courts of justice of a foreign land".

There are several factors involved in framing a successful foreign court's letter of request for the assistance of a Canadian court, whether proceeding under provincial or federal statutory provisions, in order to obtain testimony or documentary evidence required in relation to a matter pending before a foreign court. Canadian counsel should be retained prudently at an early date to assist.

For further information on this topic please contact [Kenneth R Peel](mailto:kenneth.peel@fmc-law.com) or [Michael Schafler](mailto:michael.schafler@fmc-law.com) at Fraser Milner Casgrain LLP by telephone (+1 416 863 4396) or by fax (+1 416 863 4592) or by email (kenneth.peel@fmc-law.com or michael.schafler@fmc-law.com).

Endnotes

(1) [2004] 72 OR (3d) 355 (published March 4 2005).

(2) See *McCarthy v US Securities and Exchange Commission* [1963] 2 OR 154, 38 DLR (2d) 660 (CA).

(3) *Corporacion Transnacional de Inversiones SA de CV v STET International SpA* [1999] 45 OR (3d) 183; [1999] OJ No 3573 (SCJ).

(4) [1991] 23 OR (3d) 705; 65 CCC (3d) 449 (CA).

(5) [1981] 2 SCR 392; 127 DLR (3d) 223; followed in *Re Fecht and Deloitte & Touche* [1997] 32 OR (3d) 417 (Ontario CA).

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