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British Columbia Signals To The International Community That It Is An Enforcement-Friendly Jurisdiction

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In *Sociedade-de-fomento Industrial Private Limited v. Pakistan Steel Mills Corporation*, decided on June 2, 2014, the Court of Appeal of British Columbia set the test in international arbitration for enforcing foreign arbitral awards by freezing assets. The decision confirms that a party with limited association to British Columbia may enforce an arbitral award by *Mareva* injunction without an onus to first establish that enforcement elsewhere was not possible. In considering when to grant an injunction, the court may consider the relative ease or difficulty of enforcement abroad, among other factors. Delay, inconvenience and financial loss are some of the factors that indicate difficulty in enforcement.

The Court of Appeal held that the New York Convention provides a presumption of a 'real and substantial connection' and explicitly permits parties to an international arbitration to enforce an award in any contracting state.

In June 2010, Sociedade-de-Fomento Industrial Private Limited ("SFI"), a company incorporated in India, obtained an arbitral award of $8, 673, 492.55 ("the Final Award") against Pakistan Steel Mills Corporation (Private) Limited ("PSM"), a Pakistani state owned steel manufacturer, in an arbitration conducted under the arbitration rules of the ICC. Following the award, PSM did not pay SFI. SFI was unable to identify any overseas assets of PSM against which it could seek to enforce its award. SFI eventually became aware of the fact that PSM had purchased and would be importing coal of a value of $16.5 million from British Columbia.

SFI filed a petition in the BC Supreme Court for payment of the Final Award on April 21, 2011. It also applied for and obtained an *ex parte Mareva* injunction, preventing the use of PSM's assets (including the coal delivered F.O.B.) or removal from British Columbia until $9,000,000 was paid into court. The *Mareva* Order required SFI to provide an undertaking as to any damages that PSM or a third party might suffer by reason of the Order.

On December 1, 2011, the Court recognized and enforced the Final Award. SFI sought to recover all of its costs in enforcing the Final Award. PSM argued that the *Mareva* injunction was wrongly obtained and SFI should bear the costs.

The BC Supreme Court considered the core principles for granting a *Mareva* injunction: the

applicant must show a good arguable case for the underlying claim, and the granting of the injunction must on balance be just and convenient. The Court found that the limited association of either party with British Columbia and the ability of SFI to enforce its award elsewhere, in particular in Pakistan, was a material fact that should have been disclosed to obtain the *Mareva* injunction. The Court held that the lack of evidence that SFI had made an inquiry regarding the possibility of enforcement of the award in Pakistan and the fact that SFI did not disclose that Pakistan is a signatory to the New York Convention constituted material non-disclosure.

Accordingly, the injunction was set aside and SFI was held liable to PSM for the damages caused by the *Mareva* injunction. SFI appealed the ruling.

The Court of Appeal considered whether the court of first instance erred in deciding that an injunction to secure an international arbitration award ought not to have been issued where the parties had little connection to British Columbia and where the arbitration award could have been enforced in Pakistan.

The Court of Appeal confirmed that the test for the granting of a *Mareva* injunction is the balance of justice and convenience between the parties. Depending on the facts of the case, important factors may include the merits of the underlying claim, the risk of dissipation of the asset, the balance of convenience and the interests of third parties.

The Court of Appeal addressed the effect of the New York Convention and the enabling legislation in British Columbia and found that for jurisdictional purposes, an international arbitral award is recognised on the same basis as if it were a domestic award originating in the province. The recognition and enforcement of international arbitral awards is governed by the international commercial arbitration acts of each province, which incorporate the UNCITRAL Model Law. The enforcement of foreign awards is governed by the New York Convention. The relevant legislation in British Columbia is the *Foreign Arbitral Awards Act*, RSBC 1996 c 154 and the *International Commercial Arbitration Act*, RSBC 1996, c 233 ("ICCA"). Section 4 of the *Foreign Arbitral Awards Act* provides that foreign arbitral awards may be enforced in British Columbia by application to the Supreme Court of British Columbia. Section 35(1) of the ICAA, which also provides for enforcement of awards, is expressly not limited to arbitration conducted within British Columbia. Section 10 of the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28 ("CJPTA") provides that a real and substantial connection is presumed to exist in a proceeding to enforce an arbitral award made outside of British Columbia.

The Court of Appeal found that the New York Convention, as implemented in British Columbia, removes jurisdictional boundaries and the "need for expansive inquiries into whether a proceeding has a real and substantial connection to British Columbia as an enforcing jurisdiction". The statutory scheme is unambiguous in its presumption of a real and substantial connection which is not limited to final judgments and applies equally to interlocutory remedies. The Court noted that the statutory scheme implementing the New York Convention anticipated an action to enforce the award and that there were only limited grounds on which a defendant could resist recognition and enforcement under Article V of the New York Convention and Section 36 of the ICAA. Accordingly, there was no basis for finding that a real and substantial connection existed for some, but not all, purposes in pursuing a claim for enforcement.

The Court found that while the availability of enforcement proceedings in Pakistan was not an entirely irrelevant factor to the balance of convenience analysis, the court of first instance ought to

have taken into account the delay that would accompany enforcement proceedings in Pakistan, as well as the considerable challenges to the enforcement of the Final Award under Pakistani law. The expert evidence presented by the parties conflicted on how long the enforcement process would take in Pakistan. One expert maintained that the estimated enforcement process would take between 12 and 18 months, while the other expressed the view that inordinate delay occurs in all Pakistani judicial proceedings. Both experts agreed that one of the defences available to PSM in Pakistan would have been a public policy defence, which has been interpreted as incorporating Islamic Law with respect to the payment of interest. The issue remains unsettled under the law of Pakistan.

The Court of Appeal concluded that in considering whether it was just and convenient to grant the injunction, the analysis ought to have taken into account the delay that would accompany enforcement proceedings in Pakistan, as well as the considerable doubt about the enforcement of that part of the award representing interest under Pakistani law. The Court of Appeal held that the injunction was properly ordered, set aside the order that SFI was liable to PSM for the damages suffered by it as a result of the injunction. The Court also awarded SFI its costs of enforcing the award as damages, which were remitted to court of first instance for assessment.

This appears to be the first case of its kind in Canada in which a court has granted a *Mareva* injunction in support of the enforcement of an arbitral award. This case reaffirms British Columbia's flexible approach to the granting and upholding of *Mareva* injunctions, particularly in support of international arbitration.

This case clarifies the situation in British Columbia on enforcement. This is a significant decision for the international community as foreign litigants may increasingly be looking to Canadian courts to recognize and enforce foreign arbitral awards, even when the parties to the underlying arbitration may have little or no connection to Canada. Of particular note is the Court's finding that under the British Columbia legislative scheme implementing the Convention and the British Columbia CJPTA, a real and substantial connection is presumed to exist within British Columbia in a proceeding to enforce an arbitral award made outside of British Columbia. This decision contrasts with the uncertain and difficult situation in respect of jurisdiction taken by certain US courts upon application to enforce foreign and international awards. In view of its interpretation that the Convention explicitly permits parties to an international arbitration to enforce an award in any contracting state, the Court could have reached the same decision without the support of the legislative scheme of the CJPTA.
With this decision, British Columbia has positioned itself as an enforcement-friendly jurisdiction in which the courts are prepared to uphold the spirit and purpose of the Convention.

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