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ECONOMIC DEVELOPMENT

Related subjects: Federal Court Jurisdiction; Practice

Application for order appointing arbitrator pursuant to dispute resolution clause (Arbitration Clause) in political risk insurance policy (Policy) — Applicant is federal Crown corporation while respondent Suncor Energy Inc (respondent) is Canadian corporation incorporated under *Canada Business Corporations Act*, R.S.C., 1985, c. C-44 (Act)— Applicant, as insurer, issued Policy in 2006 to respondent's predecessor, Petro-Canada — Policy insures against certain losses caused by expropriation or political violence, as those terms are defined in Policy, in respect of oil assets in number of countries outside Canada — Respondent merged with Petro-Canada in 2009, became insured under Policy — Respondent having many subsidiaries, also respondents herein (collectively, subsidiaries) — In 2015, as result of political unrest that affected oil operations in Libya, respondent claimed indemnity under Policy for losses related to Libyan oil assets — First arbitration awarding respondent over $300 million (First Arbitration) for claimed losses — With interest, applicant paid $347 million, now sought to arbitrate dispute over its rights to recover payment (Second Arbitration) — According to applicant's May 15, 2022 notice of arbitration, Libyan assets continue to have significant value, generate revenue for respondent, subsidiaries — Applicant seeking to recover amounts realized in connection with assets until $347 million repaid in full, based on two main grounds: (a) its various rights, recourses under Policy (Recovery Rights); (b) oppression provisions under Act — Applicant, respondent engaged in negotiations to constitute arbitral panel for Second Arbitration but because reaching impasse, applicant commenced present application in accordance with Arbitration Clause — Parties agreed that Court had jurisdiction to act as appointing authority — Asked Court to determine criteria that should be considered in appointing sole arbitrator for Second Arbitration, to decide who arbitrator would be — Although applicant named subsidiaries as respondents in notice of arbitration, subsidiaries submitted that they did not agree to arbitrate disputes with applicant and that Court having no jurisdiction to appoint arbitrator in manner that binds them — Subsidiaries asked in particular that Court remove them as respondents to application — Preliminary issues were: (1) whether Court having jurisdiction to appoint sole arbitrator for Second Arbitration; (2) whether subsidiaries should be removed as parties to application, or alternatively, should Court restrict scope of order — Main issues were what was appropriate criteria for selecting sole arbitrator for Second Arbitration; who should be appointed as sole arbitrator for Second Arbitration — Subsidiaries acknowledged that Court was proper appointing authority; however, they contended that Court's jurisdiction limited to appointing arbitrator who would decide dispute between applicant, respondent — This was first time Federal Court acted as appointing authority — Court having jurisdiction to act as such — Federal Court's jurisdiction conferred by statute; it must act within its statutory powers — Parties submitted Court's statutory jurisdiction to act as appointing authority derived from *Federal Courts Act*, R.S.C., 1985, c. F-7, *Commercial Arbitration Act*, R.S.C., 1985 (2nd Supp), c. 17, *Commercial Arbitration Code*, being Schedule 1 to the *Commercial Arbitration Act* — Court having jurisdiction to appoint arbitrator to adjudicate Second Arbitration — Subsidiaries submitted that parties to Policy were applicant, respondent; that they were separate, distinct legal entities from respondent; having no rights under Policy, not insured parties — Applicant responded in particular that Subsidiaries would be directly affected by, could not be disentangled from, Second Arbitration — Subsidiaries were proper parties to application — Court's role on application is to appoint arbitrator for Second Arbitration, Court's decision would

affect subsidiaries — Also, Court's order should not encroach on arbitrator's role such as appointing arbitrator to arbitrate dispute between applicant, respondent, subsidiaries — Order should not include language that could be seen as pronouncement on issues that are for arbitrator to decide, or that favour any party's position on those issues — Subsidiaries should not be removed as parties to application — Court was not deciding limits of arbitrator's jurisdiction or whether subsidiaries were proper parties to Second Arbitration — Concerning appropriate criteria for selecting sole arbitrator for Second Arbitration, independent, impartial arbitrator qualified to apply laws of Ontario to interpretation of Policy were not "threshold criteria" — *Commercial Arbitration Code*, art. 11(5) requiring Court to "have due regard" to any qualifications required of arbitrator by parties' agreement, to such considerations as are likely to secure appointment of independent, impartial arbitrator — While qualifications agreed to by parties, considerations of independence, impartiality were important, language of art. 11(5) providing flexibility — Court assigning highest priority to following criteria: (i) qualifications, experience in Canadian law, particularly Ontario law; (ii) independence, impartiality — Although Arbitration Clause not explicitly requiring that arbitrator be qualified or experienced in Ontario or Canadian law, clause coming close to that — Ontario, Canadian law of central importance to issues in dispute herein — Applicant's Recovery Rights stemming from Policy governed by laws of Ontario, federal laws of Canada applying therein — Arbitration, dispute resolution experience (particularly as sole arbitrator or tribunal president in complex arbitrations) was of high importance — Experience as sole arbitrator or tribunal president in complex international arbitrations was criteria of medium importance — Factors such as experience with international oil, gas disputes, commercial disputes, insurance disputes weighed as medium priority in assessing suitability of candidates — Court assigning low priority in particular to qualifications or experience in civil law generally — Court appointing specific individual who emerged as most suitable candidate to adjudicate particular dispute at issue — In conclusion, Court denying subsidiaries' request to be removed as parties to application; that order specify that arbitrator be appointed as between respondent, applicant — Order issued accordingly.

EXPORT DEVELOPMENT CANADA V. SUNCOR ENERGY INC. (T-2071-22, 2023 FC 1050, Pallotta, J., reasons for order dated July 31, 2023, 37 pp.)