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Arrivederci, for Now

Multi-national insolvencies often spawn complex litigation in multiple jurisdictions. In *Sociedad Concesionaria Metropolitana De Salud SA v Webuild SPA*, the Commercial List was asked to enforce a Chilean arbitral award against the Canadian assets of an Italian company that had acquired certain assets of the unsuccessful – and now insolvent – party to the arbitral proceedings. Justice Steele found that Ontario had proper jurisdiction over the respondent, but issued a rare temporary stay of the enforcement proceedings until a threshold issue could be determined by the Italian courts.

Facts: A Web of International Proceedings

The applicant, SCMS, is a Chilean construction company that entered into a construction contract with Italian conglomerate Astaldi through its Chilean division, ASC. In December 2021, SCMS was successful in an arbitration against ASC. The award, plus interest, totalled more than $180 million (the "Arbitral Award").

In July 2021, Astaldi completed a multi-year complex restructuring proceeding in Italy. As part of that proceeding, it sold a portion of its operating assets to Webuild through a partial spin-off or "Demerger Agreement".

SCMS commenced proceedings in Ontario, Delaware, and Quebec seeking enforcement of the Arbitral Award. At the same time, Webuild brought an application in Italy seeking a declaration that liability for the Arbitral Award had not been transferred as part of the Demerger Agreement.

An Inconvenient Forum for the Threshold Question

Webuild sought to dismiss SCMS's application on the basis that Ontario did not have jurisdiction to hear the matter because it did not have physical office space in Ontario. Justice Steele rejected that argument, holding that Ontario had jurisdiction for the purpose of enforcement because Webuild was involved with some of the largest infrastructure projects in Ontario: the Ontario Line and the Hurontario Light Rail Transit project.

Webuild argued that even if Ontario had jurisdiction, the Court should grant a stay on the basis of forum non conveniens. The issue of most convenient forum rarely arises in enforcement – generally speaking, a forum is convenient for enforcement if there are assets in the jurisdiction. However, in this case, Justice Steele agreed with Webuild that the question of

enforcement against it as a non-party to the arbitration could only proceed once it was established that liability for the Arbitral Award had transferred as part of the Demerger Agreement. She also agreed with Webuild that the most convenient forum for that determination was the insolvency court in Italy.

While the Ontario courts could, in theory, make a determination based on the expert evidence presented by both parties as to the guiding principles of Italian insolvency and contractual law, doing so would risk conflicting judgments in Ontario, Delaware, Quebec, and Italy. To allow time for the Italian courts to make the determination, Justice Steele ordered a temporary stay of the enforcement proceedings until the threshold issue of liability could be determined by the Italian court.

Non-Party Enforcement

This case demonstrates the challenges that can arise when seeking enforcement of foreign or arbitral awards against non-parties. In *Peace River Hydro Partners v Petrowest Corp*, the Supreme Court of Canada considered whether non-signatories to an arbitral agreement could be made parties to an arbitral proceeding. The question raised by this case goes one step farther – what are the circumstances in which a non-party to an arbitration can be held liable for an arbitral award? After the Italian courts make that determination, SCMS and Webuild may find themselves back in Ontario (and Quebec and Delaware) to ask this question once again.