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Jun 4, 2024

Mail (Un)Deliverable

In a two-way application before the Commercial list, JSC Chukotka Mining and Geological Company (“Chukotka”), a Russian-based company, sought an order recognizing and enforcing an Arbitral Award pursuant to Article 35 of the Model Law on International Commercial Arbitration (“the Model Law”). Medivolve Inc. (“Medivolve”), a Toronto-based company, opposed the application and sought an order setting aside the Arbitral Award pursuant to Article 34 of the Model Law.

Background: The Wild Goose Chase in *Medivolve Inc v JSC Chukotka Mining and Geological Company*

The Arbitral Award, issued on December 23, 2021, by the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (the “ICAC”), found that Medivolve breached a Supply Agreement involving COVID-19 rapid testing kits and ordered that it pay USD $2,405,950.78 in damages. Under the Supply Agreement, Medivolve agreed to supply Chukotka with real-time COVID-19 PCR testing kits and antibody kits (the “Equipment”). Under the agreement, Chukotka could reject the Equipment within 90 days of the transfer. Although Chukotka did not provide the contractually required 90-day notice, it complained to Medivolve that the Equipment was not functioning properly.

Following unsuccessful negotiations, a wild goose chase ensued that included the delivery of various emails and letters from Chukotka and the ICAC to Medivolve. Chukotka emailed Medivolve on 3 occasions, including to notify that it had commenced arbitration, and subsequently with a statement of claim and evidentiary record. While Medivolve did not deny receiving these emails, it did not reply. Similarly, ICAC’s correspondence on three occasions likewise failed to reach Medivolve, including a request to appoint an arbitrator and submit a statement of defence.

Throughout this series of undeliverable or un-responded to correspondence, Medivolve changed its corporate address, but did not update any corporate register, nor advise of this change until months following the commencement of proceedings. Following the update, Medivolve received a ruling, and the Arbitral Award to the correct address. While Medivolve did not respond to the ruling, it proceeded to hire counsel and (unsuccessfully) filed for power of attorney in Russia, which was subsequently, and after the delivery of the Arbitral Award,

authenticated by Global Affairs Canada. Medivolve also attempted before the Arbitration Court of the City of Moscow (the “ACCM”), albeit unsuccessfully, to set aside the award on the basis that it did not receive proper notice. Its appeal was rejected by the Arbitration Court of the Moscow District (the “ACMD”).

Findings: A Kaleidoscope of Legal Interplay

1. The Medivolve Application

Regarding Medivolve’s application to set aside the arbitral award on the basis of Article 34 of the Model Law, Justice Wilton-Siegel did not make a definitive finding as he explained that the issue was resolved on the basis of Chutkotka’s application. Pursuant to Article 34, recourse to a court regarding an arbitral award can only be made in specific circumstances, including lack of proper notice of the appointment of an arbitrator or arbitral proceeding, or where a party was otherwise unable to present its case.

Nevertheless, Justice Wilton-Siegel commented that he was inclined to find that Ontario courts did not have jurisdiction to hear Medivolve’s application on the basis that section 5(3) of the International Commercial Arbitration Act (“ICAA”) (the Ontario statute applicable to all international commercial arbitrations and awards), precludes recourse to Ontario’s Arbitration Act, as amended, which, in any event, excludes recourse pursuant to s. 2(1)(b).

However, the Judge determined that it was not necessary to make any finding regarding the applicability of Article 34, and jurisdiction over the Medivolve application, because the Chutkotka application rendered those issues moot. He concluded that, because Chutkotka was proceeding under Articles 35 and 36 of the Model Law, and Medivolve relied on Article 36, jurisdiction under the ICAA was conclusively established.

2. The Chukotka Application

Turning to Chukotka’s application, Justice Wilton-Siegel found that Chukotka successfully demonstrated that the Arbitral Award should be enforced pursuant to Article 35 of the Model Law. He was guided by three principles:

1. Reviewing courts should accord a high degree of deference to awards granted by international tribunals governed by the Model Law.
2. The distinct issue in this case was whether the notice provided to Medivolve (i.e. Chukotka emailing Medivolve

that it had commenced arbitration and a subsequent email attaching Chukotka's statement of claim and evidentiary record) constituted proper notice.

3. A court may refuse to recognize and enforce an arbitral award where a party was not given proper notice or was otherwise unable to present its case.

Medivolve brought three defences:

1. It did not receive proper notice;
2. It was unable to present its case in the arbitration; and
3. The arbitral tribunal did not treat the parties equally.

In addressing each of these defences, Justice Wilton-Siegel first found that the issue of proper notice was not estopped as neither of the ACCM or ACMD addressed the question of whether proper notice has occurred. Rather than asking the question, the decisions of both courts considered whether delivery of ICAC correspondence complied with ICAC Rules for deemed delivery.

He then went on to find that the Chukotka's emails notifying Medivolve of the commencement of arbitration and a subsequent email attaching the statement of claim and evidentiary record constituted proper notice. Justice Wilton-Siegel did not accept Medivolve's position that proper notice required ICAC to communicate with it via email even though the Supply Agreement contemplated email correspondence between the parties. He noted that the ICAC Rules do not incorporate agreements between parties regarding the service or delivery of communications. He further held Medivolve's argument that it had reasonable expectations to receive ICAC correspondence via email to be a bald assertion, noting that nothing in the evidentiary record established such an expectation. On this basis, he found that Medivolve had the opportunity to present its case. Specifically, he held that the evidentiary record failed to provide a reasonable explanation for Medivolve's failure to provide a defence.

Finally, Justice Wilton-Siegel did not find that the ICAC treated the parties differently in the absence of a request from Medivolve for email communications and that any unfair treatment alleged by Medivolve did not result from any of the ICAC's actions, noting that the ICAC communications strictly adhered to the ICAC Rules.

Key Takeaways

Medivolve v Chukotka serves as a helpful reminder that inexplicable non-responsiveness and inaction will not be

rewarded and that agreed-upon methods of communication in one context (i.e. a contract) may not transfer over to another where the other is guided by its own rules.

When provided with notice involving legal proceedings, whether from another party or an adjudication body, it is typically best to provide a response and engage in the process in order to avoid adverse findings against you.