

COURT OF APPEAL FOR ONTARIO

CITATION: Sistem Mühendislik A.S. v. Kyrgyz Republic, 2014 ONCA 576
DATE: 20140807
DOCKET: M43792 (C58711)

Juriansz J.A. (In Chambers)

BETWEEN

Sistem Mühendislik İnşaat Sanayi ve Ticaret Anomic
Sirketi

Respondent

and

Kyrgyz Republic and Kyrgyzaltyn JSC

Appellant, Kyrgyzaltyn JSC

J.B. Casey, for the appellant

S. Frankel, for the respondent

Heard: July 31, 2014

On motion regarding stay pending appeal.

Juriansz J.A.:

[1] This dispute arises out of the enforcement of a foreign arbitral award. On January 5, 2011, Justice Echlin of the Superior Court ordered the Kyrgyz Republic (the “Republic”) to pay Sistem Mühendislik İnşaat Sanayi Ve Ticaret Anomic Sirketi (“Sistem”) an amount in Canadian currency sufficient to purchase

US\$9,147,470 to satisfy an award of the International Center for Settlement of Investment Disputes, an organ of the World Bank. Sistem obtained a writ of seizure and sale issued February 11, 2011 in respect of the property of the Republic.

[2] Kyrgyzaltyn JSC (“the Company”) is an entity that is wholly owned by the Republic. The Company holds shares in Centerra Gold, a Canadian public corporation with its head office in Toronto. Centerra Gold resisted Sistem enforcement initiatives by taking the position that the Republic was not the owner of any of its shares and that it was the Company that was the registered and beneficial owner of some of its shares. Sistem obtained an order adding the Company as a party respondent and also obtained an interim order and Mareva injunction that has resulted in Centerra Gold holding in trust more than \$11 million in dividend monies to the credit of Sistem’s proceeding.

[3] That is the background.

[4] The order under appeal, that of Thorburn J. dated April 15, 2014, declared that the Republic has an equitable interest in the Centerra Gold shares issued in the name of the Company and ordered that the Sheriff could seize monies held in trust by Centerra Gold to satisfy the award.

[5] In the motion before me, the Company seeks a declaration that the Thorburn order is subject to the automatic stay provided by rule 63.01(1), and in the alternative seeks an order staying the order.

Is there an automatic stay?

[6] Rule 63.01(1) provides as follows:

The delivery of a notice of appeal from an interlocutory or final orders stays, until the disposition of the appeal, any provision of the order for the payment of money, except a provision that awards support or enforces a support order.

[7] In submitting that the order is subject to the automatic stay, counsel for the Company places reliance on *Debora v. Debora*, [2005] O.J. No. 6378, a decision of MacFarland J.A. in chambers. The order under appeal in that case declared the wife to be the owner of certain monies the husband had removed from the bank and ordered the husband to repay the monies to the wife. Counsel for the Company submits that the order in this case is analogous: the order declared that the Republic was the owner of the Centerra Gold shares and ordered that the Sheriff could seize them and their proceeds.

[8] In my view the *Debora* case is very different. In *Debora*, MacFarland J.A. said “I am of the view that the term of the judgment requiring the husband to repay the funds is a term requiring the “payment of money” referenced in the Rules.” There is no order of “repayment” in this case. The only order that requires the payment of any money is the order of Echlin J., which ordered the Republic

to pay money to Sistem. Echlin J.'s order was not appealed. The order under appeal does not order the Company to "pay" or "repay" any monies to anyone.

[9] I conclude that the order under appeal is not automatically stayed.

Should a stay be imposed?

[10] It is conceded that the appeal raises a serious issue to be decided.

[11] If the order is not stayed the Company will clearly suffer irreparable harm. Sistem has no business and no assets in Canada. If the Company is successful on appeal it will be unable to recover any monies that the Sheriff pays out to Sistem.

[12] On the other hand, if the order is stayed, Sistem faces harm. There is the prospect that other international arbitration creditors will also seek to enforce their awards against the Republic in Canada as Sistem has done. Sistem submits it will be prejudiced if any monies seized by the Sheriff must be shared proportionately among several execution creditors.

[13] Counsel for the Company responds that the prospect of the proportionate sharing of execution monies is not legally cognizable harm. That is, he submits, because proportionate sharing of the monies obtained by the sheriff among execution creditors is part of the public policy and law of the province. He submits that any negative consequences to Sistem that result from the implementation of the law cannot constitute legally cognizable harm.

[14] The law in question, s. 4 of the *Creditors Relief Act*, S.O. 2010, C. 16, provides that monies received by the sheriff shall be shared proportionately among those execution creditors whose executions are filed with the sheriff at the time the sheriff received the monies or within a one-month period after the date the sheriff receives the monies. At the time of the order under appeal and at the present, Sistem is the only execution creditor of the Republic. From the information provided to the court, I gather it is unlikely that there will be any other judgment creditor who will file an execution with the sheriff within a one-month period should the sheriff execute the writ of seizure now. I am satisfied that the harm Sistem faces if the order is not stayed is legally cognizable.

[15] I conclude that the balance of convenience in this case would be best served by staying the order under appeal on the term that the company file a letter of credit in the amount of the outstanding judgment against the Republic. Should the company fail to file the letter of credit in 15 days of this decision, Sistem may proceed to enforce the order under appeal.

[16] Costs of the motion are reserved to the panel hearing the appeal.

“R.G. Juriansz J.A.”