Federal Court  Cour fédérale

Date: 20230731

Docket: T-2071-22

Citation: 2023 FC 1050

Vancouver, British Columbia, July 31, 2023

PRESENT: Madam Justice Pallotta

BETWEEN:

EXPORT DEVELOPMENT CANADA

Applicant

and

SUNCOR ENERGY INC.
SUNCOR ENERGY OIL (NORTH AFRICA) GMBH
SUNCOR ENERGY EN NAGA LIMITED
SUNCOR ENERGY LIBYA EXPLORATION B.V.
SUNCOR ENERGY VENTURES
(NORTH AFRICA) LIMITED

Respondents

ORDER AND REASONS

I. Introduction

[1] This is an application for an order appointing an arbitrator pursuant to the dispute resolution clause (Arbitration Clause) in a political risk insurance policy (Policy).

[2] Export Development Canada (EDC) is a federal Crown corporation. Suncor Energy Inc (Suncor) is a Canadian corporation incorporated under the *Canada Business Corporations Act*, RSC 1985, c C-44 [*CBCA*].

[3] EDC, as insurer, issued the Policy in 2006 to Suncor's predecessor, Petro-Canada. The Policy insures against certain losses caused by expropriation or political violence, as those terms are defined in the Policy, in respect of oil assets in a number of countries outside Canada. Suncor merged with Petro-Canada in 2009 and became insured under the Policy.

[4] Suncor Energy Oil (North Africa) GmbH, Suncor Energy En Naga Limited, Suncor Energy Libya Exploration BV, and Suncor Energy Ventures (North Africa) Limited are subsidiaries of Suncor (collectively, Subsidiaries).

[5] In 2015, as a result of political unrest that affected oil operations in Libya, Suncor claimed indemnity under the Policy for losses related to Libyan oil assets. A first arbitration determined the value of Suncor's claimed losses, awarding Suncor over $300 million (First Arbitration). With interest, EDC paid $347 million and now seeks to arbitrate a dispute over its rights to recover payment (Second Arbitration). According to EDC's May 15, 2022 notice of arbitration, the Libyan assets continue to have significant value and generate revenue for Suncor and its Subsidiaries. EDC seeks to recover the amounts realized in connection with the assets until the $347 million has been repaid in full, based on two main grounds: (a) its various rights and recourses under the Policy (Recovery Rights); and (b) the oppression provisions under the *CBCA*.

[6] EDC and Suncor engaged in negotiations to constitute the arbitral panel for the Second Arbitration. Having reached an impasse, EDC commenced this application in accordance with the Arbitration Clause.

[7] EDC and Suncor agree that this Court has jurisdiction to act as the appointing authority. They ask the Court to determine the criteria that should be considered in appointing a sole arbitrator for the Second Arbitration, and to decide who the arbitrator will be. EDC asks the Court to appoint one of eight arbitrators it has proposed. While Suncor proposed four arbitrators, it contends two are best suited to the task and asks the Court to appoint one of them.

[8] Although EDC named the Subsidiaries as respondents in the notice of arbitration, the Subsidiaries submit they did not agree to arbitrate disputes with EDC and this Court has no jurisdiction to appoint an arbitrator in a manner that binds them. The Subsidiaries ask the Court to remove them as respondents to this application, or alternatively, to restrict the scope of the order to one that appoints an arbitrator solely as between Suncor and EDC.

[9] The Subsidiaries take no position with respect to the appointment of an arbitrator as between Suncor and EDC, or the suitability of any of the candidates.

II. **Issues**

[10] There are five issues on this application:

A. Preliminary Issue 1: Does this Court have jurisdiction to appoint a sole arbitrator for the Second Arbitration?

B. Preliminary Issue 2: Should the Subsidiaries be removed as parties to this application, or alternatively, should the Court restrict the scope of the order?

C. Preliminary Issue 3: Are there issues with EDC's evidence?

D. Main Issue 1: What are the appropriate criteria for selecting a sole arbitrator for the Second Arbitration?

E. Main Issue 2: Who should be appointed as sole arbitrator for the Second Arbitration?

[11] At the outset of the hearing, Suncor raised a concern that it had insufficient time to consider 29 additional authorities delivered by EDC on the Friday before a Monday hearing. Suncor did not object to the Court accepting the authorities; rather, Suncor was unsure of their purpose and asked for flexibility in addressing any surprise issues EDC might raise. EDC stated that the additional authorities were purely responsive to issues the respondents raised in their memorandums, namely, issues B and C above. EDC's view was that it should be permitted to respond to issues the respondents raised. If this were an action, the respondents would raise the issues by motion, and EDC would have the right to respond.

[12] I accepted the additional authorities. The authorities are responsive to issues the respondents raised. The respondents were able to address the authorities at the hearing.

III. **Analysis**

A. *Preliminary Issue 1: Does this Court have jurisdiction to appoint a sole arbitrator for the Second Arbitration?*

[13] EDC and Suncor agree that this Court has jurisdiction to appoint a sole arbitrator for the Second Arbitration. The Subsidiaries acknowledge that this Court is the proper appointing

authority; however, they contend the Court's jurisdiction is limited to appointing an arbitrator who will decide the dispute between EDC and Suncor.

[14] The parties believe this is the first case where the Federal Court has acted as an appointing authority. They were unable to find a prior reported or unreported decision where this Court has done so, and I have not found such a case. Since it appears this is the first time the Federal Court finds itself in this role, I will set out the parties' submissions regarding the source of the Court's jurisdiction. I am satisfied the Court has jurisdiction to act as appointing authority.

[15] The Arbitration Clause provides as follows:

> 8.18 (a) Any dispute, controversy or claim arising out of or relating to this Policy or the breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), as adopted under the Commercial Arbitration Act of Canada, except as modified herein.
>
> 8.18 (b) Within two months of receipt of a request for arbitration by a party, the Insured and the Insurer shall appoint an arbitrator. Where the parties cannot agree on the appointment of an arbitrator, then either the Insured or the Insurer may request the Federal Court of Canada to appoint an arbitrator pursuant to the UNCITRAL Arbitration Rules. Unless otherwise agreed, the place of arbitration shall be Ottawa and the language of arbitration shall be English.
>
> […]

[16] The Federal Court's jurisdiction is conferred by statute, and it must act within its statutory powers. The parties submit this Court's statutory jurisdiction to act as appointing authority derives from the *Federal Courts Act*, RSC 1985, c F-7 [*FCA*], the *Commercial*

Arbitration Act, RSC 1985, c 17 (2nd Supp) [*CAA*], and the *Commercial Arbitration Code*, being Schedule 1 to the *CAA* [Code].

[17] Section 26 of the *FCA* states:

26 The Federal Court has original jurisdiction in respect of any matter, not allocated specifically to the Federal Court of Appeal, in respect of which jurisdiction has been conferred by an Act of Parliament on the Federal Court of Appeal, the Federal Court, the Federal Court of Canada or the Exchequer Court of Canada.	**26** La Cour fédérale a compétence, en première instance, pour toute question ressortissant aux termes d'une loi fédérale à la Cour d'appel fédérale, à la Cour fédérale, à la Cour fédérale du Canada ou à la Cour de l'Échiquier du Canada, à l'exception des questions expressément réservées à la Cour d'appel fédérale.

[18] Sections 2, 5(2) and 6 of the *CAA* state:

Definitions	**Définitions**
2 In this Act,	**2** Les définitions qui suivent s'appliquent à la présente loi.
Code means the Commercial Arbitration Code, based on the model law adopted by the United Nations Commission on International Trade Law on June 21, 1985, as set out in Schedule 1;	***Code*** Le Code d'arbitrage commercial — figurant à l'annexe 1 — fondé sur la loi type adoptée par la Commission des Nations Unies pour le droit commercial international le 21 juin 1985
[…]	[…]
Limitation to certain federal activities	**Restriction**
5 (2) The Code applies only in relation to matters where at least one of the parties to the arbitration is Her Majesty in	**5 (2)** Le Code ne s'applique qu'au cas d'arbitrage où l'une des parties au moins est Sa Majesté du chef du Canada,

right of Canada, a departmental corporation or a Crown corporation or in relation to maritime or admiralty matters.	un établissement public ou une société d'État ou qu'aux questions de droit maritime.
[…]	[…]
Definition of court or competent court	**Définition de tribunal ou tribunal compétent**
6 In the Code, ***court or competent court*** means a superior, county or district court, except when the context requires otherwise.	**6** Dans le Code, ***tribunal ou tribunal compétent*** s'entend, sauf indication contraire du contexte, de toute cour supérieure, de district ou de comté.

[19] The Code provides as follows:

ARTICLE 1	ARTICLE PREMIER
[…]	[…]
(2) The provisions of this Code, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in *Canada*.	**2** Les dispositions du présent code, à l'exception des articles 8, 9, 35 et 36, ne s'appliquent que si le lieu de l'arbitrage est situé au *Canada*.
ARTICLE 5	ARTICLE 5.
Extent of Court Intervention	Domaine de l'intervention des tribunaux
In matters governed by this *Code*, no court shall intervene except where so provided in this *Code*.	Pour toutes les questions régies par le présent code, les tribunaux ne peuvent intervenir que dans les cas où celui-ci le prévoit.

ARTICLE 6	ARTICLE 6.
Court or Other Authority for Certain Functions of Arbitration Assistance and Supervision	Tribunal ou autre autorité chargé de certaines fonctions d'assistance et de contrôle dans le cadre de l'arbitrage
The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by the *Federal Court or any superior, county or district court*.	Les fonctions mentionnées aux articles 11-3, 11-4, 13-3, 14, 16-3 et 34-2 sont confiées *à la Cour fédérale ou à une cour supérieure, de comté ou de district.*
ARTICLE 10	ARTICLE 10.
Number of Arbitrators	Nombre d'arbitres
(1) The parties are free to determine the number of arbitrators.	**1** Les parties sont libres de convenir du nombre d'arbitres.
(2) Failing such determination, the number of arbitrators shall be three.	**2** Faute d'une telle convention, il est nommé trois arbitres.
ARTICLE 11	ARTICLE 11.
Appointment of Arbitrators	Nomination de l'arbitre ou des arbitres
(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.	**2** Les parties sont libres de convenir de la procédure de nomination de l'arbitre ou des arbitres, sans préjudice des dispositions des paragraphes 4 et 5 du présent article.
(3) Failing such agreement,	**3** Faute d'une telle convention :
[…]	[…]
(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon	b) en cas d'arbitrage par un arbitre unique, si les parties ne peuvent s'accorder sur le choix de l'arbitre, celui-ci est

request of a party, by the court or other authority specified in article 6.

nommé, sur la demande d'une partie, par le tribunal ou autre autorité visé à l'article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

4 Dans le cadre d'une procédure de nomination convenue par les parties, l'une d'entre elles peut prier le Tribunal ou autre autorité visé à l'article 6 de prendre la mesure voulue dans l'un des cas suivants :

[…]

[…]

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

b) les parties, ou deux arbitres, ne peuvent parvenir à un accord conformément à cette procédure;

[…]

[…]

any party may request the court or other authority specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an

5 La décision sur une question confiée au tribunal ou autre autorité visé à l'article 6, conformément aux paragraphes 3 et 4 du présent article, n'est pas susceptible de recours. Lorsqu'il nomme un arbitre, le tribunal tient compte de toutes les qualifications requises de l'arbitre par convention des parties et de toutes considérations propres à garantir la nomination d'un

independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.	arbitre indépendant et impartial et, lorsqu'il nomme un arbitre unique ou un troisième arbitre, il tient également compte du fait qu'il peut être souhaitable de nommer un arbitre d'une nationalité différente de celle des parties.

[20] Based on the foregoing, I agree that this Court has jurisdiction to appoint an arbitrator to adjudicate the Second Arbitration.

B. *Preliminary Issue 2: Should the Subsidiaries be removed as parties to this application, or alternatively, should the Court restrict the scope of the order?*

[21] The Subsidiaries submit this Court's statutory jurisdiction does not extend to appointing an arbitrator in a manner that binds them.

[22] The Subsidiaries submit that arbitration owes its existence to the will of the parties alone: *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41 at para 49 [*Peace River*], among other authorities. The parties to the Policy are EDC and Suncor. The Subsidiaries are separate and distinct legal entities from Suncor. They have no rights under the Policy, and they are not insured parties.

[23] The Subsidiaries argue that the jurisdiction-conferring provisions noted above do not apply to them because the Court's jurisdiction to intervene is limited to circumstances in which the parties have agreed on an appointment procedure: Code, Art 5 and Art 11(4)(b). The Subsidiaries are not parties to an arbitration agreement with EDC and they have not agreed on a

procedure for appointing an arbitrator. The Subsidiaries state their position can be illustrated by considering a role reversal. If one of the Subsidiaries had commenced an application in this Court to appoint an arbitrator between it and EDC, there would be no serious question that the Court would lack jurisdiction to decide the application.

[24] The Subsidiaries state they have objected to their inclusion in EDC's notice of arbitration, and they have asked EDC to discontinue the arbitration as against them. In response to this application, the Subsidiaries' notice of appearance expressly states the Subsidiaries do not admit they are proper parties to this application or that the Court has jurisdiction over them, and they do not attorn to the Court's jurisdiction.

[25] The Subsidiaries ask for an order removing them as parties to the application: Rule 104(1)(a) of the *Federal Courts Rules*, SOR/98-106 [*FC Rules*]. Alternatively, they ask the Court to restrict its order to specify that the order appoints an arbitrator as between Suncor and EDC.

[26] EDC responds that the Subsidiaries will be directly affected by, and cannot be disentangled from, the Second Arbitration. Suncor owns the insured assets through its Subsidiaries. The Second Arbitration relates to Recovery Rights in respect of Libyan oil wells that have and will continue to have significant value. The wells are producing oil and generating revenue. Suncor's Subsidiaries are the parties to exploration and production sharing agreements (EPSAs) with Libya's national oil company. While the Subsidiaries are not insured parties under the Policy, Suncor represented that it would cause its Subsidiaries to comply with the Policy's

terms and conditions. In addition, EDC states a number of Policy terms implicate the Subsidiaries directly, including terms that are relevant to the relief it seeks in the Second Arbitration.

[27] EDC submits the Subsidiaries are already in the Second Arbitration. The notice of arbitration names the Subsidiaries and seeks relief against them, it was served on them, and Suncor's counsel will make representations to the arbitrator on their behalf, at least to ask that they be removed from the Second Arbitration. EDC submits it falls to the arbitrator to decide whether the Subsidiaries are proper parties to the Second Arbitration. This Court does not have jurisdiction to remove them from the arbitration, and even if the Court has jurisdiction, it should defer to the arbitrator on this issue. According to the competence-competence principle, which is reflected in Article 16 of the Code, questions of jurisdiction fall within an arbitrator's powers and should be decided, at least initially, by the arbitrator: *Canada (The Attorney General) v Aéroports de Montréal*, 2016 FC 775 at paras 34-35 [*Aéroports de Montréal*].

[28] On this application, EDC states it was required to name as a respondent every person directly affected by the order sought: *FC Rules*, Rule 303(1)(a). At a minimum, the appointed arbitrator will decide whether the Subsidiaries are proper parties to the Second Arbitration. The Court's decision will therefore affect the Subsidiaries, and it was not improper to name them as parties to this application so they would have an opportunity to make representations. While it may be a matter of debate as to whether the Subsidiaries are necessary respondents to this application, EDC submits that removing them would have no consequence for the arbitration—

the arbitrator will still decide whether to remove the Subsidiaries as respondents to the Second Arbitration.

[29] In my view, the Subsidiaries are proper parties to this application. The Court's role on this application is to appoint an arbitrator for the Second Arbitration and the Court's decision will affect the Subsidiaries.

[30] First, I agree with EDC that the Subsidiaries will be affected by the Court's order at least to the extent that the arbitrator determines the limits of jurisdiction, and decides whether or not the Subsidiaries are proper parties to the Second Arbitration. Article 16 of the Code provides that an arbitral tribunal (which can comprise a sole arbitrator) may rule on its own jurisdiction as a preliminary question or as part of an award on the merits. All parties agree that generally, courts should give precedence to the arbitration process and allow an arbitrator to exercise their power to rule on their own jurisdiction first: *Aéroports de Montréal* at paras 34-35; also see *Peace River* at paras 39-41.

[31] Second, even if the Subsidiaries do not participate in the Second Arbitration as respondents, the issues between EDC and Suncor may implicate the Subsidiaries—for example, because they are compelled to comply with certain Policy terms, or because of EDC's rights of subrogation.

[32] The Subsidiaries contend the competence-competence principle supports their position. Since the question of whether they are proper parties to the Second Arbitration should be decided

by the arbitrator, this Court should not appoint an arbitrator in a manner that binds the Subsidiaries.

[33] I agree with the Subsidiaries that the Court's order should not encroach on the arbitrator's role. EDC's notice of application asks for "[a]n order appointing a sole arbitrator to arbitrate a commercial dispute between EDC, Suncor Energy and the Subsidiaries", and in my view, such language could be seen as encroaching on the arbitrator's role. For the same reason, it would not be appropriate to restrict the scope of the order to one that appoints an arbitrator solely as between Suncor and EDC. The order should not include language that could be seen as a pronouncement on issues that are for the arbitrator to decide, or that favour any party's position on those issues.

[34] Whether the Subsidiaries are proper parties to this application is a separate issue, and does not decide the jurisdictional question for the arbitrator. The fact that a party participated in the appointment of an arbitrator does not preclude it from raising a plea that the arbitrator does not have jurisdiction: Code, Art 16 (2).

[35] In summary, I am not satisfied the Subsidiaries should be removed as parties to this application. The Court has jurisdiction to act as the appointing authority for the Second Arbitration and the order should simply appoint an arbitrator for that purpose. The Court's order should not be restricted to EDC and Suncor. The Court is not deciding the limits of the arbitrator's jurisdiction or whether the Subsidiaries are proper parties to the Second Arbitration.

Once the Court exercises authority by appointing an arbitrator, these would be questions for the arbitrator to decide.

C. *Preliminary Issue 3: Are there issues with EDC's evidence?*

[36] EDC and Suncor each rely on affidavit evidence that, among other things, attaches correspondence with the candidates as well as information about the candidates' qualifications. EDC relies on affidavits from Dennie Michielsen, a paralegal/researcher at one of the law firms representing it, and Robert Caouette who is employed at EDC. Suncor cross-examined Mr. Michielsen and Mr. Caouette.

[37] Suncor relies on an affidavit from Michael Munoz who is employed at Suncor. EDC did not cross-examine him and Suncor states his evidence is unchallenged.

[38] Suncor raises three issues with EDC's evidence.

[39] First, Suncor states EDC's reliance on Mr. Michielsen's affidavit, a member of EDC's legal team, is contrary to Rule 82 of the *FC Rules*. Except with leave of the Court, a solicitor shall not both depose to an affidavit and present argument to the Court based on that affidavit; members or employees of counsel's firm should not provide evidence on contentious matters: *FC Rules*, Rule 82; *Toys "R" Us (Canada) Ltd v Herbs "R" Us Wellness Society*, 2020 FC 682 at paras 10-11; *Cross-Canada Auto Body Supply (Windsor) Ltd v Hyundai Auto Canada*, 2006 FCA 133 at paras 4, 6.

[40] Second, Suncor argues EDC's approach on cross-examination significantly undermined Suncor's rights and deprived it of the opportunity to meaningfully explore the qualifications, independence, and impartiality of EDC's proposed arbitrators. Suncor states EDC refused to allow Mr. Michielsen to answer relevant questions about EDC's candidates and counsel's communications with them, and EDC terminated Mr. Michielsen's cross-examination prematurely. EDC also objected to questions directed to Mr. Caouette about arbitrator candidates and the arbitration appointment process. Suncor states these were relevant questions and it was improper for EDC to object on the basis that they were outside the scope of Mr. Michielsen's and Mr. Caouette's affidavits.

[41] Third, Suncor raises concerns that EDC's evidence about arbitrator independence and impartiality may be incomplete. Suncor states EDC asked candidate arbitrators to make disclosures in line with International Bar Association Guidelines on Conflicts of Interest (IBA Guidelines). The parties did not agree that IBA Guidelines apply to this arbitration, and the IBA Guidelines are not referred to in the Policy or the *CAA*. Suncor states that soliciting disclosures in line with IBA Guidelines was too narrow in scope and potentially excluded relevant information, as there are circumstances not covered by the IBA Guidelines that would be relevant to an arbitrator's independence and impartiality. For example, one of EDC's candidates worked for 10 years as part of the international arbitration group at one of the law firms representing EDC, a disclosure that was not required under the IBA Guidelines as it was more than three years ago. Suncor does not know if candidates excluded relevant information because of the questions they were asked. Also, Suncor states it asked EDC to identify any instances where EDC's candidates acted as legal counsel or served as an arbitrator to the

government of Canada or any governmental entity, including crown corporations, and to describe any pre-existing relationships or significant interactions between EDC's candidates and EDC or its counsel. Suncor states EDC largely refused to provide the information.

[42] Due to these concerns, Suncor submits EDC's evidence about its arbitrator candidates "should be approached with considerable caution".

[43] EDC submits Suncor's request that evidence be approached with caution is not a request for any specific relief, and the evidentiary issue Suncor raises is a "red herring".

[44] EDC states Mr. Michielsen's affidavit does not offend Rule 82. Its sole purpose is to attest to the authenticity of documents, and it does not give evidence on contested issues: *UBS Group AG v Yones*, 2022 FC 132 at para 21; *AB Hassle v Apotex Inc*, 2008 FC 184 at para 46; *Canada v Mennes*, 2004 FC 1731 at para 39; *Subway IP LLC v Budway, Cannabis & Wellness Store*, 2021 FC 583 at paras 14-16; *Rebel News Network Ltd v Guilbeault*, 2023 FC 121 at para 55 [*Rebel News*]. Similarly, Mr. Caouette's affidavit provides background information for the application.

[45] EDC states the cross-examinations of Mr. Michielsen and Mr. Caouette were unnecessary, and the dispute that arose related to counsels' differing opinions as to the scope of proper questioning. At Mr. Michielsen's cross-examination, Suncor's questions went beyond the scope of an affidavit that was submitted for the purpose of introducing documents, impinged on solicitor client and/or litigation privilege, and went beyond Mr. Michielsen's stated knowledge,

appearing to assume he was testifying on behalf of a party and was obliged to inform himself. EDC states similar points of contention arose at Mr. Caouette's cross-examination.

[46] EDC argues its position was consistent with the rules governing cross-examinations on affidavits, set out in *Merck Frosst Canada Inc v Canada (Minister of Health)* (1997), 146 FTR 249, 79 ACWS (3d) 609, 80 CPR (3d) 550 (FCTD), affirmed 169 FTR 320 (note), 249 NR 15 (FCA) [*Merck Frosst*] at paragraph 4:

> **4** It is well to start with some elementary principles. Cross-examination is not examination for discovery and differs from examination for discovery in several important respects. In particular:
>
> a) the person examined is a witness not a party;
>
> b) answers given are evidence not admissions;
>
> c) absence of knowledge is an acceptable answer; the witness cannot be required to inform him or herself;
>
> d) production of documents can only be required on the same basis as for any other witness i.e. if the witness has the custody or control of the document;
>
> e) the rules of relevance are more limited.

[47] Later decisions, including *Merck Frosst Canada (Attorney General) v Fink*, 2017 FCA 87 and *Rebel News,* have confirmed that the principles in *Merck Frosst* are the correct framework.

[48] EDC submits Suncor has not sought a remedy with respect to Mr. Michielsen's or Mr. Caouette's testimony. Suncor was not deprived of the opportunity to ask any relevant questions on cross-examination and the Court can draw conclusions from the evidence by reading the transcripts themselves.

[49] EDC disputes Suncor's contention that its choice not to cross-examine Mr. Munoz means the evidence of his affidavit is unchallenged. Failure to cross-examine is not an admission: *Exeter v Canada (Attorney General)*, 2015 FCA 260 at para 9; *SSE Holdings, LLC v Le Chic Shack Inc*, 2020 FC 983 at paras 57-58. EDC did not cross-examine Mr. Munoz because his testimony is straightforward and factual.

[50] I agree with EDC that Mr. Michielsen's affidavit does not offend Rule 82. The affidavit consists of Mr. Michielsen's research about the respondents (principally, the results from his corporate registry searches) and it attaches correspondence from EDC's counsel's file. All of the correspondence is between counsel for Suncor and EDC, or between counsel for EDC and candidates, with Suncor's counsel copied. Mr. Michielsen states he is familiar with his firm's file and in my view, he is an appropriate person to introduce the correspondence as evidence. Mr. Michielsen does not give evidence on contested issues, the correspondence is not controversial and it would also be in Suncor's counsel's file. Similar evidence introduced by Suncor through Mr. Munoz was based on information Mr. Munoz received from Suncor's counsel.

[51] Suncor does not ask the Court to exclude EDC's evidence, nor does it assert the evidence is incorrect or unreliable. Suncor's concern is that by asking candidate arbitrators to make disclosures in accordance with IBA Guidelines, refusing to answer Suncor's questions about relationships or interactions with candidates, and preventing Suncor from obtaining similar information through the cross-examinations, EDC's evidence may not provide a complete picture.

[52] I do not agree that Suncor's letters to potential candidates were worded more broadly than EDC's letters. Suncor's letters were more general (asking candidates if they would be free of conflicts of interest, and to disclose any circumstances that could call into question their independence and impartiality), while EDC's letters were more specific (asking candidates if they would be free of conflicts of interest, and to disclose any circumstances that could call into question their independence and impartiality in line with the IBA Guidelines). However, EDC's letters did not encourage a qualified or limited response, and EDC's candidates in fact provided detailed and candid responses.

[53] Furthermore, I agree that EDC was not required to act as an intermediary between Suncor and EDC's candidates. Candidates were proposed on the understanding that the arbitrator for the Second Arbitration will be jointly retained. Suncor was copied on all correspondence with EDC's candidates, and if Suncor needed more information from any of the candidates it could have asked them directly.

[54] With respect to Suncor's requests for information that EDC "largely refused to provide", EDC answered that it was unaware of any instance in which it had retained or appointed any of the candidates. EDC objected to other requests as being outside its knowledge or overbroad. Moreover, as noted above, EDC's candidates provided detailed disclosures. I am not persuaded that Suncor was deprived of the opportunity to meaningfully explore the qualifications, independence, and impartiality of EDC's proposed arbitrators.

[55] I agree with Suncor that EDC was not justified in terminating Mr. Michielsen's cross-examination. In my view, it would have been more appropriate for Suncor's counsel to state his questions on the record and EDC's counsel to state his objections on the record.

[56] Ultimately, however, I am not satisfied that EDC's conduct prejudiced Suncor's ability to understand the qualifications, independence and impartiality of EDC's proposed arbitrators. While I appreciate that Suncor's counsel was prevented from stating all of his questions on the record, the questions he did ask had no more than marginal relevance to the issues on this application. The candidates themselves provided detailed disclosures. Suncor was free to request additional information it considered necessary, directly from the candidates. I would add that an arbitrator's duty of independence and impartiality is an ongoing duty, and Suncor remains free to raise any concerns that may arise in this regard with the arbitrator.

D. *Main Issue 1: What are the appropriate criteria for selecting a sole arbitrator for the Second Arbitration?*

(1) The parties' submissions

[57] EDC submits the Court should look to the following sources in order to decide on the criteria for selecting an arbitrator for the Second Arbitration: (i) the Policy (which is the starting point); (ii) the nature of the dispute; (iii) EDC's proposed criteria; and (iv) Suncor's proposed criteria.

[58] EDC states the differences between its proposed criteria and Suncor's proposed criteria reflect contradictory visions of the scope of the Second Arbitration. EDC has proposed arbitrators with vast experience in international arbitration. The experience of Suncor Energy's

proposed arbitrators is primarily as members of the judiciary presiding over Canadian civil litigation.

[59] Unlike courts, whose jurisdiction is rooted in the principle of territoriality, EDC submits arbitration is rooted in the principle of party autonomy. An arbitrator's power to resolve a dispute is based solely on the will of the parties: *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 at para 51. Advantages of arbitration include the freedom to determine applicable procedural rules and select decision makers with relevant experience: *Peace River* at para 46. The modern approach sees arbitration as an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts: *Ibid*.

[60] In this case, EDC states the parties expressed their autonomy by referencing international documents. In the Arbitration Clause, the parties agreed to settle any dispute arising out of or relating to the Policy "by arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), as adopted under the [*CAA*]", and the parties also agreed that the Federal Court may appoint an arbitrator "pursuant to the UNCITRAL Arbitration Rules". While the *CAA* actually adopts a form of the UNCITRAL Model Law as the Code, the UNCITRAL Model Law is consistent with the UNCITRAL Arbitration Rules. The UNCITRAL Model Law was intended to establish a modern legal framework to promote international commercial arbitration. It promotes certainty and predictability of international commercial disputes, and recognizes arbitration as a forum distinct

from and independent of national court systems: J Brian Casey, *Arbitration Law of Canada: Practice and Procedure,* 4th ed (Huntington, NY: Juris, 2022) at 23.

[61] EDC states Article 11 (5) of the Code reflects the modern approach. It provides that in appointing an arbitrator, the Court shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

[62] EDC submits the Policy is a global policy. It was issued as part of EDC's mandate as Canada's export credit agency, and covers operations outside of Canada.

[63] Turning to the nature of the dispute, EDC submits the Second Arbitration is "decidedly international". The Second Arbitration relates to oil assets in Libya, which Suncor's Subsidiaries exploit under the EPSAs. The EPSAs are fundamental to the dispute because they are the agreements that determine the value of the assets and the revenue realized from operating the assets in question. The EPSAs are governed by Libyan law.

[64] In contrast, EDC submits the nature of the First Arbitration was primarily a domestic matter. Suncor made a claim for indemnity under the Policy in connection with a loss of cash flow due to political violence in Libya. EDC and Suncor disagreed on the value of the claimed loss, and Suncor commenced the First Arbitration. A main issue in the First Arbitration related

to the method for calculating the value of Suncor's claimed loss, based on the interpretation of certain provisions of the Policy. The arbitrator did not decide EDC's Recovery Rights in the First Arbitration:

> ISSUE 5: EDC's RECOVERY RIGHTS
>
> 273. EDC pleads that pursuant to Article 8.9 of the Policy it has recovery rights and is entitled to receive the revenues Suncor generates from the Libyan Assets until EDC fully recovers the amount of the Insurance Percentage of the Net Loss. EDC did not lead any evidence on the issue of recovery rights.
>
> 274. The only witness to address this issue was Andreas Granig, who testified that Suncor's costs after the Date of Loss far exceeded its revenues.
>
> 275. Suncor submits that given the limited evidentiary foundation, I am not in a position to deal with any issues arising from recovery subrogation. I agree.
>
> 276. Suncor indicates that the Parties have shown in the past that they are able to work together to resolve recovery rights. Suncor and EDC have entered into a recovery agreement in another situation. Suncor is amenable to entering into a similar arrangement for this Claim, provided it is paid for its Net Loss first.
>
> 277. In the circumstances, I make no order with respect to recovery rights.

[65] Lastly, with respect to the parties' proposed criteria, EDC states it proposed the following arbitrator criteria to Suncor. EDC submits these criteria will ensure that the chosen arbitrator has the requisite experience and background to resolve the Second Arbitration:

> 1. International arbitration lawyer.
>
> 2. Extensive experience as sole arbitrator or tribunal president in significant, complex disputes of an international nature.
>
> 3. Nationality other than the nationalities or main locations of operations of EDC, Suncor and the Subsidiaries.

4. Qualified or experienced in common law and civil law (the Policy is governed substantively by Ontario law and the federal laws of Canada with the place of arbitration in Ottawa, while the EPSAs are governed substantively by Libyan law with the place of arbitration in Paris).

5. Experience with international oil and gas business.

6. Experience with disputes involving assets in North Africa or at least the Middle East.

7. Experience with insurance disputes, preferably involving political risk insurance, is desirable but not essential given this may limit the pool of available and otherwise-qualified candidates.

8. Experience with the work of export credit agencies (e.g., supporting and developing national export trade and national capacity to engage in that trade and to respond to international business opportunities) is desirable but not essential given this may limit the pool of available and otherwise-qualified candidates.

[66] Given the complexity of the issues and the procedural issues that must be decided in the Second Arbitration, EDC considers that the ideal sole arbitrator must necessarily have extensive experience presiding over similar complex international arbitrations, particularly arbitrations under the UNCITRAL Arbitration Rules. EDC asks the Court to accord greater weight to this characteristic. While an arbitrator may not have every characteristic, EDC invites the Court to consider the characteristics holistically, and in all the circumstances of this case.

[67] Suncor proposes two threshold criteria and three secondary criteria. Suncor's threshold criteria are an arbitrator who is: (i) independent and impartial; and (ii) qualified to apply the laws of Ontario to the interpretation of the Policy. Suncor's secondary criteria are: (i) industry experience; (ii) arbitration and dispute resolution experience; and (iii) practical considerations, including minimizing costs and maximizing efficiency.

[68] EDC states Suncor's proposed criteria are not rooted in the will of the parties, as reflected in the contract. EDC submits Suncor "invented" the threshold criterion that the arbitrator must be qualified to apply the laws of Ontario to the interpretation of the Policy, which is not a threshold criterion for three reasons. First, there is no requirement that an arbitrator must be qualified in the substantive law of the contract, or in any particular area of law, unless the parties agree to impose such a requirement. In this case, the Arbitration Clause does not require the appointment of an Ontario lawyer, and Suncor is reading in a threshold criterion that is not there. Second, an arbitrator does not provide legal services, and does not need to be licensed to practice law in Ontario, or even a lawyer. Third, while EDC and Suncor agreed to appoint a former Ontario judge, the Honourable Dennis O'Connor, to decide the First Arbitration, that agreement was made outside of the Policy and in the context of an arbitration that focused on a narrow issue of how to calculate a loss based on the terms of the Policy. EDC states one of the advantages of arbitration is that parties are free to select different arbitrators for different disputes under a contract. The Second Arbitration focuses on the Libyan operations of an international oil company, and how revenues under the EPSAs flow back to Canada through Suncor's international corporate structure. EDC submits the Court should appoint an arbitrator pursuant to the UNCITRAL Arbitration Rules as the parties agreed in the Policy, and not based on an agreement made outside the Policy for the purposes of the First Arbitration.

[69] EDC states Suncor's proposed secondary criteria of industry, arbitration, and dispute resolution experience are problematic because Suncor's position on these criteria is focused on one aspect of the dispute—that Ontario law governs the Policy. The Second Arbitration will involve not only the interpretation of the Policy and considerations of Ontario law, but also

significant components of foreign fact and law. EDC submits that the Court should consider a proposed arbitrator's experience in the context of all aspects of the dispute. EDC submits that cost considerations should not be a factor. An arbitrator's costs will be *de minimus* relative to the overall costs of the arbitration, and the amount in dispute.

[70] Considering all of the above, EDC submits that the Court should consider the following criteria in appointing an arbitrator: (i) experience as a sole arbitrator or tribunal president in complex international arbitrations; (ii) a nationality different from the nationalities or main locations of operations of the parties; (iii) qualified or experienced in common law and civil law; (iv) experience with international oil and gas business; (v) experience with disputes involving assets in North Africa or the Middle East; (vi) experience with political risk insurance disputes or the work of export credit agencies.

[71] Suncor submits the most critical job for the arbitrator in adjudicating the Second Arbitration on its merits will be to interpret the Policy pursuant to Ontario law, consider the oppression provisions of the *CBCA* in light of Canadian case law, and apply Canadian legal principles to the facts as found. Suncor submits Ontario and Canadian law will be of central importance.

[72] When drafting the Policy, Suncor states the parties ensured that only Ontario and Canadian law are applicable—the Policy is governed by the laws of Ontario and the federal laws of Canada applicable therein, it expressly prohibits applying the laws of any other jurisdiction, and the Arbitration Clause expressly requires the arbitrator to apply the laws of Ontario in

interpreting the Policy. Suncor states the principle of party autonomy holds the parties to their arbitration agreement. These provisions give rise to a threshold requirement that the arbitrator must be qualified to apply Ontario law. In addition, the Arbitration Clause designates the Federal Court—not an international body—as the appointing authority, and provides that the place of arbitration (*lex arbitri*) shall be Ottawa. The place of arbitration is a legal choice and not a geographic one: Casey, *Arbitration Law of Canada: Practice and Procedure*, section 3.12.5, page 110.

[73] While there are factual matters in the dispute that relate to oil and gas operations in Libya, Suncor states all of EDC's claims sound in Canadian law. EDC seeks relief under a Canadian contract that is governed by Ontario law, and the oppression remedy in a Canadian statute. EDC's notice of arbitration relies on Canadian statutes and cases with the exception of one United Kingdom insurance case that is routinely cited by Canadian courts.

[74] Suncor asserts that EDC's focus on the UNCITRAL Arbitration Rules elevates procedure over substance. While the parties agreed to arbitration in accordance with the UNCITRAL Arbitration Rules, there is nothing surprising about those rules or the Canadian version of the UNCITRAL Model Law that was adopted as the Code. The UNCITRAL Arbitration Rules and the UNCITRAL Model Law incorporate concepts that would be familiar to any of the candidates, and do not require an "internationalist". The Code itself is not restricted to international matters and applies to domestic matters as well.

[75] Suncor contends there are only two parties to the Policy: Suncor, a Canadian corporation with its registered office in Calgary, and EDC, a Canadian federal Crown corporation with its corporate office in Ottawa. EDC's attempt to add the Subsidiaries to the arbitration is prohibited by Policy terms which expressly state the Subsidiaries are not insured parties and have no rights under the Policy.

[76] Suncor adds that in the First Arbitration, the parties appointed a retired Ontario judge and EDC relied exclusively on Canadian legal authorities. Suncor argues that the Second Arbitration is not markedly different—the First Arbitration was about how much money Suncor lost, and the Second Arbitration will be about how much money EDC should get back. Like the First Arbitration, the Second Arbitration will turn on Ontario and Canadian law. Although the first arbitrator did not decide EDC's Recovery Rights, Recovery Rights were pleaded, and were a live issue when the parties agreed to the arbitrator for the First Arbitration.

[77] Suncor submits that it is in no party's interest to have the Second Arbitration decided by someone who is not qualified in Ontario law. Appointing someone who is not qualified to decide the issues under Canadian law risks undermining the arbitrator's authority.

[78] Suncor submits that appointing an arbitrator with a nationality different from the parties' nationalities is not a relevant consideration in this case, as the parties are not from different nations. Suncor and EDC are both Canadian companies and there is no reason to invoke the principle.

(2) Analysis

[79] My approach to selecting an arbitrator was first to consider the relative importance of the criteria in view of the circumstances of the case. I then assessed each candidate's qualifications and experience, weighing them with a view to the relative priority of the criteria to arrive at the candidate I believe to be most suitable for the Second Arbitration.

[80] I do not agree that an independent and impartial arbitrator who is qualified to apply the laws of Ontario to the interpretation of the Policy are "threshold criteria", either by agreement of the parties or under the relevant legislation. Article 11(5) of the Code requires the Court to "have due regard" to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator. While qualifications agreed to by the parties and considerations of independence and impartiality are important, the language of article 11(5) provides flexibility. The failure to satisfy these criteria would not necessarily disqualify a proposed arbitrator or trump other considerations, and I do not consider them to be "threshold criteria". I agree with EDC that an appointing authority should conduct a holistic assessment in view of all of the circumstances of the case, including the nature of the dispute that the arbitrator will be called upon to decide.

[81] That said, I assign highest priority to the following criteria: (i) qualifications and experience in Canadian law, particularly Ontario law; and (ii) independence and impartiality.

[82] The parties do not dispute that independence and impartiality are important criteria, and to repeat the language of Article 11(5) of the Code, the Court "shall have due regard" to such considerations as are likely to secure the appointment of an independent and impartial arbitrator.

[83] Turning to any qualifications agreed to by the parties, while I agree with EDC that the Arbitration Clause does not explicitly require the arbitrator to be qualified or experienced in Ontario or Canadian law, it comes close. The Arbitration Clause states that the arbitrator "shall apply this Policy and the laws of the Province of Ontario in its interpretation". Furthermore, I agree with Suncor that Ontario and Canadian law are of central importance to the issues in dispute. EDC's Recovery Rights stem from a Policy that is governed by the laws of Ontario and the federal laws of Canada applicable therein. The oppression remedy is a remedy under a Canadian statute.

[84] Assigning highest priority to qualifications and experience in Ontario law does not mean the arbitrator must be (or must have been) qualified to practice law in Ontario. I agree with EDC that experience as a licensed Ontario lawyer is not required; however, such experience is relevant insofar as it indicates experience with Ontario law.

[85] Similarly, experience as a judge is not required. Experience as a judge can provide an indication of a candidate's relevant qualifications, such as experience with Ontario law. However, the parties chose arbitration as the forum for settling their disputes, and not the courts of a particular jurisdiction. Past experience as a judge or even as an Ontario judge does not necessarily mean that a candidate is more suitable.

[86] In my view, arbitration and dispute resolution experience—particularly as a sole arbitrator or tribunal president in complex arbitrations—is of high importance. Experience as a sole arbitrator or tribunal president in complex international arbitrations is of medium importance. I agree with EDC that the international aspects of the Second Arbitration render such qualifications desirable, but I have assigned a lower priority than general arbitration and dispute resolution experience because the dispute centres around the Policy, which is governed by Ontario law.

[87] Any candidate with sufficient arbitration and dispute resolution experience would capably preside over arbitrations under the UNCITRAL Arbitration Rules or any similar arbitration rules, and this was not a factor in my determination.

[88] I weighed the following factors as medium priority in assessing the suitability of candidates (in no particular order): experience with international oil and gas disputes, commercial disputes, and insurance disputes. I would also assign medium priority to experience with political risk insurance disputes specifically; however, this was not a relevant factor because none of the candidates appear to have such experience.

[89] I assigned low priority to qualifications or experience in civil law generally. None of the candidates have experience in Libyan law, so this factor did not arise for consideration.

[90] I agree with Suncor that a nationality that differs from the nationalities of the parties is not an important consideration in this case, and it would seriously reduce the pool of candidates with the requisite experience in Ontario and Canadian law.

[91] The factors I weighed with lowest priority are: specific experience with disputes involving assets in North Africa or the Middle East, and familiarity with the political, legal, cultural, and historical context in Libya.

[92] In my view, significant differences in the arbitrator's accessibility (recognizing that remote access can be adequate for some purposes) would be a medium priority factor, and significant differences in costs would be a low priority factor. However, the record does not disclose significant differences in accessibility or costs as between the candidates I considered to be the most suitable according the other criteria, and these considerations were not a factor in my decision.

E. *Main Issue 2: Who should be appointed as sole arbitrator for the Second Arbitration?*

[93] Each of EDC and Suncor asks this Court to appoint one of the arbitrators it has proposed.

[94] EDC provides a list of eight proposed arbitrators who have confirmed they are available, willing to serve, and have no conflicts: (i) Tina Cicchetti; (ii) Stephanie Cohen; (iii) Fabian Gelinas; (iv) Bernard Hanotiau; (v) John Judge; (vi) Gabrielle Kaufmann-Kohler; (vii) Jennifer Kirby; and (viii) Ben Valentin KC.

[95] EDC did not agree with Suncor's proposal to re-appoint Mr. O'Connor. Due to his involvement in the First Arbitration, Mr. O'Connor prefers not to conduct the Second Arbitration unless the parties agree.

[96] Suncor provides a list of four proposed arbitrators who have confirmed they are available, willing to serve, and have no conflicts: (i) Mary Comeau, FCIArb; (ii) the Honourable Adelle Fruman, ICD.d; (iii) the Honourable J Douglas Cunningham; and (iv) the Honourable Robert Blair KC. Of these, Suncor states Mr. Cunningham or Mr. Blair would be best suited to arbitrate the Second Arbitration. Suncor notes that Mr. Cunningham was one of the candidates EDC proposed to arbitrate the First Arbitration.

[97] I considered the information about each of these candidates in the record. As I previously stated, I assessed the candidates' qualifications, weighing them with a view to the relative priority assigned to the criteria noted above. In my view, the most suitable candidate for the Second Arbitration is John Judge.

[98] I agree with EDC's summary of Mr. Judge's experience:

> John Judge is a prominent international arbitrator resident at Arbitration Place (Toronto) and a former partner at Stikeman Elliot LLP. He has extensive experience as sole arbitrator and tribunal chair in numerous large and complex international arbitration proceedings, including those conducted under the UNCITRAL Arbitration Rules. His broad experience covers disputes relating to insurance, industrial projects, oil and gas, mining, and infrastructure projects. He has experience with disputes involving Middle Eastern parties, oil and gas production sharing agreements and issues of force majeure in the context of civil war. He also has experience with disputes seated in Canada and governed by various Canadian laws. Mr. Judge has also appeared before trial

> and appellate courts, including the Supreme Court of Canada. He is a member of the Law Society of Ontario.

[99] Mr. Judge has extensive experience with Ontario law, which was given highest priority weighting. He also has extensive arbitration experience, which is high priority.

[100] Suncor states that EDC thwarted Suncor's reasonable efforts to explore any past relationships between the government of Canada and Mr. Judge. Suncor states it asked EDC to identify any instances in which EDC or the Canadian government have had a solicitor-client relationship with any of EDC's candidates, and EDC refused. From my review of the record, however, EDC objected to certain Suncor requests as overbroad but did respond that it is unaware of any instance in which it retained or appointed any of the candidates it had proposed. Furthermore, as noted above, if Suncor needed more information from any of the candidates, including Mr. Judge, it could have asked them directly.

[101] Mr. Judge provided a considered and detailed response to EDC's request for disclosure. In my view there is nothing in his response or in the materials that raises concerns about a lack of impartiality or independence, a factor that was given highest priority weighting.

[102] Compared to other candidates who also ranked highly for the high priority weighting factors, Mr. Judge has stronger qualifications for the medium priority and low priority weighting factors.

[103] As between the highly qualified candidates that were proposed by both parties, in my view, Mr. Judge emerged as the most suitable candidate to adjudicate this particular dispute.

IV. **Conclusion**

[104] The Subsidiaries' request to be removed as parties to this application is denied. Their request that the order specify that the arbitrator is appointed as between Suncor and EDC is also denied.

[105] Exercising this Court's role as the appointing authority for the Second Arbitration, I appoint John Judge.

[106] EDC submits that the appointment of an arbitrator is part of the arbitration process, and any award of costs related to this proceeding should be reserved to the arbitrator. In view of the nature of this proceeding and the relief sought, I am not inclined to award costs. The Court's role was to appoint the most suitable arbitrator, and as such it cannot be said that any party was successful on this application. I express no view on whether the arbitrator may award costs in connection with this proceeding, as part of the arbitration process.

ORDER IN T-2071-22

THIS COURT ORDERS that:

1. The Subsidiaries' request to be removed as parties to this application is denied.

2. John Judge is appointed as arbitrator for the Second Arbitration.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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