The Arbitration Review of the Americas

2022

Canada

The Arbitration Review of the Americas

2022

The Arbitration Review of the Americas 2022 covers Argentina, Bolivia, Canada, Ecuador, Mexico, Panama, Peru and the United States; and has eleven overviews, including two on arbitrability (one focused on Brazil in the context of allegations of corruption, the other on the relationship with competence-competence across the region). There's also a lucid guide to the interpretation of "concurrent delay" around the region, using five scenarios.

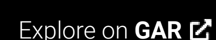
Other nuggets include:

• helpful statistics from Brazil's CAM-CCBC, showing just how often public entities form one side of an arbitration;
• an exegesis on the questions that US courts must still grapple with when it comes to enforcing intra-EU investor-state awards;
• a similarly helpful summary of recent Canadian court decisions;
• another on Mexican court decisions that showed a rather mixed year; and
• the discovery that the AmCham in Peru as of July 2021 now engages in ICC-style scrutiny of awards.

Generated: February 8, 2024

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. Copyright 2006 - 2024 Law Business Research

GAR Global Arbitration Review



Canada

Robert J C Deane, **Craig R Chiasson** and **Paige Burnham**
Borden Ladner Gervais LLP

Summary

IN SUMMARY
DISCUSSION POINTS
REFERENCED IN THIS ARTICLE
LEGISLATIVE FRAMEWORK
AN ARBITRATION-FRIENDLY JURISDICTION
RECENT CANADIAN CASE LAW
BAKARIS V SOUTHERN SKY
CONCLUSION
ENDNOTES

IN SUMMARY

Canada is an arbitration-friendly jurisdiction with a strong legislative framework that promotes the use of arbitration and minimises judicial intervention. This article provides an overview of international commercial arbitration in Canada and discusses developments in the legislation across the country's provinces, the implementation of the Model Law into provincial international commercial arbitration statutes, the willingness of courts to recognise and uphold arbitration principles and recent notable developments in the case law.

DISCUSSION POINTS

- History of the implementation of the Model Law in Canada
- Background to the legislative framework for arbitration in Canada's provinces
- List of arbitration groups and institutions throughout Canada
- Recent Canadian case law

REFERENCED IN THIS ARTICLE

- International Commercial Arbitration legislation of various Canadian provinces
- Arbitration legislation (domestic) of various Canadian provinces
- Recent Canadian jurisprudence relating to the application and interpretation of governing legislation
- United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards
- UNCITRAL Model Law on International Commercial Arbitration
- Uniform Law Conference of Canada

International commercial arbitration in Canada operates under a well-developed legal framework designed to promote the use of arbitration and minimise judicial intervention. Canadian courts have consistently upheld the integrity of the arbitral process; recent case law has further established Canada as a leader in the development of reliable jurisprudence relating to the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) by giving broad deference to the jurisdiction of arbitral tribunals and supporting the rights of parties seeking to enforce international arbitral awards. Canadian courts have also been instrumental in supporting the arbitral process when necessary.

LEGISLATIVE FRAMEWORK

UNCITRAL adopted the Model Law in 1985, and Canada and its provinces were the first jurisdictions in the world to enact legislation expressly implementing the Model Law. At the time, however, Canada's provinces were not uniform in adopting the Model Law, and a number of provinces deviated from it in certain respects.

The lack of complete uniformity among the provinces led to some discrepancies in how the courts addressed arbitration issues. Nevertheless, there was broad acceptance of international commercial arbitration as a valid alternative to the judicial process, and a high level of predictability for parties to international arbitration in Canada and those seeking to enforce international awards in Canada.

In late 2011, a working group of the Uniform Law Conference of Canada (ULCC) commenced a review of the existing model International Commercial Arbitration Act with a view to developing reform recommendations for a new model statute. Catalysed by the 2006 Model Law amendments, the review process also sought to reflect changes to international arbitration law and practice in the past three decades and to enhance the uniformity and predictability with which international commercial arbitral awards may be enforced in Canada. In 2014, the ULCC approved the working group's final report, which included a proposed new uniform International Commercial Arbitration Act for implementation throughout Canada.

Among other things, the new model statute adopts all of the 2006 Model Law amendments (except option II for article 7), including those that broaden the jurisdiction of courts and arbitral tribunals to order interim relief. The new statute also establishes a 10-year limitation period to commence proceedings seeking recognition and enforcement in Canada of foreign international commercial arbitral awards.

The new model statute will become law as it is enacted by the various Canadian federal, provincial and territorial legislatures. In March 2017, Ontario was the first to adopt a new International Commercial Arbitration Act, adopting most of the ULCC's recommendations in the proposed uniform act. In May 2018, British Columbia also amended its International Commercial Arbitration Act to incorporate the 2006 amendments to the UNCITRAL Model Law in a manner consistent with the ULCC model statute. In April 2019, the Alberta Law Reform Institute recommended that Alberta adopt the model statute; however, the province has not yet amended its International Commercial Arbitration Act.

AN ARBITRATION-FRIENDLY JURISDICTION

The Model Law and the New York Convention provide narrow grounds for judicial intervention in international commercial disputes that are subject to arbitration agreements. Canadian courts have consistently expressed their approval of those principles and frequently defer to arbitral tribunals for determinations regarding the tribunal's own jurisdiction and complex issues of fact and law. For example, in discussing the governing principles of the Model Law, one Canadian court stated that:

> [T]he purpose of the United Nations Conventions and the legislation adopting them is to ensure that the method of resolving disputes in the forum and according to the rules chosen by parties, is respected. Canadian courts have recognized that predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any international business transaction and facilitates and encourages the pursuit of freer trade on an international scale.

Courts across Canada have echoed these sentiments, consistently applying the competence–competence principle, showing broad deference to the decisions of arbitral tribunals and narrowly interpreting the grounds for setting aside arbitral awards. In addition, some provinces have explicitly accepted that international arbitral awards are akin to foreign

judgments, providing parties with jurisdictional advantages and longer limitation periods for enforcing their award.

The integrity of the international commercial arbitration process has further been endorsed in recognition and enforcement proceedings. When faced with challenges to the recognition of foreign awards, Canadian courts have consistently emphasised the mandatory nature of the enforcement provisions in the Model Law. Similarly, article V of the New York Convention, which sets out the limited grounds on which enforcement may be refused, is narrowly interpreted, and arbitral debtors have the burden of proving any allegation of injustice or impropriety that could render an award unenforceable.

Widespread support for international commercial arbitration in Canada has also led to the establishment of a number of arbitration groups and institutions, including the Western Canada Commercial Arbitration Society, the Toronto Commercial Arbitration Society, the Vancouver Centre for Dispute Resolution and Vancouver Arbitration Chambers, Arbitration Place, ICC Canada Arbitration Committee, the Vancouver International Commercial Arbitration Centre, the ADR Institute of Canada, the International Centre for Dispute Resolution Canada and the Canadian Commercial Arbitration Centre. These organisations provide parties with a variety of useful resources and services, including sets of procedural rules, contact information for qualified arbitrators and meeting facilities.

RECENT CANADIAN CASE LAW

The commitment of Canadian courts to the tenets of the Model Law and the New York Convention has been confirmed by recent case law. Significant recognition and enforcement decisions clearly demonstrate the Canadian judiciary's respect for the integrity of the international arbitration process and the importance of deference to international arbitral tribunals. Some of these cases are summarised below.

Uber Technologies Inc V Heller[1]

In the course of class certification proceedings in a proposed class action lawsuit, an application was brought to stay the plaintiff's action in favour of arbitration. In majority and concurring reasons, the Supreme Court of Canada, upholding the Ontario Court of Appeal's decision, demonstrated a willingness to set aside an international arbitration clause in an employment contract where there was significant unfairness and inequality of bargaining power between the parties.

On the narrow facts of the case before it, the majority determined that a court may rule on the validity of the arbitration agreement before the arbitral tribunal in certain limited circumstances. The proposed representative plaintiff in ***Uber Technologies Inc v Heller***, an Uber Eats delivery driver, sought to challenge the enforceability of a standard International Chamber of Commerce (ICC) arbitration provision seated in Amsterdam and under the substantive law of the Netherlands included in the employment contract with Uber, complaining, among other things, that the ICC commencement fee was equal to over half of his salary.

The issues were presented as employment law issues before the Supreme Court of Canada; however the reality was that the issue arose in the context of the plaintiff's counsel's effort to certify a class action. The majority reasons of the Supreme Court of Canada held that while competence-competence is an important and respected principle, the court could determine the issue based on the allegation that the arbitration agreement was 'unconscionable' and

its view that the plaintiff was substantially prevented from accessing recourse under the arbitration agreement. The agreement was found to be invalid.

In dissenting reasons, one of the justices referred to international jurisprudence that would have supported reading down the 'unconscionable' aspects of the arbitration agreement and enforcing the bare commitment to arbitrate.

The ***Uber Technologies Inc v Heller*** decision has been widely criticised for potentially having eroded the competence-competence principle, among other things. The decision is a fact-specific exception to the historically well-respected principle of competence-competence that should not affect the vast majority of commercial arbitral parties in Canada.

Apart from this case, the Supreme Court (and most Canadian courts) have consistently respected articles 8 and 16 of the Model Law, holding that any challenge to an arbitrator's jurisdiction or the arbitrability of a dispute should first be addressed by the arbitrator before a court can consider the issue.[2]

Recent Case Citing Uber Technologies Inc V Heller

In a recent decision by the Supreme Court of British Columbia, the Court refused to set aside an interim arbitration award in which the arbitrator held that British Columbia's International Commercial Arbitration Act (ICAA),[3] rather than British Columbia's domestic Arbitration Act, applied to the parties' dispute over an employment agreement.[4] The arbitrator concluded that the arbitration was international because:

- in accordance with section 1(3)(b)(i) of the ICAA, the place of arbitration (British Columbia) was outside the state in which the parties had their places of business; and
- the parties had been conducting themselves over three years on the basis that the arbitration was international and the ICAA applied.[5]

In upholding the arbitrator's decision that the international legislation applied, the application judge distinguished the case before him from the reasoning in *Uber*, noting that:

- the issue between the parties in Uber (ie, whether Ontario's employment standards legislation applied to Uber drivers working in Ontario) was 'clearly domestic';
- the parties in this case were residents of Nevada, United States and the impugned conduct occurred in Nevada;
- the law of Nevada governed the parties' relationships and the merits and remedies in this case; and
- the parties in this case agreed, if not expressly then by their conduct, that the arbitration was international and the arbitration was being conducted in accordance with British Columbia's ICAA.[6]

BAKARIS V SOUTHERN SKY

The Ontario Superior Court's decision in ***Bakaris v Southern Sky***[7] promotes respect for the principle of competence-competence even in the face of an agreement clause with conflicting provisions, one referring to arbitration under the London Court of International Arbitration (LCIA) Arbitration Rules and the other to litigation in Canada.

The parties entered into a memorandum of agreement (MOA) under which Nick Bakaris, an entrepreneur residing in Zimbabwe, agreed to obtain a licence on behalf of a Zimbabwean company to grow and sell medical cannabis in Zimbabwe. In exchange, Bakaris would receive, among other things, an interest in Southern Sky Holdings (formerly known as Southern Sun Pharma Inc) (Southern Sky), a British Columbia holding company whose subsidiaries produce, market and sell cannabis in Africa. Southern Sky subsequently terminated the MOA on the basis that Bakaris had not fulfilled its terms.[8]

Bakaris applied to the Ontario court to enforce his rights under the MOA pursuant to a provision in the MOA that referred to the 'non-exclusive jurisdiction' of Canadian courts to 'settle any dispute or claim arising out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims).'

However, the MOA also contained a mandatory arbitration clause, which stated that disputes 'shall be referred to and finally resolved by arbitration under the London Court of International Arbitration, Arbitration Rules, which Rules are deemed to be incorporated by reference into this clause.' Pursuant to that clause, Southern Sky moved to stay the litigation in favour of arbitration. The issue before the Court was whether Ontario's ICAA[9] applied and a stay should be granted in favour of arbitration.[10]

The application judge began her analysis by noting that the standard for demonstrating that a dispute is subject to arbitration under the Model Law is not onerous. Citing a British Columbia Court of Appeal case, the application judge held that a stay should be granted if it was 'arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement'.[11]

In reaching the conclusion that the test was met in this case, the application judge considered that the parties had turned their minds to the possibility of resolving disputes by way of arbitration, including by setting out in the MOA the number of arbitrators, the arbitral seat, the language of the arbitration and the arbitration rules that would apply. The parties also contemplated issues of confidentiality, interlocutory court orders and finality in the arbitration clause. Accordingly, the application judge 'decline[d] to reach any final determination as to the scope of the arbitration agreement' and stayed the litigation pending the determination of the LCIA on its jurisdiction to conduct the arbitration.[12]

79411 USA Inc V Mondofix Inc[13]

In a decision that recognises the importance of maintaining confidentiality in the arbitration process, the Superior Court of Quebec held that the information in arbitration awards should be kept confidential in the course of recognition and enforcement applications unless the party seeking to disclose the award can demonstrate the utility or necessity of the disclosure.

Fix Auto USA and Fusa Inc (Fix Auto) applied to recognise and enforce a domestic arbitration award resulting from an arbitration between Fix Auto and Mondofix Inc regarding a licence agreement between the parties. Although there was no disagreement that the conditions for the recognition and enforcement of the award under Quebec's Code of Civil Procedure (CCP)[14] were met, Mondofix objected to the award being made public. Mondofix asked the Court to put the award under seal and to withdraw from the court record the other exhibits filed in support of the application. The Court was only required to deal with the issue regarding the award as the parties consented to have the exhibits withdrawn from the court record in the course of the proceedings.[15]

The application judge began by noting that article 4 of the CCP, which provides that the arbitration process remains confidential subject to agreement by the parties or any 'special provisions' of the law, must necessarily extend to arbitration awards and not just the arbitration process.[16] While emphasising the importance of confidentiality in arbitration, the application judge recognised the need for exceptions to the rule that arbitration awards should remain confidential during the course of recognition and enforcement proceedings. The application judge held that applications to seal arbitration awards must be decided on a case-by-case basis and the 'solution . . . turns on the following question: Can justice "be done without the necessity of ordering the production of documents that are otherwise confidential"'.[17]

The burden of showing that an exception must be made rests with the party seeking the benefit of the exception, in this case Fix Auto. Having found that Fix Auto had not demonstrated the utility or necessity of disclosing the award in this case, the application judge ruled that the award must remain confidential.[18]

Metso Minerals Canada Inc V Arcelormittal Exploitation Minière Canada[19]

On an application to recognise an international arbitration award in circumstances where the award had already been honoured, the Superior Court of Quebec held that: the recognition and enforcement of arbitral awards are distinguishable and independent terms such that the recognition of an award can be sought independently from the enforcement of an award, and the fact that an award has already been satisfied does not necessarily render recognition 'theoretical and of no use.'

The award at issue was the result of an arbitration held in New York arising from a dispute between Metso Minerals Canada Inc and Metso Minerals Industries Inc (Metso), and ArcelorMittal Exploitation Minière Canada and ArcerloMittal Canada Inc. (ArcerloMittal) for damages allegedly caused by products sold to ArcerlorMittal by Metso. The award dismissed ArcerlorMittal's claims and required ArcerlorMittal to bear 80 per cent of the parties' arbitration fees and 80 per cent of Metso's reasonable legal costs. The award was confirmed by the New York Court and ArcerlorMittal subsequently honoured the award and satisfied payment to Metso.[20]

Metso then applied to the Quebec Superior Court, under Quebec's Code of Civil Procedure (CCP),[21] to recognise the award. The issue the Court had to decide was whether it should refuse to recognise the award on the basis that the application was theoretical because ArcerlorMittal had already satisfied the award and a declaration of satisfaction of judgment had been filed.[22]

In reaching its decision to grant Metso's application, the Court considered what the New York Convention, the UNCITRAL Model Law and the CCP say about recognition and enforcement of arbitration awards, noting that the applicable provisions of all three refer to the recognition and enforcement of an award as 'distinct aspects' of recognition and enforcement proceedings.[23] The Court elaborated further, stating that the recognition of an award 'refers to its authority or binding effect' and 'makes the award binding and gives it the same legal weight and authority as any other judgment of the Court', whereas the enforcement of an award, 'goes a step further' and 'ensures that the award is carried out, that it is executed.'[24] For that reason, the Court stated, an award can be recognised without being enforced but not vice versa.

Finally, the Court cited with approval a lengthy passage from ***Redfern and Hunter on International Arbitration,*** which discusses the purpose of recognition. On its own, recognition generally acts as a shield, for example, in circumstances where a court 'is asked to grant a remedy in respect to a dispute that has been the subject of previous arbitral proceedings.'[25] The Court noted that Metso intended to rely on the award in its defence of two cases pending before the Superior Court of Quebec (ArcelorMittal was also a party to both cases) relating to the performance of some of the same products at issue in the arbitration. Accordingly, the Court found it 'untenable' that the recognition application was merely theoretical and of no use as ArcelorMittal argued.[26]

Tianjin V Xu[27]

On an application to recognise and enforce an arbitral award issued by the Chinese International Economic and Trade Arbitration Commission (CIETAC), the Ontario Superior Court determined that 'proper notice' is where the form of notice given was reasonably calculated to inform the party of the arbitral proceedings and give the party an opportunity to respond.

The arbitral award arose from an investment agreement in China between the applicants on the enforcement application, two Chinese limited partnerships, and the respondent on the enforcement application, Shuqin Xu, her former husband, Jinlong Huang, and two Chinese companies the couple were shareholders in. The investment agreement provided, among other things, that in certain circumstances, the applicants had the right to a 'transaction reversal', which would require Xu, Huang and one of the companies to repurchase the shares from the applicants at the subscription price plus simple interest.

During the course of the agreement, the applicants sought, among other things, the transaction reversal as provided for under the agreement. Xu and Huang did not comply with the demand and, pursuant to the agreement, the applicants submitted the dispute to CIETAC for arbitration. Xu did not appear.

On the application, Xu argued that the court should not enforce the arbitral award for two reasons: first, she did not receive notice of the arbitral proceedings and was unable to present her case; and second, the arbitration was not an international commercial arbitration as defined by the Model Law such that the court had no jurisdiction to enforce the award under Ontario's ICAA.

On the first issue, the court rejected Xu's argument that service of notice of the arbitral proceedings or arbitrators should be in accordance with the Hague Convention. Given that the CIETAC Rules do not provide that service must accord with the Hague Convention, the court held that there could be no such requirement.[28] The court held that the evidence established that Xu was given proper notice of both the appointment of arbitrators and of the arbitral proceedings. In particular, there was evidence that for 10 months prior to the arbitration hearing, the Court of Arbitration of CIETAC sent the case materials a total of seven times to Xu's two addresses in China and three times to her Canadian address; six out of the 10 attempts were sent by notarised delivery. The evidence established that during all material times, Xu resided at the Canadian address the materials were sent to. The court found that the attempts were more than sufficient to inform Xu of the arbitral proceedings and give her an opportunity to respond to the arbitration.

While there was no issue that the arbitration was commercial, Xu submitted that the arbitration did not meet the definition of international arbitration under article 1(3) of the

Model Law because she was doing business in China and, therefore, the parties were all doing business in the same state. The court held that Xu's evidence made it clear she did not have a place of business in China at the time of the arbitration agreement. Xu testified that Huang had been the directing mind of the Chinese companies and that she was just a shareholder. The fact that her last known address in China was the address for one of the companies was not sufficient to show she was carrying on business in China or that China was her place of business. Without a place of business, Xu's habitual residence in Canada was the governing factor and the arbitration was found to be international.[29]

South Coast British Columbia Transportation Authority V BMT Fleet Technology Ltd[30]

In ***South Coast British Columbia Transportation Authority v BMT Fleet Technology Ltd,*** the British Columbia Court of Appeal declared a notice to arbitrate a nullity because it sought to commence four separate arbitrations against three different parties under four separate arbitration agreements.

The parties' dispute arose from four related contracts for the design and construction of a new passenger ferry in Vancouver, British Columbia. The contracts each contained an arbitration agreement. In 2011, the South Coast British Columbia Transportation Authority (TransLink) delivered a notice to arbitrate to the British Columbia International Commercial Arbitration Centre (BCICAC) to commence a single arbitration to arbitrate disputes under the four contracts and naming the three responding parties. The BCICAC accepted the notice and sent a letter to the parties indicating the start date of the arbitration as 4 April 2011.

In August 2016, TransLink applied to court for the appointment of an arbitrator in the single arbitration. The respondents objected on the basis that they had not consented to the consolidation and the notice to arbitrate was a nullity because it was contrary to section 21 of British Columbia's Arbitration Act, which requires all parties to consent to the consolidation.

Subsequently, TransLink submitted separate notices to appoint an arbitrator for separate arbitrations and requested that the BCICAC restructure its file to reflect that the 2011 notice to arbitrate had commenced four separate arbitrations (however, TransLink later discontinued against one of the respondents). TransLink also sought a declaration that the arbitrations had been commenced in April 2011 and requested an order appointing the same arbitrator for all of the arbitrations.

Supreme Court Of British Columbia

The lower court granted TransLink's application and focused its decision on the 'substance of the matter'. In particular, the court found that although the consolidated arbitration had been commenced based on a misreading of section 21 of the Arbitration Act, the 2011 notice to arbitrate contained all of the information necessary to commence four separate arbitrations. Accordingly, the single notice was merely an irregularity of form and did not prevent all of the arbitrations from commencing as of the date of the 2011 notice.[31] The lower court also ordered the appointment of the same arbitrator in the three arbitrations.

British Columbia Court Of Appeal

The Court of Appeal allowed the appeal and dismissed TransLink's application. The Court of Appeal held that the trial judge erred in law in finding that the 2011 notice to arbitrate was curably irregular and not a nullity. Critically, it found that the lower court had not addressed the implications of section 21 of the Arbitration Act in the circumstances before it. Upon

review of the relevant authorities, the Court of Appeal held that 'apart from statute law and absent consent, an arbitration may address only the contract giving rise to the dispute'.[32]

Given that section 21 is the only provision in the Arbitration Act that expressly addresses joint arbitration of disputes arising under separate arbitration agreements, the Court of Appeal held that unless the conditions of section 21 are met, including obtaining consent from all the parties to the consolidation, arbitrations cannot be consolidated.

This analysis led the Court of Appeal to conclude that the 2011 notice to arbitrate was outside the arbitration clauses, outside the parties' contracts and outside the Arbitration Act and, therefore, a nullity.[33] The Court of Appeal disagreed that TransLink could regularise the reference to arbitration by merely filing four copies of the same notice.

TransLink's application for leave to appeal to the Supreme Court of Canada was refused.[34]

Acciona Infrastructure Canada Inc V Posco Daewoo Corporation[35]

In overturning the Alberta Court of Queen's Bench decision to validate service of an arbitration notice that had not been properly served in accordance with the Hague Convention or Alberta's Rules of Court, the Alberta Court of Appeal refused to grant costs to the successful party on the basis that the party's arguments were technical, the proceedings had only served to delay the arbitration and the party had not suffered any prejudice.

The parties' disputes arose out of an arbitration clause in a subcontract related to the construction of a bridge in Edmonton, Alberta. The respondents, Acciona Infrastructure Canada Inc and Mastec Canada Inc, operating as Acciona/Pacer Joint Venture (the Joint Venture), had been contracted by the City of Edmonton to replace a local bridge. The Joint Venture entered into a subcontract for the supply of steel with the appellant, Posco Daewoo Corporation (PDC), a company based in Korea.

The parties disagreed over the meaning of the words 'in accordance with the Arbitration Act of Alberta' in the subcontract: the Joint Venture interpreted the clause to mean that Alberta's domestic Arbitration Act applied and issued an arbitration notice making reference to that Act, whereas PDC argued that Alberta's ICAA applied. Accordingly, PDC took the position that the Joint Venture's arbitration notice was invalid.[36]

In an effort to advance the arbitration process, the Joint Venture indicated that it was prepared to abide by international arbitration procedure and proceeded to nominate its arbitrator and invited PDC to do the same, however, PDC refused to participate in what it considered a 'defective arbitration'.[37]

Seven months after the Joint Venture served its arbitration notice, and shortly after the Joint Venture applied to the Alberta Court of Queen's Bench to resolve the parties' stalemate, PDC issued its own arbitration notice stating that although the subcontract referred to the domestic Act, 'by operation of law' the arbitration should be conducted under the ICAA.[38] The Joint Venture subsequently obtained ex parte orders appointing arbitrators, validating service of the initial arbitration notice and consolidating the two arbitrations. Although PDC's Korean and Canadian counsel had received actual notice of the proceedings, no one appeared on PDC's behalf.

Alberta Court Of Queen's Bench

PDC applied to set aside the three ex parte orders on the basis that: the Alberta Court did not have jurisdiction over PDC because the Joint Venture had not effected proper service of its

application in accordance with Alberta's Rules of Court relating to service outside of Alberta's jurisdiction; and a valid arbitration did not exist because the Joint Venture's arbitration notice was not a proceeding under the ICAA.

The Court disagreed with both of PDC's arguments. First, it held that the parties had attorned to the Court's jurisdiction in the subcontract and in the subsequent standstill agreement that the parties had entered into.[39] Second, it held that the issue of whether the notice issued by the Joint Venture was a nullity was a decision for the arbitration panel to determine, not the Court.[40]

The Court dismissed PDC's application.

Alberta Court Of Appeal

The Court of Appeal disagreed with the Court of Queen's Bench decision and allowed PDC's appeal. Regarding the issue of service, the Court of Appeal, in majority and concurring reasons, held that proper service had not been effected on PDC in Korea because the Joint Venture had applied to the Court after it had received notice that the application had been received by the central authority of Korea under the Hague Convention but prior to receiving confirmation of actual service on PDC in Korea; and the Joint Venture had not complied with Alberta's Rules of Court, which require judicial permission for the service of a commencement document outside Canada.

Although the Court of Appeal agreed that the Joint Venture's arguments had practical merit, including that nothing would be accomplished by setting aside the three orders except delaying the arbitration, the Court of Appeal disagreed with the Joint Venture that the Court could cure the irregularities regarding service.[41]

In its majority decision, the Court held that the deficiencies in service were significant and that it was 'not an appropriate situation in which the Court might validate service despite the irregularities.'[42] The order validating service was set aside and, in the absence of effective service, the orders appointing arbitrators and consolidating the two arbitrations could not stand and were also set aside. The Court of Appeal refused to grant costs to PDC despite its success on the application on the basis that PDC could not expect to receive costs by raising 'technical arguments' that only served to delay proceedings and in the absence of any prejudice.[43]

Octaform Inc V Leung[44]

In a decision that displays the willingness of courts to assist (but not interfere with) the conduct of an arbitration, the Supreme Court of British Columbia issued subpoenas compelling two non-party witnesses to attend an ongoing arbitration.

Octaform Inc (Octaform) brought a petition under section 27 of British Columbia's ICCA seeking the issuance of subpoenas compelling two non-party witnesses to attend the hearing of an ongoing arbitration between Octaform and others in British Columbia. At the initial hearing of the petition, the petition judge held that the relief sought was premature, adjourned the petitions sine die and gave leave to Octaform to reschedule the hearing if either witness refused to appear at the hearing voluntarily after their appearance had been reasonably requested by Octaform.[45]

Following the issuance of his reasons, the petition judge was provided with additional information regarding the arbitration, including information that made it clear that the

arbitrator had implemented a process for the taking of the witnesses' evidence that the petition judge had previously not been alive to. In his procedural orders, the arbitrator concluded, among other things, that it would be 'impractical in the circumstances to direct [the witnesses] to provide witness statements and that their evidence at the Arbitration should be entirely viva voce.' He also granted leave and approval to Octaform to take the necessary steps to obtain the witnesses' evidence at the hearing.[46]

The petition judge clarified that his initial ruling 'was not an attempt to impose a process by which evidence would be taken at the Arbitration. Rather, it was intended to ensure the process that had been directed by the Arbitrator … for the taking of evidence was followed…. It is not the role of this court to second guess the suitability of the processes adopted by the tribunal.'[47] The petition judge then considered section 27 of the ICAA, which provides that an arbitral tribunal 'may request from the Supreme Court assistance in taking evidence, and the court may execute the request within its competence and according to its rules on taking evidence.'

To satisfy himself that the requested assistance should be granted, the petition judge noted that he had to be satisfied that the request was reasonable and in accordance with the practices of the court. Despite the various objections made by the non-party witnesses, the petition judge held that the conclusions reached by the arbitrator that the witnesses should attend the arbitration were carefully reasoned and that 'this court is in no position to second guess them.'[48]

Accordingly, the petition judge agreed to issue the two subpoenas, subject to the following additional terms:

- the witnesses be provided with any documents that the arbitrator deems appropriate prior to their attendance at the hearing; and
- Octaform provides undertakings:
    - not to use the evidence obtained pursuant to the subpoenas for any purpose other than the arbitration without the consent of the witnesses or the court; and
    - to reimburse the witnesses for their respective reasonable legal expenses associated with their preparation for and attendance as a witness at the arbitration.[49]

The Russian Federation V Luxtona Limited[50]

In the re-hearing of an application brought under articles 16 and 34 of the UNCITRAL Model law, the Ontario Superior Court held that parties cannot file fresh evidence as of right and must obtain leave to do so by providing a 'reasonable explanation' demonstrating why the new evidence is necessary, including why the evidence was not, or could not have been, put before the tribunal at first instance, especially in circumstances where the parties had full opportunity to advance their evidence and respond to the other side's arguments.

The application arose from a dispute between Luxtona Limited, the former shareholder of an energy company called Yukos, and Russia, wherein Luxtona alleged that Russia had violated provisions of the Energy Charter Treaty (ECT) concerning the protection of investments, including Luxtona's investment in Yukos. The ECT had been ratified but never passed; however, the ECT contained a provision that Russia would undertake to provisionally apply

the ECT to the extent that doing so was 'not inconsistent with' Russian law. Although Russia disputed that it had provisionally agreed to apply the ECT's arbitration clause and argued that the arbitration of this claim was inconsistent with Russian law, it participated in the appointment of an arbitral tribunal seated in Toronto while reserving all of its rights.[51]

The tribunal decided the interim issue of whether the provisional application of the ECT, in particular the arbitration provision, was 'not inconsistent with' Russian law and held that it had jurisdiction to hear Luxtona's claims. Both parties relied on extensive expert evidence on relevant Russian law in the course of the hearing. Russia subsequently brought an application under articles 16(3) and 34(2) of the Model Law to set aside the tribunal's interim award on the basis that the tribunal had wrongly decided two of Russia's objections to the tribunal's jurisdiction.[52]

Russia filed two new expert reports on Russian law in support of its application before the Ontario Superior Court that had not been before the tribunal. Luxtona objected to Russia filing new evidence. In somewhat unusual circumstances, the application regarding the admissibility of the new evidence was heard twice, by two different judges of the same court. The application judge initially assigned to the case held that Russia was permitted to file new evidence as of right.[53] On account of changes to judicial assignments, a new judge was assigned to the case and was asked to decide a further evidentiary question resulting from the new evidence filed by Russia.

In the course of hearing that issue, the newly assigned judge asked the parties reargue the issue of admissibility. Upon finding that he had jurisdiction to change a previous interlocutory evidential ruling by a judge who was no longer hearing the application,[54] the application judge went on to consider afresh whether Russia's new evidence should be admitted.

The application judge began his analysis by considering articles 16 and 34 of the Model Law and following the approach set out in a previous decision of the Ontario Court of Appeal, which restricts courts to a 'review' of the arbitration tribunal's decision, as opposed to a trial de novo.[55] Upon finding that there were no Canadian cases that address what the record for the court's review comprises and in what circumstances the record can include new evidence, the application judge considered cases from other jurisdictions, including non-Model Law jurisdictions, such as the United Kingdom.[56]

Ultimately, the application judge concluded that it would be appropriate to adapt the *Palmer* test, a 'well-known and understood test' from a previous Supreme Court of Canada decision-[57] to the context of an application to set aside an arbitral tribunal's award on jurisdiction under articles 16 and 34 of the Model Law. A party seeking to adduce new evidence on such an application cannot do so as of right and must show that:

- the evidence could not have been obtained using reasonable diligence;
- the evidence would probably have an important influence on the case;
- the evidence must be apparently credible; and
- the evidence must be such that, if believed, it could reasonably, when taken with the other evidence adduced at the hearing, be expected to have affected the result.[58]

Finding that Russia had not met any of the four requirements of the test, the application judge held that Russia's new evidence was not admissible.[59]

Russia's application for leave to appeal to the Divisional Court was granted on 29 June 2020.-[60]

CONCLUSION

Canada is consistently recognised as an arbitration-friendly jurisdiction – and for good reason. First, the legislative framework governing international commercial arbitration and the enforcement of foreign arbitral awards closely mirrors the Model Law and New York Convention, and severely limits the ability of courts to intervene with decisions made by arbitrators. Second, Canadian courts are supportive of arbitration, and continue to uphold the integrity of the arbitral process by affording broad deference to tribunals on issues of jurisdiction, findings of fact and law, and in respect of relief granted. The approach of the Canadian judiciary to complex issues in international commercial arbitration should instil confidence in practitioners that Canada will remain a leader in the field of international commercial arbitration policy and jurisprudence.

Endnotes

1 2020 SCC 16, affirming 2019 ONCA 1. ^ Back to section

2 See, for example, ***Dell Computer Corp v Union des Consommateurs***, 2007 SCC 34. ^ Back to section

3 RSCB 1996, c 233. ^ Back to section

4 ***Johnston v Octaform Inc***, 2021 BCSC 536. ^ Back to section

5 ibid at paragraph 58. ^ Back to section

6 ibid paragraphs 61-63. ^ Back to section

7 2020 ONSC 7306. ^ Back to section

8 ***Bakaris v Southern Sky***, 2020 ONSC 7306 at paragraphs 2–3. ^ Back to section

9 SO 2017, c-2, Sched 5. ^ Back to section

10 ***Bakaris v Southern Sky***, 2020 ONSC 7306 at paragraphs 4–6, 16. ^ Back to section

11 ibid at paragraph 24, citing ***Gulf Resources Ltd v Arochem International Ltd***, 66 BCLR (2d) 113 (CA). ^ Back to section

12 Ibid at paragraphs 30–33. ^ Back to section

13 2020 QCCS 1104. ^ Back to section

14 CQLR c CCQ-1991. ^ Back to section

15 79411 *USA Inc v Mondofix Inc*, 2020 QCCS 1104 at paragraphs 2, 25. ^ Back to section

16 ibid at paragraphs 6–9. ^ Back to section

17 ibid at paragraph 13. ^ Back to section

18 ibid at paragraph 24. ^ Back to section

19 2020 QCCS 1103. ^ Back to section

20 *Metso Minerals Canada Inc v Arcelormittal exploitation minière Canada*, 2020 QCCS 1103 at paragraphs 2–5. ^ Back to section

21 CQLR c CCQ-1991. ^ Back to section

22 *Metso Minerals Canada Inc v Arcelormittal exploitation minière Canada*, 2020 QCCS 1103 at paragraph 7. ^ Back to section

23 ibid at paragraph 18. ^ Back to section

24 ibid at paragraphs 19–20. ^ Back to section

25 ibid at paragraph 21. ^ Back to section

26 ibid at paragraph 22. ^ Back to section

27 2019 ONSC 628. ^ Back to section

28 *Tianjin v Xu*, 2019 ONSC 628 at paragraph 35. ^ Back to section

29 ibid at paragraph 49. ^ Back to section

30 2018 BCCA 468, reversing 2017 BCSC 1683. ^ Back to section

31 *South Coast British Columbia Transportation Authority v BMT Fleet Technology Ltd*, 2017 BCSC 1683 at paragraphs 83–85. ^ Back to section

32 *South Coast British Columbia Transportation Authority v BMT Fleet Technology Ltd*, 2018 BCCA 468 at paragraph 40. ^ Back to section

33 ibid, paragraph 50. ^ Back to section

34 *South Coast British Columbia Transportation Authority v BMT Fleet Technology Ltd*, leave to appeal to SCC refused, 2019 CanLII 50899. ^ Back to section

35 2019 ABCA 241, reversing 2017 ABQB 707. ^ Back to section

36 *Acciona Infrastructure Canada Inc v Posco Daewoo Corporation*, 2019 ABCA 241 at paragraphs 4–5. ^ Back to section

37 ibid at paragraph 7. ^ Back to section

38 ibid at paragraph 6. ^ Back to section

39 ibid at paragraphs 17–20. ^ Back to section

40 *Acciona Infrastructure Canada Inc v Posco Daewoo Corporation*, 2017 ABQB 707 at paragraph 16. ^ Back to section

41 *Acciona Infrastructure Canada Inc v Posco Daewoo Corporation*, 2019 ABCA 241 at paragraphs 17, 23. ^ Back to section

42 ibid at paragraph 22. ^ Back to section

43 ibid at paragraph 29. ^ Back to section

44 2021 BCSC 761. ^ Back to section

45 *Octaform v Leung*, 2021 BCSC 73. ^ Back to section

46 *Octaform v Leung*, 2021 BCSC 761 at paragraphs 5, 10 and 14. ^ Back to section

47 ibid at paragraphs 11–12. ^ Back to section

48 ibid at paragraph 20. ^ Back to section

49 ibid at paragraph 22. ^ Back to section

50 2019 ONSC 7558, with additional reasons at 2019 ONSC 4503. ^ Back to section

51 *The Russia Federation v Luxtona Limited*, 2019 ONSC 7558 at paragraph 5. ^ Back to section

52 ibid at paragraph 6. ^ Back to section

53 *The Russia Federation v Luxtona Limited*, 2018 ONSC 2419. ^ Back to section

54 *The Russia Federation v Luxtona Limited*, 2019 ONSC 7558 at paragraphs 11 to 16. ^ Back to section

55 ibid at paragraphs 30 to 33, citing *United Mexican States v Cargill Inc*, 2011 ONCA 622. ^ Back to section

56 ibid at paragraphs 40 to 62. ^ Back to section

57 ibid at paragraphs 66 to 68, citing *R v Palmer*, [1980] 1 SCR 759. ^ Back to section

58 ibid at paragraph 69. ^ Back to section

59 ibid at paragraph 70. ^ Back to section

60 *The Russian Federation v Luxtona Limited*, 2020 ONSC 4668. ^ Back to section

Robert J C Deane rdeane@blg.com
Craig R Chiasson cchiasson@blg.com
Paige Burnham pburnham@blg.com

Tel: +1 604 687 5744

https://www.blg.com

Read more from this firm on GAR