The Arbitration Review of the Americas

2021

Canada

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Across 18 chapters, and spanning 120 pages, this edition provides an invaluable retrospective from 39 leading figures.Together, our contributors capture and interpret the most substantial recent international arbitration events of the year just gone, supported by footnotes and relevant statistics. Other articles provide valuable background so that you can get up to speed quickly on the essentials of a particular country as a seat.This edition covers Argentina, Bolivia, Canada, Ecuador, Mexico, Panama, Peru and the United States; has overviews on nascent Brazilian jurisprudence on arbitration and corruption (in the wake of Operation Carwash) and on the coronavirus and investment arbitration, among other things; and an update on how Mexico's federal courts are addressing the problem of personal injunctions against arbitrators that have brought Mexico grinding to a halt as a seat.

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Canada

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

Summary

IN SUMMARY

Canada is an arbitration-friendly jurisdiction with a strong legislative framework that promotes the use of arbitration and minimises judicial intervention. This chapter 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 and:
    - the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention); and
    - the UNCITRAL Model Law on International Commercial Arbitration (the Model Law).
- The Uniform Law Conference of Canada (ULCC).

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 arbitrations in Canada and those seeking to enforce international awards in Canada.

In late 2011, a working group of the Uniform Law Conference of Canada (the 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, the Province of 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, the Province of 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 the Province of Alberta adopt the model statute but 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 these 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 British Columbia 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.

Heller V Uber Technologies

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 its decision, the Ontario Court of Appeal 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.

Ontario Superior Court Of Justice

The proposed representative plaintiff sought, among other relief, a declaration that drivers in Ontario that work for the defendant companies (Uber) and provide food delivery services and personal transportation services, or both, using various Uber Apps were employees of Uber and therefore governed by Ontario's employment standards legislation. Uber brought a motion to stay the action in Ontario relying on the arbitration clause in the contract of employment the drivers signed with Uber. The arbitration clause called for mandatory mediation of any disputes and, if the disputes were not resolved within 60 days, the parties were required to proceed to arbitration under the Rules of Arbitration of the International Chamber of Commerce in the Netherlands.

The lower court granted Uber's motion to stay the action in favour of arbitration holding that the dispute was both international and commercial, such that Ontario's International Commercial Arbitration Act[1] (ICAA) and its domestic Arbitration Act[2] applied. The lower court also held that courts must enforce arbitration agreements that are freely entered into even in contracts of adhesion; Ontario's employment standards legislation did not preclude parties from arbitrating; and the arbitrability of employment agreements was an issue for the

arbitrator to decide at first instance under the competence-competence principle. The lower court rejected the plaintiff's argument that the employment agreement was unconscionable.

Ontario Court Of Appeal

The lower court's decision was overturned on appeal.[3] The Ontario Court of Appeal found that the application judge 'erred in principle in his analysis of the existing authorities on the issue of when it is appropriate to grant a stay in favour of an arbitration provision contained in a contract of adhesion'.[4] In spite of its reservations regarding the lower court's finding that the relationship between the parties was a commercial one, the Ontario Court of Appeal agreed with the lower court that nothing much turned on whether Ontario's international or domestic legislation applied and thus did not deal with the issue. For this same reason, the Court of Appeal only addressed Ontario's domestic Arbitration Act throughout its reasons, noting that it would have reached the same conclusions if it had applied Ontario's ICAA.

The Court of Appeal reached the conclusion that the arbitration clause was invalid under section 7(2) of Ontario's Arbitration Act and that the mandatory stay under section 7(1) did not apply for two reasons. First, the court held that the competence-competence principle had no application to this case because at issue was the validity of the arbitration clause, not a jurisdictional question to be determined by the arbitrator.[5] Having adopted the assumption that the drivers were employees for the purposes of this preliminary motion, the Court of Appeal held that the arbitration clause constituted a contracting out of the Employment Standards Act,[6] depriving the drivers of an investigative and complaints process under that Act.

Second, the Court of Appeal reached the separate and independent conclusion that the arbitration clause was unconscionable at common law. The Court of Appeal found that the arbitration clause met both tests for unconscionability: the four-part test set out by the Ontario Court of Appeal[7] and the two-part test set out by the British Columbia Court of Appeal and the Supreme Court of Canada.[8] Applying the four-part test, the arbitration clause was held to be a 'substantially improvident and unfair bargain', made without any evidence of legal advice to the drivers, between two sides with significant inequality of bargaining party and chosen by Uber to favour itself and take advantage of the drivers.[9]

Supreme Court Of Canada

Uber obtained leave to appeal to the Supreme Court of Canada on 23 May 2019 and the appeal was heard on 6 November 2019. The Supreme Court of Canada's reasons have not yet been published.

The British Columbia Supreme Court recently declined to follow the Ontario Court of Appeal's reasoning in ***Heller*** on the basis that it was 'not obvious' that the reasoning in ***Heller*** applied to British Columbia's employment standards legislation and because the unfairness concerns that informed the result in ***Heller*** did not arise on the facts of the British Columbia case.[10] Finding that the requirements of British Columbia's domestic Arbitration Act were met, the Court upheld the arbitration agreement in the parties' employment contract and granted a stay in favour of arbitration.[11]

Sum Trade Corp V Agricom International Inc[12]

On the appeal of a stay application, the British Columbia Court of Appeal refused to interfere with the application judge's finding that there was an arguable case that Sum Trade Corp and

Agricom International Inc had agreed to incorporate an arbitration clause into three of their contracts.

Pursuant to the contracts, Agricom agreed to sell lentils to Sum Trade. The contracts each had an annotation below the material terms that read as follows: 'Trade Rule Info: GAFTA 88, Incoterms 2010'. The GAFTA 88 standard form contract includes an arbitration clause whereby all disputes or claims arising out of the contract regarding the interpretation or execution of the contract are to be determined by arbitration in accordance with the GAFTA Arbitration Rules.

When Sum Trade complained that particular lentil deliveries did not meet contract specifications and sought to return the goods for a refund, Agricom asserted that the contracts incorporated the GAFTA 88 dispute resolution process and required mandatory arbitration. Instead, Sum Trade commenced a civil claim. In response, Agricom sought to stay the civil action in favour of arbitration on the basis that there was an arguable case that the terms of GAFTA 88, including the arbitration clause, were incorporated into the contracts.

Supreme Court Of British Columbia

The application judge granted the stay following previous case law that held that challenges to the arbitrator's jurisdiction should first be resolved by the arbitrator unless the challenge is based solely on a question of law, or, if a question of mixed fact and law, the question of fact requires only superficial consideration of the documentary evidence on the record.[13]

British Columbia Court Of Appeal

The Court of Appeal agreed with the application judge. The Court held that the issue in this case was the applicability of the GAFTA 88 and that previous case law had repeatedly established that the applicability of an arbitration clause, that is, whether the agreement was effective to bind the parties at all, is an appropriate question for the arbitrator. Although the judge hearing a stay application has jurisdiction to rule on the existence of an arbitration agreement, the Court held that this should only be done in clear cases.[14] In this case, where it was arguable that the parties agreed in writing to refer disputes to arbitration by a tribunal competent to rule on its own jurisdiction, the Court determined the stay should be granted. Similarly, the judge hearing a stay application should only determine whether the arbitration clause relied upon is null and void, inoperative or incapable of being performed, pursuant to section 8(2) of British Columbia's ICAA,[15] if it is clear. Otherwise, issues about the existence or validity of the arbitration agreement should be left for the arbitrator to determine.[16]

79411 USA Inc V Mondofix Inc[17]

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)[18] 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.[19]

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.[20] 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"'.[21] 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.[22]

Metso Minerals Canada Inc V Arcelormittal Exploitation Minière Canada[23]

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.[24]

Metso then applied to the Quebec Superior Court, under Quebec's Code of Civil Procedure (CCP),[25] 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.[26]

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.[27] 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.'[28] 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.'[29] 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.[30]

Tianjin V Xu[31]

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 was 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.[32] 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.[33]

South Coast British Columbia Transportation Authority V BMT Fleet Technology Ltd[34]

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.[35] 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, the Court of Appeal 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'.[36] 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 of 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.[37] 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.[38]

Acciona Infrastructure Canada Inc V Posco Daewoo Corporation[39]

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.[40] 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'.[41] 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.[42] 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, the Court 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.[43] Second, the Court 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.[44]

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.[45] 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.'[46] 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.[47]

Japan Canada Oil Sand Limited V Toyo Engineering Canada Ltd[48]

In an outlier decision, the Alberta Court of Queen's Bench consolidated two validly commenced arbitrations relating to an engineering, procurement and construction contract (the EPC Agreement) on the basis that the court has the jurisdiction to consolidate domestic and international arbitrations pursuant to section 8(1) of Alberta's ICAA[49] without the consent of all parties. The court consolidated the domestic arbitration into the international arbitration, and the consolidated arbitration proceeded as an international arbitration governed by the UNCITRAL Rules.

Pursuant to the EPC Agreement, Toyo Engineering Canada Ltd (Toyo Canada), as contractor, performed work to expand and redevelop an oil sands project in Northern Alberta for the owner, Japan Canada Oil Sands Ltd (JACOS). Toyo Canada's parent company, Toyo Engineering Construction Ltd (Toyo Japan) agreed to pay or perform the liabilities or obligations of Toyo Canada under the EPC Agreement by way of a guarantee and indemnity agreement, and to indemnify JACOS for any losses resulting from Toyo Canada's failure to satisfy its obligations under the EPC Agreement.

A number of disputes arose over the course of the project, which resulted in both parties initiating arbitration proceedings in July 2017, namely, a domestic arbitration by Toyo Canada against JACOS and, six days later, an international arbitration by JACOS against Toyo Canada and Toyo Japan. JACOS applied to have the domestic arbitration consolidated into

the international one (or, alternatively, to stay the domestic arbitration); the Toyo parties cross-applied to consolidate the international arbitration with the domestic one.

The court found that Toyo Japan was properly a party to the international arbitration pursuant to a term of the guarantee which it held 'plainly linked' the guarantee to the EPC Agreement.[50] In finding that it had jurisdiction to consolidate arbitration proceedings on terms it considers just, the court rejected the Toyo parties' argument that 'arbitration proceedings' under Alberta's ICAA meant only international arbitration proceedings, thus preventing the court from consolidating domestic and international arbitrations. The court noted that Alberta's ICAA and its domestic Arbitration Act[51] are worded differently; the domestic arbitration legislation expressly excludes arbitrations commenced under Part 2 of the ICAA from its scope, whereas the ICAA does not contain such a limitation. Noting that a narrow interpretation of the term 'arbitration proceedings' would otherwise create a 'legislative lacuna' between the two acts and that there was no reason for such an interpretation, the court found it had jurisdiction to consolidate domestic and international arbitrations pursuant to section 8(1) of Alberta's ICAA.

Despite the fact that the Toyo parties had cross-applied to consolidate the arbitrations, the court found that Toyo Japan had not consented in the guarantee to consolidate the domestic arbitration into the international one. However, the court made a distinction between consent to arbitrate generally and procedural issues that arise from that consent. Based on that analysis, and following an earlier decision of the same court, the court held that Alberta's ICAA provides jurisdiction for a court to consolidate proceedings even in the absence of consent from the parties. The factors the court took into consideration included the following:

- interpreting section 8 as requiring the parties' consent would preclude the parties from seeking recourse to the court to resolve any disputes regarding whether consolidation should occur;
- Alberta's Rules of Court generally contemplate an application being brought by one party to an action and join or consented to applications are uncommon;
- the court's discretion under section 8 would be unnecessary if the consent of all parties to the consolidation was required; and
- given that section 8(3) provides for a situation in which the parties agree to consolidate, section 8(1) must necessarily deal with disagreement between the parties.[52]

Having found it had jurisdiction to consolidate the arbitrations, the court determined that consolidation should be ordered in the interest of efficiency. The court also noted that based on the wording of the EPC Agreement, Toyo Canada and JACOS had anticipated that the issue of consolidation may arise.

The Russian Federation V Luxtona Limited[53]

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.[54]

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.[55]

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.[56] 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 re-argue the issue of admissibility. Upon finding that he had jurisdiction to change a previous interlocutory evidentiary ruling by a judge who was no longer hearing the application,[57] 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***.[58] 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, like the United Kingdom.[59]

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,-[60] 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.[61]

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.[62]

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 with respect to 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

Borden Ladner Gervais

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