GAR Global Arbitration Review

The Arbitration Review of the Americas

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Canada: Rulings demonstrate judicial deference to arbitration

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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 article provides an overview of international commercial arbitration in Canada and discusses developments in legislation across the country's provinces, the implementation of the UNCITRAL 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 UNCITRAL 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

- UNCITRAL Model Law on International Commercial Arbitration
- *Peace River Hydro Partners v Petrowest Corp*
- *Husky Food Importers & Distributors Ltd v JH Whittaker & Sons Limited*
- *Williams v Amazon.com Inc* and *Petty v Niantic Inc*
- *Davidson v Lyra Growth Partners Inc*
- *79411 USA Inc v Mondofix Inc*
- *Stewart v Stewart*
- *Octaform Inc v Leung*
- *The Russian Federation v Luxtona Limited*
- *All Communications Network of Canada v Planet Energy Corp*
- *Vento Motorcycles Inc v United Mexican States*

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 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 (ULCC) commenced a review of the existing model International Commercial Arbitration Act (ICAA) 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 ICAA for implementation throughout Canada.

Among other things, the 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 statute also establishes a 10-year limitation period to commence proceedings seeking recognition and enforcement in Canada of foreign international commercial arbitral awards. The 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 ICAA, adopting most of the ULCC's recommendations in the proposed Uniform Act. In May 2018, British Columbia also amended its ICAA 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 but the province has not yet amended its ICAA. Prince Edward Island tabled similar amendments to its ICAA in February 2022, which have not yet progressed through the Legislative Assembly.

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:

> The purpose of the United Nations Conventions and 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, the International Chamber of Commerce Canada Arbitration Committee, the Vancouver International Commercial Arbitration Centre (VanIAC, formerly the British Columbia International Arbitration Centre, which is one of the oldest modern arbitral institutions in the world, having been created in 1986), 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. VanIAC has released updated International Arbitration Rules, reflecting international best practices, effective as of 1 July 2022.

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.

Peace River Hydro Partners V Petrowest Corp

In *Peace River Hydro Partners v Petrowest Corp*,[1] Canada's highest court, the Supreme Court of Canada (SCC), emphasised the doctrine of separability's purpose to affirm arbitration agreements and addressed the narrow fact-specific circumstances in which an arbitration agreement may be found inoperative in the context of federal bankruptcy legislation.

Peace River Hydro Partners (Peace River) was a partnership formed to build a hydroelectric dam in north-eastern British Columbia. Peace River subcontracted some of its construction work to Petrowest Corporation (Petrowest), an Alberta-based construction company, in 2015. The parties entered into a number of contracts, each of which contained arbitration agreements, albeit with different wording.

Within two years, Petrowest encountered financial difficulties, which resulted in the Alberta Court of King's Bench appointing a receiver under Canada's Bankruptcy and Insolvency Act.-

[2] Through that process, the receiver was authorised to, among other things, 'initiate the prosecution of "any and all proceedings" with respect to the debtors and their property'. In 2018, the receiver brought a civil claim against Peace River in the Supreme Court of British Columbia on behalf of Petrowest and its affiliates to collect funds allegedly owing to Petrowest under the parties' subcontracting agreements. Peace River applied for a stay of the receiver's claim under section 15 of British Columbia's former Arbitration Act.[3] The receiver opposed the application.

The chambers judge agreed with the receiver and dismissed the stay application. The Court of Appeal for British Columbia upheld the chambers judge's ruling on the basis that the receiver was not a party to the arbitration agreements between Peace River and Petrowest within the meaning of section 15(1) of the former Arbitration Act. The Court of Appeal held that the doctrine of separability permitted the receiver to disclaim the arbitration agreements and sue on the underlying contracts to recover payment for past performance.[4] Peace River sought and was granted leave to appeal the Court of Appeal's decision to the SCC.

On the issue of separability, the SCC found that the Court of Appeal misapplied the doctrine. The SCC held that 'separability is intended to safeguard arbitration agreements, not imperil them . . . [I]t is for a court . . . to determine whether an arbitration agreement is valid and enforceable according to the narrow statutory exceptions.'[5]

In a narrow majority (five justices to four), the SCC held that the receiver had established the arbitration agreements were inoperative under section 15(2) on the basis that the arbitration agreements would impair the Bankruptcy and Insolvency Act's objective of an 'orderly and efficient resolution of the receivership'.[6] Accordingly, the SCC concluded that a stay in favour of arbitration could not be granted and the appeal was dismissed. The Court stressed that this was a highly fact-specific result, and while it may apply to other areas of law where public policy objectives override parties' freedom of contract, 'courts should generally hold parties to their agreements to arbitrate, even if one of them has become insolvent'.[7]

Husky Food Importers & Distributors Ltd V JH Whittaker & Sons Limited

Following the SCC's decision in *Peace River Hydro Partners v Petrowest*, the Court of Appeal for Ontario was asked to determine whether the test for granting a stay application under Ontario's ICAA was the same as for domestic arbitrations commenced under the Arbitration Act.[8]

In 2014, Husky Food Importers & Distributors Ltd (Husky Food) and JH Whittaker & Sons Limited (JH Whittaker) entered into a distribution agreement that was both oral and written. Between 2016 and 2020, the parties attempted to negotiate a formal, long-term distribution agreement. The agreement was never signed.[9] In the summer of 2020, Husky Food alleged that JH Whittaker wrongly diverted two shipments. Husky Food subsequently commenced an action in the Ontario Superior Court of Justice in June 2021. JH Whittaker applied to stay Husky Food's action in favour of arbitration pursuant to section 9 of Ontario's ICAA. Husky Food opposed the application on the basis that it had never agreed to arbitrate disputes that might arise under the parties' distribution agreement.

The application judge held that JH Whittaker's submissions were sufficient to establish that 'looking at the language of the Alleged Distribution Agreement alone, the Arbitration Clause is not rendered inoperative by the other sections contained in it' and granted JH Whittaker's stay application.[10] Husky Food appealed the application judge's decision to the Court of

Appeal for Ontario. One of the grounds of appeal was that the application judge had applied the incorrect test for a stay application.

The Court of Appeal held that although the SCC's framework for stay applications was 'crafted in the context of domestic arbitration legislation', it applies equally in respect of international commercial arbitration agreements. The four technical prerequisites are: (1) an arbitration agreement exists; (2) court proceedings have been commenced by a party to the arbitration agreement; (3) the court proceedings are in respect of a matter that the parties agreed to submit to arbitration; and (4) the party applying for a stay in favour of arbitration does so before taking any 'step' in the court proceedings. The Court of Appeal held that the application judge applied the correct 'arguable case' standard to establish the technical prerequisites for a mandatory stay and accordingly dismissed Husky Food's appeal.[11]

Williams V Amazon.com Inc And Petty V Niantic Inc

The Court of Appeal for British Columbia's companion decisions in *Williams v Amazon.com Inc*[12]and*Petty v Niantic Inc*[13] confirmed that arbitration agreements in standard form contracts of adhesion in the consumer context will generally be enforceable if they are not unconscionable or contrary to public policy.

The plaintiffs in both cases had each entered into standard form consumer contracts that contained arbitration agreements and commenced proposed class actions. The defendants, Amazon.com Inc (Amazon) and Niantic Inc (Niantic), applied to stay the proceedings in favour of arbitration, with the exception of the relief sought by each of the plaintiffs under the Business Practices and Consumer Protection Act (BPCPA).[14] The application in *Williams* was brought under section 15 of British Columbia's then-applicable domestic Arbitration Act.[15] The application in *Petty* was brought under section 8 of British Columbia's ICAA.[16]

The application judges in both cases dismissed the plaintiffs' respective arguments that the arbitration agreements were void on grounds of unconscionability or public policy and found that the prerequisites for a stay[17] in favour of arbitration had been established. A partial stay of the proceedings was ordered (as noted above, the consumer claims under the BPCPA were not stayed). Both plaintiffs appealed.

Given the similarity between the issues on appeal, the appeals were heard the same week and by the same panel of the Court of Appeal.

The main issue on both appeals was whether the application judge erred in not finding the arbitration agreements void because of unconscionability or public policy concerns. Parties in both cases relied on the SCC's decision in *Uber Technologies Inc v Heller*,[18] in which a majority of the SCC found an international arbitration clause in a contract of adhesion in the employment context where there was significant unfairness and inequality of bargaining power between the parties, invalid on the basis of unconscionability and, in concurring reasons, against public policy.

The Court of Appeal in *Williams* and *Petty* distinguished *Uber*. In particular, the Court highlighted the 'profoundly different situation' of the non-dependent consumer plaintiffs in *Williams* (and*Petty*) as compared with the plaintiff's 'vulnerable and difficult circumstances' in *Uber*.[19]

While the Court in both cases recognised that there was an inequality of bargaining power between the parties, it did not consider that to be determinative.[20] As the Court noted in *Williams*, inequality of bargaining power is just one factor in the unconscionability

analysis (which requires a finding of inequality of bargaining power and a resultant improvident bargain) and public policy analysis (a multi-factorial analysis that overlaps with the unconscionability analysis). Among the features of the arbitration agreement that weighed in favour of the Court finding that there was no improvident bargain were the fact that although the filing fee of US$200 was twice as much as the appellant's claim, it was refundable, and the fact that the arbitration could be conducted by telephone, based on written submissions, or in person in the country where the consumer lives.[21]

The Court in ***Williams*** and ***Petty*** also declined to find that either agreement was contrary to public policy. Among the relevant factors the Court considered in its analysis was the fact that the arbitration agreement had been tailored, including by giving the consumer the option to elect to pursue a small claims action in British Columbia (for claims up to C$35,000 in value) instead of an arbitration, and exempting claims involving the misuse of intellectual property from the requirement to arbitrate.[22] In the course of its analysis, the Court also distinguished the case before it from other cases that had applied ***Uber*** in a non-arbitration context.[23]

Both appeals were dismissed.

Around the same time the ***Williams*** and ***Petty*** decisions were released, the Federal Court of Appeal upheld a stay in favour of arbitration in another proposed consumer class action, ***Difederico v Amazon Inc***.[24] All three of these decisions confirm that, absent legislative intervention, Canadian courts will generally uphold mandatory arbitration even in contracts of adhesion.

Davidson V Lyra Growth Partners Inc

In a case where only a portion of the relief sought fell within the scope of an arbitration clause, the Court of Appeal for British Columbia held that a partial stay should be granted in favour of arbitration for the matters that are covered by the arbitration clause.

The underlying dispute in ***Davidson v Lyra Growth Partners Inc***[25] arose out of an employment relationship. Lyra Growth Partners Inc (Lyra) commenced litigation against a former employee and a related trust for misappropriation of funds. The employment agreement between the employer and the employee did not include an arbitration clause. Among the relief sought by Lyra was disgorgement of the shares held by the former employee's trust and an order that the former employee relinquish all shares that she held pursuant to shareholder agreements, each of which included arbitration clauses. The former employee and her trust had become shareholders in two corporations related to Lyra (LGPI), both of which were plaintiffs in the litigation.[26]

The former employee applied for a stay of proceedings under section 7 of British Columbia's Arbitration Act.[27] The application judge dismissed the application on the basis that Lyra's claim was 'fundamentally a claim for relief in respect of alleged torts of conversion and fraud, as well as alleged breaches of an employment contract and fiduciary duty' and not a 'disagreement or dispute between the parties with respect to the shareholder's agreement or the interpretation thereof' that the parties intended to be resolved through arbitration pursuant to the arbitration clause in the shareholder agreements.[28]

The former employee appealed. The issue on appeal was whether the application judge had erred in failing to apply the arguable case test to the claims by LGPI and Lyra for disgorgement

of the shares held by the trust or to the claim that the trust relinquishes all shares (the share-based remedies).[29]

The Court of Appeal found that it was at least arguable that the claims giving rise to the share-based remedies fell within the scope of the shareholders' agreements. Accordingly, relying on the competence-competence principle, the Court held that the determination of that issue should in the first instance be made by an arbitrator pursuant to the shareholders' agreements.[30]

The Court considered three questions, all of which were answered in favour of reversing the application judge's decision and granting a partial stay of arbitration in relation to the share-based remedies.

Is It Open To A Judge Hearing A Stay Application To Refuse A Stay On The Basis That The Case Is Fundamentally With Non-arbitrable Matters?

The Court held that in the absence of the statutory exclusions set out in section 7(2) of the Arbitration Act, there is no residual jurisdiction to refuse a stay of matters arguably reserved for arbitration, even where the case is 'fundamentally concerned with non-arbitrable matters or the pith and substance of the claim is not connected to the matters reserved for arbitration'.[31]

If A Stay Of Some Matters Must Be Granted, Is It Open To A Judge To Grant A Partial Stay Of The Proceeding?

After reviewing the authorities and confirming that partial stays are permitted in British Columbia even though they are not expressly provided for in the Arbitration Act, the Court held that, in the circumstances, it was not open to the application judge to dismiss the stay application.[32]

If There Is Jurisdiction To Grant A Partial Stay, What Are The Considerations In Determining Whether A Partial Or Complete Stay Must Be Granted?

The Court referred to two non-exhaustive factors to be considered: 'whether the arbitrable and non-arbitrable issues are so intertwined that they must be heard together, in which case a complete stay of the action will be appropriate'; and 'whether the core of the claim concerns non-arbitrable matters, in which case a partial stay may be more appropriate'.[33]

79411 USA Inc V Mondofix Inc

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.[34]

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)[35] 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.[36]

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.[37] 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".'[38] 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.[39]

Stewart V Stewart

A decision of the Supreme Court of British Columbia similarly recognised the importance of maintaining confidentiality in the arbitration process and upholding parties' reasonable expectations of privacy where applications related to an ongoing arbitration are made in court.[40]

The applications in this case were brought in the context of a long-standing dispute between siblings and various companies they controlled. As part of a settlement agreement in the litigation, the parties agreed that one of the defendant companies, Quadra Pacific Properties Corp, was required to purchase the plaintiff's interest in it for fair market value. The settlement agreement provided that if the parties were unable to reach an agreement on fair market value, the purchase price for the shares was to be determined by arbitration. The parties failed to agree and proceeded to arbitration. At the time of the applications, the parties were awaiting the arbitrator's award.[41]

The plaintiff and the personal defendants brought competing applications, some of which related to information and documents disclosed in the arbitration. Among other orders sought by the personal defendants was a sealing order to protect certain financial documents and information disclosed in the arbitration.[42]

The application judge began his assessment of whether a sealing order would be necessary by referring to Rule 27 of the Domestic Commercial Arbitration Rules of Procedure of the British Columbia International Commercial Arbitration Centre (now VanIAC), which expressly protects the confidentiality of arbitrations. Rule 27 provides that: 'Unless: (a) otherwise agreed by the parties, (b) required by law, or (c) necessary to enforce or challenge an award, all hearings, meetings, evidence, documents (produced or exchanged), Awards and communications shall be private and confidential as between the parties, the arbitration tribunal and the Centre.'[43] Similar provisions are contained in British Columbia's domestic Arbitration Act and its ICAA.[44]

The application judge then applied the two-part test developed by the Supreme Court of Canada for confidentiality orders (adapted from the Supreme Court of Canada's test for publication bans), which asks whether: the order is necessary to prevent a serious risk to an important interest, including a commercial interest; and the salutary effects of the order outweigh its deleterious effects, including the public interest in open and accessible court proceedings.[45] In addition to finding that the disclosure of the information over which

the defendants sought a sealing order could potentially harm the financial interests of the parties to the litigation, the application judge also held that 'the disclosure of this information would be likely to undermine the public policy in this jurisdiction of encouraging arbitrations by defeating the parties' reasonable expectations of privacy in an on-going arbitration'.[46] Accordingly, the sealing order was granted on the terms sought by the defendants.

OCTAFORM INC V LEUNG

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.[47]

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.[48]

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 witness evidence that the petition judge had previously not been aware of. 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.[49]

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.[50]

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'.[51] 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'.[52] 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 provide 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.[53]

The Russian Federation V Luxtona Limited

On an application brought under article 16 of the Model Law challenging the tribunal's ruling that it has jurisdiction on a preliminary question, the Ontario Superior Court overturned the application judge's decision and held that the application before the court is a hearing ***de novo*** (not a review of the tribunal's decision) and parties are entitled to adduce evidence on the application as of right.[54] This view was subsequently upheld on appeal by the Court of Appeal for Ontario.[55]

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 Ontario while reserving all of its rights.[56]

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. Russia subsequently brought an application 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.[57]

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. 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 to reargue 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, the application judge went on to consider afresh whether Russia's new evidence should be admitted. The application judge found that Russia had not met the stringent test for fresh evidence and therefore found the evidence inadmissible.[58] Russia applied for and was granted leave to appeal the decision to the Divisional Court.[59]

On appeal, the Divisional Court agreed that the newly assigned application judge was not bound by the evidentiary rulings of the prior application judge at any point before the application judge becomes ***functus officio***; however, it disagreed with the application judge's conclusion that Russia's application was a review of the tribunal's decision. Instead, the Court held that the language of the Model Law and the consensus in the international jurisprudence is that an application to challenge the jurisdiction of an arbitral tribunal under the Model Law is a hearing ***de novo*** such that parties are entitled to adduce evidence on the application (including expert evidence) as of right. The Court concluded that the Court of Appeal for

Ontario's decision in ***Mexico v Cargill***[60] (relied on by the application judge in his decision) was distinguishable. In particular, the application in ***Cargill*** was brought under a different provision of the Model Law (article 34(2)) and, unlike Russia's application, was not brought on the basis that the tribunal lacked jurisdiction over the dispute.[61]

The Court found the approach of the UK Supreme Court in***Dallah v Pakistan***[62]to be consistent with the language of article 16(3) of the Model Law and section 11(1) of Ontario's ICCA, which require the court to 'decide the matter', not to 'review the tribunal's decision'. Although the United Kingdom is not a Model Law jurisdiction, the Court noted that ***Dallah*** has been followed in other Model Law jurisdictions and held that 'the strong consensus of the decisions from Model Law jurisdictions points to following the approach taken in ***Dallah***'. Although the Court recognised that the ***Dallah*** decision was not binding in Ontario, it found that the 'uniformity' principle in article 2A of the Model Law renders international decisions 'strongly persuasive'.[63] The Court allowed Russia's appeal, with costs, and set aside the decision of the application judge.[64]

The Court of Appeal for Ontario affirmed the Divisional Court's decision and reasoning.[65]

All Communications Network Of Canada V Planet Energy Corp

In contrast to ***Luxtona***,where a party does not challenge the tribunal's jurisdiction on an application to set aside an international arbitral award, the Court of Appeal for Ontario confirmed in ***All Communications Network of Canada v Planet Energy Corp***[66] that a ***de novo*** hearing is not required.

The underlying dispute in this case arose from a sales agency agreement between Planet Energy Corp and other related companies (Planet Energy) and All Communications Network of Canada, Co (ACN) in relation to commissions owed under the agreement. ACN was the successful party in the arbitration.

Planet Energy brought an application to the Superior Court to set aside the award on the basis that, among other things, Planet Energy had been deprived of the opportunity to present its case and the award was contrary to public policy because it violated Ontario's Energy Consumer Protection Act 2010.[67] ACN brought a cross-application to recognise and enforce the award under the ICAA 2017,[68] which adopts the Model Law.

The application judge dismissed Planet Energy's application and enforced the award. Planet Energy appealed.

One of the issues on appeal was whether the application judge erred by not having conducted a ***de novo*** hearing. Planet Energy relied on a decision of the Court of Appeal for British Columbia, which confirmed that the standard of review for applications to set aside awards under article 36(1)(a)(iii) of the Model Law is a ***de novo*** hearing. The Court of Appeal distinguished that case on the basis that it involved a challenge to the arbitrator's jurisdiction, whereas Planet Energy was challenging the procedural fairness of the proceeding, not the arbitrator's jurisdiction. For that reason, the Court declined to find that a ***de novo*** hearing was required in the circumstances. In any event, the Court of Appeal noted that there was nothing before the application judge to suggest that Planet Energy had any new evidence to adduce to demonstrate how it had been deprived of the opportunity to present its case.[69]

The Court dismissed the appeal and awarded costs to ACN.[70]

Vento Motorcycles Inc V United Mexican States

The Ontario Superior Court recently held that the test for the admissibility of fresh evidence on an application to set aside an international arbitral award on procedural fairness grounds is akin to the test for the admission of fresh evidence on an application for judicial review.[71] The party seeking to admit fresh evidence on a set-aside application must show a 'certain degree of diligence' that the evidence could not have been put before the tribunal.

The applicant, Vento Motorcycles Inc (Vento), brought an application to set aside an arbitral award rendered in an arbitration administered by the International Centre for Settlement of Investment Disputes (ICSID) under the ICSID Rules.[72] Vento brought its application pursuant to articles 18 and 34 of the Model Law.[73] In particular, Vento argued that it was prevented from presenting its case and had been treated unequally with respect to certain evidence that was considered (and not considered) by the tribunal, and the arbitral procedure and the composition of the tribunal was not in accordance with the parties' agreement.[74] In support of the application, Vento filed a number of affidavits. The respondent, United Mexican States (Mexico), objected to the admissibility of three of the affidavits filed by Vento and sought orders prohibiting the filing of two of the affidavits in their entirety (or striking them from the application record) and striking certain paragraphs from a third affidavit.[75]

The parties disagreed on the applicable test for the admission of fresh evidence on a set-aside application. Mexico argued that the same test for the admission of fresh evidence on an application to set aside an international arbitral award with respect to jurisdictional issues (as in ***The Russian Federation v Luxtona Limited***, discussed above) should apply to set aside applications based on procedural fairness. Vento argued that the test that applies to judicial review applications was more appropriate.[76] The application judge found the differences between the two tests to be minor and that similar policy considerations (eg, order, finality and the integrity of the decision-making process) underlie both tests. Ultimately the application judge held that:

> Given the very limited grounds on which an international arbitral award can be set aside, I agree with Vento that an application to set aside such an award is much closer in nature to an application for judicial review than to an appeal. This is particularly the case when the application to set aside is based on procedural fairness, which is a common ground in applications for judicial review, but not in appeals. Further, . . . the exception applicable to the admissibility of fresh evidence relevant to procedural fairness on an application for judicial review is structured so as not to interfere with the role of the administrative decision-maker as the merits-decider. This is consistent with the high degree of defence owed to international arbitral tribunals and the very strict limits imposed on judicial intervention.[77]

The record on an application for judicial review (and in this case a set-aside application based on procedural fairness grounds) is generally limited to what was before the decision maker, subject to certain exceptions including where a party can demonstrate that the new evidence could not have been put forward by the exercise of reasonable diligence at the original proceedings. The application judge held that Vento had not met the test for fresh evidence with respect to the three affidavits (or portions thereof) that Mexico had challenged. Given its success on the application, Mexico was awarded its costs.[78]

Vento has appealed the decision to the Court of Appeal for Ontario.

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.

* *The authors are grateful for the valuable assistance of Emma Gibson (articled student, Borden Ladner Gervais LLP).*

Endnotes

1 2022 SCC 41. ^ Back to section

2 RSC 1985, c B-3. ^ Back to section

3 RSBC 1996, c 55. British Columbia's new domestic Arbitration Act came into force in 2020. ^ Back to section

4 *Petrowest Corporation v Peace River Hydro Partners*, 2020 BCCA 339 at paragraph 55. ^ Back to section

5 *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41 at paragraphs 168, 194. ^ Back to section

6 *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41 at paragraph 34. ^ Back to section

7 *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41 at paragraph 10. ^ Back to section

8 2023 ONCA 260. ^ Back to section

9 *Husky Food Importers & Distributors Ltd v JH Whittaker & Sons Limited*, 2023 ONCA 260 at paragraph 10. ^ Back to section

10 *Husky Food Importers v JH Whittaker & Sons*, 2022 ONSC 1679 at paragraph 27. ^ Back to section

11 *Husky Food Importers & Distributors Ltd v JH Whittaker & Sons Limited*, 2023 ONCA 260 at paragraphs 19–31. ^ Back to section

12 2023 BCCA 314. ^ Back to section

13 2023 BCCA 315. ^ Back to section

14 SBC 2004, c 2 [BPCPA]. In a previous decision, the Supreme Court of Canada held that for the purposes of consumer protection claims under section 172 of the BPCPA are legislatively exempt from a contractual arbitration provision: ***Seidel v TELUS Communications Inc,*** 2011 SCC 15. ^ Back to section

15 RSBC 1996, c 55. This Act was replaced by Arbitration Act, SBC 2020, c 2. ^ Back to section

16 RSBC 1996, c 233. ^ Back to section

17 The three prerequisites are: (1) the applicant is a party to an agreement that contains an arbitration clause; (2) the proceedings relate to a matter that falls within the scope of the arbitration provision; and (3) the stay application is brought in a timely manner: ***Williams v Amazon.com Inc,*** 2023 BCCA 314 at paragraph 25. ^ Back to section

18 2020 SCC 16. ^ Back to section

19 ***Williams v Amazon.com Inc,*** 2023 BCCA 314 at paragraphs 126–27. ^ Back to section

20 ***Petty v Niantic Inc,*** 2023 BCCA 315 at paragraphs 58–60; ***Williams v Amazon.com Inc,*** 2023 BCCA 314 at paragraph 128. ^ Back to section

21 ***Williams v Amazon.com Inc,*** 2023 BCCA 314 at paragraphs 134–35. ^ Back to section

22 ***Williams v Amazon.com Inc,*** 2023 BCCA 314 at paragraph 140; ***Petty v Niantic Inc,*** 2023 BCCA 315 at paragraph 79. ^ Back to section

23 ***Williams v Amazon.com Inc,*** 2023 BCCA 314 at paragraphs 148–75; ***Petty v Niantic Inc,*** 2023 BCCA 315 at paragraphs 31 and 76. ^ Back to section

24 ***Difederico v Amazon.com, Inc,*** 2023 FCA 165 at paragraph 69. ^ Back to section

25 2024 BCCA 133. ^ Back to section

26 ***Davidson v Lyra Growth Partners Inc,*** 2024 BCCA 133 at paragraphs 6 and 11. ^ Back to section

27 SBC 2020, c 2. ^ Back to section

28 ***Davidson v Lyra Growth Partners Inc,*** 2022 BCSC 2107 at paragraph 23. ^ Back to section

29 ***Davidson v Lyra Growth Partners Inc,*** 2024 BCCA 133 at paragraph 23. ^ Back to section

30 ***Davidson v Lyra Growth Partners Inc,*** 2024 BCCA 133 at paragraphs 50–54. ^ Back to section

31 *Davidson v Lyra Growth Partners Inc,* 2024 BCCA 133 at paragraph 58. ^ Back to section

32 *Davidson v Lyra Growth Partners Inc,* 2024 BCCA 133 at paragraphs 85–106. ^ Back to section

33 *Davidson v Lyra Growth Partners Inc,* 2024 BCCA 133 at paragraph 108. ^ Back to section

34 2020 QCCS 1104. ^ Back to section

35 CQLR c CCQ-1991. ^ Back to section

36 *79411 USA Inc v Mondofix Inc*, 2020 QCCS 1104 at paragraphs 2 and 25. ^ Back to section

37 *79411 USA Inc v Mondofix Inc*, 2020 QCCS 1104 at paragraphs 6–9. ^ Back to section

38 *9411 USA Inc v Mondofix Inc*, 2020 QCCS 1104 at paragraph 13. ^ Back to section

39 *79411 USA Inc v Mondofix Inc*, 2020 QCCS 1104 at paragraph 24. ^ Back to section

40 2021 BCSC 1212. ^ Back to section

41 *Stewart v Stewart*, 2021 BCSC 1212 at paragraphs 1–4. ^ Back to section

42 *Stewart v Stewart*, 2021 BCSC 1212 at paragraphs 5–7, 124–25. ^ Back to section

43 *Stewart v Stewart*, 2021 BCSC 1212 at paragraph 123. ^ Back to section

44 Arbitration Act, SBC 2020, c 2, s. 63; International Commercial Arbitration Act, RSBC 1996, c 233, s. 36.01. ^ Back to section

45 *Stewart v Stewart*, 2021 BCSC 1212 at paragraphs 126–27, citing ***Dagenais v Canadian Broadcasting Corp***, [1994] 3 SCR 835 at p. 878 and ***Sierra Club of Canada v Canada*** (Minister of Finance, 2002 SCC 41 at paragraph 48. ^ Back to section

46 *Stewart v Stewart*, 2021 BCSC 1212 at paragraphs 128–29. ^ Back to section

47 2021 BCSC 761. ^ Back to section

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

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

50 *Octaform v Leung*, 2021 BCSC 761 at paragraphs 11–12. ^ Back to section

51 *Octaform v Leung,* 2021 BCSC 761 at paragraph 13. ^ Back to section

52 *Octaform v Leung*, 2021 BCSC 761 at paragraph 20. ^ Back to section

53 *Octaform v Leung*, 2021 BCSC 761 at paragraph 22. ^ Back to section

54 2023 ONCA 393, affirming 2021 ONSC 4604, reversing 2019 ONSC 7558. ^ Back to section

55 *The Russian Federation v Luxtona Limited*, 2023 ONCA 393 at paragraph 40. ^ Back to section

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

57 *The Russian Federation v Luxtona Limited*, 2019 ONSC 7558 at paragraph 6. ^ Back to section

58 *The Russian Federation v Luxtona Limited*, 2019 ONSC 7558 at paragraph 70. ^ Back to section

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

60 *Mexico v Cargil*, 2011 ONCA 622. ^ Back to section

61 *The Russian Federation v Luxtona Limited*, 2021 ONSC 4604 at paragraphs 23–25. ^ Back to section

62 *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan*, 2010 UKSC 46. ^ Back to section

63 *The Russian Federation v Luxtona Limited*, 2021 ONSC 4604 at paragraphs 30–37. ^ Back to section

64 *The Russian Federation v Luxtona Limited*, 2021 ONSC 4604 at paragraph 39. ^ Back to section

65 *The Russian Federation v Luxtona Limited*, 2023 ONCA 393 at paragraph 49. ^ Back to section

66 2023 ONCA 319. ^ Back to section

67 SO 2010, c 8. ^ Back to section

68 SO 2017, c 2, Sch 5. ^ Back to section

69 *All Communications Network of Canada v Planet Energy Corp,* 2023 ONCA 319 at paragraphs 43–50. ^ Back to section

70 *All Communications Network of Canada v Planet Energy Corp,* 2023 ONCA 319 at paragraph 75. ^ Back to section

71 2021 ONSC 7913. ^ Back to section

72 *Vento Motorcycles Inc v United Mexican States*, 2021 ONSC 7913 at paragraph 1. ^ Back to section

73 *Vento Motorcycles Inc v United Mexican States*, 2021 ONSC 7913 at paragraphs 24–26. The Model Law is Schedule 2 to Ontario's ICAA, SO 2017, c 2, Schedule 5. ^ Back to section

74 *Vento Motorcycles Inc v United Mexican States*, 2021 ONSC 7913 at paragraph 19. ^ Back to section

75 *Vento Motorcycles Inc v United Mexican States*, 2021 ONSC 7913 at paragraph 2. ^ Back to section

76 *Vento Motorcycles Inc v United Mexican States*, 2021 ONSC 7913 at paragraphs 29–41.- ^ Back to section

77 *Vento Motorcycles Inc v United Mexican States*, 2021 ONSC 7913 at paragraphs 43–44.- ^ Back to section

78 *Vento Motorcycles Inc v United Mexican States*, 2021 ONSC 7913 at paragraphs 51, 67 and 68. ^ Back to section

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