Case Law Update: Domestic and International Commercial Arbitration

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Sixth Annual WCART/WCCAS Energy, Mining, and Resources Arbitration Conference

Calgary, AB 15 May 2012

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Agenda

- Arbitrability (Chris O'Connor)
- Appeal Issues in Respect of Canadian Domestic Commercial Arbitration Proceedings (Angus Gunn)
- Novel Issues (Rob Deane)
- Discussion

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Arbitrability

- **Hostility to arbitration alive and well in some quarters**
- **Will compare and contrast results in five cases**
  - *Seidel v. TELUS Communications Inc.* (SCC, 2011)
  - *AT&T Mobility LLC v. Concepcion* (USSC, 2011)
  - *Shaw Satellite G.P. v. Pieckenhagen* (ONSC, 2011)
  - *New World Expedition Yachts, LLC* v. *F.C. Yachts Ltd.* (BCSC, 2011)
  - *Mercer Gold Corp. (Nevada) v. Mercer Gold Corp. (B.C.)* (BCSC, 2011)

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Arbitrability

- ***Seidel v. TELUS Communications Inc.* (SCC, 2011)**
  - Telus consumer contract with arbitration clause prohibiting class actions
  - Plaintiffs' claim was to enforce statutory consumer protection standards pursuant to section 172 of British Columbia's *Business Practices and Consumer Protection Act*
  - Majority (5-4) held that arbitration clause will be trumped by statutory right of persons affected by deceptive and unconscionable conduct to bring court proceedings

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Arbitrability

- ***Seidel v. TELUS Communications Inc.* (SCC, 2011)**
  - Without clear statutory prohibition of arbitration for consumer contracts (as in Ontario and Alberta) the court read a permissive statutory clause permitting court proceedings expansively to trump arbitration
  - Benefits of court versus arbitration
    - Publicity
    - Power to bind third parties
    - Deterrence
    - Achievement of legislative purpose

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Arbitrability

- ***Seidel v. TELUS Communications Inc.* (SCC, 2011)**
  - Competence-competence does not apply for pure question of law or one of mixed fact and law that requires only superficial consideration of the evidence
  - Dissent: majority view “an inexplicable throwback to a time when courts monopolized decision making and arbitrators were treated as second-class adjudicators”

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Arbitrability

- ***AT&T Mobility LLC v. Concepcion* (USSC, 2011)**
  - Consumer contract with arbitration clause and prohibition of class actions
  - Plaintiff sought to apply California judge-made rule arising from California Civil Code that invalidated as unconscionable contracts that impeded class actions
  - Majority (5-4) held that *Federal Arbitration Act* provision that enforces arbitration clauses trumps state rule of law even though *FAA* provided that an arbitration agreement is enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract"

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Arbitrability

- ***AT&T Mobility LLC v. Concepcion* (USSC, 2011)**
  - States could not constitutionally prohibit arbitration, so court concluded that state law rule could also not stand as an obstacle to *FAA*'s objectives
  - Court outlined the benefits of arbitration
    - Efficient process compared to litigation of class actions
    - Opportunity to have case decided by specialist in relevant field
    - Confidentiality to protect trade secrets
    - Informality of proceedings expedites dispute resolution

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Arbitrability

- ***AT&T Mobility LLC v. Concepcion* (USSC, 2011)**
  - Concurrence (Thomas J) held that California rule did not invalidate agreement as it did not relate to making of an agreement to arbitrate
  - Dissent (Breyer J) opined that California rule that rendered unconscionable waivers of class actions was enforceable against all manner of contracts including those with arbitration clauses

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Arbitrability

- ***Shaw Satellite G.P. v. Pieckenhagen* (ONSC, 2011)**
  - Cable piracy claim alleging fraud, breach of statute, illegality, misrepresentation, and breach of consumer contract that contained an arbitration clause
  - Plaintiff pleaded that defendants were party to contract with arbitration clause
  - Defendants demurred
  - Court refused to enforce arbitration clause as defendants not "party to an arbitration agreement”

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Arbitrability

- ***Shaw Satellite G.P. v. Pieckenhagen* (ONSC, 2011)**
  - Court also refused to enforce arbitration clause even though defenses were within the language of the arbitration clause as arising out of or relating to the agreement as
    - Terms of Service not pith and substance of dispute
    - Heart of dispute was whether it was a fraud between parties; and
    - Only incidentally concerns Terms of Service
  - Court even refused partial stay as
    - One of parties not a party to arbitration agreement
    - Non-party's dispute and arbitration dispute both contain closely related facts and issues in dispute so a partial stay was not reasonable

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Arbitrability

- ***New World Expedition Yachts, LLC* v. *F.C. Yachts Ltd.* (BCSC, 2011)**
- ***Mercer Gold Corp. (Nevada) v. Mercer Gold Corp. (B.C.)* (BCSC, 2011)**
  - Arbitration clause in a ship construction contract and an option agreement
  - Claims brought by non-parties as well as arbitration parties
  - Claims alleged fraud, fraudulent misrepresentation, fraudulent inducement to enter into agreements that contain arbitration clause, illegality, conspiracy, unlawful activity, etc.

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Arbitrability

- ***New World Expedition Yachts, LLC* v. *F.C. Yachts Ltd.* (BCSC, 2011)**
- ***Mercer Gold Corp. (Nevada) v. Mercer Gold Corp. (B.C.)* (BCSC, 2011)**
  - In both cases all proceedings stayed in favor of arbitration clause
  - Clause requiring arbitration of disputes "with respect to" agreement should be read broadly and expansively as even a claim that agreement is void on some basis raises questions or matters “with respect to” the agreement

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Arbitrability

- ***New World Expedition Yachts, LLC* v. *F.C. Yachts Ltd.* (BCSC, 2011)**
- ***Mercer Gold Corp. (Nevada) v. Mercer Gold Corp. (B.C.)* (BCSC, 2011)**
  - As allegations of wrongdoing based upon parties' rights and obligations under agreement (or alternatively allegations of fraud misrepresentation, etc., arise from agreement itself), broad scope should be given to arbitration clause
  - Sections of agreement that refer to access to "courts or courts of competent jurisdiction" should be read down unless they specifically pre-empt arbitration clause

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Arbitrability

- ***New World Expedition Yachts, LLC* v. *F.C. Yachts Ltd.* (BCSC, 2011)**
- ***Mercer Gold Corp. (Nevada) v. Mercer Gold Corp. (B.C.)* (BCSC, 2011)**
  - In none of the cases was competence-competence principle properly respected

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Appeal Issues in Respect of Canadian Domestic Commercial Arbitrations

1. Relevant considerations in determining whether to grant leave to appeal from domestic awards
2. “Questions of law” and contractual interpretations
3. Further appeals from refusals/grants of leave to appeal: BC update

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Appeal Issues in Respect of Canadian Domestic Commercial Arbitrations

1. Relevant considerations in determining whether to grant leave to appeal from domestic awards

- *VIA Aviation Group Ltd. v. CHC Helicopter LLC*, 2012 BCCA 125
- On proposed appeal from domestic award, petitioners intended to advance argument inconsistent with approach urged on arbitration panel at first instance
- Petitioners had identified a question of law and had satisfied the test for leave in section 31 of BC's *Commercial Arbitration Act*

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Appeal Issues in Respect of Canadian Domestic Commercial Arbitrations

1. **Relevant considerations in determining whether to grant leave to appeal from domestic awards**
   - Leave nevertheless refused, though, on grounds that petitioners' proposed argument on appeal would be inconsistent with arguments they advanced before arbitration panel
   - Was that change in position a legitimate consideration in the discretionary determination of whether to grant leave?

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Appeal Issues in Respect of Canadian Domestic Commercial Arbitrations

1. **Relevant considerations in determining whether to grant leave to appeal from domestic awards**
   - BCCA: yes
     - "Where parties have deliberately preferred arbitration as the method for resolving disputes, it is to be expected that they will fully argue their cases in that forum."
     - "… allowing a party to change positions too readily on an arbitration appeal risks subverting the goals of the arbitration process, which is designed to be expeditious and provide finality."

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Appeal Issues in Respect of Canadian Domestic Commercial Arbitrations

2. "Questions of law" and contractual interpretations

- ULCC's Uniform Arbitration Act 1990 and most Canadian domestic commercial arbitration statutes establish right of appeal (with leave) from arbitral awards "on a question of law"
- Is there a growing instability in the law as to the characterization of contractual interpretation for purposes of that test?

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Appeal Issues in Respect of Canadian Domestic Commercial Arbitrations

2. "Questions of law" and contractual interpretations

- *MacDougall v. MacDougall* (ONCA, 2005) at paras. 30-31: "A failure to follow the proper principles, including a failure to apply a fundamental principle of interpretation, would be an error of law attracting review on the standard of correctness. To the extent that this task of interpretation includes consideration of extrinsic evidence, or a determination of the factual matrix, the trial judge is involved in making a finding of fact, or drawing inferences from a finding of fact. Further, the trial judge's "interpretation of the evidence as a whole" is one involving factual or inferential determinations. In interpreting the contract, the trial judge also applies the legal principles to the language of the contract in the context of the relevant facts and inferences. This requires the application of law to fact. This has been said to be a question of mixed fact and law."

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Appeal Issues in Respect of Canadian Domestic Commercial Arbitrations

2. "Questions of law" and contractual interpretations

- *Hayes Forest Services Ltd. v. Weyerhaeuser Company Ltd.* (BCCA, 2008) at paras. 43-44: "In my view, taken broadly, the construction of a contract often is a question of mixed fact and law. Insofar as the task narrowly is to determine the meaning of the words in the contract the matter may be a question of law … , but where the factual matrix of the contract is questioned, determining that matrix and its significance is a question of fact. Interpreting the language of the contract in the context of the factual matrix is a question of mixed fact and law."

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Appeal Issues in Respect of Canadian Domestic Commercial Arbitrations

2. "Questions of law" and contractual interpretations

- *Bell Canada v. The Plan Group* (2009, ONCA) at para. 31:
  "… contractual interpretation is an exercise that generally falls much more towards the error of law end of the … spectrum, once the factual issues referred to above have been resolved or if – as is the case here – they are not in dispute. The Supreme Court of Canada has yet to consider the standard of review in contractual interpretation cases post-*Housen*. …"

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Appeal Issues in Respect of Canadian Domestic Commercial Arbitrations

2. "Questions of law" and contractual interpretations

- *JEL Investments Ltd. v. Boxer Capital Corp.* (BCCA, 2011) at paras. 22, 26: "None of these cases referred to the longstanding rule enunciated by this court and many others that a question of contractual construction per se is a question of law. … [T]he primary error alleged in the case at bar was one of legal methodology -- that instead of considering the "objective forms of communication" used by the parties in their contract … to determine what they had intended, the arbitrator examined the evidence of their pre-contractual negotiations, gleaned their subjective intentions from those dealings, and then determined that the implied term was necessary, not to make the contract "operative", but to give effect to their found intentions. This raises a question of law."

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Appeal Issues in Respect of Canadian Domestic Commercial Arbitrations

2. "Questions of law" and contractual interpretations

- *Daniels v. Daniels* (MBCA, 2011) at para. 60: " … the judge's conclusion that Article 18.01 of the settlement agreement did not preclude him from making the receiver order. In my view, these questions demand two enquiries. The first is, what is the meaning of Article 18.01 of the settlement agreement, which is a question of contractual interpretation. Given that the judge was not called upon to make findings of fact, it is question of law, and not mixed fact and law, and the standard of review is correctness. … The second enquiry is what is the impact, if any, of Article 18.01 on the judge's decision to appoint a receiver. That enquiry puts at issue the legal effect of such an appointment. As that is a question of law, the standard of review is correctness."

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Appeal Issues in Respect of Canadian Domestic Commercial Arbitrations

2. "Questions of law" and contractual interpretations

- *Hoban Construction Ltd. v. Alexander* (BCCA, 2012) at para. 56: "Although the standard of review applicable to questions of contractual interpretation is an issue of some debate … , that debate does not materialize here. The authorities are clear that the failure to apply the appropriate principles of contractual interpretation is an extricable legal error reviewable on a standard of correctness … .

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Appeal Issues in Respect of Canadian Domestic Commercial Arbitrations

2. "Questions of law" and contractual interpretations

- *Redfern Resources Ltd. (Receiver of) v. Sandvik Mining and Construction Canada Inc.* (BCCA, 2012) at para. 47: "The first ground, which turns on the meaning of "satisfactorily provided" in para. 13 of the Purchase Order, would be characterized as a question of mixed fact and law. However, the question of whether the chambers judge correctly applied legal principles of contractual interpretation in finding that "satisfactorily provided" did not import a requirement for successful inspection pursuant to para. 5, engages an extricable legal issue that does not require a review of the judge's factual findings … . This issue is therefore reviewable on a standard of correctness, which is also the applicable standard of review with respect to the legal effect of the term "satisfactorily provided"."

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Appeals from Lower Courts in Domestic Commercial Arbitrations

3. Further appeals from refusals/grants of leave?

- **Ontario says no**: *Metropolitan Toronto Condominium Corp. No. 879 v. Mereshensky*, 2012 ONCA 73; *Lombard Canada Co. v. Axa Assurance Inc.*, 2007 ONCA 550; *Denison Mines Ltd. v. Ontario Hydro* (2001), 56 O.R. (3d) 181 (C.A.) (except where leave judge mistakenly declines jurisdiction: *Hillmond Investments Ltd. v. Canadian Imperial Bank of Commerce* (1996), 29 O.R. (3d) 612 (C.A.))
- **Alberta says no**: *Sherwin-Williams Co. v. Walls Alive (Edmonton) Ltd.*, 2003 ABCA 191; *Co-operators General Insurance Co. v. Great Pacific Industries Inc.*, 1998 ABCA 272
- **Saskatchewan says no**: *Bank of Nova Scotia v. Span West Farms Ltd.*, 2003 SKCA 35

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Appeals from Lower Courts in Domestic Commercial Arbitrations

3. Further appeals from refusals/grants of leave?

- **BC says yes**: refusals of leave have been amenable to appeal for almost two decades: see *Sandbar Construction Ltd. v. Pacific Parkland Properties Inc.* (1994), 87 B.C.L.R. (2d) 145 (C.A.) (reversing *Insurance Corporation of British Columbia v. Brewer* (1991), 6 B.C.A.C. 115 (C.A.))
- On the final/interlocutory debate, a refusal of leave is a final Order: *Weyerhaeuser Co. v. Hayes Forest Services Ltd.*, 2008 BCCA 120 (although leave perhaps required as a matter of policy?)
- Now grants of leave equally amenable to appeal (with leave): see *Arbutus Software Inc. v. ACL Services Ltd.* (13 April 2012), Vancouver CA039709 (B.C.C.A.)

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Novel Issues

- **Five recent decisions of possible interest**
  - ***Momentous.ca Corp. v. Canadian American Association of Professional Baseball Ltd.*** (2012 SCC 9) – Arbitration agreement ousts jurisdiction
  - ***3GS Incorporated v. Altus Group Ltd.***, 2011 ONSC 5755 – Multiple arbitration agreements lead to multiple arbitrations
  - ***Activ Financial Systems, Inc. v. Orbixa Management Services, Inc.***, 2011 ONSC 7286 – Model Law is exclusive vehicle for enforcement of foreign arbitral award
  - ***Mobile Telesystems Finance SA v. Nomihold Securities***, [2011] EWCA Civ 1040 – Mareva injunction issued in aid of arbitration
  - ***AES UST-Kamenogorsk Hydropower LLP v. Ust Kamenogorsk Hydropower Plant JSC*****,** [2011] EWCA Civ 647 – Anti-suit injunction issued even in absence of pending arbitration

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Novel Issues

- ***Momentous.ca Corp. v. Canadian American Association of Professional Baseball Ltd.*** **(2012, SCC)**
  - Motion to dismiss claim on ground that Ontario courts had no jurisdiction, given parties' agreement to arbitrate in North Carolina
  - Motion made after delivery of Statement of Defence, *i.e.*, after step taken in proceeding
  - In some other Model Law provinces (such as BC), that would have been a bar to stay application

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Novel Issues

- ***Momentous.ca Corp. v. Canadian American Association of Professional Baseball Ltd.*** **(2012, SCC)**
  - Held: under Ontario *Rules of Civil Procedure*, must apply promptly to dismiss for want of jurisdiction (based on arbitration agreement), but not necessarily before pleadings filed
  - "Strong cause" test applied to question of whether jurisdiction should be retained notwithstanding the arbitration agreement

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Novel Issues

- ***3GS Incorporated v. Altus Group Limited* (2011, ONSC)**
  - Asset Purchase Agreement included two arbitration agreements
    - General arbitration agreement, with reference to be heard by single arbitrator
    - Specialized arbitration agreement dealing solely with disputes over working capital calculations, with reference to be heard by a partner in an independent firm of auditors (Grant Thornton LLP eventually selected)
  - Arbitration commenced under specialized arbitration agreement, but claims extended beyond working capital adjustment (general and punitive damages)

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Novel Issues

- ***3GS Incorporated v. Altus Group Limited* (2011, ONSC)**
  - Held: although general policy is to avoid multiplicity of proceedings, parties agreed that only disputes about working capital adjustments would be resolved by an arbitrator with accounting expertise
    - Other disputes remain to be resolved under general arbitration agreement, by an arbitrator with legal expertise
    - Therefore, two separate arbitrations, before two separate arbitrators, must proceed even though both arise out of same facts

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Novel Issues

- ***Activ Financial Systems, Inc. v. Orbixa Management Services, Inc*. (2011, ONSC)**
  - Activ obtained AAA award in New York, without reasons (as parties had agreed)
  - Activ obtained SDNY Order recognizing award as court judgment, which Activ then sought to enforce in Ontario at common law
  - Held: even though award had been "converted" into court judgment, in substance it remained an international arbitral award

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Novel Issues

- ***Activ Financial Systems, Inc. v. Orbixa Management Services, Inc*. (2011, ONSC)**
  - Model Law the exclusive vehicle for award's enforcement, not a common law action on foreign judgment
  - Requirements for certified copy of award and arbitration agreement directory, not mandatory
  - No grounds established for refusing enforcement under Model Law

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Novel Issues

- ***Mobile Telesystems Finance SA v. Nomihold Securities* (2011, EWCA Civ)**
  - Dispute arising under share purchase agreement and option agreement
  - Nomihold obtained award in an LCIA arbitration, and sought to register it in England
  - Freezing Order issued (in Mareva form), without an exception for payments in ordinary course of business

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Novel Issues

- ***Mobile Telesystems Finance SA v. Nomihold Securities* (2011, EWCA Civ)**
  - Held: award cannot be treated for all purposes as court judgment because it is not immediately enforceable, and nature of freezing Order must reflect that fact
  - Order varied to permit payments made in ordinary course of business

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Novel Issues

- ***AES UST-Kamenogorsk Hydropower LLP v. Ust Kamenogorsk Hydropower Plant JSC* (2011, EWCA Civ)**
  - Concession agreement binding owner and operator of hydroelectric facilities in Kazakhstan
  - Contract included ICC arbitration agreement
  - Kazakhstan court held arbitration agreement void as contrary to public policy

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Novel Issues

- ***AES UST-Kamenogorsk Hydropower LLP v. Ust Kamenogorsk Hydropower Plant JSC* (2011, EWCA Civ)**
  - English court took jurisdiction to issue permanent anti-suit injunction barring court proceedings in Kazakhstan – even absent any pending arbitral proceedings in England
  - Injunction intended to protect contractual *right* to arbitrate, not any existing arbitral *proceedings* in England

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Discussion

- **Arbitrability**
  - If you are faced with a dispute where the range of issues involves challenges and arbitrator's jurisdiction, are you better off
    - appointing an arbitrator expeditiously and asking it to rule on its jurisdiction by filing an expansive claim that includes claims arising out of the relationship? or
    - filing an action and waiting for the other party to apply to stay the proceedings?
  - Why should there be a difference in result (assuming there is) as result of the way you proceed?

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Thank You!

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