Case Law Update – 2015

Western Canada Commercial Arbitration Society
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Domestic Arbitration Awards – Appeals

***Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53** (1 August 2014): Creston sought leave to appeal the arbitrator's decision in a dispute under BC's *Arbitration Act*. The Act permits an appeal on a question of law with leave. SCC addressed when contractual interpretation was a question of law as opposed to a question of mixed fact and law.

- "Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix."
- Extricable questions of law in a contractual interpretation dispute may include: applying an incorrect principle, failing to consider a required element of a legal test or failing to consider a relevant factor. Instances of such extricable questions of law will be rare.
- To demonstrate that a point of law may prevent a miscarriage of justice, the point of law needs to be material to the final result and have arguable merit.

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Domestic Arbitration Awards – Appeals – Cases applying *Sattva Capital Corp.*

***Ottawa (City) v Coliseum Inc.*, 2014 ONSC 3838** (9 September 2014): Application for leave and appeal from arbitral award granted on the basis of, *inter alia*, extricable legal errors in contractual interpretation, specifically, the arbitrator: found general language overrode specific language; speculated on one party's intentions as opposed to determining mutual intentions; and ignored the principle that an agreement to agree cannot be enforced. Also noteworthy: purpose of the "significantly affect the rights" prerequisite is to eliminate grounds of appeal that are less than decisive to the outcome of the arbitration.

***Canadian National Railway Company v Ramara (Township)*, 2015 ONSC 1433** (4 March 2015): Application for leave to appeal arbitrator's decision denied as the determination of liability on a matter of contractual misrepresentation involved mixed fact and law. Further, the importance of the matters at stake (award was $70,166.97) did not justify an appeal.

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Domestic Arbitration Awards – Appeals – Cases applying *Sattva Capital Corp.*

***Strata Plan BCS 3165 v KBK No. 11 Ventures Ltd.*, 2014 BCSC 2276** (4 December 2014): No leave granted where Arbitrator's conclusion that the meaning of the defined words "reasonable budget" was reasonably confusing. Finding did not mean, as a matter of law, that the arbitrator found an ambiguity requiring application of *contra proferentem* to avoid a commercial absurdity.

***New Forest Woodland Inc. v Nature Trust of British Columbia*, 2015 BCSC 111** (26 January 2015): Petitioner was able to raise a question of law on the basis the arbitrator deviated from the text of the written agreement at issue so substantially that he created a new agreement. However, the petitioner was unable to demonstrate arguable merit to this question in light of the standard of reasonableness.

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Domestic Arbitration Awards – Appeals / Applications to Set Aside

***Apollo Building Group v Rabkin*, 2015 ONSC 1329** (27 March 2015): Application to set aside the arbitral award on allegations the ADR Chambers Expedited Arbitration Rules failed to provide a fair and equal opportunity for the applicants to present their case and respond to the opposition's case was dismissed.

***1016912 Alberta Ltd. v Parkland County (Municipality)*, 2014 ABQB 266** (2 July 2014): Application for leave to appeal arbitrator's decision was dismissed because the question on recoverable costs under the contract was not an extricable question of law. Even if it was a question of law, such question was expressly referred to the arbitrator for decision (as a necessary element of the question on appeal). Further, a "mere pecuniary interest" is not sufficient for a leave application; there is a public interest requirement entrenched in the law in Alberta that requires consideration. Fact Developer faced insolvency as a result of the Award insufficient.

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Enforcement of Arbitration Agreements – Stays – Multiparty Proceedings

***Alberici Western Constructors Ltd. v Saskatchewan Power Corp.*, 2015 SKQB 74** (6 March 2015): Court confirmed plaintiff/applicant EPCM company was entitled to stay its own litigation against defendant project owner and sub-contractors to remove liens pending determination of arbitration between the applicant and project owner.

- Authority for plaintiff applying to stay litigation in favour of arbitration lies in section 37 of *The Queen's Bench Act* and not section 8 of *The Arbitration Act*.
- Court expressly declined to follow the reasoning of the ABCA in *New Era Nutrition Inc. v Balance Bar Co.*, 2004 ABCA 280, where it held ss. 6 and 7 of the *Alberta Arbitration Act* (specifically s. 7(5)) were specifically designed to prevent the duplication of proceedings and the Court could stay arbitration in favour of litigation.

Enforcement of Arbitration Agreements – Stays – Multiparty Proceedings

***UCANU Manufacturing Corp. v Graham Construction and Engineering Inc.*, 2015 ABCA 22** (19 January 2015): Appeal from Chambers Judge's decision staying litigation between Graham, UCANU and other parties pending the outcome of the arbitration between UCANU and Graham. On a separate application a Chambers Judge had refused to stay the arbitration. The stay was upheld: the arbitration would "go a long way" in resolving the dispute and would define the issues between the other parties to the litigation.

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Enforcement of Arbitration Agreements – Stays

***2156775 Ontario Inc. v Just Energy Ontario LP*, 2014 ONSC 3276** (30 Mar 2014): application for a stay of litigation to pursue arbitration dismissed because the action was not "in respect of a matter to be submitted to arbitration under the agreement" as required by s 7(1) of the *Arbitration Act*. The arbitration provision related to "concern(s) or dispute(s) under" the agreement and because the action was a challenge to the validity of the agreement, it was not subject to the arbitration provision.

***Comtois International Export Inc. v Livestock Express BV*, 2014 FC 475** (15 May 2014): Court stayed litigation in favour of arbitration proceedings in England pursuant to the arbitration clause in the agreement between the parties.

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Enforcement of Arbitration Agreements – Stays

***Enbridge Inc. v Chartis Insurance Co. of Canada*, 2014 CarswellAlta 1030** (27 May 2014): Court stayed litigation pending a determination by the arbitral tribunal on whether the tribunal had jurisdiction to decide a dispute as to which contract governs the agreement between the parties and whether the dispute thereunder is arbitrable.

***Metropolitan Toronto Condominium Corp. No. 965 v Metropolitan Toronto Condominium Corp. No. 1031*, 2014 ONSC 5362** (23 September 2014): Plaintiff opposed defendant's application for a stay of litigation and to appoint an arbitrator on grounds that relief sought in the action (oppression remedies) was not arbitrable by statute. The Court stayed the action as it was arguable that the dispute was arbitrable and determining this issue required an examination of the statute and the claims.

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Enforcement of Arbitration Agreements – Stays – Reversal

***Cie Amway Canada v Murphy*, 2014 FCA 136** (27 May 2014): The appellant had successfully obtained a stay of class proceedings (2013 FCA 38) on grounds the claims, for $15,000, were arbitrable for falling within an arbitration clause that prevented litigation of matters where more than $1,000 is claimed. The plaintiffs in the action applied to lift the stay on grounds the claims would be amended to only seek $1,000. The Court found this would bring the litigation outside of the scope of the arbitration provision thereby providing grounds to lift the stay under s 50(3) of the *Federal Courts Act*.

Enforcement of Arbitration Agreements – Stays – Legislation Excluding Arbitration

***Briones v National Money Mart*, 2014 MBCA 57** (5 June 2014): The consumer protection legislation in issue gives the Courts exclusive jurisdiction. Not reasonable to separate those claims that were under the consumer protection legislation and those that were not to permit the latter to proceed through arbitration because the claims were inextricably linked and were based on essentially the same facts. It would be undesirable and inefficient to have parallel proceedings with the risk of inconsistent results.

***1146845 Ontario Inc. v Pillar to Post Inc.*, 2014 ONSC 7400** (22 December 2014): Class action Plaintiffs' claim that the arbitration agreement violated legislation purporting to limit franchisees' rights was not successful in defeating the defendant's application for a stay. Where arbitrator arguably has jurisdiction court should defer the issue of jurisdiction to the arbitrator. The legislation could not be interpreted as preventing arbitration and therefore litigation must be stayed.

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Enforcement of Arbitration Agreements - Confidentiality and Res Judicata based on Previous Arbitrations

***ENMAX Energy Corporation v TransAlta Generation Partnership*, 2015 ABQB 185 (1 April 2015):** Will be addressed in further detail in a later presentation.

The Court held that a prior arbitration decision between the parties was not binding in a current arbitration as *res judicata* does not apply to private arbitrations.

Whether confidentiality existed over other previous arbitral decisions involving third parties was a question of law. However whether such confidentiality prevented disclosure in the current arbitration is an issue of mixed fact and law for the arbitrator.

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Enforcement of Arbitration Agreements – Applicability of Statutory Limitation Periods

***Lafarge Canada v Edmonton*, 2015 ABQB 56** (21 January 2015): Will be addressed in further detail in a later presentation.

As a result of the Court of Appeal finding that Lafarge's Statement of Claim did not serve as a notice of, or as a commencement document for, an arbitration (2013 ABCA 376), the Court of Appeal remitted matters not previously decided in first instance such as attornment to litigation or wavier of arbitration rights, and delay in bringing an application to stay or strike litigation, to the Court.

QB Court struck the action.

Enforcement of Arbitration Agreements – Stays – Model Law

***Nordion Inc. v Life Technologies Inc.*, 2015 ONSC 99** (7 January 2015): The Defendant in this case did not expressly seek a stay but did give notice of its position promptly and pled in its statement of defence that the court has no jurisdiction which was sufficient for the requirements of prompt notice under Article 8 of the Model Law.

***Ciano Trading & Services C.T. & S.R.L. v Skylink Aviation Inc.*, 2015 ONCA 89** (26 January 2015): Court of Appeal upheld the motion Judge's decision that under the *International Commercial Arbitration Act* and the UNCITRAL Model Law, the Courts are obliged to defer the issue of whether or not there is an arbitration clause to the arbitrator "unless the agreement is null and void, inoperative or incapable of being performed."

***T. Films S.A. v Cinemavault Releasing International Inc.*, 2015 ONSC 937** (10 February 2015): Court upheld the refusal to stay litigation in favour of arbitration because the appellant did not bring the application for a stay at the first opportunity ("not later than when submitting his first statement on the substance of the dispute") as required by Article 8(1) of the Model Law and arbitration would only resolve one issue, not the numerous other issues involving related entities not party to the arbitration.

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Interim Relief – Injunctive Relief in Aid of Arbitration

***Sociedade de Fomento Industrial Private Ltd. v Pakistan Steel Mills Corp. (Private) Ltd.*, 2014 BCCA 205 (leave to appeal to SCC denied)** (2 June 2014): Lower court held that SFI's Mareva injunction was wrongfully obtained because it had failed to disclose that the award could be enforced in Pakistan (PSM's home country). Court of Appeal held that SFI was entitled to proceed in BC before turning to Pakistan; a real and substantial connection was presumed based on the existence of the award.

***African Mixing Technologies (PTY) Ltd. v. Canamix Processing Systems Ltd.*, 2014 BCSC 2130** (14 November 2014): AMT sought an injunction restraining Canamix from using its confidential information. Court acknowledged its jurisdiction to issue interim relief, but dismissed the application because (1) harm to Canamix' business would be substantial, (2) Tribunal was a better venue to seek interim relief, and (3) injunction would effectively usurp Tribunal's jurisdiction if it forced Canamix out of business. Instead, Court ordered Canamix to refrain from transferring information to third parties.

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Interim Relief – Injunctive Relief in Aid of Arbitration

***Stans Energy v. Kyrgyz Republic*, 2014 ONSC 6195** (24 October 2015):

- Application to extend a *Mareva* injunction against shares in Centerra (ON company).
  - Krygyz publicly announced that it planned to move the shares out of reach.
- Krygyz expropriated a mine from Stans in 2012, and Stans succeeded in arbitration in Moscow in 2014 (a $118 million award).
  - unsuccessful application to set aside the award is under appeal.
- In an unrelated dispute, ONSC allowed Sistem, another arbitral creditor, to seize Centerra shares from Krygyz on the basis that Krygyz has an equitable interest .
  - order has been stayed pending appeal (2014 ONSC 576).
- Court extended the injunction, *prima facie* right to enforce the award is not affected by the chance it will be set aside, and real risk of dissipation of assets.
- To watch…Stans has confirmed that its application to enforce its $118 million award will be heard in June 2015.

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Setting Aside Awards – Applying Quebec's *Civil Code*

***Dynafund Ltd. v Italsav srl,* 2014 QCCS 3772** (6 August 2014): Dynafund sought to set aside an arbitral award on the basis of the public policy defence in the Civil Code. In 2009, Cuban authorities seized Dynafund's bank accounts, including funds paid to Dynafund as an intermediary between Cuba and Italsav, which were owed to Italsav. Court rejected argument that enforcing the award would sanction a breach of international law:

- underlying contracts did not conflict with public order.
- risk that Cuban government may act contrary to the rule of law should be borne by both parties.

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Enforcement of Arbitral Awards

***Depo Traffic Facilities (Kunshan) Co. v. Vikeda Intl Logistics and Automotive Supply,* 2015 ONSC 999** (18 February 2015): Depo (a Chinese company) sought to enforce an award from the Shanghai International Arbitration Commission. Vikeda claimed the Tribunal had ignored its defence of 'double recovery', in breach of natural justice and Article 36(1)(a) and (b). Court held that there was no misconduct that could justify a refusal to enforce the award; Vikeda had had an opportunity to present its case and the Commission had been alive to the defence.

***Alfred Wegener Institute v. ALCI Aviation Ltd.,* 2014 ONCA 398:** ALCI, which did not appear or file material at the arbitration, appealed the enforcement of AWI's award on the basis that it had not filed a certified copy of the arbitral award. Court held that it was open to applications judge to accept affidavit evidence in place of a certified copy, particularly where accuracy was not challenged.

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Enforcement of Arbitral Awards

***Brentwood Plastics Inc., v. Topsyn Flexible Packaging Ltd.*, 2014 MBQB 97** (5 May 2014): Underlying contract was an oral agreement whereby Topsyn would purchase plastic film from Brentwood; no mention of arbitration except in invoices received on delivery, Topsyn argued there was no arbitration agreement. Court refused to enforce Brentwood's award because no "agreement in writing" existed, Topsyn had no notice of the arbitration clause until after products received.

***Sanum Beteiligungsgesellschaft MbH v. PDC Biological Health Corporation*, 2015 BCSC 570** (14 April 2015): Sanum commenced enforcement proceedings, then applied to strike PDC's pleadings. PDC argued that the arbitrator had not adequately considered its defences, in breach of natural justice and public policy. Court struck PDC's pleadings, holding that it would be an abuse of process to allow PDC to relitigate the issues in the arbitration.

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Collecting on Awards – Applying the Oppression Remedy to Third Parties

***T. Films SA v. Cinemavalut Releasing International Inc.*, 2015 ONSC 6608** (12 January 2015): By the time T. Films enforced in Ontario in 2013, CRI (an OBCA company) had already transferred all of its assets to affiliated corporations . T. Films invoked the oppression remedy, claiming that CRI had prejudiced its interests as a creditor by transferring the assets to its affiliates. Court found both affiliates and the sole shareholder liable to T. Films for the amount of the award pursuant to s. 248 of the OBCA (oppression remedy). Shareholder was also held personally liable for knowingly assisting breach of trust in relation to the funds received from distribution of film.

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Investor-State Arbitration – Canadian Investors Active

Apotex Holdings Inc. v. United States of America **(ICSID Case No. ARB(AF)/12/1)** (25 August 2014): Apotex claimed it lost $1.5 billion when the FDA issued an "Import Alert" after discovering deviations from manufacturing standards in its facilities, leading to the detainment of drugs at the border. Tribunal found that "new drug applications" were not "investments", but that the FDA's actions were lawful and appropriate in the circumstances.

Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela **(ICSID Case No. ARB(AF)/11/1)** (30 April 2014): Nova Scotia claimed that its subsidiary, Emera lost $180 million when Venezuela's state owned coal company abruptly cancelled a supply contract, forcing Nova Scotia to buy coal at higher prices. Tribunal found that purchase and supply contracts were not an investment because there was no "contribution" and it was less risky.

Investor-State Arbitration – Canadian Investors Active

***Gold Reserve Inc. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/01** (22 September 2014): Gold Reserve had invested over $300 million in a gold mine in Venezuela when Venezuela revoked its construction permit in 2008. Tribunal held that Venezuela violated Article 11(2) of the BIT by failing to accord fair and equitable treatment to Gold Reserve's investment and awarded it $740.3 million in compensation based on the number of seriousness of the breaches.

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