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LEGAL UPDATE: DOMESTIC ARBITRATION WCCAS - MAY 10, 2016

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Overview

This portion of the "legal update" presentation is intended to address general trends and noteworthy cases in **non-international** arbitration **not** being covered by the "Hot Topics" and "Arbitration Appeals" panels:

1. Is the upswing in family law arbitration eroding "commercial" considerations in non-international arbitration?
2. Last, best offer arbitrations
3. Mediation/arbitration: a worthwhile process?
4. Deciding between lawyer and non-lawyer arbitrators
5. Reasonable apprehension of bias

Overview (cont'd)

6. Dealing with self-represented parties
7. Arbitrators' addition of parties
8. Do arbitrators have contempt powers?
9. Enforcement of domestic arbitral awards
10. Stays of court proceedings in favour of arbitration

1. Erosion of Commercial Imperatives in Non-International Arbitration?

- A striking development over the past six months or so is the increase in court decisions dealing with family law arbitration yielded by a search for “Arbitration Act”.
- Various concepts discussed in those cases are specific to the family law statutes that factor into the decisions.
- However, watch for erosion of commercial imperatives in even non-family cases as judges apply the same Arbitration Acts to both sets of circumstances.

2. Last, Best Offer Arbitrations

McLaren v. Casey, 2016 BCSC 169:

- last, best offer arbitration recently commented on in the context of family law arbitrations
- permitted at least in respect of financial matters
- recognized as not necessarily the best means of resolving multi-issue disputes

3. Developments in Mediation/Arbitration

- In mediation/arbitration, the same individual serves as mediator and arbitrator.
- Examples in family law cases **but also** in commercial cases.
- Direct experience with parties who have ongoing relationships with each other and possibly also with the mediator/arbitrator.

3. Mediation/Arbitration (cont'd)

Different perspectives on this practice, as reflected in different statutory wording:

- Ontario's *Arbitration Act*, s. 35: "The members of an arbitral tribunal **shall not** conduct any part of the arbitration as a mediation or conciliation process or other similar process **that might compromise or appear to compromise the arbitral tribunal's ability to decide the dispute impartially**."
- Alberta's *Arbitration Act,* s. 35: "(1) The members of an arbitral tribunal **may**, if the parties consent, use mediation, conciliation or similar techniques during the arbitration to encourage settlement of the matters in dispute" and "(2) After the members of an arbitral tribunal use a technique referred to in subsection (1), they may resume their roles as arbitrators without disqualification."

3. Mediation/Arbitration (cont'd)

Pinder v. Woodrow, 2015 ABQB 750:

- What does "consent" (to the use of mediation, conciliation or similar techniques) mean in s. 35 of Alberta's *Arbitration Act*?
- Section 35 does not require a precise process to be followed where the parties agree to shift from arbitration mode to another form of dispute resolution.
- In some circumstances, explicit prior consent on the record may not be required.

3. Mediation/Arbitration (cont'd)

McClintock v. Karam, 2015 ONSC 1024:

- "Used in the right circumstances, and with proper safeguards, [mediation/arbitration] can be a useful means of dispute resolution. However, **care must be taken to ensure fairness, and to ensure that a reasonable apprehension of bias does not arise.**"
- "[A]t a bare minimum the parties are entitled to expect that the mediator/arbitrator will be **open to persuasion, and will not have reached firm views or conclusions.**" He or she should "refrain from expressing strong views that might disclose a predisposition to decide one way or the other."

3. Mediation/Arbitration (cont'd)

HOWEVER (also from *McClintock*):

- A reasonable apprehension of bias likely does not arise in mediation/arbitration simply because the mediator/arbitrator has taken the sort of steps associated with effective mediation, *e.g.*, "persuading, arguing, cajoling, and, to some extent, predicting".
- Further, "[i]f the mediator/arbitrator must move into the arbitration phase, it cannot be expected that he or she can entirely cleanse the mind of everything learned during the mediation phrase, and of every tentative conclusion considered, or even reached, during the mediation phase."

3. Mediation/Arbitration (cont'd)

Dawson v. Dawson, 2016 ABQB 167:

- No reason that a settlement reached through the use of mediation techniques contemplated in s. 35 [of Alberta's *Arbitration Act*] could not be **incorporated into an arbitration award**.
- This interpretation accords with the legislative intent; s. 36 should not be confined to arbitration hearings ["If the parties settle the matters in dispute during arbitration, the arbitration tribunal shall...record the settlement in the form of an award"].

4. Lawyer or Non-lawyer Arbitrator?

Non-lawyer arbitrators may receive some leeway in expression/process:

Highbury Estates Inc. v. Bre-Ex Limited, 2015 ONSC 4966:

- As the arbitrator is "an engineer and not a lawyer, ... some allowance needs to be given for inexactitude in expression".

Palmieri v. Alaimo, 2015 ONSC 4336:

- "Holding [an arbitrator who is 'not trained in procedural matters'] to a judicial standard would be inappropriate".

4. Lawyer or Non-lawyer Arbitrator? (cont'd)

Plaza 88 Retail Limited Partnership v. First Plaza Capital Realty Inc., 2014 BCSC 2453 - a **court** in determining whether to appoint a lawyer or accountant may look to:

- the nature of the questions that arise for determination (complex legal principles, and complex procedural and evidentiary issues, favour appointing a lawyer);
- the factual matrix in which the issues arise;
- who has more experience as arbitrator;
- amount of money at stake.

5. Reasonable Apprehension of Bias

Salomon c. 2700620 Canada inc., 2015 QCCQ 1161

- The "reasonable apprehension of bias" standard applied to judges "is applied by analogy to arbitrators".
- "[A]n arbitrator benefits from a legal presumption of impartiality".
- "A clear and cogent reason to favour one party is required to be shown in order to rebut that presumption".
- "[T]he mere existence of a connection" should not be confused with "a valid cause of partiality".

6. Dealing with Self-Represented Parties

0927613 B.C. Ltd. v. 0941187 B.C. Ltd., 2015 BCCA 457:

- "There are no special rules of procedure for a self-represented party in an arbitration proceeding beyond the basic procedural requirements for any arbitration..."
- As in the courts, "self-represented litigants to not have 'some kind of special status' that allows them to ignore rules of procedure".
- "While some latitude is to be given to self-represented parties who may not understand or be unfamiliar with the arbitration process, an arbitrator, like a judge, is not required to ensure that a self-represented party participate in a proceeding if that party chooses not to do so".

7. Arbitrator's Addition of Parties to the Arbitration

DNM Systems Ltd. v. Lock-Block Canada Ltd., 2015 BCSC 2014:

- Non-signatories to an arbitration agreement may be proper parties to the arbitration in certain circumstances (*e.g.*, if the corporate veil should be pierced and a non-signatory parent held legally accountable for the actions of its subsidiary).
- "[I]f an arbitrator purports to bind a non-party in the absence of one of the exceptions, or errs in the application of an exception, the arbitrator will have exceeded his or her jurisdiction and committed arbitral error".

7. Arbitrator's Addition of Parties to the Arbitration (cont'd)

- Such an error is subject to review under s. 30 of B.C.'s *Arbitration Act* ("[i]f an award has been improperly procured or an arbitrator has committed an arbitral error, the court may (a) set aside the award, or (b) remit the award to the arbitrator for reconsideration").
- Important ability as (unlike s. 31, which governs "appeals") s. 30 does not require a "question of law" or obtaining leave to appeal.
- See also: *Covanta Durham York Renewable Energy Partnership v. Barton-Malow Canada Inc.*, 2016 ONSC 2044

8. Do Arbitrators Have Contempt Powers?

Kaplan v. Kaplan, 2015 ONSC 1277:

- "Arbitrators do not have the powers of a court to compel directions through contempt or other means", which is among the reasons that arbitrations "are not particularly effective when the litigants are, for lack of a better word, ungovernable".

8. Do Arbitrators Have Contempt Powers? (cont'd)

Woronowicz v. Conti, 2015 ONSC 5247:

- Arbitrators may interpret court orders and issue awards based on that interpretation. An arbitrator can determine that a party's conduct was inconsistent with a court order, state what the party was required to do or refrain from doing in order to comply with that order, and/or order costs against the party.
- However, an arbitrator has no jurisdiction to take the next step and decide that the party's conduct "amounted to contempt of court, or purport to impose penalties for such contempt".

9. Enforcement of Domestic Arbitral Awards

- "Awards of an arbitrator…are not immediately enforceable; they must be incorporated into a court order…"
- What bearing do limitation periods on converting arbitral awards into court judgments have?

Kaplan v. Kaplan, 2015 ONSC 1277; *North Ridge Development Corporation v. Saskatoon (City)*, 2015 SKQB 351

10. Staying Court Proceedings in Favour of Arbitration

Haas v. Gunasekaram & Feng, 2015 ONSC 5083:

- In determining whether a court proceeding should be stayed in favour of arbitration, the court should look at the "pith and substance" of the allegations in the pleadings.

  (with reference to s. 7(1) of Ontario's *Arbitration Act*: "If a party to an arbitration agreement commences a **proceeding in respect of a matter to be submitted to arbitration under the agreement**, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding".)

Gulak v. Breckenridge, 2015 BCSC 153:

- A judge's summary of issues in dispute for the purpose of deciding a stay application is "not binding on any arbitrator or the parties".

10. Staying Court Proceedings – Inoperative Arbitration Clause?

Rashid v. Wipro Limited, 2015 BCSC 2199:

- Various statutes allow courts to refuse a stay where the arbitration clause is void, inoperative or incapable of being performed
- An arbitration clause that requires disputes to be resolved "in accordance with the provisions of the *Arbitration Act, 1991* (Ontario)" is not void, inoperative or incapable of being performed when another contractual provision says that "[t]his Agreement shall be governed by the laws of the Province of British Columbia and the federal laws of Canada applicable therein".
- Clauses can be read together.

QUESTIONS?

THANK YOU.