CASE LAW UPDATE
Domestic and International Arbitration

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DOMESTIC ARBITRATION

OVERVIEW

- Canadian courts have again tackled a wide range of subjects related to domestic (non-international) arbitration
- Efforts have also been afoot to improve legislation and arbitral rules

STAYING COURT PROCEEDINGS IN FAVOUR OF ARBITRATION

STAYING COURT PROCEEDINGS IN FAVOUR OF ARBITRATION

***Penncorp Life Insurance Company v. Mirza*, 2016 MBQB 233**

- Undue delay is a basis under various domestic arbitration statutes for rejecting a stay application
- Delay measured from filing of claim to filing of motion to stay proceedings
- Assessing delay is “not a mathematical exercise, but contextual” depending on the history of the dispute and the steps taken in the litigation

CONDUCT OF THE ARBITRATION

NATURAL JUSTICE IN ARBITRATION

Lockman v. Rancourt, 2017 ONSC 2274

- An arbitrator's breach of the obligation to treat parties equally and fairly (under s. 19 of Ontario's *Arbitration Act*) was a breach of natural justice
- Deference must be given to the discretionary decision of an arbitrator to grant or refuse an adjournment, but that discretion must be exercised judicially
- The arbitration award was set aside and the court required a new arbitrator to conduct a new hearing

ARBITRAL BIAS

Gerstel v. Kelman, 2017 ONSC 214

- Bias “is a subset of unequal and unfair treatment. If an arbitrator is biased, his or her treatment of the parties will not be fair and is unlikely to be equal.”
- Parties cannot contract out of s. 19 of Ontario’s *Arbitration Act* (equality and fairness required)

ARBITRAL BIAS (cont'd)

- "[I]f the spectre of bias could be raised every time a judge, tribunal member, mediator or arbitrator is too quick and provides an unfortunate answer in an inappropriate tone, a necessary human element of conducting a decision making process: the flexibility and ability to respond to different situations in different ways, could be lost."
- "It is not inherently biased for a decision maker to communicate with a party. It is contrary to the rules the court employs but to insist on it, in situations involving other dispute resolution models, may result in too much formality and detract from their ability to succeed."
- "[A]rbitrations carried out by those who are sought because they are community leaders (as opposed to professional arbitrators, lawyers and retired judges) are likely to be less formal or bound up in legal niceties."

ARBITRAL AWARDS

REASONS FOR ARBITRAL AWARD

***Peters v. D'Antonio*, 2016 ONSC 7141**

- Absence of reasons for arbitral award violated both statutory requirements (Ontario's *Arbitration Act*, s. 38) and common law requirements
- Court refused to imply reasons for the award
- Though s. 46(8) of Ontario's *Arbitration Act* allows a court to remit the award to the arbitral tribunal, that was not a viable option here as the court did not know, for example, whether the arbitrators were available or had made notes
- Arbitral award set aside

EFFECT OF ARBITRAL AWARD

***Canadian National Railway Company v. Ramara (Township)*, 2016 ONSC 7985**

- More confirmation that *res judicata* and issue estoppel apply to arbitrations and arise in relation to arbitral awards

CHALLENGING ARBITRAL AWARDS

APPEALS AND REVIEW

- Appeals:
  - Available (for now) in non-international arbitrations – for example, under s. 44 of Alberta's *Arbitration Act*
  - Not available in international arbitrations
- Review:
  - On grounds such as lack of jurisdiction, natural justice, reasonable apprehension of bias, fraud – for example, under s. 45 ("setting aside of award") of Alberta's *Arbitration Act*
  - Also available in international arbitrations – Article 34 of Model Law

APPEALS – WHERE, WHEN, AND OF WHAT?

NEW FORUM FOR APPEALS?

- Currently expect to go to superior courts of first instance (e.g., B.C. Supreme Court, Alberta Court of Queen's Bench)
- Potential appeals to an **arbitral panel**:
  - September 2016 revisions to Domestic Commercial Arbitration Rules of BC International Commercial Arbitration Centre (BCICAC)
- Potential appeals directly to **Courts of Appeal**:
  - Uniform Law Conference of Canada's *Uniform Arbitration Act*, adopted on December 1, 2016, seeking to "reduce unduly protracted post-award litigation"

DEADLINE FOR APPEALING

***Broadband Communications North Inc. v. I-Netlink Incorporated*, 2017 MBQB 32**

- "within 30 days after the appellant or applicant receives the award, correction, explanation, change or statement of reasons on which the appeal or application is based...": (Manitoba) *Arbitration Act*, s. 46(1)
- "despite the use of the words 'on which the appeal or application is based', it was not the intent of the legislature that a separate application for leave would be required within 30 days of the award and then 30 days after the arbitrator issued a correction, clarification or additional award...a party is entitled to seek a correction, clarification or an additional award during the 30-day period following the delivery of the award and then seek leave to appeal 30 days after receiving the correction, clarification or additional award"

TEST FOR LEAVE TO APPEAL

***Driscoll v. Hautz*, 2017 ABQB 168**

- Alberta's *Arbitration Act* requires, among other things, that "the importance to the parties of the matters at stake in the arbitration justifies an appeal" (s. 44(2.1)(a))
- Above provision "requires the applicant [for leave] to show that the matters at stake are of greater importance to the parties than may be expected in a typical leave application, and are of sufficient importance to justify engaging the appellate process....this standard will be neither easy nor impossible to satisfy. Most applications will not meet it."

WHAT CAN BE APPEALED? QUESTIONS OF LAW

***Chung v. Shin*, 2017 BCSC 64**

- Questions of **contractual interpretation** are almost always questions of mixed fact and law
- However, interpreting standard form contracts may give rise to “a question of pure law...when the interpretation would be of precedential value”
  - citing ***Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.***, 2016 SCC 37

QUESTIONS OF LAW ON APPEAL (cont'd)

***Driscoll v. Hautz*, 2017 ABQB 168**

- Unless a **misapprehension of evidence** "concerned substance, not detail" and unless "it played an essential part in the reasoning process that led to the result below", "an error of fact derived from evidence that has been overlooked or misunderstood remains an error of fact, and is not reviewable under the [*Arbitration*] Act."
- Leave to appeal can be granted in this regard "only if the alleged misapprehensions were essential to the reasoning process and amount to a denial of natural justice."

PROVIDING FOR APPEALS BEYOND QUESTIONS OF LAW

- Possible under **certain existing legislation** in Canada, e.g., Ontario's *Arbitration Act*:
  - Where parties seek to contract for rights of appeal on **fact or mixed fact or law**, they must do more than say the arbitral award will be "subject to appeal in accordance with the *Arbitration Act*"; the further scope of appeal must actually be specified. Otherwise only questions of law can be appealed, with leave: ***6524443 Canada Inc. v. Toronto (City)***, 2016 ONSC 7147
- Possible under **revised BCICAC Domestic Commercial Arbitration Rules**:
  - 42(1) A party to an arbitration, other than an arbitration in respect of a family law dispute, may appeal to an Appeal Tribunal **on any question of law arising out of the award if**: (a) all of the parties to the arbitration consent; or (b) the arbitration agreement provides that either party may appeal; or (c) the Appeal Tribunal grants leave to appeal.
  - 42(3) Notwithstanding subrule (1) if the parties have agreed in an arbitration agreement that an appeal may be brought on **questions of mixed law and fact or fact or on specified grounds** the Appeal Tribunal shall hear the appeal on those specified grounds.

OR, SHOULD APPEALS BE RESTRICTED EVEN IN DOMESTIC ARBITRATION?

- Under certain existing legislation, e.g. in Ontario, parties can **"contract out"** of appeal provisions
  - but to do so should do more than describe the arbitration award as "final and binding" – ***Peters v. D'Antonio***, 2016 ONSC 7141
- Potentially if the *Uniform Arbitration Act* is adopted:
  - Parties may need to "opt in" for an appeal to be available at all – the Act provides for appeals on **questions of law on an "opt in" basis**
  - Parties may not be able to "opt in" beyond questions of law – Act **prohibits appeals on questions of fact or on questions of mixed fact and law**, even if the parties have agreed to allow such appeals.
    - 65(2) A provision of an arbitration agreement purporting to allow ... an appeal to a court on a question of mixed fact and law, is an agreement providing that an appeal may be brought ... on a question of law.
    - 65(4) A provision of an arbitration agreement purporting to allow an appeal to a court on a question of fact has no effect.

HEARING NEW ISSUES ON APPEAL

***Chung v. Shin*, 2017 BCSC 64**

- "[R]aising new issues and arguments not raised at the arbitration should be discouraged when considering leave to appeal"
- "A key reason to guard against liberally permitting new issues to be raised is primarily prejudice" to the other party
- Party seeking to raise new issues must argue why and "persuade the court that the evidence for the issue can be found within the record"
- "[C]onceptual difficulty" where a court could conclude an arbitrator erred when no request that the arbitrator address that issue

REMEDIES ON REVIEW

REMEDIES ON REVIEW OF AWARD

Basandhi v. Patel, 2016 ONSC 7556

- A court's jurisdiction under s. 46 of Ontario's *Arbitration Act* (allowing for review where natural justice is breached, jurisdiction exceeded, etc.) is restricted to setting aside the award or remitting the award to the arbitrator, with directions about the conduct of the arbitration
- The court does not have jurisdiction on such a review to award damages claimed in the arbitration

INTERNATIONAL ARBITRATION

PROCEDURAL ISSUES

PROCEDURAL ISSUES – CONSOLIDATION

- Consolidation operates differently depending on the Provinces
- In British Columbia, s. 27(2) of the *International Commercial Arbitration Act (“**ICCA**”)* requires that all parties to the arbitrations agree to consolidate
- In Alberta, s. 8(1) of the *ICAA* is worded differently:

> **8(1)** The Court of Queen’s Bench, on application of the parties to 2 or more arbitration proceedings, may order
>
> (a) the arbitration proceedings to be consolidated, on terms it considers just,
>
> (b) the arbitration proceedings to be heard at the same time, or one immediately after another, or
>
> (c) any of the arbitration proceedings to be stayed until after the determination of any other of them.

PROCEDURAL ISSUES – CONSOLIDATION (cont'd)

Under the 2017 Ontario *ICAA*, the provision is worded differently again:

> **8**(1) If all parties to two or more arbitral proceedings have agreed to consolidate those proceedings, a party, with notice to the others, may apply to the Superior Court of Justice for an order that the proceedings be consolidated as agreed to by the parties.

Do any of these provisions allow international arbitrations to be consolidated over the objection of one or more parties?

PROCEDURAL ISSUES – CONSOLIDATION (cont'd)

At least in Alberta, YES

***Pricaspian Development Corporation v BG International Ltd.*, 2016 ABQB 611**

- Whether the Court has the jurisdiction to consolidate arbitrations under the *ICAA* on the application of one party, when the other party does not consent or disagree
- Three arbitrations – two consolidated by consent
- Contested application to consolidate the two remaining arbitrations into one
- Issue was whether the reference to "on application of the parties" in s. 8(1) of the *ICAA* meant "all of the parties"

PROCEDURAL ISSUES – CONSOLIDATION (cont'd)

***Pricaspian Development Corporation v BG International Ltd.*, 2016 ABQB 611**

- As a matter of statutory interpretation, including reviewing the *UNCITRAL* working documents leading to the development of the *Model Law*, the Court held that it has the jurisdiction to consolidate international arbitrations under the *ICAA* even over the opposition of one of the parties
- "The factors to consider for an international commercial arbitration consolidation application are similar, but not the same, as those used for a domestic arbitration, or for litigation"

PROCEDURAL ISSUES – CONSOLIDATION (cont'd)

Pricaspian Development Corporation v BG International Ltd., 2016 ABQB 611

- Arbitration agreement is the primary consideration, but other factors include:
  - the principle that the Court is to be non-interventionist (which may mean referring consolidation applications to the tribunals);
  - whether the issues in both arbitrations are identical;
  - whether there are common claims, disputes and relationships between the parties;
  - whether consolidation will save time and resources;
  - whether one party will be seriously prejudiced by having two arbitrations heard together;
  - whether one arbitration is at a more advanced stage than the other;
  - whether consolidation will delay the hearing of one arbitration to the serious prejudice of the other party
- Held, consolidation application dismissed

STAYS OF COURT PROCEEDINGS

Possibly diverging approaches being taken in Canada to applications to stay court proceedings in deference to international arbitration agreements

Is there cause to be concerned?

STAYS OF COURT PROCEEDINGS

Article 8 of the *Model Law* (applicable in Alberta and in pre-2017 Ontario):

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

Section 8 of the BC *ICAA* is worded differently:

> **8** (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before service of any pleadings or taking any other step in the proceedings, apply to that court to stay the proceedings.
>
> (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed.

STAYS OF COURT PROCEEDINGS (cont'd)

***Hosting Metro Inc. v Poornam Info Vision Pvt., Ltd.*, 2016 BCSC 2371**

- Confirmed that, under the BC *ICAA*, an applicant must only establish an arguable case that:
  - The person against which the stay is sought is a party to the arbitration agreement;
  - The matter for which the legal proceedings have been commenced is one that was agreed to be submitted to arbitration; and
  - The application has been brought before taking any other steps in the action
- Held, stay granted and jurisdictional objections deferred
- "Albeit not determinative, the evidence put forward in those [arbitral] proceedings, the factual findings made and/or the legal conclusions reached are likely to be of material assistance in assessing both territorial competence and the appropriate forum for the Civil Claim"

STAYS OF COURT PROCEEDINGS (cont'd)

***Greer v Babey*, 2016 SKCA 45**

- Application by one defendant to stay the action against it under the ICAA, while leaving the balance of the action to proceed
- Chambers judge declined to stay the court proceeding in order to avoid a multiplicity of proceedings
- Court of Appeal confirmed that the ICAA requires the court proceeding to be stayed notwithstanding the potential for multiple proceedings and inconsistent results

STAYS OF COURT PROCEEDINGS (cont'd)

Greer v Babey, 2016 SKCA 45

- Endorsed the principle in *John Holland Pty Limited v. Kellogg Brown & Root Pty Ltd*., [2015] NSWSC 451:

> . . .The fact there may be an overlap of issues with claims between one or other of the parties to the arbitration agreement and third parties, with the consequent risk of inconsistent findings arising out of a multiplicity of proceedings, is no longer a relevant factor to be considered by a court in deciding whether or not to refer parties to arbitration (or grant a stay in that context). . . .
>
> . . . Section 8(1) reflects the modern trend both domestically and internally to facilitate and promote the use of arbitration and to minimize judicial intervention in the process. It gives full effect to the parties' contractual freedom, which they have exercised by their arbitration agreement."

STAYS OF COURT PROCEEDINGS (cont'd)

***Toyota Tsusho Wheatland Inc. v Encana Corporation,* 2016 ABQB 209**

- Application to stay claim against one party (Encana) in favour of arbitration, in the context of complex multi-party litigation
- Court stayed the arbitrable claims against Encana, but allowed the balance of the action to proceed
    - No discretion to refuse the stay as against Encana on the grounds of inconvenience or a desire to avoid a multiplicity of proceedings
    - Discretion to stay the court proceeding but a delay would prejudice the non-arbitrating parties
- Dismissed an application to stay the arbitration, holding that the ICAA provided that could be done only with the consent of all parties, and the Court's general jurisdiction could not be used to obtain a different result

But not all the news is good

STAYS OF COURT PROCEEDINGS (cont'd)

***Novatrax International Inc. v Hagele Landtechnik Gmbh*, 2016 ONCA 771**

- Application to stay an action commenced by Novatrax against Hagele, a German company
- Arbitration agreement provided:

  > "The contractual parties agree that German law is binding and to settle any disputes by a binding arbitration through the "Industrie und Handelskammer (Chamber of Commerce) in Frankfurt."

- Motions judge considered the application under the domestic *Arbitration Act*, not the *ICAA* – and applied a forum *conveniens* analysis

STAYS OF COURT PROCEEDINGS (cont'd)

Novatrax International Inc. v Hagele Landtechnik Gmbh, 2016 ONCA 771

- Court of Appeal also treated it as a forum selection clause, which could be disregarded if "strong cause" could be shown for doing so, following *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27
    - because Novatrax's claims all related to the contract and were somewhat intertwined, the effect of the "forum selection clause" was applied to all of the parties to the litigation
- Neither court referred to the *ICAA* or the UNCITRAL *Model Law* incorporated in the *ICAA*.
- Stay was issued to facilitate arbitration, but for the wrong reason?

STAYS OF COURT PROCEEDINGS (cont'd)

Haas v Gunasekaram, 2016 ONCA 744

- Dispute between an Ontario resident and a foreign resident regarding a shareholders agreement, which contained an arbitration agreement
- Stay sought under both the domestic *Arbitration Act* and the *ICAA*
- Court applied the domestic *Arbitration Act* because "the subject matter of this action is situated in Ontario" and held that the *Acts* were substantively the same in any event
- Motions judge applied a "pith and substance" approach, rather than assessing whether it was arguable that the claims fell within the scope of the arbitration agreement
- No analysis of *ICAA* or the *Model Law*

STAYS OF COURT PROCEEDINGS (cont'd)

***Trade Finance Solutions v Equinox Global Limited*, 2016 ONSC 7988**

- Application to stay an action against an agent and Lloyds based on an arbitration agreement calling for LCIA arbitration in London
- In process of "Canadianizing" the policy, an endorsement was added referring to an "action to enforce the obligations of the underwriters", which was held to be a reference to a "court proceeding"
- Court declined to assess the matter on the basis of whether there was an "arguable" claim that the dispute was arbitrable
- Refused to apply the *Model Law* and the *ICAA* on the basis that "this is for situations where the parties to the agreement have agreed to arbitration as the sole method of proceeding and not where the parties have also agreed or contemplated an alternative, being 'an action to enforce the obligations of the Underwriters'".

Generally, Canadian courts continue to apply a restrained approach to the grounds upon which an international arbitration award may be set aside

SETTING ASIDE AWARDS

Popack v Lipszyc, 2016 ONCA 135

- Considered the scope of the discretion to refuse to set aside an award even if one or more of the grounds in the *ICAA* are established
- In the course of an arbitration before a New York Rabbinical Court, the tribunal had an *ex parte* meeting with an arbitrator in a previous case
- Motions judge found that the *ex parte* meeting breached the agreed procedure, but found she had a discretion under Article 34(2)(a)(iv) of the *ICCA* to decline to set it aside
- Court of Appeal dismissed the appeal, holding that the Court may refuse to set aside an award even if one or more of the grounds set out in the *Model Law* are established

SETTING ASIDE AWARDS (cont'd)

***Popack v Lipszyc*, 2016 ONCA 135**

- Factors to consider in the exercise of the discretion:
  - the nature of the ground upon which the award might be set aside (jurisdiction, procedural fairness, public policy etc.);
  - the seriousness of the breach;
  - the potential impact of that breach on the result; and
  - potential prejudice flowing from the need to redo the arbitration if the award is set aside.

SETTING ASIDE AWARDS (cont'd)

***Consolidated Contractors Group S.A.L. (Offshore) v Ambatovy Minerals S.A.*, 2016 ONSC 7171**

- Application under the *ICAA* to set aside an ICC award dealing with a dispute over the construction of a slurry pipeline in Madagascar
- Applicant argued that the Tribunal incorrectly assumed over certain environmental claims that had not passed through the contractual pre-arbitration steps; denied the applicant the right to present its case; and made findings contrary to public policy.
- Court held that the pre-arbitration steps were not "true questions of jurisdiction" (*Cargill*), and declined to interfere with the Tribunal's assessment that it was appropriate to decide the environmental claims in this arbitration.
- No miscarriage of justice, and no aspect of the Award was contrary to Ontario public
- Confirmed narrow discretion to refuse to set aside even if a ground established

Generally, Canadian courts continue to be willing to enforce international arbitration awards, and to apply the exceptions strictly

ENFORCEMENT

China Citic Bank Corporation Limited v Yan, 2016 BCSC 2332

- Legacy of *Sociedade-de-fomento Industrial Private Limited v. Pakistan Steel Mills Corporation (Private) Limited*, 2014 BCCA 205
    - In *Sociedade*, the Court of Appeal held that the chambers judge erred in finding that a *Mareva* injunction was wrongfully obtained on the basis of non-disclosure, in part because the right to enforce the award was "very strong, approaching certainty given the limited grounds upon which the claim could be defended" under the *Model Law* (at para. 47).
- In *China Citic*, the Court accepted that there was non-disclosure, but held that the injunction should nevertheless not be set aside
- Given the *Model Law* and the *ICCA*, and following *Sociedade*, the plaintiff had a strong prima facie case for enforcement
- Award subsequently enforced: 2017 BCSC 596

ENFORCEMENT (cont'd)

***Crystallex International Corporation v Venezuela,* 2016 ONSC 4693**

- Application to enforce an investment treaty award against Venezuela, made under the Canada-Venezuela BIT
- Although seeking to set aside the award at the seat, Venezuela did not resist the enforcement application in Canada
- Court canvassed the nature of the "agreement to arbitrate", which must be supplied to the Court on an enforcement application under the *Model Law*

ENFORCEMENT (cont'd)

- An "arbitration agreement is based on the consent of the contracting parties to refer their disputes to arbitration"
  - Venezuela's consent was found in the terms of the BIT
  - Crystallex accepted that consent (offer) in its Notice of Dispute
  - BIT provided that the dual consents functioned as an "agreement in writing" under the *New York Convention*
    - By extension, this applied to the *Model Law* as well
    - No basis upon which to refuse recognition, and the award was enforced

ENFORCEMENT (cont'd)

***Belokon v Krygyz Republic*, 2016 ONCA 981**

- Appellants seeking to enforce arbitration awards against the Kyrgyz Republic
- Sought to execute against shares in Centerra Gold Inc. registered in the name of Kyrgyzaltyn JSC
- Held, the Republic had no legal or beneficial interest in the shares
    - Court declined to disturb the separate corporate personal
    - Highlights difficulty of enforcing awards against state parties

Thank You