
# The Arbitration Review of the Americas

2020

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GAR Global Arbitration Review

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## Summary

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

Among other things, the new 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 new statute also establishes a 10-year limitation period to commence proceedings seeking recognition and enforcement in Canada of foreign international commercial arbitral awards. The new model statute will become law as it is enacted by the various Canadian federal, provincial and territorial legislatures. In March 2017, the Province of Ontario was the first to adopt a new International Commercial Arbitration Act, adopting most of the ULCC's recommendations in the proposed uniform act. In May 2018, the Province of British Columbia also amended its International Commercial Arbitration Act, to incorporate the 2006 amendments to the UNCITRAL Model Law in a manner consistent with the ULCC model statute. These amendments bring the province's legislation in line with current international best practices. The government's stated objective in making these changes is to improve the desirability of British Columbia, and particular Vancouver, as a seat for international arbitration.

## 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:

> [T]he purpose of the United Nations Conventions and the 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. [1]

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. [2]

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, ICC Canada Arbitration Committee, the British Columbia International Commercial Arbitration Centre, the ADR Institute of Canada (ADRIC), the International Centre for Dispute Resolution Canada (ICDR 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.

ADRIC and ICDR Canada have revised and updated the procedural rules available to parties, bringing them in line with international best practices and offering an improved option for parties. ADRIC's revisions came into force on 1 January 2014, and seek to limit the tendency of parties to domestic arbitrations to adopt litigation-like procedures. Specific changes include a narrower test for document production that accords with international standards, an interim arbitrator mechanism for urgent relief, and a prohibition on examinations for discovery. ICDR Canada's new rules came into force on 1 January 2015, and reflect the ICDR International Arbitration Rules. The new rules include expedited procedures for claims under

C$250,000, an emergency arbitrator process for urgent relief, and recognition that court procedures such as oral and document discovery are generally not appropriate in arbitration.

## 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.

## TEAL CEDAR PRODUCTS LTD V BRITISH COLUMBIA [3]

In Teal Cedar Products Ltd v British Columbia, a majority of the Supreme Court of Canada (the SCC) provided guidance on two key aspects of the scope of appellate intervention in domestic commercial arbitration, namely, the court's jurisdiction on when to grant leave to appeal and the standard of review.

Teal Cedar Products Ltd (Teal Cedar) holds three licences to harvest Crown timber in British Columbia (BC). As a result of the enactment of the Forestry Revitalization Act (FRA), BC reduced the volume of Teal Cedar's allowable harvest and deleted certain areas from the related Crown land base. After prolonged negotiations, Teal Cedar and BC were still unable to reach a settlement on how much compensation BC should pay to Teal Cedar for reducing the latter's access to certain improvements such as roads and bridges which Teal Cedar used to harvest the timber. As required under the FRA, their dispute was submitted to arbitration.

### Arbitration Award

The arbitrator's decision was challenged on three issues.

- An issue of statutory interpretation: pursuant to the FRA, the arbitrator had to determine the proper valuation method for the improvements, which he found to be the depreciation replacement cost method.
- An issue of contractual interpretation: an agreement reached by the parties prior to arbitration appeared to exclude interest from the province's payment of compensation to Teal Cedar for the improvements. The arbitrator rejected this interpretation and held that Teal Cedar was entitled to interest on the compensation for the improvements.
- An issue of statutory application: in applying the specific valuation methodology chosen by the arbitrator, he determined that Teal Cedar was not entitled to compensation for the improvements to which it did not lose access.

### BC Supreme Court

The application judge upheld the arbitrator's award except in connection with the statutory application issue, which was remitted to the arbitrator and resulted in an additional award in an amount equal to the value of the improvements.

### BC Court Of Appeal

In its first decision, a majority of the Court of Appeal reversed the application judge's decision on all three issues. After the release of the SCC's decision in Sattva Capital Corp v Creston Moly Corp, [4] the Court of Appeal reconsidered its first decision but held unanimously that its disposition of the appeal was unaltered by Sattva.

**Supreme Court Of Canada**

The majority restored the arbitrator's award on all three issues on the basis that the arbitrator reached a reasonable conclusion on the statutory interpretation issue and the appellate court lacked jurisdiction to intervene on the other two issues.

In reaching this conclusion, the majority first considered whether the appellate court has jurisdiction to review the arbitrator's decision on these three issues.

The majority started its analysis by noting that the Arbitration Act [5] of BC limits appellate review of arbitration awards to questions of law and the jurisprudence is clear on the characterisation of a question into three principal types: legal, factual or mixed. The majority then went on to comment that if the underlying legal test may have been altered when applied to a set of facts, a legal question emerges as a result of this allegation and is open to appellate review. The majority called these questions 'extricable questions of law' and held that they are 'better understood as a covert form of legal question . . . than as a fourth and distinct category of questions'. [6] However, it also cautioned that courts need to scrutinise questions framed as extricable questions of law to distinguish between 'a party alleging that a legal test may have been altered in the course of its application' and 'a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome'. [7] According to these principles, the majority concluded that a question of statutory interpretation is normally characterised as a legal question while, in general, contractual interpretation remains a mixed question as it involves applying contractual law to contractual facts.

Applying these principles to the facts of this case, the majority found that courts have jurisdiction to review the arbitrator's decision with respect to the pool of acceptable valuation methods under the FRA but not the specific method he chose to apply in this case. On the contractual interpretation issue, the majority held that the courts have no jurisdiction to review the arbitrator's decision in this regard. Finally, on the statutory application issue, the majority found the question to be a mixed question and beyond the scope of appellate review.

On the question of standard of review, the majority reiterated the SCC's position in Sattva and held that where the decision under review is an award under the Arbitration Act, the standard of review is 'almost always' reasonableness. [8] The majority commented that it is wrong to assume all statutory interpretation by an arbitrator attracts a correctness standard of review. As a result, under a reasonableness standard, the majority concluded that the arbitrator's decision to adopt the depreciation replacement cost method was reasonable.

The minority agreed that the contractual interpretation is not reviewable by the courts but disagreed with the majority on the statutory interpretation of the FRA. The minority held that, regardless of the applicable standard of review, the arbitrator's interpretation of the relevant provisions in the FRA must fail.

This decision highlights the SCC's deferential approach to the commercial arbitration process and the limited ways even a domestic arbitral award can be reviewed by the courts.

**CONSOLIDATED V AMBATOVY [9]**

In Consolidated v Ambatovy, the Ontario Superior Court confirmed that a court has a residual discretion to refuse to set aside an arbitral award even when all four criteria for setting aside arbitral award under the Model Law are engaged.

Disputes arose between the respondent, Ambatovy Minerals SA (AMSA), and the applicant, Consolidated Contractors Group SAL (CCG), during the construction of a C$300 million pipeline project. The parties' agreement contained an arbitration clause and the disputes were submitted to arbitration, which was conducted before a panel of three arbitrators in Toronto under Ontario law. The arbitration lasted over three years.

In its application, CCG advanced three challenges to the arbitral award under article 34 of the Model Law:

- the arbitral tribunal incorrectly assumed, or failed to exercise, jurisdiction;
- the arbitral tribunal denied CCG the right to present its case; and
- the arbitral tribunal made findings that were contrary to Ontario public policy.

First, CCG claimed that the environmental counterclaims raised by AMSA during the arbitration had not gone through the required pre-arbitration steps as stipulated in the contract. The court found that the arbitral tribunal's decision to assume jurisdiction was an acceptable choice for two reasons:

- the court was of the view that the counterclaims were linked to CCG's claims and had to be determined together; and
- the pre-arbitration steps were not true conditions precedent to the jurisdiction of the arbitral tribunal as they only determine when the contractual right to arbitrate arises, not whether there is a right to arbitrate at all (ie, the issue is one of admissibility and not jurisdiction).

Secondly, CCG took issue with five instances where it alleged to have been denied the opportunity to present its case before the arbitral tribunal. The court referred to article 34(2)(a)(ii) of the Model Law and held that in order to justify setting aside an arbitration award on the basis of a party's inability to present his or her case, the conduct of the arbitral tribunal must be sufficiently serious to offend the most basic notions of morality and justice. This is a high threshold and examples of this kind of conduct include:

- where an award is based on a theory of liability that either or both the parties were not given an opportunity to address; or
- where the arbitral tribunal ignored or failed to take the evidence or submissions of the parties into account.

Based on these principles, the court dismissed CCG's arguments.

Thirdly, CCG claimed that by awarding AMSA liquidated damages and also requiring CCG to forfeit tranche payments as a result of CCG not achieving the set milestones specified in the contract, the arbitral tribunal essentially granted AMSA double recovery, which is inconsistent with the public policy of Ontario. Although the court ultimately dismissed CCG's claim in this regard by holding that the arbitral tribunal viewed the denial of tranche payments and the imposition of liquidated damages as two separate contractually mandated remedies intended to address different issues, this argument gained some traction with the court and arguably made public policy considerations a potential ground upon which the court might decide to set aside an arbitral award under the Model Law.

The court also commented on its discretion under article 34 to refuse to set aside an award even if one of the grounds for doing so has been established. The court recognised that the scope of the discretion is significantly affected by the specific ground on which the award is sought to be set aside. Specifically, the court stated:

> It would be inconsistent with the intention of the legislature and the current jurisprudential trend in favour of maintaining arbitral awards to treat every breach of applicable procedure, however minor or inconsequential, as requiring the court to refuse to set aside an award if so requested. It is necessary to balance the nature of the breach in the context of the arbitral process, determine whether the breaches are of such a nature as to undermine the integrity of the process and assess the extent to which the breach had any bearing on the award itself. [10]

The court took a deferential approach towards the arbitration process, resolving to respect the finality of the arbitral award, particularly after a difficult and prolonged arbitration process.

## HELLER V UBER TECHNOLOGIES

In the course of class certification proceedings in a proposed class action lawsuit, an application was brought to stay the plaintiff's action in favour of arbitration. In its decision, the Ontario Court of Appeal demonstrated a willingness to set aside an international arbitration clause in an employment contract where there was significant unfairness and inequality of bargaining power between the parties.

### Ontario Superior Court Of Justice [11]

The proposed representative plaintiff sought, among other relief, a declaration that drivers in Ontario that work for the defendant companies (Uber) and provide food delivery services and personal transportation services using various Uber apps were employees of Uber and therefore governed by Ontario's employment standards legislation. Uber brought a motion to stay the action in Ontario relying on the arbitration clause in the contract of employment the drivers signed with Uber. The arbitration clause called for mandatory mediation of any disputes and, if the disputes were not resolved within 60 days, the parties were required to proceed to arbitration under the Rules of Arbitration of the International Chamber of Commerce in the Netherlands.

The lower court granted Uber's motion to stay the action in favour of arbitration holding that the dispute was both international and commercial, such that Ontario's International Commercial Arbitration Act [12] (ICAA) and its domestic Arbitration Act [13] applied. The lower court also held that

- courts must enforce arbitration agreements that are freely entered into even in contracts of adhesion;
- Ontario's employment standards legislation did not preclude parties from arbitrating; and
- the arbitrability of employment agreements was an issue for the arbitrator to decide at first instance under the competence-competence principle.

The lower court rejected the plaintiff's argument that the employment agreement was unconscionable.

**Ontario Court Of Appeal**

The lower court's decision was overturned on appeal. [14] The Ontario Court of Appeal found that the application judge 'erred in principle in his analysis of the existing authorities on the issue of when it is appropriate to grant a stay in favour of an arbitration provision contained in a contract of adhesion'. [15] In spite of its reservations regarding the lower court's finding that the relationship between the parties was a commercial one, the Ontario Court of Appeal agreed with the lower court that nothing much turned on whether Ontario's international or domestic legislation applied and thus did not deal with the issue. For this same reason, the Court of Appeal only addressed Ontario's domestic Arbitration Act throughout its reasons, noting that it would have reached the same conclusions if it had applied Ontario's International Commercial Arbitration Act (ICAA).

The Court of Appeal reached the conclusion that the arbitration clause was invalid under section 7(2) of Ontario's Arbitration Act and that the mandatory stay under section 7(1) did not apply for two reasons. First, the court held that the competence–
competence principle had no application to this case because at issue was the validity of the arbitration clause, not a jurisdictional question to be determined by the arbitrator. [16] Having adopted the assumption that the drivers were employees for the purposes of this preliminary motion, the Court of Appeal held that the arbitration clause constituted a contracting out of the Employment Standards Act, [17] depriving the drivers of an investigative and complaints process under that act.

Secondly, the Court of Appeal reached the separate and independent conclusion that the arbitration clause was unconscionable at common law. The Court of Appeal found that the arbitration clause met both tests for unconscionability: the four-part test set out by the Ontario Court of Appeal [18] and the two-part test set out by the British Columbia Court of Appeal and the Supreme Court of Canada. [19] Applying the four-part test, the arbitration clause was held to be a 'substantially improvident and unfair bargain', made without any evidence of legal advice to the drivers, between two sides with significant inequality of bargaining power and chosen by Uber to favour itself and take advantage of the drivers. [20]

Uber has obtained leave to appeal to the Supreme Court of Canada.

**JAG Worldwide V Lakeside Produce [21]**

In a case with competing applications to enforce an arbitral award and to set it aside, the Ontario Superior Court held that in very limited circumstances arbitral awards can be set aside for public policy reasons. In this case, the award was held to be enforceable.

Lakeside Produce sought an order recognising and enforcing an international commercial arbitral award, and JAG Worldwide sought an order setting it aside. [22] During the arbitration hearing, the arbitrator considered a one year contract between the parties which stated certain terms that were at issue, including the quality of the tomatoes to be delivered and where they were to be graded. The arbitrator ruled that Lakeside Produce had to pay JAG Worldwide for the few shipments that met the agreed quality standard, but the amount awarded was less than JAG Worldwide claimed was owed to them. [23] Following this award, JAG Worldwide brought a series of applications seeking a remedial claim pursuant to the ICAA and Model Law, which Lakeside Produce resisted.

The court determined that an application to set aside an award made pursuant to the ICAA and Model Law must be made within the established time frame of three months after the party making the application received the award. JAG Worldwide did not bring its application within this time frame, and the parties agreed that this period cannot be extended by court order. [24] Conceding that it did not expressly claim relief pursuant to the ICAA and Model Law in its notice of application, JAG Worldwide submited that its residual pleaded claim in a basket clause for 'such further and other relief' was sufficient to provide notice of its newly asserted claim under the ICAA. [25] Lakeside Produce argued that it would be inappropriate and an error of law to read the 'basket clause' in JAG Worldwide's notice of application as allowing for a remedy.26 The court agreed.

The court held that JAG Worldwide's application was restricted to its remedial request pursuant to the governing legislation: the court stated that each of JAG Worldwide's grounds to set aside the award was a distinct cause of action that had to be expressly asserted along with the relief. [27] Since the award was made pursuant to the legislation in relation to an international commercial arbitration award subject to the ICAA, the court lacked jurisdiction to award relief, and the plaintiff's application was dismissed.28

Upon determining that the arbitral award was still enforceable, the court went further to discuss the public policy argument put forth by JAG Worldwide to set aside the award. The court recognised and agreed that the Model Law does permit domestic courts to set aside awards for public policy reasons, but rejected the proposition that the award here should be set aside. [29] The public policy issues identified by the court as warranting the setting aside of an award as illegality, acts repugnant to orderly functioning of social or commercial life, or incompatibility with the most basic notions of morality and justice.30 The court also mentioned that in the context of commercial arbitrations, an arbitrator's findings are generally afforded significant deference.

This decision demonstrated that Canadian jurisdictions continue to respect parties' decisions to arbitrate their disputes, and will not go beyond the limited scope of the courts' jurisdiction when reviewing international arbitration awards.

**Sum Trade Corp V Agricom International Inc [31]**

On the appeal of a stay application, the British Columbia Court of Appeal refused to interfere with the application judge's finding that there was an arguable case that Sum Trade Corp and Agricom International Inc had agreed to incorporate an arbitration clause into three of their contracts.

Pursuant to the contracts, Agricom agreed to sell lentils to Sum Trade. The contracts each had an annotation below the material terms that read as follows: 'Trade Rule Info: GAFTA 88, Incoterms 2010'. The GAFTA 88 standard form contract includes an arbitration clause whereby all disputes or claims arising out of the contract regarding the interpretation or execution of the contract are to be determined by arbitration in accordance with the GAFTA Arbitration Rules.

When Sum Trade complained that particular lentil deliveries did not meet contract specifications and sought to return the goods for a refund, Agricom asserted that the contracts incorporated the GAFTA 88 dispute resolution process and required mandatory arbitration. Instead, Sum Trade commenced a civil claim. In response, Agricom sought to stay the civil action in favour of arbitration on the basis that there was an arguable case that the terms of GAFTA 88, including the arbitration clause, were incorporated into the contracts.

**Supreme Court Of British Columbia [32]**

The application judge granted the stay following previous case law that held that challenges to the arbitrator's jurisdiction should first be resolved by the arbitrator unless the challenge is based solely on a question of law, or, if a question of mixed fact and law, the question of fact requires only superficial consideration of the documentary evidence on the record.

**British Columbia Court Of Appeal**

The Court of Appeal agreed with the application judge. The court held that the issue in this case was the applicability of the GAFTA 88 and that previous case law had repeatedly established that the applicability of an arbitration clause, that is, whether the agreement was effective to bind the parties at all, is an appropriate question for the arbitrator. Although the judge hearing a stay application has jurisdiction to rule on the existence of an arbitration agreement, the Court held that this should only be done in clear cases. [33] In this case, where it was arguable that the parties agreed in writing to refer disputes to arbitration by a tribunal competent to rule on its own jurisdiction, the court determined the stay should be granted. Similarly, the judge hearing a stay application should only determine whether the arbitration clause relied upon is null and void, inoperative or incapable of being performed, pursuant to section 8(2) of British Columbia's ICAA, [34] in cases where it is clear. Otherwise, issues about the existence or validity of the arbitration agreement should be left for the arbitrator to determine. [35]

**Tianjin V Xu [36]**

On an application to recognise and enforce an arbitral award issued by the Chinese International Economic and Trade Arbitration Commission (CIETAC), the Ontario Superior Court determined that 'proper notice' is where the form of notice given was reasonably calculated to inform the party of the arbitral proceedings and give the party an opportunity to respond.

The arbitral award arose from an investment agreement in China between the applicants on the enforcement application, two Chinese limited partnerships, and the respondent on the enforcement application, Shuqin Xu, her former husband, Jinlong Huang, and two Chinese companies the couple was shareholders in. The investment agreement provided, among other things, that in certain circumstances, the applicants had the right to a 'transaction reversal', which would require Xu, Huang and one of the companies to repurchase the shares from the applicants at the subscription price plus simple interest. During the course of the agreement, the applicants sought, among other things, the transaction reversal as provided for under the agreement. Xu and Huang did not comply with the demand and, pursuant to the agreement, the applicants submitted the dispute to the CIETAC for arbitration. Xu did not appear.

On the application, Xu argued that the court should not enforce the arbitral award for two reasons:

- she did not receive notice of the arbitral proceedings and was unable to present her case; and
- the arbitration was not an international commercial arbitration as defined by the Model Law such that the court had no jurisdiction to enforce the award under Ontario's ICAA.

On the first issue, the court rejected Xu's argument that service of notice of the arbitral proceedings or arbitrators should be in accordance with the Hague Convention. Given that the CIETAC Rules do not provide that service must accord with the Hague Convention, the court held that there could be no such requirement. [37] The court held that the evidence established that Xu was given proper notice of both the appointment of arbitrators and of the arbitral proceedings. In particular, there was evidence that for a period of 10 months prior to the arbitration hearing, the Court of Arbitration of the CIETAC sent the case materials a total of seven times to Xu's two addresses in China and three times to her Canadian address; six out of the 10 attempts were sent by notarized delivery. The evidence established that during all material times, Xu resided at the Canadian address the materials were sent to. The court found that the attempts were more than sufficient to inform Xu of the arbitral proceedings and give her an opportunity to respond to the arbitration.

While there was no issue that the arbitration was commercial, Xu submitted that the arbitration did not meet the definition of international arbitration under article 1(3) of the Model Law because she was doing business in China and therefore the parties were all doing business in the same state. The court held that Xu's evidence made it clear she did not have a place of business in China at the time of the arbitration agreement. Xu testified that Huang had been the directing mind of the Chinese companies and that she was just a shareholder. The fact that her last known address in China was the address for one of the companies was not sufficient to show she was carrying on business in China or that China was her place of business. Without a place of business, Xu's habitual residence in Canada was the governing factor and the arbitration was found to be international. [38]

South Coast British Columbia Transportation Authority v BMT Fleet Technology Ltd [39]

In South Coast British Columbia Transportation Authority v BMT Fleet Technology Ltd, the British Columbia Court of Appeal declared a notice to arbitrate a nullity because it sought to commence four separate arbitrations against three different parties under four separate arbitration agreements.

The parties' dispute arose from four related contracts for the design and construction of a new passenger ferry in Vancouver, British Columbia. The contracts each contained an arbitration agreement. In 2011, the South Coast British Columbia Transportation Authority (TransLink) delivered a notice to arbitrate to the British Columbia International Commercial Arbitration Centre (BCICAC) to commence a single arbitration to arbitrate disputes under the four contracts and naming the three responding parties. The BCICAC accepted the notice and sent a letter to the parties indicating the start date of the arbitration as 4 April 2011.

In August 2016, TransLink applied to court for the appointment of an arbitrator in the single arbitration. The respondents objected on the basis that they had not consented to the consolidation and the notice to arbitrate was a nullity because it was contrary to section 21 of British Columbia's Arbitration Act, which requires all parties to consent to the consolidation. Subsequently, TransLink submitted separate notices to appoint an arbitrator for separate arbitrations and requested that the BCICAC restructure its file to reflect that the 2011 notice to arbitrate had commenced four separate arbitrations (however, TransLink later discontinued against one of the respondents). TransLink also sought a declaration that the arbitrations had been commenced in April 2011 and requested an order appointing the same arbitrator for all of the arbitrations.

**Supreme Court Of British Columbia**

The lower court granted TransLink's application and focused its decision on the 'substance of the matter'. In particular, the court found that although the consolidated arbitration had been commenced based on a misreading of section 21 of the Arbitration Act, the 2011 notice to arbitrate contained all of the information necessary to commence four separate arbitrations. Accordingly, the single notice was merely an irregularity of form and did not prevent all of the arbitrations from commencing as of the date of the 2011 notice. [40] The lower court also ordered the appointment of the same arbitrator in the three arbitrations.

**British Columbia Court Of Appeal**

The Court of Appeal allowed the appeal and dismissed TransLink's application. The Court of Appeal held that the trial judge erred in law in finding that the 2011 notice to arbitrate was curably irregular and not a nullity. Critically, the Court of Appeal found that the lower court had not addressed the implications of section 21 of the Arbitration Act in the circumstances before it. Upon review of the relevant authorities, the Court of Appeal held that 'apart from statute law and absent consent, an arbitration may address only the contract giving rise to the dispute'. [41] Given that section 21 is the only provision in the Arbitration Act that expressly addresses joint arbitration of disputes arising under separate arbitration agreements, the Court of Appeal held that unless the conditions of section 21 are met, including obtaining consent from all of the parties to the consolidation, arbitrations cannot be consolidated.

This analysis led the Court of Appeal to conclude that the 2011 notice to arbitrate was outside the arbitration clauses, outside the parties' contracts and outside the Arbitration Act and therefore a nullity. [42] The Court of Appeal disagreed that TransLink could regularise the reference to arbitration by merely filing four copies of the same notice.

TransLink has filed leave to appeal to the Supreme Court of Canada.

**JAPAN CANADA OIL SAND LIMITED V TOYO ENGINEERING CANADA LTD [43]**

In an outlier decision, the Alberta Court of Queen's Bench consolidated two validly commenced arbitrations relating to an engineering, procurement and construction contract (the EPC Agreement) on the basis that the court has the jurisdiction to consolidate domestic and international arbitrations pursuant to section 8(1) of Alberta's ICAA [44] without the consent of all parties. The court consolidated the domestic arbitration into the international arbitration and the consolidated arbitration proceeded as an international arbitration governed by the UNCITRAL Rules.

Pursuant to the EPC Agreement, Toyo Engineering Canada Ltd (Toyo Canada), as contractor, performed work to expand and redevelop an oil sands project in Northern Alberta for the owner, Japan Canada Oil Sands Ltd (JACOS). Toyo Canada's parent company, Toyo Engineering Construction Ltd (Toyo Japan) agreed to pay or perform the liabilities or obligations of Toyo Canada under the EPC Agreement by way of a guarantee and indemnity agreement, and to indemnify JACOS for any losses resulting from Toyo Canada's failure to satisfy its obligations under the EPC Agreement.

A number of disputes arose over the course of the project which resulted in both parties initiating arbitration proceedings in July 2017, namely, a domestic arbitration by Toyo Canada against JACOS and, six days later, an international arbitration by JACOS against Toyo Canada and Toyo Japan. JACOS applied to have the domestic arbitration consolidated into

the international one (or, alternatively, to stay the domestic arbitration); the Toyo parties cross-applied to consolidate the international arbitration with the domestic one.

The court found that Toyo Japan was properly a party to the international arbitration pursuant to a term of the guarantee which it held 'plainly linked' the guarantee to the EPC Agreement. [45] In finding that it had jurisdiction to consolidate arbitration proceedings on terms it considers just, the court rejected the Toyo parties' argument that 'arbitration proceedings' under Alberta's ICAA meant only international arbitration proceedings, thus preventing the court from consolidating domestic and international arbitrations. The court noted that Alberta's ICAA and its domestic Arbitration Act [46] are worded differently: the domestic arbitration legislation expressly excludes arbitrations commenced under Part 2 of the ICAA from its scope, whereas the ICAA does not contain such a limitation. Noting that a narrow interpretation of the term 'arbitration proceedings' would otherwise create a 'legislative lacuna' between the two acts and that there was no reason for such an interpretation, the court found it had jurisdiction to consolidate domestic and international arbitrations pursuant to section 8(1) of Alberta's ICAA.

Despite the fact that the Toyo parties had cross-applied to consolidate the arbitrations, the court found that Toyo Japan had not consented in the guarantee to consolidate the domestic arbitration into the international one. However, the court made a distinction between consent to arbitrate generally and procedural issues that arise from that consent. Based on that analysis, and following an earlier decision of the same court, the court held that Alberta's ICAA provides jurisdiction for a court to consolidate proceedings even in the absence of consent from the parties. The factors the court took into consideration included the following:

- interpreting section 8 as requiring the parties' consent would preclude the parties from seeking recourse to the court to resolve any disputes regarding whether consolidation should occur;
- Alberta's Rules of Court generally contemplate an application being brought by one party to an action and joint or consented to applications are uncommon;
- the court's discretion under section 8 would be unnecessary if the consent of all parties to the consolidation was required; and
- given that section 8(3) provides for a situation in which the parties agree to consolidate, section 8(1) must necessarily deal with disagreement between the parties. [47]

Having found it had jurisdiction to consolidate the arbitrations, the court determined that consolidation should be ordered in the interest of efficiency. The court also noted that based on the wording of the EPC Agreement, Toyo Canada and JACOS had anticipated that the issue of consolidation may arise.

**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 Paige Burnham (lawyer, Borden Ladner Gervais LLP).*

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Notes

[1] Automatic Systems Inc v Bracknell Corp (1994), 18 OR (3d) 257 at p 264, cited with approval in Seidel v TELUS Communications Inc, 2011 SCC 15 and Desputeaux v Editions Chouette (1987) Inc, 2003 SCC 17.

[2] For example, the definition of 'local judgment' in British Columbia's Limitations Act specifically includes arbitral awards to which the Foreign Arbitral Awards Act or the International Commercial Arbitration Act apply, providing arbitral creditors with a 10-year limitation period for enforcement proceedings. Similarly, the British Columbia Court Jurisdiction and Proceedings Transfer Act presumes a 'real and substantial connection' (the standard for Canadian courts to assume jurisdiction over a dispute) in any proceeding to enforce a foreign arbitral award.

[3] Teal Cedar Products Ltd v British Columbia, 2017 SCC 32.
[4] Sattva Capital Corp v Creston Moly Corp, 2014 SCC 53.
[5] Arbitration Act, RSBC 1996, chapter 55.
[6] Teal Cedar Products Ltd v British Columbia, 2017 SCC 32 at paragraph 44.
[7] Teal Cedar Products Ltd v British Columbia, 2017 SCC 32 at paragraph 45.
[8] Teal Cedar Products Ltd v British Columbia, 2017 SCC 32 at paragraph 74.
[9] Consolidated v Ambatov, 2016 ONSC 7171.
[10] Consolidated v Ambatov, 2016 ONSC 7171 at paragraph 154.
[11] Heller v Uber Technologies Inc, 2018 ONSC 718.
[12] SO 2017, c. 2, Sched. 5.
[13] 1991, SO 1991, c. 17.
[14] Heller v Uber Technologies Inc, 2019 ONCA 1.
[15] Heller v Uber Technologies Inc, 2019 ONCA 1 at paragraph 20.
[16] Heller v Uber Technologies Inc, 2019 ONCA 1 at paragraph 39.
[17] 2000, SO 2000, c. 41.
[18] Titus v William F Cooke Enterprises Inc, 2007 ONCA 573 at paragraph 38, affirmed in Phoenix Interactive Design Inc v Alterinvest II Fund LP, 2018 ONCA 98.
[19] Morrison v Coast Finance Ltd (1965), 55 DLR (2d) 710 (BC CA); Douez v Facebook, Inc, 2017 SCC 33 at paragraph 115.
[20] Heller v Uber Technologies Inc, 2019 ONCA 1 at paragraph 68.
[21] JAG Worldwide v Lakeside Produce, 2017 ONSC 4933.
[22] JAG Worldwide v Lakeside Produce, 2017 ONSC 4933 at paragraph 1.
[23] JAG Worldwide v Lakeside Produce, 2017 ONSC 4933 at paragraph 3.
[24] JAG Worldwide v Lakeside Produce, 2017 ONSC 4933 at paragraphs 18–19.
[25] JAG Worldwide v Lakeside Produce, 2017 ONSC 4933 at paragraph 20.
[26] JAG Worldwide v Lakeside Produce, 2017 ONSC 4933 at paragraph 37.
[27] JAG Worldwide v Lakeside Produce, 2017 ONSC 4933 at paragraph 47.
[28] JAG Worldwide v Lakeside Produce, 2017 ONSC 4933 at paragraph 56.
[29] JAG Worldwide v Lakeside Produce, 2017 ONSC 4933 at paragraph 81.
[30] JAG Worldwide v Lakeside Produce, 2017 ONSC 4933 at paragraphs 83–85.
[31] 2018 BCCA 379.
[32] Sum Trade Corp v Agricom International Inc, 2017 BCSC 2213 at paragraphs 27–28.
[33] Sum Trade Corp v Agricom International Inc, 2018 BCCA 379 at paragraphs 34-35.
[34] RSBC 1996, c 233.
[35] Sum Trade Corp v Agricom International Inc, 2018 BCCA 379 at paragraph 36.
[36] 2019 ONSC 628.
[37] Tianjin v Xu, 2019 ONSC 628 at paragraph 35.
[38] Tianjin v Xu, 2019 ONSC 628 at paragraph 49.
[39] 2018 BCCA 468, reversing 2017 BCSC 1683.

[40] South Coast British Columbia Transportation Authority v BMT Fleet Technology Ltd, 2017 BCSC 1683 at paragraphs 83–85.
[41] South Coast British Columbia Transportation Authority v BMT Fleet Technology Ltd, 2018 BCCA 468 at paragraph 40.
[42] South Coast British Columbia Transportation Authority v BMT Fleet Technology Ltd, 2018 BCCA 468 at paragraph 50.
[43] 2018 ABQB 844.
[44] RSA 2000, c I-5.
[45] Japan Canada Oil Sands Limited v Toyo Engineering Canada Ltd, 2018 ABQB 844 at paragraph 56.
[46] RSA 2000, c A-43.
[47] Japan Canada Oil Sands Limited v Toyo Engineering Canada Ltd, 2018 ABQB 844 at paragraph 77.


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