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Canada: rulings demonstrate judicial deference to arbitration

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Summary

IN SUMMARY

Canada is an arbitration-friendly jurisdiction with a strong legislative framework that promotes the use of arbitration and minimises judicial intervention. This article provides an overview of international commercial arbitration in Canada and discusses developments in the legislation across the country's provinces, the implementation of the Model Law into provincial international commercial arbitration statutes, the willingness of courts to recognise and uphold arbitration principles and recent notable developments in the case law.

DISCUSSION POINTS

- History of the implementation of the Model Law in Canada
- Background to the legislative framework for arbitration in Canada's provinces
- List of arbitration groups and institutions throughout Canada
- Recent Canadian case law

REFERENCED IN THIS ARTICLE

- International commercial arbitration legislation of various Canadian provinces
- Arbitration legislation (domestic) of various Canadian provinces
- Recent Canadian jurisprudence relating to the application and interpretation of governing legislation and the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the UNCITRAL Model Law on International Commercial Arbitration
- Uniform Law Conference of Canada (ULCC)

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 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 (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 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 model statute will become law as it is enacted by the various Canadian federal, provincial and territorial legislatures. In March 2017, 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, 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. In April 2019, the Alberta Law Reform Institute recommended that Alberta adopt the model statute but the province has not yet amended its International Commercial Arbitration Act.

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.

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.

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 Vancouver International Commercial Arbitration Centre (VanIAC, formerly the British Columbia International Arbitration Centre, which is one of the oldest modern arbitral institutions in the world, having been created in 1986), the ADR Institute of Canada, the International Centre for Dispute Resolution 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. VanIAC has recently released updated International Arbitration Rules, reflecting international best practices, effective 1 July 2022.

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.

Bakaris V Southern Sky[1]

The Ontario Superior Court's decision in ***Bakaris v Southern Sky*** promotes respect for the principle of competence-competence even in the face of an agreement clause with conflicting provisions, one referring to arbitration under the London Court of International Arbitration (LCIA) Arbitration Rules and the other to litigation in Canada.

The parties entered into a memorandum of agreement (MOA) under which Nick Bakaris, an entrepreneur residing in Zimbabwe, agreed to obtain a licence on behalf of a Zimbabwean company to grow and sell medical cannabis in Zimbabwe. In exchange, Bakaris would receive, among other things, an interest in Southern Sky Holdings (formerly known as Southern Sun Pharma Inc) (Southern Sky), a British Columbia holding company whose subsidiaries produce, market and sell cannabis in Africa. Southern Sky subsequently terminated the MOA on the basis that Bakaris had not fulfilled its terms.[2]

Bakaris applied to the Ontario court to enforce his rights under the MOA pursuant to a provision in the MOA that referred to the 'non-exclusive jurisdiction' of Canadian courts to 'settle any dispute or claim arising out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims).' The MOA also contained a mandatory arbitration clause, however, which stated that disputes 'shall be referred to and finally resolved by arbitration under the LCIA Arbitration Rules, which Rules are deemed to be incorporated by reference into this clause.' Pursuant to that clause, Southern Sky moved to stay the litigation in favour of arbitration. The issue before the Court was whether Ontario's ICAA[3] applied and a stay should be granted in favour of arbitration.[4]

The application judge began her analysis by noting that the standard for demonstrating that a dispute is subject to arbitration under the Model Law is not onerous. Citing a British Columbia Court of Appeal case, the application judge held that a stay should be granted if it was 'arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement'.-[5] In reaching the conclusion that the test was met in this case, the application judge considered that the parties had turned their minds to the possibility of resolving disputes by way of arbitration, including by setting out in the MOA the number of arbitrators, the arbitral seat, the language of the arbitration and the arbitration rules that would apply. The parties also contemplated issues of confidentiality, interlocutory court orders and finality in the arbitration clause. Accordingly, the application judge 'decline[d] to reach any final determination as to the scope of the arbitration agreement' and stayed the litigation pending the determination of the LCIA on its jurisdiction to conduct the arbitration.[6]

79411 USA Inc V Mondofix Inc[7]

In a decision that recognises the importance of maintaining confidentiality in the arbitration process, the Superior Court of Quebec held that the information in arbitration awards should be kept confidential in the course of recognition and enforcement applications unless the party seeking to disclose the award can demonstrate the utility or necessity of the disclosure.

Fix Auto USA and Fusa Inc (Fix Auto) applied to recognise and enforce a domestic arbitration award resulting from an arbitration between Fix Auto and Mondofix Inc regarding a licence agreement between the parties. Although there was no disagreement that the conditions for the recognition and enforcement of the award under Quebec's Code of Civil Procedure (CCP)[8] were met, Mondofix objected to the award being made public. Mondofix asked the Court to put the award under seal and to withdraw from the court record the other exhibits filed in support of the application. The Court was only required to deal with the issue regarding the award as the parties consented to have the exhibits withdrawn from the court record in the course of the proceedings.[9]

The application judge began by noting that article 4 of the CCP, which provides that the arbitration process remains confidential subject to agreement by the parties or any 'special provisions' of the law, must necessarily extend to arbitration awards and not just the arbitration process.[10] While emphasising the importance of confidentiality in arbitration, the application judge recognised the need for exceptions to the rule that arbitration awards should remain confidential during the course of recognition and enforcement proceedings. The application judge held that applications to seal arbitration awards must be decided on a case-by-case basis and the 'solution . . . turns on the following question: Can justice "be done without the necessity of ordering the production of documents that are otherwise confidential"'.[11] The burden of showing that an exception must be made rests with the party seeking the benefit of the exception, in this case Fix Auto. Having found that Fix Auto had not demonstrated the utility or necessity of disclosing the award in this case, the application judge ruled that the award must remain confidential.[12]

Stewart V Stewart[13]

A decision of the Supreme Court of British Columbia similarly recognised the importance of maintaining confidentiality in the arbitration process and upholding parties' reasonable expectations of privacy where applications related to an ongoing arbitration are made in court.

The applications in this case were brought in the context of a longstanding dispute between siblings and various companies they controlled. As part of a settlement agreement in the litigation, the parties agreed that one of the defendant companies, Quadra Pacific Properties Corp (QPPC), was required to purchase the plaintiff's interest in it for fair market value. The settlement agreement provided that if the parties were unable to reach an agreement on fair market value, the purchase price for the shares was to be determined by arbitration. The parties failed to agree and proceeded to arbitration. At the time of the applications, the parties were awaiting the arbitrator's award.[14]

The plaintiff and the personal defendants brought competing applications, some of which related to information and documents disclosed in the arbitration. Among other orders sought by the personal defendants was a sealing order to protect certain financial documents and information disclosed in the arbitration.[15]

The application judge began his assessment of whether a sealing order would be necessary by referring to Rule 27 of the Domestic Commercial Arbitration Rules of Procedure of the British Columbia International Commercial Arbitration Centre (now VanIAC), which expressly protects the confidentiality of arbitrations. Rule 27 provides that '[u]nless: (a) otherwise agreed by the parties, (b) required by law, or (c) necessary to enforce or challenge an award, all hearings, meetings, evidence, documents (produced or exchanged), Awards and communications shall be private and confidential as between the parties, the arbitration tribunal and the Centre.'[16] Similar provisions are contained in British Columbia's domestic Arbitration Act and its ICAA.[17]

The application judge then applied the two-part test developed by the Supreme Court of Canada for confidentiality orders (adapted from the Supreme Court of Canada's test for publication bans), which asks whether: the order is necessary to prevent a serious risk to an important interest, including a commercial interest; and the salutary effects of the order outweigh its deleterious effects, including the public interest in open and accessible court proceedings.[18] In addition to finding that the disclosure of the information over which the defendants sought a sealing order could potentially harm the financial interests of the parties to the litigation, the application judge also held that 'the disclosure of this information would be likely to undermine the public policy in this jurisdiction of encouraging arbitrations by defeating the parties' reasonable expectations of privacy in an on-going arbitration.'[19] Accordingly, the sealing order was granted on the terms sought by the defendants.

Metso Minerals Canada Inc V ArcelorMittal Exploitation Minière Canada[20]

On an application to recognise an international arbitration award in circumstances where the award had already been honoured, the Superior Court of Quebec held that: the recognition and enforcement of arbitral awards are distinguishable and independent terms such that the recognition of an award can be sought independently from the enforcement of an award; and the fact that an award has already been satisfied does not necessarily render recognition 'theoretical and of no use.'

The award at issue was the result of an arbitration held in New York arising from a dispute between Metso Minerals Canada Inc and Metso Minerals Industries Inc (Metso), and ArcelorMittal Exploitation Minière Canada and ArcelorMittal Canada Inc (ArcelorMittal) for damages allegedly caused by products sold to ArcelorMittal by Metso. The award dismissed ArcelorMittal's claims and required ArcelorMittal to bear 80 per cent of the parties' arbitration fees and 80 per cent of Metso's reasonable legal costs. The award was confirmed by the

New York Court and ArcelorMittal subsequently honoured the award and satisfied payment to Metso.[21]

Metso then applied to the Quebec Superior Court, under Quebec's Code of Civil Procedure (CCP),[22] to recognise the award. The issue the Court had to decide was whether it should refuse to recognise the award on the basis that the application was theoretical because ArcelorMittal had already satisfied the award and a declaration of satisfaction of judgment had been filed.[23]

In reaching its decision to grant Metso's application, the Court considered what the New York Convention, the UNCITRAL Model Law and the CCP say about recognition and enforcement of arbitration awards, noting that the applicable provisions of all three refer to the recognition and enforcement of an award as 'distinct aspects' of recognition and enforcement proceedings.[24] The Court elaborated further, stating that the recognition of an award 'refers to its authority or binding effect' and 'makes the award binding and gives it the same legal weight and authority as any other judgment of the Court', whereas the enforcement of an award, 'goes a step further' and 'ensures that the award is carried out, that it is executed.'[25] For that reason, the Court stated, an award can be recognised without being enforced but not vice versa.

Finally, the Court cited with approval a lengthy passage from ***Redfern and Hunter on International Arbitration,*** which discusses the purpose of recognition. On its own, recognition generally acts as a shield, for example, in circumstances where a court 'is asked to grant a remedy in respect to a dispute that has been the subject of previous arbitral proceedings.'[26] The Court noted that Metso intended to rely on the award in its defence of two cases pending before the Superior Court of Quebec (ArcelorMittal was also a party to both cases) relating to the performance of some of the same products at issue in the arbitration. Accordingly, the Court found it 'untenable' that the recognition application was merely theoretical and of no use as ArcelorMittal argued.[27]

Tianjin V Xu[28]

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 were 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 CIETAC for arbitration. Xu did not appear.

On the application, Xu argued that the court should not enforce the arbitral award for two reasons: first, she did not receive notice of the arbitral proceedings and was unable to present

her case; and second, 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.[29] 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 10 months prior to the arbitration hearing, the Court of Arbitration of 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 notarised 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.[30]

The Ontario Superior Court's decision was recently cited in a decision of the Federal Court of Australia that addressed the same issue in the context of a CIETAC arbitration.[31]

Friction Co Ltd V Novalex Inc[32]

On an appeal from an order for security for costs in connection with an application for recognition and enforcement of an arbitral award, the Ontario Superior Court held that a foreign enforcement applicant should not be ordered to post security for costs solely because the applicant is a non-resident of Ontario.

The arbitration underlying the appeal was conducted in China pursuant to the parties' sales contract. An arbitral award issued by CIETAC required the respondent, Novalex Inc (Novalex) to pay the applicant, China Yantai Friction Co Ltd (Friction), US$1 million in respect of automobile brake pads that Novalex had received but not paid for. Novalex did not apply to set aside or otherwise appeal the award in either Ontario or China. Friction applied to have the award recognised and enforced in Ontario. Novalex sought an adjournment of the application to prepare its responding materials and also applied for an order for security for costs pursuant to Rule 56.01(1) of Ontario's Rules of Civil Procedure on the basis that Friction 'is ordinarily resident outside Ontario'. Friction cross-applied for an order that Novalex pay into court the full sum of the arbitral award as a condition for consenting to the requested adjournment.[33]

The preliminary applications regarding security for costs were heard together. The application judge: granted Novalex's application and ordered Friction to post C$76,376.71

as security for costs on the basis that Friction is ordinarily resident in China, not Ontario; dismissed Friction's application for an order requiring Novalex to post the amount of the arbitral award with the court; and adjourned the hearing of the recognition and enforcement application.[34]

Friction sought and was granted leave to appeal from the security for costs orders by the Divisional Court of the Ontario Superior Court.[35] In finding that Friction had met the leave to appeal test, the Divisional Court underscored the importance of the matter 'because it speaks to the response of Canadian courts to international comity and our relationships with other courts'.[36]

On the appeal, the Ontario Superior Court considered whether the application judge had erred by making an order for security for costs against Friction or refusing to order payment by Novalex of the arbitral award into court. On the second issue, the Court considered article 36(2) of the Model Law (and Ontario's ICAA), which provides that an enforcement applicant like Friction can only seek an order for security in circumstances where the enforcement respondent has brought an application to set aside or suspend an arbitral award to 'a court of the country in which, or under the law of which, that award was made'. There was no dispute that Novalex had not brought an application of that nature in China. Accordingly, the Court held there was no basis for the application judge to require Novalex to post security into court.[37]

With respect to the order for security for costs made against Friction, the Court found that the application judge failed to conduct the proper analysis and set aside the order. In particular, the Court found that rather than taking the proper holistic approach that examines all of the circumstances of the case, including whether it is just to make a security for costs order, the application judge had focused narrowly on the fact that Friction was not ordinarily resident in Ontario. He then baldly concluded that Novalex might be unable to recover a costs award associated with Novalex's response to Friction's enforcement application. The Court pointed to a number of relevant factors that the application judge had failed to consider, including the merits of Friction's enforcement application; the fact that Novalex had participated in the arbitration; the unanimous arbitral award issued by the three members of the tribunal (one of whom had been selected by Novalex); and the fact that Novalex had not availed itself of its rights to set aside or appeal the award. The judge had also not considered whether Novalex could bring itself within the very narrow grounds for refusing recognition or enforcement of arbitration awards under article 36(1)(a) of the Model Law (and Ontario's ICAA).[38]

Given the parties' divided success on the appeal, the Court ordered the parties to bear their own costs.[39]

South Coast British Columbia Transportation Authority V BMT Fleet Technology Ltd[40]

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, it 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.[41] The lower court also ordered the appointment of the same arbitrator in the three arbitrations.

Court Of Appeal For British Columbia

The Court of Appeal allowed the appeal and dismissed TransLink's application. It 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'.[42] 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.[43] The Court of Appeal disagreed that TransLink could regularise the reference to arbitration by merely filing four copies of the same notice.

TransLink's application for leave to appeal to the Supreme Court of Canada was refused.[44]

Octaform Inc V Leung[45]

In a decision that displays the willingness of courts to assist (but not interfere with) the conduct of an arbitration, the Supreme Court of British Columbia issued subpoenas compelling two non-party witnesses to attend an ongoing arbitration.

Octaform Inc (Octaform) brought a petition under section 27 of British Columbia's ICCA seeking the issuance of subpoenas compelling two non-party witnesses to attend the hearing of an ongoing arbitration between Octaform and others in British Columbia. At the

initial hearing of the petition, the petition judge held that the relief sought was premature, adjourned the petitions ***sine die*** and gave leave to Octaform to reschedule the hearing if either witness refused to appear at the hearing voluntarily after their appearance had been reasonably requested by Octaform.[46]

Following the issuance of his reasons, the petition judge was provided with additional information regarding the arbitration, including information that made it clear that the arbitrator had implemented a process for the taking of witness evidence that the petition judge had previously not been alive to. In his procedural orders, the arbitrator concluded, among other things, that it would be 'impractical in the circumstances to direct [the witnesses] to provide witness statements and that their evidence at the Arbitration should be entirely ***viva voce***.' He also granted leave and approval to Octaform to take the necessary steps to obtain the witnesses' evidence at the hearing.[47]

The petition judge clarified that his initial ruling 'was not an attempt to impose a process by which evidence would be taken at the Arbitration. Rather, it was intended to ensure the process that had been directed by the Arbitrator . . . for the taking of evidence was followed. . . . It is not the role of this court to second guess the suitability of the processes adopted by the tribunal.'[48] The petition judge then considered section 27 of the ICAA which provides that an arbitral tribunal 'may request from the Supreme Court assistance in taking evidence, and the court may execute the request within its competence and according to its rules on taking evidence.' To satisfy himself that the requested assistance should be granted, the petition judge noted that he had to be satisfied that the request was reasonable and in accordance with the practices of the court. Despite the various objections made by the non-party witnesses, the petition judge held that the conclusions reached by the arbitrator that the witnesses should attend the arbitration were carefully reasoned and that 'this court is in no position to second guess them.'[49] Accordingly, the petition judge agreed to issue the two subpoenas, subject to the following additional terms: the witnesses be provided with any documents that the arbitrator deems appropriate prior to their attendance at the hearing; and Octaform provide undertakings not to use the evidence obtained pursuant to the subpoenas for any purpose other than the arbitration without the consent of the witnesses or the court and to reimburse the witnesses for their respective reasonable legal expenses associated with their preparation for and attendance as a witness at the arbitration.[50]

The Russian Federation V Luxtona Limited[51]

On an application brought under article 16 of the Model Law challenging the tribunal's ruling that it has jurisdiction on a preliminary question, the Ontario Superior Court overturned the application judge's decision and held that the application before the court is a hearing ***de novo*** (not a review of the tribunal's decision) and parties are entitled to adduce evidence on the application as of right.

The application arose from a dispute between Luxtona Limited, the former shareholder of an energy company called Yukos, and Russia, wherein Luxtona alleged that Russia had violated provisions of the Energy Charter Treaty (ECT) concerning the protection of investments, including Luxtona's investment in Yukos. The ECT had been ratified but never passed; however, the ECT contained a provision that Russia would undertake to provisionally apply the ECT to the extent that doing so was 'not inconsistent with' Russian law. Although Russia disputed that it had provisionally agreed to apply the ECT's arbitration clause and argued that the arbitration of this claim was inconsistent with Russian law, it participated in the appointment of an arbitral tribunal seated in Ontario while reserving all of its rights.[52]

The tribunal decided the interim issue of whether the provisional application of the ECT, in particular the arbitration provision, was 'not inconsistent with' Russian law and held that it had jurisdiction to hear Luxtona's claims. Russia subsequently brought an application to set aside the tribunal's interim award on the basis that the tribunal had wrongly decided two of Russia's objections to the tribunal's jurisdiction.[53]

Russia filed two new expert reports on Russian law in support of its application before the Ontario Superior Court that had not been before the tribunal. Luxtona objected to Russia filing new evidence. In somewhat unusual circumstances, the application regarding the admissibility of the new evidence was heard twice, by two different judges of the same court. The application judge initially assigned to the case held that Russia was permitted to file new evidence as of right.[54] On account of changes to judicial assignments, a new judge was assigned to the case and was asked to decide a further evidentiary question resulting from the new evidence filed by Russia. In the course of hearing that issue, the newly assigned judge asked the parties reargue the issue of admissibility. Upon finding that he had jurisdiction to change a previous interlocutory evidentiary ruling by a judge who was no longer hearing the application,[55] the application judge went on to consider afresh whether Russia's new evidence should be admitted. The application judge found that Russia had not met the stringent test for fresh evidence and therefore found the evidence inadmissible.[56] Russia applied for and was granted leave to appeal the decision from the Divisional Court.[57]

On appeal, the Court agreed that the newly assigned application judge was not bound by the evidentiary rulings of the prior application judge at any point before the application judge becomes ***functus officio***; however, it disagreed with the application judge's conclusion that Russia's application was a review of the tribunal's decision. Instead, the Court held that the language of the Model Law and the consensus in the international jurisprudence is that an application to challenge the jurisdiction of an arbitral tribunal under the Model Law is a hearing ***de novo*** such that parties are entitled to adduce evidence on the application (including expert evidence) as of right. The Court concluded that the Ontario Court of Appeal's decision in ***Mexico v Cargill*** (relied on by the application judge in his decision) was distinguishable. In particular, the application in ***Cargill*** was brought under a different provision of the Model Law (article 34(2)) and, unlike Russia's application, was not brought on the basis that the tribunal lacked jurisdiction over the dispute.[58]

The Court found the approach of the UK Supreme Court in***Dallah v Pakistan*** to be consistent with the language of article 16(3) of the Model Law and section 11(1) of Ontario's ICCA, which require the court to 'decide the matter', not to 'review the tribunal's decision'. Although the UK is not a Model Law jurisdiction, the Court noted that ***Dallah*** has been followed in other Model Law jurisdictions and held that 'the strong consensus of the decisions from Model Law jurisdictions points to following the approach taken in ***Dallah***.' Although the Court recognised that the ***Dallah*** decision was not binding in Ontario, it found that the 'uniformity' principle in article 2A of the Model Law renders international decisions 'strongly persuasive'.-[59]

The Court allowed Russia's appeal, with costs, and set aside the decision of the application judge.[60]

Vento Motorcycles Inc V United Mexican States[61]

The Ontario Superior Court recently held that the test for the admissibility of fresh evidence on an application to set aside an international arbitral award on procedural fairness grounds

is akin to the test for the admission of fresh evidence on an application for judicial review. The party seeking to admit fresh evidence on a set-aside application must show a 'certain degree of diligence' that the evidence could not have been put before the tribunal.

The applicant, Vento Motorcycles Inc (Vento), brought an application to set aside an arbitral award rendered in an arbitration administered by the International Centre for Settlement of Investment Disputes (ICSID) under the ICSID Rules.[62] Vento brought its application pursuant to articles 18 and 34 of the Model Law.[63] In particular, Vento argued that it was prevented from presenting its case and had been treated unequally with respect to certain evidence that was considered (and not considered) by the tribunal, and the arbitral procedure and the composition of the tribunal was not in accordance with the parties' agreement.[64] In support of the application, Vento filed a number of affidavits. The respondent, Mexico, objected to the admissibility of three of the affidavits filed by Vento and sought orders prohibiting the filing of two of the affidavits in their entirety (or striking them from the application record) and striking certain paragraphs from a third affidavit.[65]

The parties disagreed on the applicable test for the admission of fresh evidence on a set-aside application. Mexico argued that the same test for the admission of fresh evidence on an application to set aside an international arbitral award with respect to jurisdictional issues (as in *The Russian Federation v Luxtona Limited* discussed above) should apply to set aside applications based on procedural fairness. Vento argued that the test that applies to judicial review applications was more appropriate.[66] The application judge found the differences between the two tests to be minor and that similar policy considerations (eg, order, finality and the integrity of the decision-making process) underlie both tests. Ultimately the application judge held that:

> Given the very limited grounds on which an international arbitral award can be set aside, I agree with Vento that an application to set aside such an award is much closer in nature to an application for judicial review than to an appeal. This is particularly the case when the application to set aside is based on procedural fairness, which is a common ground in applications for judicial review, but not in appeals. Further, . . . the exception applicable to the admissibility of fresh evidence relevant to procedural fairness on an application for judicial review is structured so as not to interfere with the role of the administrative decision-maker as the merits-decider. This is consistent with the high degree of defence owed to international arbitral tribunals and the very strict limits imposed on judicial intervention.[67]

The record on an application for judicial review (and in this case a set-aside application based on procedural fairness grounds) is generally limited to what was before the decision-maker, subject to certain exceptions including where a party can demonstrate that the new evidence could not have been put forward by the exercise of reasonable diligence at the original proceedings. The application judge held that Vento had not met the test for fresh evidence with respect to the three affidavits (or portions thereof) that Mexico had challenged. Given its success on the application, Mexico was awarded its costs.[68]

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.

Endnotes

1 2020 ONSC 7306. ^ Back to section

2 ***Bakaris v Southern Sky***, 2020 ONSC 7306 at paragraphs 2-3. ^ Back to section

3 SO 2017, c-2, Sched 5. ^ Back to section

4 ***Bakaris v Southern Sky***, 2020 ONSC 7306 at paragraphs 4-6, 16. ^ Back to section

5 ***Bakaris v Southern Sky***, 2020 ONSC 7306 at paragraph 24, citing ***Gulf Resources Ltd v Arochem International Ltd***, 66 BCLR (2d) 113 (CA). ^ Back to section

6 ***Bakaris v Southern Sky***, 2020 ONSC 7306 at paragraphs 30 to 33. ^ Back to section

7 2020 QCCS 1104. ^ Back to section

8 CQLR c CCQ-1991. ^ Back to section

9 ***79411 USA Inc v Mondofix Inc,*** 2020 QCCS 1104 at paragraphs 2, 25. ^ Back to section

10 ***79411 USA Inc v Mondofix Inc***, 2020 QCCS 1104 at paragraphs 6 to 9. ^ Back to section

11 ***79411 USA Inc v Mondofix Inc***, 2020 QCCS 1104 at paragraph 13. ^ Back to section

12 ***79411 USA Inc v Mondofix Inc***, 2020 QCCS 1104 at paragraph 24. ^ Back to section

13 2021 BCSC 1212. ^ Back to section

14 ***Stewart v Stewart***, 2021 BCSC 1212 at paragraphs 1-4. ^ Back to section

15 ***Stewart v Stewart***, 2021 BCSC 1212 at paragraphs 5-7, 124-125. ^ Back to section

16 ***Stewart v Stewart***, 2021 BCSC 1212 at paragraph 123. ^ Back to section

17 Arbitration Act, SBC 2020, c 2, section 63; International Commercial Arbitration Act, RSBC 1996, c 233, section 36.01. ^ Back to section

18 *Stewart v Stewart*, 2021 BCSC 1212 at paragraphs 126-127, citing *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 878 and*Sierra Club of Canada v Canada (Minister of Finance*, 2002 SCC 41 at paragraph 48. Back to section

19 *Stewart v Stewart*, 2021 BCSC 1212 at paragraphs 128-129. Back to section

20 2020 QCCS 1103. Back to section

21 *Metso Minerals Canada Inc v ArcelorMittal Exploitation Minière Canada*, 2020 QCCS 1103 at paragraphs 2-5. Back to section

22 CQLR c CCQ-1991. Back to section

23 *Metso Minerals Canada Inc v ArcelorMittal Exploitation Minière Canada*, 2020 QCCS 1103 at paragraph 7. Back to section

24 *Metso Minerals Canada Inc v ArcelorMittal Exploitation Minière Canada*, 2020 QCCS 1103 at paragraph 18. Back to section

25 *Metso Minerals Canada Inc v ArcelorMittal Exploitation Minière Canada*, 2020 QCCS 1103 at paragraphs 19-20. Back to section

26 *Metso Minerals Canada Inc v ArcelorMittal Exploitation Minière Canada*, 2020 QCCS 1103 at paragraph 21. Back to section

27 *Metso Minerals Canada Inc v ArcelorMittal Exploitation Minière Canada*, 2020 QCCS 1103 at paragraph 22. Back to section

28 2019 ONSC 628. Back to section

29 *Tianjin v Xu*, 2019 ONSC 628 at paragraph 35. Back to section

30 *Tianjin v Xu*, 2019 ONSC 628 at paragraph 49. Back to section

31 *Beijing Jishi Venture Capital Fund v Liu*, [2021] FCA 477 at paragraph 42. Back to section

32 2021 ONSC 7714. Back to section

33 *Friction Co Ltd v Novalex Inc*, 2021 ONSC 7714 at paragraphs 6 to 10. Back to section

34 *Friction Co Ltd v Novalex Inc*, 2021 ONSC 7714 at paragraphs 11 to 13. Back to section

35 *China Yantai Friction Co Ltd v Novalex Inc*, 2021 ONSC 3571. Back to section

36 *China Yantai Friction Co Ltd v Novalex Inc*, 2021 ONSC 3571 at paragraph 13. Back to section

37 *Friction Co Ltd v Novalex Inc*, 2021 ONSC 7714 at paragraphs 34 to 37. Back to section

38 *Friction Co Ltd v Novalex Inc*, 2021 ONSC 7714 at paragraphs 23 to 33. Back to section

39 *Friction Co Ltd v Novalex Inc*, 2021 ONSC 7714 at paragraph 40. Back to section

40 2018 BCCA 468, reversing 2017 BCSC 1683. Back to section

41 *South Coast British Columbia Transportation Authority v BMT Fleet Technology Ltd*, 2017 BCSC 1683 at paragraphs 83–85. Back to section

42 *South Coast British Columbia Transportation Authority v BMT Fleet Technology Ltd*, 2018 BCCA 468 at paragraph 40. Back to section

43 ibid at paragraph 50. Back to section

44 *South Coast British Columbia Transportation Authority v BMT Fleet Technology Ltd*, leave to appeal to SCC refused, 2019 CanLII 50899. Back to section

45 2021 BCSC 761. Back to section

46 *Octaform v Leung*, 2021 BCSC 73. Back to section

47 *Octaform v Leung*, 2021 BCSC 761 at paragraphs 5, 10, 14. Back to section

48 *Octaform v Leung*, 2021 BCSC 761 at paragraphs 11 to 12. Back to section

49 *Octaform v Leung*, 2021 BCSC 761 at paragraph 20. Back to section

50 *Octaform v Leung*, 2021 BCSC 761 at paragraph 22. Back to section

51 2021 ONSC 4604, reversing 2019 ONSC 7558. Back to section

52 *The Russian Federation v Luxtona Limited*, 2019 ONSC 7558 at paragraph 5. Back to section

53 *The Russian Federation v Luxtona Limited*, 2019 ONSC 7558 at paragraph 6. Back to section

54 *The Russian Federation v Luxtona Limited*, 2018 ONSC 2419. Back to section

55 *The Russian Federation v Luxtona Limited*, 2019 ONSC 7558 at paragraphs 11 to 16. Back to section

56 *The Russian Federation v Luxtona Limited*, 2019 ONSC 7558 at paragraph 70. Back to section

57 *The Russian Federation v Luxtona Limited*, 2020 ONSC 4668. Back to section

58 *The Russian Federation v Luxtona Limited*, 2021 ONSC 4604 at paragraphs 23 to 25. Back to section

59 *The Russian Federation v Luxtona Limited*, 2021 ONSC 4604 at paragraphs 30 to 37. Back to section

60 *The Russian Federation v Luxtona Limited*, 2021 ONSC 4604 at paragraph 39. Back to section

61 2021 ONSC 7913. Back to section

62 *Vento Motorcycles Inc v United Mexican States*, 2021 ONSC 7913 at paragraph 1. Back to section

63 *Vento Motorcycles Inc v United Mexican States*, 2021 ONSC 7913 at paragraphs 24-26. The Model Law is Schedule 2 to Ontario's ICAA, SO 2017, c 2, Sch 5. Back to section

64 *Vento Motorcycles Inc v United Mexican States*, 2021 ONSC 7913 at paragraph 19. Back to section

65 *Vento Motorcycles Inc v United Mexican States*, 2021 ONSC 7913 at paragraph 2. Back to section

66 *Vento Motorcycles Inc v United Mexican States*, 2021 ONSC 7913 at paragraphs 29 to 41. Back to section

67 *Vento Motorcycles Inc v United Mexican States*, 2021 ONSC 7913 at paragraphs 43 to 44. Back to section

68 *Vento Motorcycles Inc v United Mexican States*, 2021 ONSC 7913 at paragraphs 51, 67 to 68. Back to section

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