The Arbitration Review of the Americas

2019

Canada

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The Arbitration Review of the Americas 2019 provides an unparalleled annual update – written by the experts – on key developments. It is their wealth of experience and knowledge – enabling them not only to explain law and policy, but also to put theory into context – which makes the report of particular value to those conducting international business in the Americas today.

GAR Global Arbitration Review

Canada

Robert J C Deane and **Craig Chiasson**
Borden Ladner Gervais LLP

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's 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 COLUMBIA3

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 AMBATOVY9

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 though all four criteria for setting aside arbitral award under the Model Law were engaged.

The respondent, Ambatovy Minerals SA (AMSA), contracted with the applicant, Consolidated Contractors Group SAL (CCG), to complete a C$300 million pipeline construction project. The

parties signed a contract which contained an arbitration clause. Disputes arose between CCG and AMSA during the construction of the pipeline and they were submitted to arbitration. The arbitration was conducted in front of a panel of three arbitrators in Toronto under Ontario law. The arbitration lasted for more than three years with the final award issued on 30 September 2015.

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.

On the first challenge, 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. CCG argued that the arbitral tribunal invented its own theory to decide that it had jurisdiction to decide claims that had not passed through the pre-arbitration steps on the basis that they were so connected to claims of the other party that they should be decided at the same time. The court found that the arbitral tribunal's decision to assume jurisdiction was an acceptable choice for two reasons:

- first, the court was of the view that the counterclaims were linked to CCG's claims and had to be determined together; and
- second, the court found the pre-arbitration steps not to be 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).

On the second challenge, 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.

Following these principles, the court went on to dismiss CCG's arguments with respect to all five of these alleged instances.

On the third challenge, 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 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 again 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.

Belokon et al v The Kyrgyz Republic

Valeri Belokon (Belokon), a citizen and resident of Latvia, purchased a local bank in the Kyrgyz Republic (the Republic) in 2007. In 2010, the Republic took steps against Belokon, which he believed amounted to the expropriation of his bank. Belokon subsequently started arbitration proceedings under a bilateral investment treaty between Latvia and the Republic. Belokon was awarded a C$20.5 million award against the Republic on 24 October 2014.

Belokon, along with three other companies that all obtained arbitral awards in their favour against the Republic, brought applications to recognise and enforce the arbitral award in Ontario. There have been a myriad of court proceedings commenced by both sides with respect to set aside and enforcement. The latest development in these proceedings focused on an attempt to execute against the shares of Centerra Gold Inc (Centerra), a Canadian company. One of Centerra's registered shareholders is Kyrgyzaltyn JSC (Kyrgyzaltyn), which is a wholly-owned subsidiary of the Republic. The application to the court was for a declaration that the Republic has an ownership interest in the shares of Centerra.

The application was based on three main arguments:

- a 2009 agreement between the Republic, Kyrgyzaltyn, Centerra and some other entities (the ANT), considered together with the Republic's conduct and statement, should lead to the conclusion that the Republic is the owner of the shares;
- in the alternative, Kyrgyzaltyn holds the shares for the Republic on an express trust; or
- in the further alternative, Kyrgyzaltyn holds the shares on a resulting trust for the Republic.

Ontario Superior Court of Justice[11]

The application judge rejected all three arguments and dismissed the application, holding that the applicants' case lacked evidence at several points and overall fell short to establish,

on a balance of probabilities, that the Republic has any ownership interest in the Centerra shares.

Ontario Court of Appeal[12]

The Court of Appeal upheld the application judge's decision and continued to refuse to recognise an ownership interest in the shares of Centerra by the Republic.

The Court of Appeal found that the appellants' first argument lacked 'a solid conceptual underpinning'.[13] The Court of Appeal noted that the applicants conceded that they could not argue the corporate veil had been pierced between Kyrgyzaltyn and the Republic. Rather, they argued that there had been a transfer of rights in the Centerra shares from Kyrgyzaltyn to the Republic. Specifically, the applicants relied on article 222(3) of the Republic's Civil Code to advance an argument that under the Republic's law, an owner of property can transfer rights in that property to another person while still remaining the owner of the property, but led no expert evidence on the meaning of article 222(3), focusing the majority of the evidence on what the Republic had done, not what Kyrgyzaltyn had done to delegate or confer rights in the shares to the Republic. The Court of Appeal concluded that the application judge's reliance on the ANT was 'entirely reasonable' as it was 'the only document capable of proving there had been a transfer'.[14]

The Court of Appeal noted that any review of the application judge's contractual interpretation of the ANT would be on a standard of palpable and overriding error, and that the application judge's interpretation was 'thorough and persuasive' and provided a complete answer to the issues raised.[15] Similarly, the Court of Appeal found no palpable and overriding error in application judge's decision in rejecting the second and third arguments.

Supreme Court of Canada

Two of the applicants appealed the decision of the Court of Appeal to the Supreme Court of Canada. Both applications for leave to appeal were dismissed with costs on 15 June 2017 without reasons.

Although the applicants were not successful in their attempt to execute their awards against the Centerra shares, the decision of both the application judge and the Court of Appeal showed that courts were well versed in dealing with international arbitration awards.

Toyota Tsusho Wheatland Inc v Encana[16]

In Toyota Tsusho Wheatland Inc v Encana, the Alberta Queen's Bench addressed a series of applications arising out of a tripartite dispute, where only two of the parties were bound by an arbitration agreement. The court's insistence that the two bound parties settle their part of the dispute through arbitration illustrated Canada's deference to arbitral agreements, especially where they fall under the International Commercial Arbitration Act[17] (the International Act).

Encana, an Alberta based energy company, agreed to sell Toyota Tusho Wheatland Inc (TTWI) royalty rights over energy rich land in Alberta (the Property). The agreement contained an arbitration clause. It also contained a clause requiring that Encana not dispose of the Property without TTWI's consent; however, the clause also stipulated that consent could not be unreasonably withheld.

Encana informed TTWI that it intended to transfer the Property's title to PrairieSky Royalty Ltd (PrairieSky), a newly formed, wholly-owned subsidiary of Encana. Encana, PrairieSky, and

TTWI tried, unsuccessfully, to negotiate an agreement to facilitate the transfer. Ultimately, Encana transferred the title without securing the support of TTWI. Encana then sold all of PrairieSky through two public offerings.

TTWI claimed that Encana had disposed of the Property without its permission, contrary to the agreement. Encana responded that TTWI had unreasonably withheld its consent. TTWI commenced an action (the Action) in Alberta Court against Encana and PrairieSky, and arbitration proceedings (the Arbitration) against Encana.

Encana then brought an application to the Alberta Queen's Bench to stay the Action against both itself and PrairieSky, and refer all the matters against it to arbitration. PrairieSky brought a cross-application to stay the Arbitration. TTWI opposed both applications.

As a preliminary matter, the parties also disagreed about which arbitration act applied. PrairieSky, seeking to stay the Arbitration, argued that the matter fell under Alberta Arbitration Act[18] (the Domestic Act), which provides more room for judicial interference. TTWI and Encana argued that the more robust International Act applied instead.

On this issue, the court held that the International Act applies to arbitrations which are considered international under the Model Law. If the International Act applies, the Domestic Act does not. The court referred to article 1(3)(a) of the Model Law which stipulates that an arbitration is considered international if the parties had their respective places of business in different states at the time the agreement was made. Based on this, the court found that the arbitration in this case was international as Encana's place of business was Canada while TTWI's business was being conducted from either Tokyo or Houston.

Encana's application to stay the Action was allowed in part. The court determined that matters raised against Encana would be stayed and referred to arbitration. The court noted that the Domestic Act sets out when a court may intervene in matters governed by the Act and the starting point is 'non-intervention'.[19] Since the court found this arbitration to be governed by the International Act, it commented that the legislative direction for limited judicial intervention under the International Act is 'perhaps even stronger than under the Domestic Act'.[20] And the presence of a third party that was not subject to arbitration did not change the International Act's strong expectation of judicial non-intervention.

However, Encana's effort to stay the Action in respect to TTWI's suit against PrairieSky was unsuccessful. The court noted that although the issues to be determined in both proceedings were similar, PrairieSky and TTWI would face considerable prejudice were a stay granted given that it would create considerable delay, and that the arbitration would not itself be able to determine the rights or obligations of TTWI and PrairieSky given that the latter was not bound to it. This prejudice outweighed the inconvenience that Encana would face by having to have personnel attend as witnesses to both sets of proceedings and having to produce documents for both proceedings, as well as the potential risk of inconsistent decisions.

Finally, PrairieSky's application to have the Arbitration stayed was denied. PrairieSky argued that courts had increasingly sought to protect third parties that were impacted by arbitration agreements. The court again found itself bound by the strictly worded International Act, noting that courts in Alberta had interpreted the International Act to stand for the position that no arbitration under it could be stayed without the consent of all the parties.

Alberta Motor Association Insurance Company v Aspen Insurance UK Limited[21]

In Alberta Motor Asssociation Insurance Company v Aspen Insurance, the plaintiff brought an application to determine which arbitration statute governs the arbitration between the parties and whether several arbitrations could be consolidated. The impugned contract contained an ambiguously worded arbitration agreement, but was silent as to whether Alberta's domestic or international arbitration act applied and whether consolidation was available. The underlying dispute arose from damages to residences, business and vehicles affected by a wildfire in Fort McMurray, Alberta, which were covered by 13,000 policies issued by the plaintiff. The plaintiff had paid out approximately C$293 million under those policies and made a claim under its reinsurance coverage with the defendant reinsurers, and a dispute arose about that coverage. The governing law mattered significantly, since, if the parties fell under the domestic legislation, the court could stay the proceeding in favour of summary judgment (which was sought by the plaintiff). If, on the other hand, the parties were subject to the international act, the dispute must be referred to arbitration.22

Ultimately the court determined that only one overarching agreement existed between the plaintiff and the reinsurer defendants, and as a result whether any party is 'international' would dictate which arbitration act applies.23

Two of the reinsurer defendants said that they were international parties, and the international legislation must apply. To determine whether the international act governed, the court considered the meaning of 'place of business' – one of the determining factors for that act to apply – and relied heavily on the reasoning set out in another Alberta Queens Bench decision, Toyota Tsusho Wheatland Inc v Encana Corp (discussed above), to find that a party's place of business is the location of the business, and may also include any location from which a party participates in economic activities in an independent manner, or the place where the business decisions are made.24 On this reasoning, the defendants who had claimed to be international parties were confirmed in one case to be international, but the other's arguments were rejected and it was held to be a domestic entity. Because the court held that there was only a single governing agreement between all the parties, the presence of one international party meant that the international act must apply. Accordingly, the plaintiff's claim and application for summary judgment was stayed.25

However, the International Act requires consent of all parties to consolidate the proceedings, and with the plaintiff not consenting (the reasoning for its opposition was not disclosed to the court), the application for consolidation was dismissed.26

Much like in Toyota Tsusho, the court demonstrated its willingness to stay matters and refer to arbitration and to not consolidate proceedings absent approval of all parties.

HELLER V UBER TECHNOLOGIES27

The Ontario Superior Court of Justice determined that an international arbitration clause in an employment contract is enforceable in the context of class actions, resulting in the stay of the proposed class proceeding.

The plaintiff was a proposed representative plaintiff for a proposed class action for drivers of the defendant's company in Ontario, alleging that he and other drivers were employees who were entitled to certain rights and benefits under the Employment Standards Act of Ontario. The contracts of employment with the defendant contained a clause indicating that any dispute between the parties had to be arbitrated under the Rules of Arbitration of the International Chamber of Commerce in the Netherlands.28 The defendants made a motion to stay the action in Ontario, since the drivers agreed to the terms of the

contract when they signed up on the 'Uber App' and clicked accept to the list of terms and conditions. The court determined that the international arbitration legislation applied, the competence-competence principle applied and no exceptions to a stay and referral to arbitration applied. As a result, the court stayed the proposed class action.

The plaintiff claimed that the contractual agreement did not fall under the definition of 'commercial' according to the ICAA as it was an employment relationship and not a commercial one.29 The court disagreed with this argument because the licence agreements of the contract fell within the definition of a 'transaction for the supply or exchange of goods . . . licensing . . . joint venture and other forms of industrial or business cooperation; carriage of goods or passenger'. The court further concluded that the contract was subject to the international legislation because it does not follow that all employment relationships are not commercial agreements, and it is up to the arbitrator in the Netherlands to determine whether they have jurisdiction to decide whether the agreements are employment contracts.30

The competence-competence principle indicates that a challenge to the arbitrator's jurisdiction should first be resolved by the arbitrator, and the challenges to this rule are based solely on questions of law. However, the court held that if a challenge of mixed fact and law arises, the challenge should be referred to an arbitrator unless the questions of fact requires only superficial consideration of the documentary evidence in the record.31 The plaintiff alleged that since the relationship is an employment relationship it is outside the jurisdiction of the arbitrator to decide. The court disagreed and determined in the defendant's position that it is for the arbitrator to decide whether the tribunal has jurisdiction except for limited circumstances where the court may decide not to refer a matter arbitration was correct.32

Finally, the plaintiff suggested that the claim should not be referred to arbitration since the agreement is unconscionable and thus illegal.33 While the court did state there was an inequality of bargaining power, the agreement was most likely not unconscionable, as it was unlikely that the defendant took advantage of the plaintiff or other drivers, or created a substantially unfair agreement.34

This decision shows that Canadian courts are willing to recognise and uphold international arbitration clauses in various contexts, such as employment contracts and in class action proceedings. In analysing and applying the competence-competence principle, the court also displayed a respect for the arbitration process and will defer first to arbitrators before interpreting legislation when there are complex issues of mixed fact and law.

TRADE FINANCE SOLUTIONS INC V EQUINOX GLOBAL LTD35

This case involved the proper effect to be given to an international insurance agreement that contains both an arbitration provision and an 'Action Against Insurer' clause. It considers whether an Ontario action brought by an insured for breach of that agreement must be stayed and referred to arbitration. The Court of Appeal for Ontario held that the proceedings below were properly stayed, reversing the decision of the lower court.

Ontario Superior Court of Justice

The plaintiff had an insurance contract with the defendants which included an arbitration clause stating that the policy was governed by the laws of England and Wales and that any dispute had to be submitted to arbitration under the London Court of International Arbitration rules.36 The contract also included an 'Action Against Insurer' clause that contemplated that service in regards to an 'action to enforce the obligations of the underwriters' could be made

in Montreal.37 The defendants brought a motion to stay on the basis that the dispute relating to the insurance contract had to be submitted to arbitration.

In its reasoning, the court stated that the words used in the 'Action Against Insurer' clause are wider than the limited purpose of a service suit clause, and the words permitted dispute resolution by arbitration or litigation. The court further stated that the arbitration legislation did not apply because its application was limited to situations where the parties to the agreement have agreed to arbitration as the sole method of proceeding, but this contract contained clauses providing for alternative, optional methods of dispute resolution.38 Based on this reasoning, the court held that the action could proceed in the courts. The insurers appealed.

Ontario Court of Appeal

On appeal, the Ontario Court of Appeal rejected the lower court's reasoning, determining that the action must be stayed and referred to arbitration in London, England.39 The Court of Appeal stated that the motion judge did not correctly interpret the 'Action Against Insurer' clause, and disagreed with the motion judge's conclusion on the operation of the UNICTRAL Model Law on International Commercial Arbitration, which has been adopted in Ontario.

The Court of Appeal indicated that the motion judge was wrong to widen the meaning of the Action Against Insurer clause because the plain language of the clause can be given meaningful effect without conflicting with the mandatory language of the arbitration clause. Thus, the Action Against Insurer clause does not clearly provide an alternative right for the insured to start a domestic action against the insurers.40 The court further interpreted the insurance contract as a whole and determined that the motion judge failed to give effect to the language of the arbitration clause stating that any dispute under the policy 'shall be referred to and finally resolved by arbitration'.41

In the analysis regarding interpretation of the contract's language, the court determined that arbitration was the sole method of proceeding, so the Model Law applied to the facts. However, the court went further to address the Model Law and clarified it in this situation. The court suggested that while a purely optional arbitration provision does not attract the application of the Model Law, an agreement by parties to submit certain, but not all disputes in a contract to arbitration attracts its application.42 This is because in its definition of 'arbitration agreement', the Model Law specifically contemplates arbitration agreements where parties only agree to submit certain disputes to arbitration, and there are Ontario cases to support this interpretation.43 Finally the court stated that if parties agree that arbitration is an optional method of dispute resolution, and one party elects to start arbitration there is no reason why the Model Law should not apply to stay any duplicative court actions in Ontario.44

This decision affirms that Canadian courts will respect international arbitration clauses. In addition, by interpreting the clause and the Model Law, the court demonstrated that they will strictly adhere to the language laid out in arbitration clauses.

CHINA CITIC BANK CORPORATION LIMITED V YAN45

In China Citic Bank Corporation Limited v Yan, the Supreme Court of British Columbia refused to set aside a Mareva injunction against the defendant, which was issued in aid of an anticipated arbitration award, even though the court found that there were sufficient grounds to set aside the injunction.

The defendant is the former majority shareholder and general manager of a furniture manufacturing company in China. The plaintiff extended a 50 million yuan line of credit to the company, which was withdrawn by the company in a single transaction and was never repaid. The plaintiff obtained an arbitration award in China that held the defendant jointly liable for payment of the debt. However, the defendant did not participate in the arbitration proceeding and claimed that he did not have notice of the arbitration. The defendant subsequently appealed to the courts in China but the appeal was dismissed.

Before seeking to have the arbitration award enforced in BC, the plaintiff applied for a Mareva injunction to freeze the defendant's assets in BC. The injunction was first granted against four real properties and accounts at four banks. It was subsequently varied to include only the cash deposits the defendant had in BC. More than two months after the initial injunction application, the plaintiff filed a petition pursuant to the Foreign Arbitral Awards Act[46] (FAAA) seeking to enforce the arbitration award.

The court started its analysis by noting that the FAAA recognises the New York Convention and requires courts in BC to enforce a foreign arbitral award, subject only to very limited defences in which the defendant bears the onus of proof. The court went on to review the legal test for setting aside a Mareva injunction and focused on the effect of failing to make full and frank disclosure of all material facts. The court accepted the view that 'a court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of an ex parte order, nevertheless to continue the order, or to make a new order on the same terms'.[47]

Applying the legal test to the facts in this case, the court found that at least two statements in the affidavit of the vice president of the plaintiff deliberated overstated the plaintiff's case and made prejudicial allegations against the defendant by suggesting that he absconded with the loan proceeds. The court commented that the plaintiff knew or ought have known that these allegations were not relevant to its eventual claim, which was the enforcement of an arbitration award based on a commercial guarantee contract and does not require proof of any deliberate wrongdoing. Accordingly, the court concluded that there was sufficient ground to set aside the Mareva injunction.

However, the court exercised its discretion and refused to do so after weighing the balance of convenience. The Court was heavily influenced by the BC Court of Appeal decision in Sociedade-de-fomento Industrial Private Limited v Pakistan Steel Mills Corporation (Private) Limited,[48] which held that a party's claim to enforce a foreign arbitration award was 'very strong, approaching certainty given the limited grounds upon which the claim could be defended'.[49] Although the defendant in this case raised one of the limited defences recognised under the New York Convention – that is, he was unaware of the arbitration proceeding – the court held that this was not an issue that had to be decided in this application and the plaintiff had a strong prima facie case given its ability to rely on the New York Convention and the FAAA.

The court also noted other factors that propelled it to conclude that the balance of convenience still favoured the plaintiff, including that the injunction, as varied, did not completely deny the defendant access to his deposits and that the defendant is highly mobile with the resulting real risk of his assets being removed from BC.

JAG WORLDWIDE V LAKESIDE PRODUCE[50]

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 the JAG Worldwide sought an order setting it aside.51 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 the JAG Worldwide for the few shipments that met the agreed quality standard, but the amount awarded was less than JAG claimed was owed to them.52 Following this award, JAG Worldwide brought a series of applications seeking a remedial claim pursuant to the International Commercial Arbitration Act (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.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.54 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.55 The court agreed.

The court held that JAG Worldwide's application is 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.56 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.57

Upon determining that the arbitral award is 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.58 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.59 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.

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.

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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 Belokon et al v The Kyrgyz Republic, 2016 ONSC 4506.
12 Belokon v Krygyz Republic, 2016 ONCA 981.
13 Belokon v Krygyz Republic, 2016 ONCA 981 at paragraph 6.
14 Belokon v Krygyz Republic, 2016 ONCA 981 at paragraphs 14 and 17.
15 Belokon v Krygyz Republic, 2016 ONCA 981 at paragraph 27.
16 Toyota Tsusho Wheatland Inc v Encana Corporation, 2016 ABQB 209.
17 International Commercial Arbitration Act, RSA 2000, chapters I–5.
18 Arbitration Act, RSA 2000 c A-43.
19 Toyota Tsusho Wheatland Inc v Encana Corporation, 2016 ABQB 209 at paragraph 47.
20 Toyota Tsusho Wheatland Inc v Encana Corporation, 2016 ABQB 209 at paragraph 48.
21 Alberta Motor Association Insurance Company v Aspen Insurance UK Limited, 2018 ABQB 207.
22 Alberta Motor Association Insurance Company v Aspen Insurance UK Limited, 2018 ABQB 207 at paragraphs 11–13.
23 Alberta Motor Association Insurance Company v Aspen Insurance UK Limited, 2018 ABQB 207 at paragraph 52.
24 Alberta Motor Association Insurance Company v Aspen Insurance UK Limited, 2018 ABQB 207 at paragraph 67.
25 Alberta Motor Association Insurance Company v Aspen Insurance UK Limited, 2018 ABQB 207 at paragraph 129.
26 Alberta Motor Association Insurance Company v Aspen Insurance UK Limited, 2018 ABQB 207 at paragraph 165.
27 Heller v Uber Technologies Inc, 2018 ONSC 718.
28 Heller v Uber Technologies Inc, 2018 ONSC 718 at paragraphs 5–32.
29 Heller v Uber Technologies Inc, 2018 ONSC 718 at paragraph 39.
30 Heller v Uber Technologies Inc, 2018 ONSC 718 at paragraphs 48–49.

31 Heller v Uber Technologies Inc, 2018 ONSC 718 at paragraph 54.
32 Heller v Uber Technologies Inc, 2018 ONSC 718 at paragraph 56.
33 Heller v Uber Technologies Inc, 2018 ONSC 718 at paragraph 67.
34 Heller v Uber Technologies Inc, 2018 ONSC 718 at paragraph 70.
35 Trade Finance Solutions Inc v Equinox Global Limited, 2018 ONCA 12.
36 Trade Finance Solutions Inc v Equinox Global Limited, 2018 ONCA 12 at paragraph 11.
37 Trade Finance Solutions Inc v Equinox Global Limited, 2018 ONCA 12 at paragraph 12.
38 Trade Finance Solutions Inc v Equinox Global Ltd, 2016 ONSC 7988 at paragraph 11.
39 Trade Finance Solutions Inc v Equinox Global Limited, 2018 ONCA 12 at paragraphs 1–2.
40 Trade Finance Solutions Inc v Equinox Global Limited, 2018 ONCA 12 at paragraphs 35–36.
41 Trade Finance Solutions Inc v Equinox Global Limited, 2018 ONCA 12 at paragraphs 47–48.
42 Trade Finance Solutions Inc v Equinox Global Limited, 2018 ONCA 12 at paragraph 54.
43 Trade Finance Solutions Inc v Equinox Global Limited, 2018 ONCA 12 at paragraphs 55–56.
44 Trade Finance Solutions Inc v Equinox Global Limited, 2018 ONCA 12 at paragraph 57.
45 China Citic Bank Corporation Limited v Yan, 2016 BCSC 2332.
46 Foreign Arbitral Awards Act, RSBC 1996, c 154.
47 China Citic Bank Corporation Limited v Yan, 2016 BCSC 2332 at paragraph 13.
48 Sociedade-de-fomento Industrial Private Limited v Pakistan Steel Mills Corporation (Private) Limited, 2014 BCCA 205.
49 Sociedade-de-fomento Industrial Private Limited v Pakistan Steel Mills Corporation (Private) Limited, 2014 BCCA 205 at paragraph 47.
50 JAG Worldwide v Lakeside Produce, 2017 ONSC 4933.
51 JAG Worldwide v Lakeside Produce, 2017 ONSC 4933 at paragraph 1.
52 JAG Worldwide v Lakeside Produce, 2017 ONSC 4933 at paragraph 3.
53 JAG Worldwide v Lakeside Produce, 2017 ONSC 4933 at paragraphs 18–19.
54 JAG Worldwide v Lakeside Produce, 2017 ONSC 4933 at paragraph 20.
55 JAG Worldwide v Lakeside Produce, 2017 ONSC 4933 at paragraph 37.
56 JAG Worldwide v Lakeside Produce, 2017 ONSC 4933 at paragraph 47.
57 JAG Worldwide v Lakeside Produce, 2017 ONSC 4933 at paragraph 56.
58 JAG Worldwide v Lakeside Produce, 2017 ONSC 4933 at paragraph 81.
59 JAG Worldwide v Lakeside Produce, 2017 ONSC 4933 at paragraphs 83–85.

Borden Ladner Gervais

Robert J C Deane rdeane@blg.com
Craig Chiasson cchiasson@blg.com

Tel: +1 604 687 5744

https://www.blg.com