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Commercial Arbitration

Arbitration Brings Change

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What do you want change for?

The Problem with Court Litigation

Business cases can take years (sometimes 5 to 10 years) to work their way through the entire process

Costs regularly dwarf the amounts in issue

Court litigation seems to be the only product or service where the cost and availability is determined almost entirely without reference to the utility to and needs of the purchasers

A Business Model in Trouble?

- The vanishing trial
- Mitigation attempts within the court process have limited success:
  - Early mandatory mediation/ late mediation
  - Judicial mediation
  - More easily available summary judgment/less easily available summary judgment
  - More, or less, discovery
  - Case management

Hyrniak v Mauldin 2014 SCC 7

"Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised. However, undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result."

SCC calls for “Culture Change”?

- Judges to be more pro-active in “finding the facts” and managing motions for summary judgment
- Lawyers to be more mindful of their obligation to make the system work
- Court says “arbitration is not the answer”
- BUT lack of resources in the court system and the unsupervised combat of the court litigation process remain huge obstacles to change in the court system

Arbitration

An old idea provides a new alternative.

Gerard Malynes "The Ancient Law Merchant" published in 1685:

"The second meane or rather ordinary course to end the questions and controversies arising between Merchants, is by way of Arbitrement, when both parties do make choice of honest [individuals] to end their causes, which is voluntarie and in their own power, and therefore called Arbitrium, or free will, whence the name Arbitrator is derived: and these [individuals]…give their judgments by Awards, according to Equitie and Conscience, observing the Custome of Merchants, and ought to be void of all partialitie or affection more or lesse to the one, than to the other, having onely care that right may take place according to truth, and that the difference may be ended with brevitie and expedition…"

(Edited for gender neutrality)

Lord Mustill in the Privy Council in 1995 :

"Arbitration is a contractual method of resolving disputes. By their contract the parties agree to entrust the differences between them to the decision of an arbitrator or panel of arbitrators, **to the exclusion of the Courts**, and they bind themselves to accept that decision, once made, **whether or not they think it right**." (Emphasis added.)

Pupuke Service Station Ltd. V Caltex Oil (NZ) Ltd PC 63/94, 16 November 1995 at 1.

The Idea of Arbitration

"The idea of arbitration is that of binding resolution of disputes accepted with serenity by those who bear the consequences because of their special trust in chosen decision-makers.": Jan Paulsson, *The Idea of Arbitration*, Oxford University Press, 2013

Two Conceptual Bases of Arbitration

Jurisdictional

- Jurisdiction is transferred from the courts to an arbitral tribunal
- Court like procedures are used
- Dispute dynamic is adversarial and largely unsupervised
- iatrogenic* content of dispute is higher

Contractual

- The parties confer jurisdiction on the tribunal
- Procedures are determined by the nature of the dispute
- Dispute dynamic is collaborative and supervised
- iatrogenic content of dispute is lower

* iatrogenic= disease caused by the process of examination or treatment

Albert Einstein

"Insanity is doing the same thing over and over again and expecting different results."

UNCITRAL ARBITRATION RULES

Article 17

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with **equality** and that at an appropriate stage of the proceedings each party is given **a reasonable opportunity of presenting its case**. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

Examples of international arbitrations conducted in Canada by Canadian lawyers

- Canadian company in dispute with international insurers over coverage for a satellite outage
- Dispute between US and Canadian company re right to use a brand name after corporate divestiture
- Dispute re termination of a mining project in Argentina
- US and Canadian companies dispute re sale of a forest products facility
- Termination of a Canadian distributorship of a US clothing manufacturer
- Dispute re alleged corrupt payments on IT consulting contract

Examples of non-international arbitration conducted by Canadian Lawyers

- Dispute over construction of a nuclear facility
- Dispute regarding a telecommunication interconnect agreement
- National advertizing disputes
- Dispute regarding environmental remediation costs of a manufacturing facility
- Disputes re alternative energy projects
- Disputes regarding privatization of government businesses
- Rate renewal disputes: pipeline, commodity terminal, major commercial building

Three Issues with Arbitration of Canadian Business Disputes

- Arbitrability
- Enforcement of agreements to arbitrate and stays of litigation
- Arbitration appeals and the leave to appeal process

Current Uniform Act

- 7(1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.
- (2) However, the court may refuse to stay the proceeding in any of the following cases:
- (a) a party entered into the arbitration agreement while under a legal capacity;
- (b) the arbitration agreement is invalid;
- (c) the subject-matter of the dispute is not capable of being the subject of
- arbitration under the law of (enacting jurisdiction) even if the parties expressly agree to submit the dispute to arbitration;
- (d) the motion was brought with undue delay;
- (e) the matter is a proper one for default or summary judgment.

Arbitrability

Statutory claims:

- Copyright
- Patent
- Oppression Remedy

Statutes appear to confer jurisdiction on the courts

Courts struggle with this

ULCC DALP Preliminary Consensus

Arbitrability

"The New Uniform Act should take a liberal approach to the issue of arbitrability and the jurisdiction of arbitrators to fashion appropriate relief; generally, parties should be able to resolve by arbitration any dispute that they could resolve by agreement."

Desputeux v Editions Chouette (1987) Inc. [2003] 1 S.C.R. 178

41 However, an arbitrator's powers normally derive from the arbitration agreement. In general, arbitration is not part of the state's judicial system, although the state sometimes assigns powers or functions directly to arbitrators. Nonetheless, arbitration is still, in a broader sense, a part of the dispute resolution system the legitimacy of which is fully recognized by the legislative authorities.

42 The purpose of enacting a provision like s. 37 of the *Copyright Act* is to define the jurisdiction *ratione materiae* of the courts over a matter. It is not intended to exclude arbitration. It merely identifies the court which, within the judicial system, will have jurisdiction to hear cases involving a particular subject matter. It cannot be assumed to exclude arbitral jurisdiction unless it expressly so states. Arbitral jurisdiction is now part of the justice system of Quebec, and subject to the arrangements made by Quebec pursuant to its constitutional powers.

ULCC DALP Preliminary Consensus

Stays of Litigation

"It is fundamental to the arbitration process and the concept of party autonomy, by which parties can bind themselves to have their disputes decided by arbitration outside the court system, that the applicable legislation contain measures to compel the parties to honour their commitment to arbitrate."

Section 7 (5) of the Current Uniform Act

- (5) The court may stay the proceedings with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,
- (a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and
- (b) it is reasonable to separate the matters dealt with in the agreement from the other matters.

Issue Identified by ULCC DALP

"In considering these issues is it reasonable to factor in the possibility that the current provisions may allow a party wishing to escape from its commitment to arbitrate do so by including in its court claim extra issues or parties not covered by the arbitration and then arguing that it is not reasonable to separate the claims and that a stay of the action should be refused?"

A Question about Mixed Claims

Would a court prevent some of the parties to a lawsuit from settling some but not all of the claims or issues in the case because the settlement might conflict with determinations the court may make on the issues that have not been settled?

If not, why not enforce an agreement of those parties that those issues would be settled **by arbitration**?

Appeals

Current Uniform Act:

- 45(1) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law, a question of fact or a question of mixed fact and law.
- (2) Subject to subsection (3), if the arbitration agreement does not provide that the parties may appeal an award to a court on a question of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,
- (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
- (b) determination of the question of law at issue will significantly affect the rights of the parties.

ULCC DALP Preliminary Consensus

Appeals

"Would it be more consistent with user expectations to exclude any right of appeal unless parties agree that there should be such a right, and to limit appeals to errors of law, and possibly having appeals go to the CA rather than a trial judge?"

This approach has been taken by the Alberta Law Reform Institute

- **<u>Appeals Continued</u>**

"Would it be more consistent with user expectations to exclude any possibility of appeal in all cases (while preserving right to set aside on grounds of unfairness etc)?"

This is the Quebec/ Canadian federal/international approach

Reasons to Arbitrate and the Effect of an Appeal

Confidentiality

Cost

Expedition

Neutral Forum

Flexibility of Procedure

Choice of Decision Maker

Choice of Decision Maker

- David Haigh
- Jack Marshall
- David Tavender
- Frank Foran
- Jim Redmond
- Jim McCartney
- Rowland Harrison

- Hon. Jack Major
- Hon. Frank Iacobucci
- Hon. Ian Binnie

- Mary Comeau
- Clarke Hunter
- Carsten Jensen
- David P. Jones
- Sabri Shawa
- Bryan Duguid
- Ed Halt

Sattva Capital v. Creston Moly Corp [2014] S.C.J. No 53

- Arbitration process= 10 months
- Leave and Appeal Process= 5 ½ years

- BC Court of Appeal finds award absurd
- SCC finds award "not unreasonable"

Sattva Capital v. Creston Moly Corp [2014] S.C.J. No 53

SCC tries to limit arbitration appeals:

1) Interpretation of contract is question of mixed fact and law not a question of law ("QOL")

2) for leave to be granted QOL must be "extricable" and there must be "arguable merit" in the applicants position that QOL was wrongly decided

3) Unless QOL involves a constitutional issue or substantial issue of public law, the standard of review of the award is not correctness but reasonableness

Sattva Capital v. Creston Moly Corp [2014] S.C.J. No 53

- How easy will it be to draft around *Sattva* and return to the status quo?
- How easy will it be for the court to "navigate" around the *Sattva?*
- Is it a good thing for parties and lower courts to limit the effects of *Sattva?*

It all depends on…..

…….what you want change for.

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