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Canadian arbitration jurisprudence: an update

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In recent years, Canadian courts have continued their long tradition of providing firm support for the institution of arbitration, particularly in its international aspects. At the same time, that support has been tested in a number of challenging situations which may be of interest to non-Canadian parties who choose to arbitrate their disputes (or are required to enforce their awards) in Canada.

Arbitrability

The bellwether of recent Canadian jurisprudence on arbitration is undoubtedly the decision of the Supreme Court of Canada in *Desputeaux v Éditions Chouette*.[1] Although the case involved domestic arbitration, the importance of the decision extends well beyond its specific facts. In its unequivocal defence of the values associated with arbitration, the Supreme Court of Canada rejected the notion that a dispute was not arbitrable as between two parties to a contract merely because it involved rights created by a statute (the Copyright Act) which conferred jurisdiction on a particular court or courts. LeBel J, writing for a unanimous court, reasoned that in conferring concurrent jurisdiction on the federal and provincial courts 'to hear and determine all proceedings…for the enforcement of the provision of [the Copyright Act]', Parliament had merely identified the court which, within the judicial system, will have jurisdiction to hear cases involving a particular subject matter. However, this by no means precluded the ability of parties to provide for binding arbitration with reference to their contractual rights and obligations as against each other. Similarly, the fact that court adjudication was necessary in order to enforce valid copyright interests against third parties did not preclude arbitration of copyright interests as between parties to a contract.

In *Desputeaux*, the Supreme Court of Canada also laid down a very liberal approach for the interpretation of the scope of arbitration clauses and a very narrow application of the principle of 'public order' to limit those issues which may be considered arbitrable:

> 'The arbitrator's mandate must not be interpreted restrictively by limiting it to what is expressly set out in the arbitration agreement. The mandate also includes everything that is closely connected with that agreement, or, in other words, questions that have "a connection with the question to be disposed of by the arbitrators and with the dispute submitted to them".'

The notion that rights created purely by statute may be adjudicated in an arbitration, notwithstanding the fact that the statute confers jurisdiction on a specific court, was also affirmed by the Ontario Court of Appeal in the case of *Armstrong v Northern Eyes Inc*.[2] In that case, it was held that an arbitral tribunal may apply the oppression remedy as between parties to a shareholders' agreement.

Jurisdiction

Canadian courts have also been very supportive of the right of an arbitral tribunal to determine its own jurisdiction in the first instance. This support has been somewhat qualified in the context of domestic arbitration given that domestic statutes do not limit the role of the courts to the same extent as the UNCITRAL Model Law.

The issue usually arises on an application by one of the parties to stay litigation which has been commenced in the face of an arbitration clause. In domestic arbitration cases, it has been held that the courts *may* determine the arbitrability of the disputed claims on such an application: see the decision of the Ontario Court of Appeal in *Woolcock v Bushert*.[3] The procedure which has been consistently followed by Ontario courts was laid down in the decision of *Mantini v Smith Lyons LLP*[4] in which the courts stated:

> 'In order to determine whether a claim should be stayed under s 7(1) of the [Ontario] Arbitration Act, the court first interprets the arbitration provision, then analyses the claims to determine whether they must be decided by an arbitrator under the terms of the agreement, as interpreted by the court. If so, then under s 7(1), the court is required to stay the action and refer the claims to arbitration subject to the limited exceptions in s 7(2).'

A very different approach is adopted for international arbitrations which, throughout Canada, are governed by the UNCITRAL Model Law. The language of J M Farley J in the *Morran v Carbone*[5] case aptly summarises the approach which is to be taken in such cases:

> 'Considering s 8(1) [of the Model Law] in relation to the provisions of s 16 and the jurisdiction conferred on the arbitral tribunal, in my opinion, it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement, because those are matters within the jurisdiction of the arbitral tribunal.

> . . . Where it is 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 then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal.
>
> An issue may also arise on an article 8 motion as to whether the agreement is (a) null and void; (b) inoperative; or (c) incapable of being performed. In the same way, where it is clear that one of these situations exists, the court will make a determinative finding to that effect and dismiss the motion for referral. However, in cases where it is not clear, it may be preferable to leave any issue related to the 'existence or validity of the arbitration agreement' for the arbitral tribunal to determine in the first instance under article 16. In my view, this deferential approach is consistent with both the wording of the legislation and the intention of the parties to refer their disputes to arbitration.'

One case which tested the limits of judicial deference on jurisdiction arose in the context of an issue as to whether the purchaser of certain business assets was bound by the arbitration clause in a prior agreement between the vendor of those assets and a supplier. The agreement by which the purchaser acquired the assets did not contain an arbitration provision or a specific provision that the purchaser was bound by the arbitration clause in the prior agreement. The Ontario Court of Appeal found that, on application of the purchaser, it could determine whether or not the purchaser was, under the terms of its own agreement, an assignee of the prior agreement. The Court of Appeal determined the substantive question notwithstanding that the supplier had commenced an international arbitration against both the seller and the purchaser of the assets in which the supplier had asserted that the purchaser was bound by the prior agreement.[6]

'Strategic' stay applications

Recently, there has been a trend towards what may best be described as the 'strategic' use of arbitration clauses to defuse litigation.

In the Alberta case of *PetroKazakhstan Inc v Lukoil Overseas Kumkol BV*,[7] an attempt was made to block legal proceedings to approve a merger of two corporations on the basis that the merger would prejudice the rights of a joint venture partner of one of the merger partners with respect to a pending arbitration. The Alberta Court of Queen's Bench acknowledged all the applicable principles under the UNCITRAL Model Law but determined that the allegations made in the arbitration went well beyond the scope of the application to approve the merger and, in any event, the rights of the objecting party could be pursued in the arbitration against the merged entity.

In *Grammercy Ltd v Dynamic Tire Corp*,[8] a Chinese entity sought to stay litigation in Ontario on the basis that the agreement which gave rise to the litigation included an arbitration clause. The request for a stay was rejected on the basis that the Chinese party itself had ignored the arbitration clause and pursued litigation in China. The court agreed with an expert called in the Ontario proceedings that the litigation in China with respect to this matter supported the view that the arbitration clause was invalid under Chinese law. The Ontario court also held that the litigation in Ontario involved issues and parties which had not been involved in the Chinese litigation.

In *CanWest Global Communications Corp v Hollinger Inc*,[9] the court rejected an application to stay litigation on the basis that an alleged right of set-off was being pursued through arbitration. The court held that the claim being asserted in the lawsuit was clearly not subject to set-off or arbitration.

A number of attempts have also been made to use arbitration clauses in consumer contracts as a means of precluding access to class actions. The argument that the inclusion of an arbitration clause in a consumer contract should in principle defeat access to class proceedings was accepted in at least one Ontario decision.[10] However, it must be said that the consensual foundations of the institution of arbitration are somewhat attenuated in the context of contracts of adhesion. As a result, statutory changes in Ontario now require that a consumer consent to arbitration after a dispute has arisen in order for an arbitration clause to be enforceable in a consumer contract.[11]

In British Columbia, the Court of Appeal has recently affirmed the discretion of the court to stay class proceedings in the face of arbitration clauses in consumer contracts which give rise to the claims. However, the British Columbia Court of Appeal has held that such a determination can only be made at the same time as the decision on whether or not to certify a class action. Thus, the policy reasons for favouring arbitration proceedings are balanced against the policy reasons for permitting class actions, preserving for the court a full range of options for determining the preferable procedure: *Mackinnon v National Money Mart Co.*[12]

Outside the consumer context, the fact that agreements to arbitrate can preclude access to class actions was recently affirmed by the Supreme Court of Canada in the case of *Bisaillon v Concordia University.*[13] The decision of the majority in that case is rooted in the context of labour legislation and case law that affirms grievance arbitrators' exclusive jurisdiction under collective agreements and the responsibility of unions to represent their members. The majority held that these considerations should prevail even if facts can be stated that would otherwise support recourse to class proceedings. In *Bisaillon*, class proceedings were not authorised even though multiple collective agreements were involved.

Notwithstanding the labour context of the case, it may be expected that this decision will be used to support the stay of class proceedings in favour of arbitration, especially in the non-consumer context.

Enforcement of awards

Canadian courts have also been very supportive of international arbitration in post-award proceedings. In the recent case of *United Mexican States v Karpa*,[14] the Ontario Court of Appeal upheld an award by a NAFTA panel and rejected arguments that the award should be set aside because the tribunal had drawn an adverse inference from the failure of Mexico to produce information which, according to Mexico, could only have been produced in violation of Mexican law. The Court of Appeal noted that the adverse inference drawn by the tribunal was based on the selective provision of information by Mexico. The Court of Appeal also rejected arguments that the award of damages was contrary to public policy because it amounted to a rebate of taxes which was illegal under Mexican law. The Court of Appeal found that the award of damages was rationally connected to the discriminatory conduct found by the tribunal.

Similar arguments regarding an international arbitration award being contrary to public policy were rejected by Master Breitkreuz in the Alberta Court of Queen's Bench in the case of *Karaha Boda Co, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*.[15] In that case, two Indonesian state-owned entities argued that they could not be held liable for breaching Indonesian law and that their non-performance was excused by a *force majeure* provision of the agreement. Both of these defences had been rejected by the arbitrator and were held by Master Breitkreuz not to give rise to a public policy defence to enforcement of the award.

Evidence gathering

As has been the case elsewhere,[16] Canadian courts have refused to give effect to direct requests from foreign arbitral tribunals to take evidence in Canada, requiring instead that such requests be stated through the courts of the seat of arbitration.[17] Subject to that qualification, Canadian courts have been very willing to make the appropriate orders to facilitate the gathering of evidence for arbitration proceedings.

Indeed, it may be argued by some that in one recent case[18] the Alberta Court of Appeal went too far in giving effect to an order of an international arbitration tribunal that non-parties to the arbitration be examined for 'discovery' under the rules of procedure applicable to court proceedings in Alberta, where the arbitration was being conducted. The parties to the arbitration had adopted the Alberta rules of civil procedure for the purposes of the arbitration. But the non-parties who were to be examined for discovery argued that they could not be bound by the agreement of the parties to the arbitration. The Alberta Court of Appeal held that Article 27 of the UNCITRAL Model Law allows the court at the seat of arbitration to execute a request for assistance in the taking of evidence 'according to its rules on taking evidence'. With respect to the argument that 'discovery' was not evidence because it would only be placed before the tribunal in limited circumstances, the Alberta Court of Appeal pointed out that Canadian courts regularly treat as requests for 'evidence' requests from foreign courts for the examination of witnesses at the preliminary or investigative stages of the foreign legal proceedings. As the witnesses in the Alberta case could clearly have been ordered to give ordinary 'evidence' under the authority of Article 27 and as the evidence adduced before an arbitral tribunal, especially in international arbitrations, often comes into existence prior to the hearing (eg affidavits, witness statements, etc), it may be that the issue really comes down to what use can be made of the examinations in the arbitration – a matter that is controlled by the agreement of the parties and, if necessary, the direction of the arbitration tribunal.

Conclusion

Canadian courts continue to affirm the basic principles of support for arbitration even in some unusual situations which have tested the limits. Although, as with decisions of particular arbitrators on specific issues, there can be room for debate as to decisions in certain cases, there can be no doubt that the overall effort of Canadian judges is to support arbitration and its necessary functions.

Notes

1 *(1987) Inc* [2003] 1 SCR 178.
2 (2000) 48 OR (3d) 442 (Div Ct); aff'd by (2001) 107 ACWS (3d) 360 (Ont CA); for the same principle in a patent case see: *University of Toronto v John N Harbinson Ltd* [2005] OJ No 5437.
3 (2004), 246 DLR (4th) 139 (Ont CA).
4 (2001), 64 OR (3d) 505 (Ont CA).
5 (2005) 7 CPC (6th) 360 (Ont SCJ).
6 *SimEx Inc v IMAX Corp* [2005] OJ No 5389 (CA).
7 (2005) 144 ACWS (3d) 65 (Alta QB).
8 (2004) 71 OR (3d) 191 (SCJ).
9 [2004] OJ No 3324 (SCJ) (QL).
10 *Kanitz v Rogers Cable Inc* (2002), 58 OR (3d) 299 (Ont SCJ).
11 Consumer Protection Act 2002, SO 2002, c 30, Sched A, s 8.
12 (2004) 203 BCAC 103.
13 2006 SCC 19.
14 (2005) 74 OR (3d) 180 (CA).
15 (2004) 364 AR 272 (QB).
16 Steven A Hammond, 'The Act of the Missed Opportunity – How U.S. Courts declined to assist private arbitral tribunals under the U.S. Law Authorizing Discovery in Aid of Foreign and International Proceedings' (2000) 17 J Int Arb 4, 131-143.
17 *BF Jones Logistics Inc v Rolko* (2004) 72 OR (3d) 355 (Ont SCJ).
18 *Jardine Lloyd Thompson Canada Inc v Western Oil Sands Inc* (2006) 13 BLR (4th) 1 (Alta CA), leave to appeal refused by *Jardine Lloyd Thompson Canada Inc v Western Oil Sands Inc* (SCC 1 June 2006).