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Favor Arbitrandum and the Supreme Court of Canada: More Red Flags

Frédéric Bachand (McGill University Faculty of Law) · Monday, October 6th, 2014 · Institute for Transnational Arbitration (ITA), Academic Council

The pronouncements of the highest-ranking court are key indicators of a legal system's stance vis-à-vis arbitration and other private means of dispute resolution. Over the past decade, the Supreme Court of Canada has dealt with arbitration in a number of cases, and it initially did so in a manner that revealed a very supportive attitude. Indeed, the earlier decisions—*Desputeaux*, 2003 SCC 21, *GreCon*, 2005 SCC 46, and *Dell*, 2007 SCC 34—adopted a resolutely pro-arbitration approach on such key issues as the reach of the doctrine of non-arbitrability, the impact of international arbitration agreements on the jurisdiction of domestic courts, and the legal effectiveness of arbitration clauses inserted in consumer contracts. But cracks started appearing in a 2011 consumer arbitration case, *Seidel*, 2011 SCC 15. A majority of the Court, appearing much more skeptical about arbitration, adopted an attitude that could—at best—be described as neutral ("the Court's job is neither to promote nor detract from private and confidential arbitration"). The dissenting justices, who criticized the majority opinion harshly, went so far as to suggest that it marked a return to the anti-arbitration stance that was once dominant among the judiciary.

Commentators were divided as to whether *Seidel* really marked a departure from the pro-arbitration attitude that had emerged a few years earlier. Perhaps, some thought, that as the case involved consumer arbitration, the decision wouldn't change much to the courts' ongoing support of arbitration in commercial matters. But their optimism must have been dampened when Justice Ian Binnie—who penned the majority opinion in *Seidel*—publicly worried, shortly after his retirement, that the rise of arbitration could "balkanize the legal system" and deprive courts of commercial cases providing opportunities to develop the law.

The Supreme Court's unanimous decision in *Hryniak v. Mauldin*, 2014 SCC 7, rendered at the beginning of the year, provides further reason to believe that the Court's attitude towards arbitration is not as unreservedly sympathetic as it was a few years ago. The dispute had nothing to do with arbitration, as it concerned the conditions under which judges may exercise their summary judgment powers in civil and commercial cases. But the Court analyzed that issue within the broader context of Canada's civil justice crisis which, like in many countries, is first and foremost a crisis of accessibility. While addressing avenues for reform, the Court said this:

> "In some circles, private arbitration is increasingly seen as an alternative to a slow judicial process. But private arbitration is not the solution since, without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined."

The suggestion that arbitration is not an adequate alternative to the judicial process, and that it may even constitute a threat to the rule of law, is—to say the least—not likely to find much favour among readers of this blog. But while these surprisingly pessimistic words surely go too far, they do reveal a widespread skepticism among Supreme Court justices about the legitimacy of arbitration. In light of these developments, one wonders whether it may still be claimed that Canada's judiciary is wholeheartedly—or even strongly—pro-arbitration.

But, some may ask, what about *Sattva Capital Corp.*, 2014 SCC 53? In a decision rendered in August, the Supreme Court clarified the conditions under which domestic arbitration awards may be appealed as well as the standard of review applicable in such appeals. Only the domestic arbitration statutes adopted in Canadian common law provinces provide for arbitral appeals. And as is the case in other countries, appeal rights vary depending on the nature of the conclusion being challenged. Under the British Columbia statute applicable in that case, appeals from commercial arbitration awards are limited to questions of law, and they can only be pursued with the parties' consent or with leave of the court.

By determining, firstly, that most issues of contractual interpretation—being inherently fact-specific—do not raise questions of law and, secondly, that awards challenged trough appeals are to be reviewed under a reasonableness—rather than a de novo—standard, the Supreme Court's decision certainly reinforces the autonomy of the arbitral process. But there isn't much in the Court's reasons suggesting that it was animated by the openly pro-arbitration philosophy that characterized its earlier decisions. The rejection of the traditional view that contractual interpretation raises questions of law was mainly influenced by the courts' increased willingness to adopt a contextual approach while determining the meaning of contractual provisions. It was also influenced by the Supreme Court's recent jurisprudence on the distinction between questions of law and mixed questions of fact and law. As for its holding on the applicable standard of review, it rested mainly on administrative law cases dealing with judicial review of decisions made by statutory tribunals. And tellingly, in a section of its opinion dealing with the factors that should bear on decisions to grant or deny leave to appeal, the Court refused to follow lower court decisions standing for the proposition that "fostering and preserving the integrity of the arbitral system" was a discrete discretionary consideration.

Opponents of arbitral appeals may have reasons to rejoice, but the chill caused by *Seidel* and renewed by *Hryniak* remains very much undispelled.

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