Kluwer Arbitration Blog

Born v. Born: The Battle of Scholarly Citations in the Canadian Supreme Court's Uber v. Heller Decision

Augusto Garcia Sanjur · Sunday, July 12th, 2020

Most individuals with involvement in international arbitration—as a scholar, practitioner, arbitrator, or as a brave student participating in a moot competition—have cited Gary Born for some legal principle. Indeed, sometimes this name is cited by opposing sides in support of their contrary legal arguments. While this has been a common practice among students and, in particular, Mooties, it now seems that a similar practice is reflected in the majority and dissenting opinions in the long-waited and important international arbitration decision, *Uber v. Heller, 2020 SCC 16.*

Relevant legal issues in the case concerning the UNCITRAL Model Law

The facts of *Uber v. Heller* have already been discussed on the Blog in a prior post. An aspect not addressed in that prior post is that, in part, the Supreme Court based its decision on that the arbitration law applicable to the arbitration agreement was the Ontario's domestic arbitration law, rather than Ontario's International Commercial Arbitration Act ("ICAA"), which is based on the UNCITRAL Model Law ("Model Law"). (¶ 21.) For ICAA to be applicable, the arbitration agreement must be both international and commercial. The Supreme Court correctly decided that the agreement was "international." The *Uber* majority decided that the agreement was not "commercial" because employment disputes are not covered in the term "commercial" as is presented in the Model Law and its domestic counterpart the ICAA. (¶ 28.)

This case presented two issues related to the Model Law. First, the Justices focused on whether the term "commercial" of the Model Law refers to the "type of dispute" (the majority position) or "the nature of the relationship" between the parties (the dissenting Justice Côté's position). Second, the Justices considered whether employment disputes were excluded from the term "commercial" of the Model Law.

Does the term "commercial" of the Model Law focus on the nature of the claim or of the relationship between the parties?

On the first issue, the majority cited UNCITRAL commentary on the Model Law to indicate that labour or employment disputes are not covered by the term "commercial" as defined in the

footnote of art. 1(1) of the Model Law. Based on this commentary, the majority determined that the analysis of whether a dispute is "commercial" should focus on the nature of the dispute instead of the nature of the parties' relationship.

By contrast, in the dissenting opinion, Justice Côté used a different interpretation of the same source to reach the opposite conclusion. She reasoned that the same footnote of art. 1(1) of the Model Law confirmed that "*the term 'commercial' should be given a wide interpretation so as to covers all relationships of a commercial nature*." (¶ 212.) The analytical commentary cited by the Supreme Court indicates that "*the fact that a transaction is covered by the Model Law by virtue of its commercial nature does not necessarily mean that all disputes arising from the transaction are capable of settlement by arbitration.*" (UNCITRAL commentary at 108.) Thus, the focus should be on the nature of the transaction or relationship between the parties. If a transaction is commercial, the Model Law will apply, but not all the claims proceeding from that transaction may be arbitrable. That will depend on the domestic law.

In support of her analysis, Justice Côté relied on Born's treatise on international commercial arbitration: "*Among other things, the term [commercial] applies without regard to the nature or form of the parties' claims and looks only to the character of their underlying transaction or conduct.*" (Gary Born, *International Commercial Arbitration* (2d ed. 2014) at 309.) In citing the Born's treatise, Justice Côté pointed out that the majority had itself relied extensively on his treatise. (¶ 215.)

Are employment disputes excluded from the term "commercial" of the Model Law?

On the second issue, the majority cited Born's treatise in support of the proposition that the reference in art. 1(1) Model Law to "trade" transactions does not refer to consumers or employees. (¶ 27.) Specifically, the majority quoted a footnote, which states that "*one could draw a negative inference from the definition's omission of 'employment' relations.*" (¶ 27 citing Born at 309, fn. 454.) This footnote is one of the key sources relied on by the majority to conclude that the employment disputes are not covered in the Model Law, and as such are not considered "commercial."

In answering this second question, Justice Côté again also cited the same authority, but again as a basis for reaching the opposite conclusion to that drawn by the majority. Justice Côté argued that Born's treatise "*does present the proposition that consumer and employment disputes are excluded from the Model Law, but as an alternative to his own view*." (¶ 215.) Perhaps more importantly, Born's treatise's conclusion is that "*the better view, therefore, is that the Model Law includes within its coverage both consumer and employment matters, subject to any specific nonarbitrability rules adopted in particular states pursuant to Article 1(5) of the Law*." (Born at 309.) Thus, according to Born's treatise, the Model Law includes employment disputes. Further, contrary to the majority's interpretation, Justice Côté correctly interpreted Born's treatise indicating that, so long as the underlying relationship is commercial, the Model Law may apply to employment disputes. (¶ 306.)

Even though the issue was whether employment disputes are included in the Model Law, Justice Côté disagreed with Born's treatise indicating that employment relationships are outside of the scope of the Model Law based on Canadian jurisprudence (¶ 213.) and UNCITRAL commentary.

(¶ 214.) Justice Côté indicated that a superficial review of the evidence established that the relationship between Heller and Uber was commercial in nature, as the service agreement expressly stated that it did not create an employment relationship, but it was a software licensing agreement. (¶ 216.) She then concludes that the court should not engage in any further analysis of the evidence because that would be a usurpation of the role of an arbitral tribunal. (¶ 217.)

In sum, while both the majority and dissent quoted Born's treatise, the majority did not cite this authority in its analysis of the first issue and only cited one aspect of its reasoning that, while supportive of its position, was inconsistent with the treatise's ultimate substantive conclusion on that very issue. The dissent pointed out this apparent "cherry picking" of quotes from the treatise and interprets the authority in a way that appears to be more consistent with its overall approach to the issue of the interpretation of the term "commercial" of the Model Law.

While competing views over the interpretation of "commercial" in the Model Law may be of greater interest to the international arbitration community, ultimately the outcome of the case rested on the independent ground that the arbitration agreement was unconscionable because there was an inequality of bargaining power and the bargain was improvident.

Conclusion

Beyond its insights about how to interpret the Model Law, the *Uber* decision also provides insights about the use of sources and in particular a treatise as comprehensive as Born's treatise. It is not entirely persuasive to rely on a source's outline of provisional arguments or steps in analysis, while turning a blind eye to the same source's final conclusions at the end of those arguments. Justice Côté was right to challenge the majority for this inconsistency, which was ultimately an unnecessary exercise given that the majority's decision in *Uber* hinged on an interpretation of domestic law unconscionability of contracts. The *Uber* decision may give rise to unnecessary confusion over the definition of "commercial" in international arbitration settings. Finally, the decision is also a lesson to future moot students and practitioners about how *not* to cite Born's treatise.

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