Kluwer Arbitration Blog

Highlights from CanArb Week 2021: "New World New Rules" Tackles Transparency, Efficiencies, and Canadian Developments in Arbitration

Jocelyn Turnbull Wallace, Heather Maki (McCarthy Tétrault LLP) · Wednesday, October 20th, 2021

Canadian Arbitration Week ran online from September 20 – 24, 2021 under the theme of adaptation and acceleration. A timely focus as the pandemic continues to accelerate sweeping changes in the legal world.

The 2021 YCAP Fall Symposium titled "New World, New Rules" took place on September 23 and addressed the theme in a session moderated by Sarah Firestone (associate, Osler, Hoskin & Harcourt). The panelists, Tamryn Jacobson (partner, Goodmans), James Plotkin (lawyer, Caza Saikaley LLP), and Patricia Snell (associate, Covington & Burling LLP) discussed recent changes to arbitral institutional rules through three main lenses: 1) ethics and transparency; 2) procedural efficiency and creative mechanisms for the taking of evidence; and 3) Canadian trends and developments.

Ethics and Transparency

The first discussion explored rule changes in relation to the popular topic of third-party funding. Notably, the International Chamber of Commerce (ICC) Rules of Arbitration now require parties to disclose the existence of any third-party funding arrangements in order to avoid conflicts and allow greater transparency (see further discussion in previous post). Similar disclosure requirements are featured in the new generation of foreign investment protection agreements, such as the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) (Article 8.26).

The panelists further discussed transparency trends, noting that the ICC has been, once again, leading the charge in that respect. The 2021 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration provides that awards, procedural orders, dissenting and/or concurring opinions will be published by the ICC in their entirety, including the names of the parties and of the arbitrators, unless the parties specifically opt out of the publication. Many other institutions still hold on to the norm that parties must opt-in on publication.

Although privacy and confidentiality are deeply entrenched in the arbitration world, one panelist noted the need for balancing between confidentiality as the cornerstone of arbitration and publication as a means to ensuring the development of the law suggesting that parties should be

encouraged to choose publication in cases where confidentiality is not paramount or where appropriate redactions could protect the parties.

In response to the concerns about the law going "stale", it was suggested that the substantive development of the law was continuing, and would always continue, through the courts. The panelists agreed that the lack of publication of procedural rulings and orders contributes to the lack of understanding of arbitral procedures by litigators who only occasionally dabble in arbitration. The panelists acknowledged that solving this issue and encouraging publication of awards and procedural orders was complex given a key value of arbitration is confidentiality. This void of procedural precedents is perhaps a greater issue in Canada than other jurisdictions, where Canadian litigators who take the occasional arbitration often look to the court's procedural decisions as precedents without fully appreciating the arbitral process.

Procedural Efficiencies and Creative Mechanisms of Taking of Evidence

With respect to changes in procedural efficiencies, the discussion focused on the increase in "early determination" provisions, starting with Rule 29 of the Singapore International Arbitration Centre (SIAC) Rules. This rule allows a party to apply for early dismissal of a claim that manifestly lacks legal merit or is manifestly outside the tribunal's jurisdiction. Similar rules have followed, such as Article 22.1(viii) of the London Court of International Arbitration (LCIA) Rules. Under the LCIA Rules, the arbitral tribunal has the authority to dismiss claims upon the application of any party or the arbitral tribunal's own initiative.

Perhaps the reason for adding this new early determination procedure is comparable to early dismissal procedures that are available in Canadian courts to help clear "hopeless" claims. This power can be seen as one supporting a fair and efficient dispute resolution process. On the other hand, early determination of a claim may mean that the decision is made before a party has presented any evidence. In such cases, the procedural protections differ significantly from that available in Canadian courts, where a right of appeal remains available to correct errors. However, proponents of arbitration would argue that the parties' rights would remain sufficiently protected as relevant arguments may be asserted during set aside or enforcement proceedings.

The rise of virtual hearings and the electronic taking of evidence has also been much discussed in the arbitral world, and outside. Although these changes have allowed for gains in efficiency, there are also challenges of cyber security and data collection that come with the remote model. Preserving confidentiality and complying with data protection is increasingly challenging and costly, which weighs against the simplicity and efficiency afforded by technology. The audience was pointed to developments in the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration, where the tribunal shall consider whether it is appropriate to adopt security measures to protect electronic information (Article 2.2) and, at the request of parties, can exclude evidence obtained illegally (Article 9.3). As it is an unresolved issue in arbitration as to whether evidence illegally obtained as a result of hacking should be admitted and what factors a tribunal should consider, it is interesting to see this development in the IBA Rules and we can likely expect more of it in the future.

Canadian Trends and Developments

The panelists highlighted the significant technology advancements being made with the not too subtle push of the pandemic, noting that arbitrators and practitioners were being dragged into the 21st century, where the panelists all agreed, we would be forced to stay. The panel encouraged all practitioners and arbitrators to check out the Campaign for Greener Arbitrations to see how choosing greener initiatives can translate to cost savings for clients.

The panelists also tackled the emerging trend of a mediation-arbitration hybrid model which is gaining attention following the domestic 2020 ADRIC Med-Arb Rules. Though 2020 ADRIC Med-Arb Rules were designed to assist in resolving domestic commercial disputes, they can be widely used and applied provided parties wish to adopt them. In med-arb, the arbitrator has a dual role, in which they first act as the mediator and, if issues remain unresolved, they remain as the decision-maker in the second phase of arbitration, unless parties agree from the start to have a separate mediator and arbitrator. In addition to the provincial statutes which allow parties to agree to a hybrid mediation and arbitration process, there are now detailed and thoughtful rules laid out to assist in guiding practitioners through balancing mediation, followed by binding arbitration. Despite the Med-Arb Rules attempting to deal with a number of fundamental issues surrounding arbitrator bias and procedural fairness, the panelists vocalized a common concern among practitioners about the overall effectiveness of the Med-Arb process; specifically, whether or not the parties would truly be forthcoming with a mediator who may ultimately determine their dispute as arbitrator.

There is an incredible amount of time and energy being devoted within the arbitration sphere to understanding unconscious biases of both arbitrators and practitioners in an effort to expand diversity initiatives and to ensure the arbitration sphere correctly and fully reflects the complex diversity of its users. For example, Racial Equality for Arbitration Lawyers (REAL) focusses on racial equality within international arbitration and aims to create platforms that recognize and address issues of systemic discrimination and implicit bias. As discussed in a previous post, diversity in adjudicative bodies directly impacts how claims are evaluated by decision makers. Given the hesitation of practitioners to embrace the Med-Arb process, it may be prudent to invest some time and resources in better understanding the unconscious biases experienced by mediators who later find themselves the decision-maker. Arbitration is rooted in the idea that arbitrators will be independent and impartial. It is this idea that pushes the new ADRIC Med-Arb Rules to suggest that arbitrators should not allow the information gained in the mediation to influence their decision in the arbitration. For those who attended Professor Craig E. Jones' lecture on "Biases in Adjudication in the age of Zoom" (forming part of WCCAS' conference for Canadian Arbitration Week), you know that even where the decision maker has separated the information in their mind, and believes they relied solely on the facts in evidence before them, the unconscious mind is always there to subtly influence and sway them.

The final discussion point on the topic of Canadian developments was related to the dominance of ad hoc arbitrations in Canada and a question of whether, as a result of that, the rule changes might have less of an impact. One of the reasons provided for the prevalence of ad hoc arbitrations is that many Canadian litigators participating in occasional arbitrations tend to favor ad hoc, into which they can import familiar court rules, over institutional arbitration with obscure rules. Although ad hoc arbitration is meant to allow the parties the freedom to create their own process, in Canadian practice it oftentimes evolves the process and becomes a litigation-look alike. The more arbitration mirrors litigation, the less parties get the benefit of the faster, cheaper, more effective promise of arbitration. Therefore, what is important in ad hoc domestic arbitrations is first, educating litigators

and, second, being careful and deliberate about arbitrator appointments. Whether an arbitrator runs an arbitration like a court litigation or takes advantage of the flexibility of arbitration, arguably has more of an impact on the procedure than any particular change to the institutional rules, at least with respect to domestic arbitrations. According to the panelists, one of the silver linings of the pandemic is an increase in the use of arbitration and, as a result, litigators are swiftly being immersed into the arbitration culture.

This final discussion leaves a number of unanswered questions, such as: With the rising number of Canadian litigators joining the arbitration process what future adaptations are in store? Can existing arbitration practitioners educate and inspire litigation counsel to embrace arbitration as an efficient, effective, and creative process of dispute resolution? Will these additional litigators dilute the advancement of arbitration and hinder the adaptation through their continued reliance on litigation precedents and court procedures? As the panelists aptly pointed out, arbitration is so much more than "litigation sitting down". To not only embrace the existing changes but to motivate the next round of adaptations, arbitration practitioners are being called on to showcase and clearly demonstrate the strengths of arbitration to our curious, open-minded, litigation colleagues.

Other posts covering CanArbWeek can be found here.

This entry was posted on Wednesday, October 20th, 2021 at 8:34 am and is filed under Bias, Canada, CanArb Week, Confidentiality, Confidentiality and Transparency, Diversity, Early Determination, Efficiency, Third party funding
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.