Kluwer Arbitration Blog

Highlights from CanArb Week 2022: Review of Cross-Canada Jurisprudential Trends and Curiosities

Dina Prokic (Senior Assistant Editor) (Woods LLP) · Tuesday, November 22nd, 2022

The third edition of CanArb Week took place in Montréal from October 19 to 21, 2022. Speakers from all walks of arbitration life (academics, arbitrators, counsel, experts, leaders of arbitral institutions, and third party funders), as well as justices of the Supreme Court of Canada, gathered in the "Paris of North America", to the delight of all participants in person and online. More than ten organizations partook in the event, including the Young Canadian Arbitration Practitioners ("YCAP") and the *Institut de médiation et d'arbitrage du Québec* ("IMAQ").

YCAP's bilingual panel was organized in collaboration with IMAQ and was moderated by Lisa C. Munro (partner, Lerners LLP). True to the session's title, "Arbitration case-law from sea to sea: *quoi de neuf*?", panelists Eric Bédard (partner, Woods LLP), Laura Cundari (partner, Blake, Cassels & Graydon LLP) and Marie-Claude Martel (partner, Forseti) discussed three recurring themes identified in jurisprudence over the last two years: (1) the impact of resignations and bias allegations on arbitral proceedings; (2) decisions concerning jurisdiction and stay of proceedings; (3) non-signatories to arbitration agreements.

Resignations and bias allegations: How have they affected arbitral proceedings?

Recent years have seen a spike in arbitrator challenges (meritorious or not), prompting courts across the globe to revisit or elaborate upon applicable tests and standards of independence and impartiality. Eric Bédard addressed a few cases in which Canadian courts faced similar issues, such as *Dufferin v. Morrison Hershfield* and *Aquanta Group Inc. v. Lightbox Enterprises Ltd.*. Though the Ontario Superior Court of Justice in both referred to the "reasonable apprehension of bias" test, the outcomes were largely a result of the Court's perception of fairness. The challenge in *Dufferin* was triggered by the arbitrator's proactiveness during the hearing which, according to the applicants, "crossed from adjudication to advocacy". The Court disagreed, treating the arbitrator's preparedness and interventions as evidence of him being "truly a subject matter expert who seeks to find the truth". Apart from the fact that his right to interject with questions was built into the procedural order, the arbitrator's various inquiries did not give rise to a reasonable apprehension of bias as he always ensured that counsel had the opportunity to ask any questions that arose from his own line of inquiry. Since both parties had a fulsome hearing and were granted an opportunity to explain their evidence, the Court dismissed the application for the arbitrator's removal.

Similar considerations of fairness led the Court to a different conclusion in *Aquanta Group Inc. v. Lightbox Enterprises Ltd.* where the applicant sought to appoint an arbitrator who had previously ruled in its favour in a different contract dispute involving the same parties. The other side protested arguing, *inter alia*, that the arbitrator had made findings against its key witnesses in the context of the earlier arbitration, and that the prior award was the subject of a set aside application. The applicant, however, submitted that the arbitrator was uniquely placed to rule on the parties' new dispute, including on the applicant's argument that some of the issues were *res judicata*, because he could rely on his personal notes from the previous proceeding (an official transcript not having been made). This is precisely why the Court ordered the parties to approach other candidates. Apart from the nearly sacrosanct principle of deliberative secrecy, which would be violated if the arbitrator were to use his notes in the new arbitration, the Court underscored the "commitment to limiting the decision-maker's reference to the open and transparent evidentiary record [which] is fundamental to due process," and preventing "decision-makers from having to spend more time testifying about their decisions than making them".

Allegations of bias, however, are not the only reason why an arbitrator's mandate may end (or not begin in the first place). Though arbitrators generally have the right to resign, the effects of such resignations on the arbitral process have stirred up debate. Whereas in *SZ v. JZ*, the arbitrator's resignation terminated the arbitration, in *Kubecka v. Novakovic*, it did not. Because the parties in *SZ* had arguably agreed to arbitration only with the said arbitrator, his resignation due to potential scheduling conflicts led the Alberta Court of Queen's Bench to find the arbitration terminated. Conversely, the Ontario Superior Court of Justice in *Kubecka* found no such indication and held "it would be surprising if the mere resignation of an arbitrator […] would trigger the end of the arbitral process and a return to the court's jurisdiction." The outcomes in both cases largely turned on the interpretation of the arbitration agreement, but also on particularities of the Arbitration Acts of Alberta and Ontario. While the panelist would not suggest addressing arbitrator resignations in the arbitration agreement itself, it may be prudent to do so in the first procedural order.

Issues arising on review of jurisdictional decisions and stay applications: A can of worms that will (not) be closed by new legislation?

Laura Cundari considered the *Luxtona* case wherein Ontario justices struggled to determine what the evidentiary record before a court reviewing tribunal's jurisdictional decisions rendered "as a preliminary question" ought to be. As previously discussed on this blog, some allowed parties to file new evidence as of right (justifying such an approach through a correctness / de novo standard of review), whereas others imposed strict conditions for the admission of "fresh evidence". The decision issued in 2021 by the Divisional Court (a branch of the Ontario Superior Court of Justice) confirmed the standard of review as being *de novo*, meaning that the reviewing court was not restricted to the evidentiary record that was available to the arbitral tribunal. Though we have probably not heard the last of this case, it has already affected a number of domestic matters, in an outside of Ontario. *Hornepayne First Nation v. Ontario First Nations (2008) Ltd.*, *Optiva Inc. v. Tbaytel*, *Iris Technologies Inc. v. Rogers Communications Canada Inc.*, and *Ong v. Fedoruk* – all confirmed that "decide the matter" from Article 16(3) of the UNCITRAL Model Law presupposes a hearing *de novo* without deference to the arbitral tribunal's decision. Some of these cases also emphasized the absence of appeals from courts' judgments reviewing tribunals' jurisdictional decisions. Though consistent with the Model Law, the panelist wondered how justified such an approach was, considering that appeals are possible when jurisdictional matters are resolved at a

later stage.

Since members of the Toronto Commercial Arbitration Society Arbitration Act Reform Committee ("AARC") were in the audience, they were asked to comment on whether these issues could be addressed through legislative reform. Indeed, in 2021 AARC released a draft commercial arbitration act which, if enacted in Ontario, would apply to both domestic and international arbitrations, thereby replacing the current dual statutory regime. While acknowledging all the dilemmas Article 16(3) has prompted, AARC's co-chair J. Brian Casey noted that the draft maintained Model Law's language. Any errors made in the law's application thus far would, therefore, have to be rectified by courts.

The panelist also touched upon the recent Ontario Court of Appeal judgment in *Mundo Media* which concerned an application to stay judicial proceedings launched by a receiver in favour of an arbitration in New York. The Court of Appeal upheld the Superior Court's refusal to refer the parties to arbitration, thereby confirming that the arbitration agreement had been rendered inoperative by the "single proceeding model" – a judicial construct used to group all claims against a debtor into a single forum so as to facilitate negotiation with creditors. That, coupled with the broad discretion that courts exercise in bankruptcy matters, enabled bankruptcy courts to preclude the operation of arbitration legislation. The panelist noted that the Supreme Court of Canada would probably provide further clarifications on the interplay between arbitration and insolvency in *Peace River Hydro Partners et al. v. Petrowest Corporation et al.* (the judgment has since been released).

Non-signatories to arbitration agreements: To bind or not to bind?

Marie-Claude Martel primarily focused on the position of non-signatories in Quebec, which has been largely influenced by a recent resurgence in the application of the 1996 Court of Appeal judgment in *Décarel inc. v. Concordia Project Management Ltd*. In this decision the Court held that the defendant's shareholders and directors were bound to the arbitration agreement because holding otherwise would be tantamount to "nonsense based on blind technicality and knowing ignorance of the particular circumstances of the case". Building on that, the Superior Court in *Newtech Waste Solutions inc. v. Asselin* recently allowed a "reverse" veil piercing, when it bound a non-signatory corporation to an arbitration agreement entered into by its shareholder and director. Though non-signatories are usually expected to oppose arbitration, in *Tessier v. 2428-8516 Québec inc.* and *10053686 Canada inc. v. Tang* non-signatories were the ones to seek referral to arbitration. Binding non-signatories, however, remains an exception rather than the rule.

The panelist highlighted that the courts often referred to the close links between the non-signatories and the persons (whether individuals or corporations) involved in the dispute to justify imposing arbitration on non-signatories but noted that considerations for proportionality and the avoidance of multiple proceedings seemed to have also played into the decisions. Suggesting that this recent line of cases may have connections with the fact that parties to an arbitration can no longer opt out of the application of the principle of proportionality in Québec, the panelist asked whether we would see a continuation of the trend in months to come.

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In canvassing recent trends, the panelists' presentations highlighted the peculiar nature of the Canadian legal system which, on the one hand, features the co-existence of common law and civil

law, and, on the other, is affected by the distribution of legislative powers among the federal and provincial governments, as evidenced in *Mundo Media* where federal insolvency rules trumped provincial arbitration rules.

** The views expressed herein are those of the author and do not necessarily reflect the views of Woods LLP or its partners.*

Follow along and see Kluwer Arbitration Blog's prior coverage of CanArbWeek here.

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