Kluwer Arbitration Blog

2022 Year in Review: Commercial Arbitration in Canada

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In 2022, Canadian courts revisited some old issues, like the timeframe for recognizing foreign arbitral awards, but also faced new dilemmas, such as the impact of sanctions on recognition and enforcement. Fostering Canada's pro-arbitration standing, courts were generally adamant about referring commercial parties to arbitration, although a few exceptions that arose in insolvency contexts are worth mentioning. In the sphere of domestic arbitration, one of the main issues remained the standard of review on appeals of commercial arbitral awards.

No Surprises in the Context of Referrals to Arbitration (Except in Insolvency Matters?)

Canadian courts have largely continued to build on the "arbitration-friendly" reputation established in prior years. Whenever a party objected to the commencement of court proceedings due to the existence of an arbitration clause, courts have generally referred parties to arbitration (e.g., in Bermuda, Hong Kong, New Zealand), thereby reaffirming the principles of *competence-competence* and systematic referral. A notable outlier was the judgment of the Ontario Court of Appeal in *Mundo Media Ltd. (Re)* where arbitration in New York gave way to proceedings in Canadian court. The case involved a US-based SPay Inc. and a Canadian-based Mundo Media Ltd. that were bound by contracts containing arbitration clauses. After Mundo Media Ltd. was placed in receivership, the court-appointed receiver sued SPay Inc. for US$4,124,000 on account of unpaid invoices. The latter opposed, requesting that the dispute be resolved by arbitration in New York pursuant to New York law. The Ontario Court of Appeal refused to refer the parties to arbitration, thereby siding with the first instance judge. According to the Court of Appeal, the "single proceeding model", the purpose of which is to group all claims against a debtor into one proceeding to bring efficiency to the insolvency process, could be used as a "sword" to enable receivers to pursue claims against a third party (paras. 40, 52). While acknowledging that SPay Inc. had raised issues that "may be characterized as issues of some importance", such as the single proceeding model rendering an arbitration clause in an international commercial agreement inoperative, the Court of Appeal found no error in the earlier court's articulation of the law (para. 56).

The relevance of *Mundo Media Ltd. (Re)* has possibly become somewhat uncertain following the issuance of SCC's eagerly-awaited judgment in *Peace River Hydro Partners v. Petrowest Corp.* ("*Petrowest*"). As discussed on this blog, that case arose in a domestic context and, although the ultimate result was the same as in *Mundo Media Ltd. (Re)*, the majority furnished a more nuanced

approach for addressing the interplay between insolvency and arbitration. While stressing the context-specific nature of the outcome in *Petrowest*, the importance of respecting valid arbitration agreements, and the heavy burden that a party seeking to establish a clear case of inoperability or incapacity to perform must bear, the majority enumerated the following (non-exhaustive) factors that may assist in the court's analysis:

- the effect of arbitration on the integrity of the insolvency proceedings;
- the relative prejudice to the parties to the arbitration agreement and the debtor's stakeholders;
- the urgency of resolving the dispute;
- the effect of a stay of proceedings arising from the bankruptcy or insolvency proceedings, if applicable; and
- any other factors the court considers material in the circumstances (paras. 10, 72, 155-156, 174-188).

It remains to be seen if and how this framework will be applied in matters involving parties from different jurisdictions.

Important Developments involving Applications for Recognition and Enforcement of Foreign Arbitral Awards

Other notable developments arose out of applications for recognition and enforcement of foreign arbitral awards.

For example, the Québec Court of Appeal in *Itani v. Société Générale de Banque au Liban SAL* ("*Itani*") ruled that the period for seeking recognition and enforcement is 10 years, failing which a party is prescribed, as per Article 2924 of the *Civil Code of Québec* ("CCQ"). Whereas for Alberta (and other common law provinces with similar limitation statutes) this issue has largely been settled by *Yugraneft Corp. v. Rexx Management Corp.* ("*Yugraneft*"), *Itani* brings clarity to parties seeking recognition and enforcement in Québec. In *Yugraneft*, the SCC held that an arbitral award was not a judgment or a court order for the payment of money and, as such, could not benefit from the 10-year limitation period; rather, applications for recognition and enforcement were subject to the two-year limitation period (para. 1). Conversely, the Québec Court of Appeal found that an arbitral award was included within "judgment" at Article 2924 of the CCQ (para. 35). Highlighting that the SCC in *Yugraneft* acknowledged the right of provincial legislators to define "judgments" as including "arbitral awards", the Québec Court of Appeal found that that was precisely how the CCQ provisions on extinctive prescription were to be read (*Itani*, para. 34; *Yugraneft*, paras. 45-47).

The Alberta Court of King's Bench in *Angophora Holdings Limited v. Ovsyankin* refused to stay enforcement of a recognition and enforcement order ("REO") concerning a more than CA$59 million LCIA award, despite a finding of a strong prima facie case that the party seeking enforcement was controlled by or acting on behalf of a person designated in the *Special Economic Measures (Russia) Regulations* (paras. 13, 32, 36, 42). The Applicant (Ovsyankin) requested that: (i) the enforcement of the REO be temporarily stayed because "it would result in the liquidation of assets located in Alberta and payment of the proceeds of such liquidation to Angophora, which […] would contravene [Canada's] prohibitions against Russia and certain of its citizens and corporations arising from the war in Ukraine" (para. 1), and (ii) that the writ of enforcement be

stricken (para. 11).

The Court dismissed the Applicant's requests, noting he had not met the requirements for a stay, and ordered the sale of the properties to proceed in accordance with the REO. According to the Court, "[w]hile it is certainly true that it is in the public interest for the Russian Sanctions to be enforced, it would be contrary to the public interest to allow them to be used by a judgment debtor without any further recourse to delay a sale under execution properly authorized by a recognition and enforcement order" (para. 47). Therefore, in the Court's view, "it would not be a breach of the Russian Sanctions for the order to be enforced through the sale of the seized properties, including payment of the costs of enforcement. However, before distribution of the proceeds, persons in Canada may wish to be satisfied that they are not in breach of the Russian Sanctions by further action. That, of course, is their decision." (para. 50).

Domestic Arbitration and the Continuing Impact of *Vavilov*

One of the recurring themes in the past year continued to be the impact of *Canada (Minister of Citizenship and Immigration) v. Vavilov* judgment ("*Vavilov*") rendered by the SCC in late 2019. While *Vavilov*, which was previously discussed on this blog (here and here), clarified the law applicable to the judicial review of administrative decisions, courts across the country have since wondered whether that framework is applicable in the context of appellate review of commercial arbitral awards (which exists in all provinces except Quebec, where awards may only be challenged by way of annulment or opposition to homologation). Some courts have even been asked to consider *Vavilov* in the context of set aside applications (e.g. *SNS-Lavalin Inc. v. Saskatchewan Power Corporation*, para. 32; *Baffinland v. Tower-EBC*, para. 35).

Since the prevailing understanding is that arbitral awards merit deference, in the provinces where appeals are allowed, they have been reviewed on the standard of reasonableness (as per *Sattva Capital Corp. v. Creston Moly Corp.* and *Teal Cedar Products v. British Columbia*). While, pursuant to *Vavilov*, "reasonableness" is the presumed standard of review, this presumption can be rebutted in two types of situations: (i) where the legislature has explicitly prescribed a different standard of review; and (ii) where the rule of law requires that the standard of correctness be applied (which will be the case for certain categories of legal questions, e.g. constitutional questions and general questions of law of central importance to the legal system as a whole). Applying the *Vavilov* framework to appeals of arbitral awards would arguably submit them to stricter scrutiny as they may be reviewed on the standard of correctness.

To date, the jury is still out. Whereas some courts have applied the correctness standard (*D Lands Inc. v. KS Victoria and King Inc.*, para. 64;), others concluded that *Vavilov* had not overruled *Sattva* and *Teal Cedar*, such that the standard was still "reasonableness" (*Grewal v. Mann*, para. 11; *Serbcan Inc. et al. v. National Trust Company et al.*, para. 15; *Christie Building Holding Company, Limited v. Shelter Canadian Properties Limited*, paras. 84-85; *Goel v. Sangha*, para. 25). Some courts have declined to decide this complex question (*Spirit Bay Developments Limited Partnership v. Scala Developments Consultants Ltd.*, para. 58), whereas others thought such a determination was unnecessary (*Escape 101 Ventures Inc. v. March of Dimes Canada*, para. 101).

What's In Store for 2023?

One may hope that the judiciary will continue to foster arbitration by upholding valid arbitration agreements and rendering decisions in line with the spirit and letter of the New York Convention. On the domestic front, courts are likely to continue to grapple with *Vavilov*'s impact on commercial arbitration and, potentially, with the newly established framework for evaluating arbitration agreements in the insolvency context. Readers may also look forward to hearing more updates from one of the world's "most liveable cities" – Vancouver – since the Vancouver International Arbitration Centre (which, incidentally, revamped its international arbitration rules in 2022) will be co-hosting the 2023 ICCA conference.

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

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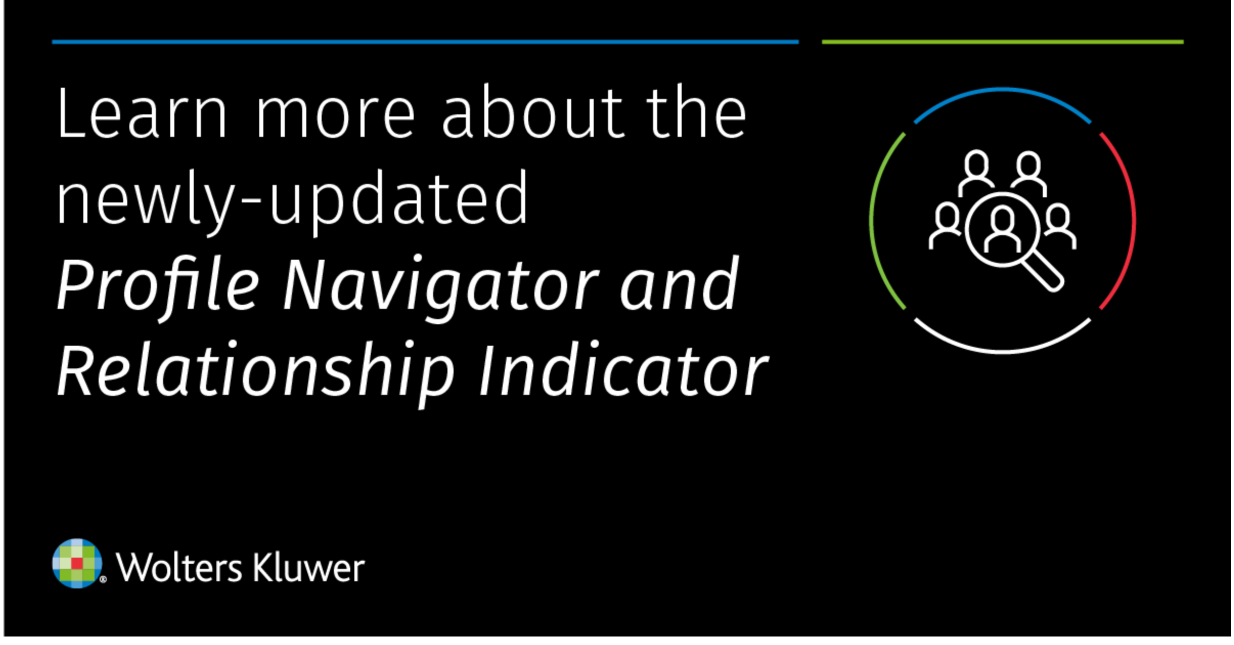

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